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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 74R-39

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ALVIN L. KORNGOLD, SUN CITY, ARIZ.	Docket No. 19087 File No. BPH-6755
SUN CITY BROADCASTING CORP., SUN CITY, ARIZ. For Construction Permit	Docket No. 19088 File No. BPH-6808

APPEARANCES

Lewis I. Cohen and *Arthur Scheiner*, on behalf of Alvin L. Korngold; *Lawrence J. Bernard, Jr.* and *George R. Borsari, Jr.*, on behalf of Sun City Broadcasting Corporation; and *William D. Silva* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted February 1, 1974; Released February 7, 1974)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND PINCOCK.

1. The above-captioned mutually exclusive applications for a construction permit for a new FM broadcast station at Sun City, Arizona were designated for hearing by Commission Order, FCC 70-1211, released November 18, 1970. Administrative Law Judge James F. Tierney conducted the hearing on financial issues against both applicants, Section 1.65 issues against both applicants, an issue to determine the efforts made by Korngold to ascertain community needs and interests (*Suburban* issue), and a standard comparative issue.

2. In his Initial Decision, FCC 73D-15, released March 28, 1973, Administrative Law Judge James F. Tierney concluded that both applicants are financially qualified; that Korngold must be disqualified because he failed to comply with both Section 1.65 of the Commission's Rules and with the requirements of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants;*[1] that Sun City must be assessed a comparative demerit for failing to comply with Section 1.65 of the Commission's Rules; that were the comparative issue to be controlling in this proceeding, the application of Sun City would be preferred; and ultimately that the application of Sun City should be granted. All of the parties have filed exceptions to the Initial Decision. After careful consideration of the record, the Initial Decision, the exceptions, replies to exceptions and the oral argument,[2] the Board is satisfied that Judge Tierney's ultimate deter-

[1] 27 FCC 2d 650, 21 RR 2d 1507 (1971).
[2] Oral argument was held before a panel of the Review Board on January 15, 1974.

mination should be affirmed. Moreover, the Judge's findings of fact, which are generally complete and fairly reflect the facts of record, are adopted as modified by this Decision and in our rulings on exceptions contained in the attached Appendix. In the Board's view, however, the facts of record and the Judge's findings in this proceeding do not require the disqualification of either applicant. Accordingly, the Board would decide the case on the comparative issue.

1.65 Issue—Korngold

3. All of the parties to this proceeding agree that Korngold violated the provisions of Section 1.65 of the Commission's Rules by his failure to amend his Sun City application to reflect a subsequently-filed application for a new FM station, the grant of a previous application for a new AM station, and the grant of a previously filed application for a new FM station. The Judge accepted the Broadcast Bureau's contentions that Korngold willfully failed to update his Sun City application because to do so would have raised questions concerning his financial qualifications, and, therefore, concluded that Korngold was not qualified to be a Commission licensee. It is conceded by Korngold that if all of his subsequently filed applications are considered, the financial proposals included in those applications fail to show that Korngold had sufficient liquid assets to finance all of the proposals. The Bureau and Judge Tierney infer from this fact a scheme to deceive the Commission. However, we have observed that in each of the several subsequently filed applications, Korngold noted all of his existing broadcast properties and prior filed applications, thus providing the Commission with the information necessary to ascertain all of his financial commitments. Concededly, there are uncertainties and confusion which inevitably flow from Korngold's poorly prepared and often incomprehensible financial statements and his testimonial explanation of his financial affairs. However, his testimony that his failure to comply with Section 1.65 of the Rules occurred because he did not fully understand the rule and case precedent interpreting that rule, is undisputed, as is his testimony that he always believed that he could finance any and all of his proposals. This testimony, coupled with the fact that Korngold made full disclosure of all his existing licenses and prior filed applications in each new application, persuades the Board that his omissions were not willful.[3] Even if we accept the Judge's view that we should, by virtue of Korngold's training and experience, expect a better understanding of the Commission's Rules and a more precise factual presentation than appears in this record, we cannot attribute his failures to an intent to deceive the Commission. Violations of Section 1.65 of the Rules do not disqualify an applicant for broadcast facilities where there is no showing of "fraud, concealment or other serious misconduct".[4] We, therefore, do not find Korngold disqualified to be a licensee of the Commission. However, the Board notes that it cannot condone Korngold's failure to comply with the Rules and will assess a comparative demerit against him.

[3] Sun City agreed with Korngold that while Korngold was guilty of a violation of Section 1.65 of the Rules, such violation did not appear to be the result of an attempt to mislead or deceive the Commission.

[4] Gross Broadcasting Company, 41 FCC 2d 729, 731, 27 RR 2d 1543, 1545 (1973).

Financial Issues—Korngold

4. The financial qualifications issue was added to this proceeding by the Review Board when it appeared that because of subsequently filed applications Korngold may not have had available sufficient liquid assets to meet his several commitments, 31 FCC 2d 89, 22 RR 2d 701. At the hearing, Korngold amended his application to show reliance on a bank loan commitment in sufficient amount to pay for the construction and first year of operation of both his proposed Sun City, Arizona and his Albuquerque, New Mexico FM stations. We agree with the Judge's finding that the loan commitment by its terms makes clear that it will be available for construction and operation of both proposed stations. We cannot accept the Bureau's argument that, because Korngold failed to set forth in detail the financial independence of his new AM station KAMX, Albuquerque, New Mexico and his new FM Station KWFM, Tucson, Arizona, both of which were operational at the time of the hearing, we should find that the loan may not be available to Korngold or that in the absence of such a showing Korngold has not met the burden of proof imposed by the Board at the time the issue was added. At the time the Board referred to those stations in its Memorandum Opinion and Order enlarging the issues, Korngold was relying entirely upon his personal assets. With the advent of the bank commitment, that question was satisfactorily resolved. We therefore agree with Judge Tierney that, based on this showing, Korngold is financially qualified to construct his proposed FM station in Sun City.

Suburban Issue—Korngold

5. It is apparent from the Judge's findings of fact and the record in this proceeding that Sun City is a unique community, having no governmental structure and lacking many of the civic, industrial, cultural and educational facilities common to other communities. It was designed by and is operated by the Del E. Webb Development Corporation to appeal to and meet the needs of retired people. We do not fault Korngold for his failure to consult with county or other local governmental officials responsible for the provision of governmental needs of that community. In our view, he made a *bona fide* effort to find such community leaders as were available in Sun City, his community of license, interviewed those leaders and translated the product of those interviews into a list of community needs. His interviews of leaders in surrounding communities, while less extensive, appear to represent a minimum acceptable effort, at least in the circumstances of this case. Nor do we believe that his survey of the general public was deficient because it was done by persons employed by Korngold for the specific purpose of conducting that survey under his supervision and direction. In our opinion, there is no requirement in the *Primer* that the employees conducting the general survey be long-term employees of the applicant. Neither Sun City nor the Bureau has suggested that the persons interviewed did not represent an accurate cross section of the public in Sun City or that the questions asked were not appropriate. Moreover, Korngold has specifically set forth in detail the programs which will be presented on a regularly scheduled basis to meet the several needs

ascertained in his survey. In view of these circumstances, the Board concludes that the efforts made by Korngold comply with the requirements of the Commission's *Primer on Ascertainment of Community Problems*, *supra*. Accordingly, the Board concludes that Korngold has met his burden of proof under the *Suburban* issue.

1.65 Issue—Sun City

6. As was the case with Korngold, Sun City concedes that it failed to comply with the requirements of Section 1.65 of the Commission's Rules by failing to timely amend its Sun City application to reflect a subsequently filed application for an FM station in Carlisle, Pennsylvania. The Presiding Judge concluded, since Sun City included a reference to its Sun City application in its Carlisle, Pennsylvania application, and since Sun City came forward with its amendment, admittedly filed very late, before a petition to enlarge the issues was filed, it should not be disqualified under this issue. The Board agrees with the Administrative Law Judge that Sun City's failure to comply with Section 1.65 of the Rules does not warrant disqualification, but does require a comparative demerit. We cannot accept the Bureau's contention that the confusing and somewhat conflicting explanations offered by Sun City for its failure to comply with Section 1.65 require its disqualification. For while the testimony of Lash, the president and major stockholder of Sun City, and Mehrens, its counsel and a nonvoting stock subscriber, reflect confusion and lack of attention to the implications of their answers, we cannot infer from this testimony a lack of candor or a deliberate attempt to misrepresent facts to the Commission.

Standard Comparative Issue

7. In the Board's view, the comparative issue is decisive in this proceeding. As noted by the Presiding Judge, the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965), sets forth two primary objectives: the best practicable service to the public and diversification of control of the media of mass communications. Viewed in light of these objectives, it is clear that Sun City must be preferred over Korngold. The Judge concluded that since the proposed Sun City station would be managed full time by an owner of a fairly substantial amount of nonvoting stock,[5] a preference should be accorded that applicant for integration of ownership and management. We cannot accept this conclusion. For while we believe that White's incentive to effectively operate the proposed station is somewhat greater than if he were merely an employee, his inability to effectively influence company policy and the right of the Board of Directors to redeem White's non-voting stock and terminate his employment at any time, very substantially reduces credit to Sun City for integration of ownership and management. On the other hand, we cannot accept Korngold's argument that his promise to devote full time to the proposed station in its beginning phases and a few hours

[5] White, the proposed station manager, has subscribed to $1000.00 of nonvoting stock. This stock, may, at any time, subject to a vote of the Board of Directors, be redeemed by the payment of the purchase price, plus interest.

each week thereafter warrants a preference for his proposed integration of ownership and management. The *Policy Statement*, *supra*, makes it very clear that less than full-time participation in management on a daily basis by the ownership of a proposed facility entitles it to very little credit.[6] In our opinion, Korngold's part-time proposal is of minimal value.[7] In these circumstances, the Board must conclude that neither applicant is entitled to a sufficient preference for integration of ownership anl management to effect the outcome of this proceeding. Nor is Korngold entitled to any preferential consideration for his broadcast experience since his proposed participation in the management of the new station is so minimal. Both applicants have failed to comply with Section 1.65 of the Rules and while the Board has not found either of them to be disqualified both must receive a demerit for their failure to comply with that Rule. Thus, on none of the foregoing criteria can either be preferred over the other.

8. However, it is very clear that Sun City must receive a substantial preference for diversification of ownership of media of mass communications. Korngold owns three broadcast stations, two in Arizona and one in New Mexico and is a sales representative of several Mexican stations, while none of the principals of Sun City has any ownership interest in any media of mass communication. In these circumstances, Sun City's application must be preferred because it will result in greater diversification of ownership of media of mass communications. *Terre Haute Broadcasting Corp.*, 25 FCC 2d 348, 19 RR 2d 487 (1970), and cases cited therein. Therefore, we conclude that a grant of the application of Sun City would better serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of Alvin L. Korngold for a new FM broadcast station in Sun City, Arizona (File No. BPH–6755) IS DENIED and;

10. The application of Sun City Broadcasting Corporation for a new FM broadcast station in Sun City, Arizona (File No. BPH–6808), IS GRANTED.

DEE W. PINCOCK,
Member, Review Board,
Federal Communications Commission.

APPENDIX

RULINGS ON LIMITED EXCEPTIONS OF SUN CITY BROADCASTING CORPORATION

Exception No.	*Ruling*
1, 6	Denied. See paragraph 4 of this Decision.
2	Granted. The information referred to is not in the record and is not essential to the disposition of this case.
3	Denied. See paragraph 5 of this Decision.
4	Granted. See paragraph 6 of this Decision.
5, 7, 8	Granted in substance. See paragraph 6 of this Decision.
9	Granted in part and denied in part. See paragraph 7 of this Decision.

[6] "To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d at 395, 5 RR 2d at 1909.

[7] *Ultravision Broadcasting Co.*, 11 FCC 2d 394, 12 RR 2d 137, review denied FCC 68–127, released October 30, 1968, affirmed *sub nom. WEBR, Inc.* v. *FCC*, 136 U.S. App. D.C. 316, 420 F. 2d 158, 16 RR 2d 2191 (1969).

RULINGS ON EXCEPTIONS OF ALVIN L. KORNGOLD

Exception No.	*Ruling*
1	Denied. The sentence does not misinterpret the testimony.
2	Granted. Paragraph 10 of the Initial Decision is modified by addition of the following sentence: "However, KWFM, Inc., has never engaged in radio broadcasting and, except as noted, has been wholly inactive."
3, 4, 10	Denied as being of no decisional significance.
5	Denied. See paragraph 3 of this Decision.
6, 7, 8, 9	Granted in part and denied in part. See paragraph 3 of this Decision.
11, 12, 13, 14, 15	Granted in part and denied in part. See paragraph 5 of this Decision.
16, 17	Denied. See paragraph 8 of this Decision.
18	Denied for the reasons stated in the whole of this Decision.

RULINGS ON BROADCAST BUREAU'S EXCEPTIONS TO INITIAL DECISION

1, 4	Granted. The record supports the Bureau's exception.
2, 3, 5, 6	Denied. See paragraph 4 of this Decision.
7, 8	Denied as being of no decisional significance.
9, 10	Denied. See paragraph 6 of this Decision.
11	Granted. The record establishes that Sun City has met the financial issue specified against it.
12, 13	Denied for the reasons stated in the whole of this Decision.

F.C.C. 73D-15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ALVIN L. KORNGOLD, SUN CITY, ARIZ.	Docket No. 19087 File No. BPH-6755
SUN CITY BROADCASTING CORP., SUN CITY, ARIZ. For Construction Permits	Docket No. 19088 File No. BPH-6808

APPEARANCES

Alvin L. Korngold, pro se, and *Lewis I. Cohen, Esq., Edward R. Wholl, Esq.* and *Robert N. Boyer, Esq.* (Cohen & Berfield) for Alvin L. Korngold; *Craig Mehrens, Esq.* (Mehrens & Pearce), *Harold S. Irwin, Esq.* and *Leonard S. Joyce, Esq.* and *George R. Borsari, Jr., Esq.* (Daly, Joyce & Borsari) for Sun City Broadcasting Corporation; *Stephen A. Gold, Esq.* for Zia Tele-Communications, Inc.; *Katherine Savers McGovern, Esq.* and *William D. Silva, Esq.* for Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

(Issued March 22, 1973; Released March 28, 1973)

PRELIMINARY STATEMENT

The Commission designated by Order released November 18, 1970 (FCC 70-1211) for hearing the mutually exclusive applications for an FM construction permit in Sun City, Arizona, of Alvin L. Korngold (Korngold) and Sun City Broadcasting Corporation (Sun City). The following issues were specified against the applicants.

1. To determine the funds required to construct and operate Sun City Broadcasting's proposed station for one year, and whether these funds are available to it as required for construction and first year operation of its proposed station without reliance on revenue to thus demonstrate its financial qualifications.

2. To determine the efforts made by Alvin Korngold to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine in the light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications for construction permit should be granted.

On August 10, 1971, the Review Board by its Memorandum Opinion and Order, 31 FCC 2d 39, enlarged the issues against Korngold.

5. To determine whether Alvin L. Korngold has available sufficient additional funds, without reliance on revenues, to construct and operate his proposed Sun City, Arizona, FM station for one year, and whether, in light of the evidence adduced, Alvin L. Korngold is financially qualified.

6. To determine whether Alvin L. Korngold has failed to comply with the requirements of Section 1.65 of the Commission's Rules and, if so, the effect thereof upon the applicant's basic or comparative qualifications to be a Commission licensee.

On January 7, 1972, the Commission released its Memorandum Opinion and Order, FCC 72–4, consolidating the instant proceeding with the pending proceeding for an FM station at Albuquerque, New Mexico (Dockets 19178–19179) for the limited purpose of receiving evidence and resolving the 1.65 issue (Issue 6, *supra*) specified against Korngold. The Commission designated the Judge in the instant proceeding to preside over that limited hearing. By Order FCC 72M–64, released January 14, 1972, the Presiding Judge rescheduled the hearing for March 6, 1972. A hearing on the issues specified, *supra*, was held during the week of March 6, 1972.[1] However, subsequent to those hearing sessions, the Review Board in its Memorandum Opinion and Order, 34 FCC 2d 712, April 26, 1972, further enlarged the issues, this time, against Sun City, to wit:

7. To determine whether Sun City Broadcasting Corporation has failed to comply with the provisions of Section 1.65 of the Commission's Rules: and, if so, the effect of such non-compliance on the applicant's basic or comparative qualifications to be a Commission licensee.

A hearing on this issue was held on October 5, 1972. The record was again closed and a date for proposed findings of fact and conclusions of law was set.[2] All parties submitted timely proposed findings and conclusions and reply findings. When parties are directed or invited to file proposed findings and conclusions, in these proceedings, it not only serves the object of speedy expedition of legal contests but, equally, where faithful to and reflective of the record, proposed findings effectively honor the ends of justice. Thus, the proposed findings of the Broadcast Bureau, because of their admirable accuracy in this respect, as well as being an aid, to a fair and just resolution of the issues, will, in the main, be adopted, save for language preference, more editorial than substantive. The other submissions, while commendable lawyer-like documents, will serve, principally, as sources of findings in areas not responded to by the Broadcast Bureau.

As noted above, the Commission consolidated the instant proceeding with the pending proceeding (Dockets 19178–19179) for an FM station in Albuquerque, New Mexico for the limited purpose of resolving the Rule 1.65 issue against Korngold. Rather than setting out a separate Initial Decision, for reasons of administrative efficiency and orderly disposition, that issue (issue 6, *supra*) against Korngold will be treated as the first order of business herein.

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[1] At the March session, the Presiding Judge specified that the record would be closed on March 31, 1972. It was reopened to receive certain amendments to the Korngold application, and again closed, in an Order, FCC 72M–501, released April 14, 1972.

[2] Petitions to Enlarge filed by Korngold on November 2 and 20, 1972, are still pending before the Review Board.

For the reasons set forth hereinafter, this, as an Initial Decision, Shall Grant the application of Sun City Broadcasting Corporation, and shall find Korngold disqualified under Rule 1.65, among other reasons.

FINDINGS OF FACT

Korngold 1.65 Issue

1. Section 1.65 of the Commission's Rules requires, in part, that:

> Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promtly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate.

2. The Review Board in adding the 1.65 issue noted that Korngold failed to timely amend his Sun City application to reflect the subsequent filing of his Albuquerque FM application (BPH–6952, filed December 4, 1969). The Board further noted that this failure was significant, inasmuch as Korngold's financial commitment to the Albuquerque proposal could affect his financial qualifications in the instant proceeding.

3. Korngold filed the following applications with the Commission. The filing date and pertinent information from each are also listed.[3]

a. On April 23, 1968, Korngold filed an application for a new standard broadcast station in Albuquerque, New Mexico (KAMX). He noted therein that he was the principal shareholder of Tucson Radio, Inc., licensee of Station KEVT (AM), Tucson, Arizona, and had held this interest since May 4, 1966. The estimated cost of construction and operation for KAMX totalled $56,787.42. To show he was financially qualified Korngold relied on assets reflected in his attached financial statement. The financial statement listed the following liquid assets: cash in bank—$32,000 and cash value life insurance—$8,000 for a total of $40,000 liquid assets. Current liabilities totalled $20,000. Net liquid assets would, consequently, total $20,000. The financial statement also reflected the following assets: Automobile—$4,000; stocks and bonds—$198,500; real estate—$80,000; and notes receivable—$39,803. Long term liabilities totalled $10,500 (Broadcast Bureau Ex. 1).

b. On April 16, 1969, Korngold filed an application for an FM application in Tucson (BPH–6698) (KWFM). He listed KEVT (AM) and the pending Albuquerque application as other broadcast interests. First year cost of construction and operation were estimated at $16,372.76. Korngold relied on assets reflected in his attached financial statement to show he was financially qualified. The financial statement showed liquid assets as follows: cash and CPs in banks—$34,000; cash value of life insurance—$8,500. Current liabilities totalled $24,500. Other assets included: automobile—$3,400; stocks and bonds—$252,500; real estate—$90,000; notes receivable—$43,700; and a 30-day note—$10,000.[4] Net liquid assets would total $18,000 not including the $10,000 30-day note under liquid assets ($42,500 minus $24,500). No long term liabilities were listed (Broadcast Bureau Ex. 2).[5]

c. On June 6, 1969, Korngold filed the Sun City application (the instant application). He listed KEVT (AM), the pending Albuquerque application and

[3] See Attachment A for a summary of this information.

[4] The debtor on this note or his willingness or ability to pay within 30 days was not shown.

[5] The applications for the Albuquerque AM and the Tucson FM were never amended to reflect the Sun City application prior to a grant of these construction permits on September 24, 1969, and August 6, 1969, respectively.

the pending Tucson application (KWFM) as other broadcast interests. First year cost of construction and operation of Sun City was estimated at $13,649. Korngold relied on cash reflected in his attached financial statement to show he was financially qualified. The financial statement (Exhibit 2 of the application) reflected $29,000 in cash and certificates of deposit in banks and $8,500 cash value life insurance. Other assets listed were: automobile—$3,400; stocks and bonds—$252,500; real estate—$90,000; notes receivable—$43,700; and a 30-day note $10,000. Short term (and total liabilities) totalled $19,500 (Broadcast Bureau Ex. 3). Amended exhibit 2 to the Sun City application dated October 1, 1969, lists cash and CPs in banks at $31,500 and was received on October 3, 1969. Liabilities (all apparently current) total $4,500 (Broadcast Bureau Ex. 4).

d. On December 4, 1969, Korngold filed an application for a new FM station in Albuquerque, New Mexico (BPH–6952). He listed as other broadcast interests KEVT (AM), the Tuscon FM application (KWFM) (CP granted), the Albuquerque AM application (KAMX) (CP granted) and the Sun City FM application. First year cost of construction and operation totalled $12,575.07. Korngold relied on cash reflected in his attached financial statement to show he was financially qualified. Korngold's financial statement dated December 2, 1969, and attached as Exhibit No. 3 to his application lists cash and U.S. Treasury Bills and Notes at a value of $35,200. Cash value of life insurance totals $3,800. Other assets included: automobile—$3,100; stocks and bonds—$275,500; real estate—$90,000; notes receivable—$43,700; and a 30-day note—$15,000. Total liabilities (all apparently current) were listed at $4,500 (Broadcast Bureau Ex. 5).

e. On June 3, 1971, Korngold submitted an amendment[6] to his Sun City application wherein he notified the Commission that, *inter alia:* (1) he filed an FM application for Albuquerque; (2) his FM station for Tucson (KWFM) was licensed on May 18, 1970;[7] (3) his application for an AM application for Albuquerque (KAMX) was granted on September 24, 1969; and (4) his estimate of first year operating costs for Sun City was being increased to $16,614.[8] Also included was a financial statement of Mr. and Mrs. Korngold dated May 14, 1971 wherein the following assets were listed: automobile—$2,100; cash and U.S. Treasury bills and notes—$21,600; value of KEVT, Tucson, Arizona—$320,000; personal assets and jewelry—$25,000; real estate—$90,000; notes receivable—$43,700; and value of KWFM, Tucson, Arizona—$120,000. Liabilities included: note payable bank—$6,000 and miscellaneous less than—$3,000. (Broadcast Bureau Ex. 8).

f. On July 19, 1971, Korngold submitted an amendment to his Albuquerque FM application wherein he notified the Commission that, *inter alia:* (1) The Tucson FM (KWFM) was licensed on May 18, 1970;[9] (2) the Albuquerque AM (KAMX) was granted on September 24, 1969; (3) the application of Tucson Radio, Inc., (KEVT) to change transmitter was granted on June 30, 1971, and a renewal application filed; (4) the application to change transmitter site for KWFM was granted on June 16, 1971, and a renewal application filed; and (5) the estimate for first year operating costs for the Albuquerque FM was being increased to $15,455.07. Also included was a financial statement of Mr. and Mrs. Korngold dated June 24, 1971. This financial statement lists the same assets and liabilities as the statement dated May 14, 1971 and submitted as an amendment to the Sun City application on June 3, 1971 (see paragraph 3e, *supra*) except that the note payable to the bank was reduced by $1,000 to $5,000 (Broadcast Bureau Ex. 9).

g. On August 7, 1967, Korngold filed an application for authority to operate nighttime on Station KEVT(AM), Tucson, Arizona. On January 23, 1970, the Commission denied Korngold's application and returned it (FCC 70–69). Subsequently on August 16, 1970, the Commission denied Korngold's petition for reconsideration and returned his application as unacceptable for filing (FCC 70–846). On February 1, 1972, Korngold again tendered Tucson Radio's appli-

[6] This was filed subsequent to the filing by the Bureau on May 10, of a request for a financial and Rule 1.65 issue against Korngold.

[7] The construction permit for the Tucson FM was granted on August 6, 1969.

[8] The Review Board noted that the annual cost of leasing broadcast equipment ($3,159) should be added to this figure for a total of $19,773 first year operating costs (31 FCC 2d 39, fn. 14).

[9] As of July 19, 1971, Korngold had completed his first year of operation at KWFM. He had not received a license or completed his first year of operation at KAMX as of that date.

cation for nighttime authority for KEVT. The estimated cost of construction and operation for the first year was estimated at $20,801.50 (BR–2882) (Official Notice Taken).[10]

4. Korngold purchased his first broadcast facility, KEVT(AM), Tucson, Arizona in 1966. From that time until he filed his Sun City application on June 6, 1969, he prepared all of his own applications for filing before the FCC.[11] In addition to his broadcast activities, Korngold is a member of the New York, Arizona, District of Columbia, and the U.S. Supreme Court Bars, and maintains a legal practice out of his Tucson office, Korngold stated that he is familiar with the general rules of the Commission and explains his failure to update the Sun City application to disclose the subsequently filed Albuquerque application as follows:

> Inadvertently, I failed to recognize certain rules that required that every time you do something, you have to advise every file affecting anything at the Commission as to what your latest position is. There was no intent to hide this because, when I filed for the Albuquerque FM under BPH–6952, a short five or six months later, in Section 2, page 4, I listed my application for a CP at Sun City, Arizona, with the file number BPH–6755. In all of their applications affecting any license, renewals and so forth, I have since then up-dated to show the Sun City application (Tr. 44, also Korngold Ex. 1).

He stated further that it was "purely an unintentional, minor, clerical error on my part".

5. As already noted, *supra*, Tucson Radio, Inc. had an application pending for authority to operate KEVT nighttime from August 7, 1967 to January 23, 1970.[12] Korngold is 100% owner of Tucson Radio, Inc. This application was not disclosed in his subsequently filed applications (KAMX, KWFM, Sun City FM, and Albuquerque FM) and his explanation was that "it involves a corporation, not my personal application, and the funds involved will be paid by that corporation, not by me personally". In further explanation, Korngold stated that the more than $20,000 required for KEVT's application, should it be granted, was not relevant to his Sun City application because "it was not relevant to his personal financial statement".

6. Korngold's later testimony, in support of his financial showing, demonstrated a close relationship between his corporate and personal assets:

> Q. Have you, at any time, really had this amount of money which you say in all of your exhibits is in your possession with respect to outstanding applications before the Commission?
>
> A. Yes, together with the bank loans.
>
> Q. Could you refer to the Broadcast Bureau Exhibits which are before you, and pick out a time at which you believe that your liquid assets together with the alleged bank loans would supply you with enough money to meet the financial commitments you had made to the Commission via the representations on your applications?
>
> A. I think I will repeat the same answer that together with the bank loans of approximately $35,000, together with my income occasionally from my law prac-

[10] This application was returned on October 6, 1972.

[11] These include: August 1967—application for KEVT(AM) to go nighttime; April 1968—application for Albuquerque AM (KAMX); and April 1969—FM application for Tucson (KWFM).

[12] This application was again tendered on February 1, 1972, and the estimated cost of construction and operation for the first year totalled $20,801.50 (Official Notice Taken). The application was returned on October 6, 1972 because information requested by the Commission in its Memorandum Opinion and Order released June 20, 1972, was not supplied.

tice, which goes anywhere from $10,000 to $30,000 a year, both in New York and Arizona, and together with the flow of money from Tucson Radio Inc., which is a very successful Spanish language radio station, I have always had sufficient funds to do whatever I want in this field. I would have had enough money.

Q. Is it shown on your financial statements, Mr. Korngold, that you would draw from the Corporate [monies] [13] of Tucson Radio Inc?

A. Yes . . . [I]n every exhibit there is "Notes Receivable", running anywhere from 30 to $40,000, as a Corporate debt of Tucson Radio, Inc. to Alvin L. Korngold for monies advanced.

Q. What mechanism would you have had to call upon Tucson Radio, Inc., to pay you all of these monies that are owed to you?

A. I would hold a meeting with myself as President and say, "take some of the money out of the account". There is a flow every month and there is money there.

7. The financial status of Tucson Radio, Inc. (KEVT–AM), represented by the financial statement,[14] of Nov. 30, 1971, submitted on February 1, 1972, Korngold contended, in effect was an inaccurate picture of Tucson Radio Inc.'s financial posture and of the monies available to him from it. However, none of his assertions were documented.[15] This balance sheet, submitted apparently for the purpose of demonstrating Radio Tucson's financial ability to meet the estimated costs of nighttime operation, showed cash assets of $1,828, current liabilities of $6,108, a capital deficit of $12,074, no earnings after taxes in 1969 and $5,450.84 earnings after taxes in 1970. (KEVT application, filed February 1, 1972, Exhibits 4 and 5). It did not show "Notes Payable" to Alvin Korngold as claimed by Korngold.[16] The financial statement, dated June 24, 1971,[17] submitted as part of an amendment to Korngold's Albuquerque application, shows $43,700 in "Notes Receivable" but makes no reference to these notes being corporate as compared to trade (or some other circumstance) debts. (Broadcast Bureau Exhibit No. 9). Once again there was no documentation received from Korngold to support this representation, a representation unsupported by his various financial statements, both corporate and personal, made a part of this record.[18] Moreover, Korngold's allegations that these "Notes Receivables" ranged from $30,000 to $40,000 do not find support in the financial statements he has submitted, and which have been made a part of the record. Except for his February 12, 1969 application for KAMX (Broadcast Bureau Ex. 1), at all times, he has shown these so-called "Notes Receivable" to be $43,700 or more (Broadcast Bureau Exhibits 2 to 9).

8. In addition to the financial representations made by Korngold in conjunction with the initial filings of his various applications, Korngold, on four other occasions, filed financial statements which

[13] The transcript erroneously shows the word "entities", rather than "monies" at this point. Line 10, Tr. 110.

[14] The license file and application(s) respecting KEVT were granted official notice by the Presiding Judge.

[15] In this regard, the Bureau specifically requested that further documentation respecting KEVT's assets be submitted and Korngold agreed to do so. The Presiding Judge allowed him an additional period of time following the close of the hearing in which to file these materials. They were never submitted.

[16] The balance sheet did show an "accounts payable" item under current liabilities for $3,476. There is nothing to indicate, however, that this item represents notes payable to Korngold.

[17] Only 5 months prior to the date of the Tucson Radio financial statement of November 30, 1971, *supra*.

[18] See Broadcast Bureau Exhibits 1 through 9, Exhibit 4 to KEVT application of February 1, 1972, *supra*.

failed to reflect his financial commitments to various broadcast interests.[19]

9. Only through cross-examination, Korngold disclosed for the first time his business interests in representing three Mexican radio stations.[20] Korngold's testimony describing his relationship is inconsistent. On one hand, Korngold asserted that this relationship was not a business interest, but on the other hand he asserted that his position as "U.S. sales representative" had brought him "anywhere from $8,000 to $10,000" in the first two years, that XEJ alone would bring him $1,000 a month, and that the monies earned by him as sales representative for these Mexican stations are placed in a bank account called "all Spanish network account". Korngold stated that this account is used to "pay the radio stations in Mexico and the sales representatives who represent my radio station in the U.S. I may use some of that for expenses for myself if I am going to Los Angeles or Mexico. What is left, I will put into one of my bank accounts." [21] Additionally, Korngold stated that this business was set up as "Alvin Korngold d/b/a 'All Spanish Networks' ".

10. Korngold also disclosed, for the first time, during his testimony that he had established a Corporation, "KWFM, Inc.," which had been used to obtain financing for KWFM's equipment. The Articles of Incorporation for KWFM, Inc. provide, *inter alia*, for it to engage in radio broadcasting.[22]

11. When Korngold filed the four applications for new stations (KAMX, KWFM, Sun City and Albuquerque) it was his intent that the monies would come out of his personal assets as shown in the financial statement attached to each application. Each of these financial statements represents joint assets held by both Korngold and his wife. The fact that these are joint financial statements is not apparent from the applications themselves (Broadcast Bureau Exs. 1, 2, 3 and 5). Korngold admits that on June 6, 1969, when he filed his Sun City application, he also had a financial commitment for KAMX in the amount of $56,787, for KWFM in the amount of $13,106, and including the Sun City commitment of $17,808,[23] a total of $87,702.[24] All of these monies were to come from his personal assets. He also admits that as of December 4, 1969, when Korngold filed the Albuquerque FM application, he had outstanding commitments of $48,000 for KAMX; $13,106 for KWFM; $17,808 [23] for Sun City; and $13,170 [25] for the Albuquerque FM for a total of $91,489 in commitments.[26] Korngold also stated that, in his opinion, he had sufficient liquidity to put all four stations on the air assuming he was given permission. He could have arranged to have the monies, he stated,

[19] Broadcast Bureau Exhibits 4, 6, 7, 9.
[20] XEL, Mexicali; XEBG, Tijuana; XEJ, Juarez.
[21] Korngold estimated that 99% would go into his personal account.
[22] Attachment B to "Broadcast Bureau's Motion for Clarification", filed May 12, 1972, incorporated herein by reference.
[23] The estimate of total first year cost of construction and operation appearing on the original application was $13,649. The use of the figure $17,808 is unexplained. The $13,106 for KWFM represents first year cost of operation.
[24] This should total $87,701.
[25] This figure should be $12,575 (Para. 3d, *supra*).
[26] It was noted that the construction permit for KAMX was granted on September 24, 1969. Therefore, the $48,000 used here represented first year cost of operation only. In addition, this should total $92,084.

and he would have relied, in part, on the notes receivable shown on his financial statement. These notes receivable were representative of money owed him by Tucson Radio (KEVT). Korngold could not state how much money he received from Tucson Radio either, as shown on his financial statement. These notes receivable were representative of money owed him by Tucson Radio (KEVT). Korngold could not state how much money he received from Tucson Radio either as salary or repayment of a note in 1969. In 1970, he received more than $10,000 and possibly as high as $20,000 from Tucson Radio.

12. Korngold submitted an updated financial statement of himself and his wife dated December 24, 1971 (Korngold Ex. 6). During cross-examination of Korngold on this document, he disclosed that he owns a home which is reflected under the assets column as "real estate". Korngold stated that there is a mortgage on this property in the builder's name, but not in his name nor his wife's. Korngold makes payments of $300 a month to the bank, and states the unpaid balance is $28,000. He has been making payments since 1966. Korngold considers this a long-term liability. The liability of $9,500 listed in the financial statement represents a loan from the Union Bank in Tucson. This includes a loan of $6,000 for a swimming pool taken out in the summer of 1971 which is repayable at $125 a month or $1,500 a year. Korngold believes the bank took some type of mortgage to secure the swimming pool loan, possibly a mortgage on his home. The $9,500 also includes a balance of $4,000 on a loan for equipment for KAMX. Korngold took out a loan of $6,000 to put KAMX on the air.[27] This is a short term liability, a ninety day renewable note, which has been reduced from $6,000 to $4,000. Korngold reported this as a long term liability on the balance sheet because the bank keeps renewing it. Korngold's personal signature was the only security required by the bank.

13. Korngold lists the value of Station KEVT at $320,000 in his financial statement of December 24, 1971 (Korngold Ex. 6). He testified that Tucson Radio, Inc., licensee of Station KEVT, had no net income in 1969, and had net income after taxes in 1970 of $5,450.84. Korngold based the value of Station KEVT on two factors; offers he has received and the market value resale of radio stations. Korngold contended that radio stations are being sold for 1½ to 4 times their gross income depending upon their location. Korngold could identify no one who had offered him $320,000 for KEVT. A Mr. Ed Rickter from Tucson, according to Korngold, offered him $125,000 to $150,000 for KEVT. Asked about his law practice, Korngold stated that he considers it substantial in relation to the time he spends at it. He has not practiced in New York since 1966, but left 300 or 400 files with other firms, and "every once in awhile" he receives a "nice" check from them. Under liabilities in Korngold Exhibit 6, the figure under the caption "Misc. less than . . . $3,000" represents a monthly figure. Korngold does not believe that these expenses amount to $36,000 a year, however.

[27] The $6,000 loan was taken out by Korngold between January 1971 and May 14, 1971.

Korngold Financial Issue: (*Issue No. 5, supra*)

14. The Review Board, in specifying a financial issue against Korngold, noted (para. 6):

> Therefore, based on his May 14, 1971, balance sheet, Korngold has shown only $21,600 in liquid assets (cash and U.S. Treasury bills and notes) with which to meet at least $32,943 in total estimated costs for the two pending FM proposals,[10] plus whatever demands may be made on Korngold's assets by virtue of the KWFM and KAMX operations. However, even these liquid assets must be reduced by $9,000, which figure represents the total number of liabilities listed on Korngold's most recent balance sheet and which, in the absence of appropriate segregation, must be treated as current liabilities.[28]

The Board stated in a footnote above:

> [10] As previously pointed out (see Note 13, *supra*), Korngold has indicated an intention to increase his estimate of operating costs for the Albuquerque proposal. Such a revision would correspondingly affect our figure of $32,943 and the applicant's showing of available funds.[28A]

15. To meet the issue, Korngold introduced two bank letters from the Union Bank of Tucson, dated February 17, 1972 (Korngold Exs. 3 and 4). These letters, both notarized, represented commitments to loan Korngold $15,000 for construction and first-year operation of Sun City and $20,000 for the Albuquerque FM. The loans required interest quarterly at a rate of 8.75% per annum and would be due in one year.

16. Korngold also submitted the affidavit of his wife dated March 2, 1972, indicating that she is willing to release joint assets and join in loans to meet the financial requirements of the instant application (Korngold Ex. 2).

17. Another bank letter, March 1, 1972, from the Arizona Bank of Tucson stated that the bank was prepared to lend the necessary funds to purchase equipment for FM radio stations to be constructed in Sun City, Arizona and Albuquerque, New Mexico for a term of three to five years covering an amount up to $50,000. The loan commitment ran for a period of 45 days and if it was to be made to a corporation, personal guarantees and a first lien on any equipment purchased would be required (Korngold Ex. 5).

18. On April 3, 1972, Korngold filed a Petition to Amend, in which he sought to reflect in his application the loan commitment from the Arizona Bank. The petition was granted by Order released April 14, 1972 (FCC 72M-501). The amendment contained a letter from the Arizona Bank, March 30, 1972, which provided that the bank agreed to loan Mr. and Mrs. Korngold $25,000 for construction and first year operation of the Sun City station and $25,000 for Albuquerque. Also, no security would be required except for the signatures of both Mr. and Mrs. Korngold and no payments to principal would be necessary during the first year. Interest would be due quarterly and repayment commencing after one year would be made over a 36 month period. The interest rate would be 8% and the loan could be applied to cost of construction and operation. A total of $50,000 could be loaned. The commitment is open end, conditioned on the availability of funds and no adverse change in the Korngolds' financial statements.

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[28] 31 FCC 2d 39 at 43 (1971).
[28A] *Ibid.*

19. The findings contained in paragraphs 3(e) and 3(f), *supra*, are incorporated herein as they are relevant to the financial issue. These relate to Korngold's amendments increasing the estimated first year cost of operation and construction for Sun City and Albuquerque to $19,773 and $15,455, respectively.

Sun City 1.65 Issue

20. The Review Board, in adding a 1.65 issue against Sun City, noted that in addition to its failure to timely amend the Sun City application to show Lash's interest in the subsequently filed Carlisle application:

> . . . Lash proposed to provide funds to both applicants in a total amount of $74,710, and the balance sheet submitted with each application did not reflect sufficient liquid assets to meet both of these commitments. No reference to Lash's promise to lend Sun City $40,000 was shown on the financial statement submitted with the Carlisle application. Therefore, it is clear that Lash's subsequently filed Carlisle FM application could have possible decisional significance and as such should have been timely reported to the Commission. Sun City's failure to report this change for over 1½ years there requires addition of the requested Rule 1.65 issue.

21. Russell C. Lash is the holder of 50% of the common stocks in Sun City Broadcasting Corporation. On September 25, 1969,[29] approximately three months after the Sun City application was filed, Lash filed an application for an FM construction permit for Carlisle, Pennsylvania (Sun City Ex. 12). The Sun City application was not amended to show Lash's interest in the Carlisle application until February 14, 1972.[30] Lash prepared the Carlisle application himself with help from Mr. Gilbert.[31] Gilbert typed possibly half of the Carlisle application. The Sun City application is referenced in the Carlisle application, but Lash was not aware of the requirement to amend the Sun City application to reflect Carlisle. During this period, Lash relied on Gilbert. Gilbert was relied on as a broadcast consultant. However, he is not an attorney and was not relied on for legal advice. Lash represented in Sun City Ex. 12 that prior to March 1971, he did not have legal counsel involved with the Carlisle application. At the hearing he testified that he retained legal counsel for the Carlisle application on April 13, 1972.

22. Gilbert also aided in the preparation of the Sun City application. Mr. Craig Mehrens acted as counsel for Sun City.[32] Sun City retained no other counsel except a Mr. Irvin, an attorney from Carlisle, who entered an appearance at one prehearing conference in order to save Mr. Mehrens from traveling from Phoenix to Washington, D.C. Lash cannot recall when Mehrens found out that he had filed the Carlisle application. However, in Sun City Ex. 12, Lash[33] swore that he was informed of the need to amend the Sun City application by Sun City's counsel in December 1970 or January 1971; that for over a year he did

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[29] Official Notice was taken of the Carlisle application. It was also admitted in part as Sun City Ex. 14 and Sun City Ex. 4.

[30] See Order granting amendment, FCC 72M-271, released March 1, 1972.

[31] As noted, *infra*, Mr. Gilbert is a resident of Phoenix, and licensee of an FM station in Glendale, Arizona. He was hired by Lash as a consultant to help prepare both the Sun City and Carlisle applications.

[32] Mr. Mehrens is also a shareholder in Sun City who is committed to purchase 1,000 shares of preferred stock (⅓ of that to be issued).

[33] Sun City Ex. 12 is the affidavit of Lash signed on the morning of the hearing, October 5, 1972 and prepared by Mehrens in Phoenix.

not advise Sun City's counsel (Mehrens) that he had filed for an FM station in Carlisle; that he had not seen Sun City Ex. 12 before the morning of the hearing (October 5, 1972) when he signed it. Lash discussed the preparation for this hearing session with Mehrens about a month before in a telephone conversation. Lash tried to recall when Mehrens was first informed of the existence of the Carlisle application during this preparation, but could not.

23. Sun City Ex. 13 is the affidavit of Craig Mehrens. In that document Mehrens does not recall the exact date he learned of the Carlisle application but believes it was either December 1971 or January 1972.[34] Mehrens explained that the dates contained in Sun City Ex. 12 (Lash's statement) are typographical errors and should be the same dates as listed in his affidavit; that Lash's affidavit (Sun City Ex. 12) was prepared in his office in Phoenix after a phone conversation with Lash and that the dates contained in his affidavit are correct and Lash signed an incorrect affidavit. Mehrens also stated that he learned about the Carlisle application from two to three years after it was filed. Lash's statement in Sun City Ex. 12, that it was over one year is obviously not accurate. Mehrens recalls preparing for the March 1972 hearing and learning to his shock that there had been an application filed in Carlisle by Lash. He did not recall who informed him of this. Mehrens recalled discussing this with both Lash and Gilbert on numerous occasions, but cannot recall the source of this information. Mehrens has a general law practice in Arizona and has not represented broadcast applicants heretofore. He has no record of when he discovered the existence of the Carlisle application, because he learned of it orally. Neither Lash or Mehrens can recall when Mehrens learned of the Carlisle application.

24. Lash testified that Madeira and White, other shareholders in Sun City, knew about the Carlisle application two or three months after it was filed.[35] Mr. Titus, another shareholder, probably found out about the same time that Mehrens did. Madeira and White are both residents of Pennsylvania (Sun City Exs. 9 and 11.) Titus and Mehrens are residents of Phoenix, Arizona. (Sun City Ex. 13 p. 1). Gilbert is also a resident of Phoenix, Arizona and is licensee of an FM station in Glendale, Arizona (approximately 15 miles from Sun City).

25. Gilbert, who helped Lash prepare the Carlisle application in September 1969, did not tell Mehrens about the existence of the Carlisle application in 1969, according to Mehrens. Gilbert did not tell Mehrens about the Carlisle application around the time the Review Board added the 1.65 issue against Korngold (August 10, 1971). Mehrens received the Review Board Order adding a 1.65 issue against Korngold in August 1971. He did not provide Lash with this Order because: (1) Lash was provided only with pleadings specifically applicable to him; and (2) there was no apparent need to provide Lash with the pleading at that time. Mehrens recalls discussing the addition of a 1.65 issue against Korngold with Gilbert, but this took place when

[34] The only point of reference offered by Mehrens was that he learned of the Carlisle application shortly before filing the Sun City amendment on February 14, 1972.

[35] Lash and Madeira each hold 1,000 shares of the 2,000 shares of common stock issued. Mehrens, White and Titus will each hold 1,000 shares of the 3,000 shares of preferred, non-voting stock to be issued.

Mehrens was attempting to find out why he had not been informed about the Carlisle application. This discussion took place shortly before Mehrens filed the amendment for Sun City reflecting the Carlisle application. Mehrens did not discuss the addition of the 1.65 issue against Korngold with Lash until after he learned that Lash had filed an application for Carlisle.

26. Official Notice was taken of the Carlisle application. In Exhibit 3 to that application, Lash states that "the applicant will furnish all of the funds required for the construction and first-year operation of the proposed station". Lash estimated that these costs would total $34,710 (Sun City Ex. 4). In his financial statement, dated September 8, 1969, attached to the Carlisle application, Lash showed the following liquid assets: Cash—$13,000; Savings—$44,339; and Stocks—$3,000. The liabilities shown were: a mortgage of $75,954; Russell National Bank note of $4,325; CCNB debit of $12,500. No reference was made of Lash's promise to loan Sun City $40,000 on this financial statement. Lash, in Exhibit 3 to his Carlisle application, also submitted a letter from Farmers Trust Company of Carlisle, offering to loan him $40,000 for the Carlisle application. Lash could have relied on either his personal assets or the bank loan to finance the Carlisle application, but "guesses" he intended to rely on the loan.

27. The original financial plan submitted with the Sun City application involved a loan by Russell Lash of $40,000 to the corporation.[36] In a letter dated July 8, 1969, Lash promised to loan the corporation up to $40,000 with "no payment of principal or any interest on the funds advanced during the first year of operation of said station". Lash's financial statement, May 12, 1969, submitted with the Sun City application showed liquid assets of: Cash—$3,120; Stocks and Bonds—$3,000; Savings—$44,339.78. His liabilities included a real estate mortgage of $78,271, a debit to Russell National Bank of $4,725, a note at Farmers of $12,711.44, and a debit at CCNB of $13,500. All of the liabilities were shown as not due within twelve months from the date of the statement.[37]

Sun City Financial Issue

28. The Commission set a financial issue against Sun City because: (1) out of the estimated cost of first year operation and construction ($26,058), less than $18,000 was planned for salaries to cover six employees; and (2) although Sun City proposed to rely on cash of $100, new capital of $3,000, and a stockholder loan of $40,000, stockholder's balance sheets had not been filed to show the availability of new capital or the $40,000 loan.

29. Lash proposes to lease broadcast equipment from CCA at a cost of $243 per month or $3,159 for the first year, (Sun City application). Rent for the studios from the Del Webb Corporation would amount to $2,899 for the first year. The cost of miscellaneous office supplies and leased office equipment would cost $500 each, Records (costing a dollar each) would cost $1,000 for the first year. Estimated salaries would break down as follows:

[36] According to the Sun City application, Lash had already been issued 50% of the common stock for $1,000.
[37] Official Notice of Sun City application, as requested, is taken.

(1) The manager/chief engineer would be paid $6,500 less $1,000 for a stock purchase;

(2) Three combination men (announcer/operators) would work 85 hours per week at $2.00 per hour for a total of $8,840 per year;

(3) Two salesmen would work strictly on commission; and

(4) A fund for extra help containing $1,160 was budgeted.

Other expenses include power—$1,000; phones and postage—$750; and ASCAP–BMI—$750.

30. It is Lash's understanding that janitorial services are included in the cost of leasing the studio from Del E. Webb Development Corporation. Gilbert assisted Lash in preparing the figures for estimated cost and reliance was placed on Gilbert's expertise in the area. Gilbert is to be paid $10,000 by Lash personally, if the construction permit is granted to Sun City. Counsel for Sun City is also to be paid by Lash personally, contingent on the grant of the construction permit to Sun City.

31. To meet first year cost of operation and construction, Sun City now proposes to rely on a bank loan. Sun City has submitted the affidavit of the Vice President of Farmers Trust Company of Carlisle, Pennsylvania, March 3, 1972. The affidavit sets forth a commitment to loan Sun City $50,000 on the personal guaranty of Russell Lash. No other security will be required and no repayment of principal or interest will be due during the first year. Principal and interest will be payable, thereafter, in 36 equal monthly installments, interest being charged at a rate between 7% and 9%. Also disclosed in the affidavit is a loan commitment of $40,000 to Russell Lash, on the same terms as previously set forth, for use in constructing a radio station in Carlisle. The $50,000 commitment is irrespective of and in addition to the $40,000 commitment (Sun City Ex. 1). Should Sun City be granted the construction permit, Lash would give his personal guaranty as required by the loan commitment. The loan commitment is of indefinite duration.

32. Sun City's revised financial plan consisting of the above-noted bank loan was submitted in the form of an amendment on March 9, 1972. The amendment was accepted by Order released March 20, 1972 (FCC 72M–360).

Ascertainment of Community Problems Issue (Korngold)

33. Prior to the filing of his original application in these proceedings, Korngold conducted a survey of the community needs and interests of the Sun City area. In the course of that survey he interviewed comunity leaders and members of the general public who were residents of Sun City, Arizona. The interviews revealed that there were few community problems in Sun City. Of primary concern was the objectionable presence of a cattle feed lot near Sun City and the fact that the Santa Fe Railroad trains made excessive noise. He also found that there was a need for more restaurants and better ambulance service.

34. Subsequently, after the release of the Commission's *Primer on Ascertainment of Community Needs and Interests* on February 23, 1971, Korngold conducted a second and more extensive survey. Korn-

gold was permitted to amend his application to reflect the second survey by Order on May 25, 1971 (FCC 71 M-828). Briefly, the second survey covered the following:

A. Demographic Information

35. Sun City is an unincorporated community and at the time that this survey was conducted (November, 1970 to April 30, 1971), the United States Census Report for unincorporated areas in Arizona was not then available. Korngold found no statistics of Sun City other than those prepared by the Del E. Webb Development Corporation existed at that time. The Del E. Webb Development Corporation is the developer of Sun City, Arizona, a planned retirement community. The information supplied by the corporation indicated there were approximately 15,000 people residing in Sun City at the time the survey was conducted and of this population less than 50 were children. The average age of the residents of Sun City was approximately 63 years old and there were no Negro families living in the community at that time.[38] The average income of the residents of Sun City was approximately $7,400 in 1970.

36. Because Sun City is a "planned community" for retirement age people, the developer has placed certain restrictions on potential home buyers. For example, at least one spouse must be at least fifty years old and people under eighteen years of age cannot under any circumstances be permanent residents of the community. The average cost of a house in Sun City in 1970 was $25,000. Two-thirds of the homes in the community are paid for in cash and 99.1 percent of the residents own their own homes.

37. Sun City, Arizona, has numerous recreational facilities and activities particularly suited for persons of retirement age. There are over 100 social, cultural, hobby, travel and service organizations in Sun City. Among these organizations are ceramic workshops, bridge clubs, art classes, sewing classes, bowling classes, coin clubs and women's clubs. There are also eleven churches in Sun City and facilities for worship for all faiths are available. A large manmade lake for boating has been constructed by the Del E. Webb Development Corporation and a bowling alley has recently been erected. Medical services are available on a 24 hour basis and a new hospital has recently been built in the community.

38. The 1970 Census reports for Sun City, Arizona, now available, indicate that the total population of Sun City in 1970 was 13,670. Of that total, 99.8% or 13,637 people were Caucasian. Thirty-three people or 0.2 percent were of other races including Indians, Japanese and Chinese; however, there were no Negro residents of Sun City at that time. A majority of the residents of Sun City are over 65 years of age (63.7 percent). Only 35.8 percent of the population is between 18 and 64 years of age and only 0.5 percent of the population (76 people) is under 18 years of age. The median age is 67.5 years. A total of 56 percent of the population of Sun City (7,654) is female and 44 per-

[38] Korngold was unofficially advised, however, that one house had been sold to a Negro family in the community.

cent of the population (6,016) is male. There are 7,385 households in Sun City with an average of 1.85 persons per household. There are a total of 5,749 families in Sun City.

39. A total of 9,412 residents of Sun City are native born; 3,361 are natives of foreign or mixed parentage and 932 are foreign born. English is the primary language for 10,622 residents. German is the primary language of 1,181 residents and other languages, including French and Spanish, are the primary languages for 1,902 residents. A total of 11,732 residents (91.7 percent) were born outside of the State of Arizona.

40. Only 1,538 residents are employed and the median income of 1969 for employed male workers was $7,027 and for female workers was $3,489. Median family income was $8,544 per year.

41. There are no industries in Sun City itself but the residents of Sun City who are employed are primarily professional persons in the engineering, medical, education or technical fields. There are also substantial numbers of sales, clerical and service personnel. The primary industries in which Sun City residents are employed include manufacturing, retail trades and health services.

42. The total school enrollment in Sun City for persons 3 to 34 years of age is 46. A total of 15 persons were enrolled in high school and 31 persons were enrolled in college. The average male resident of Sun City has completed 12.5 years of school and 61.9 percent are high school graduates. The average female resident has completed 12.6 years of school and 69.3 percent are high school graduates. A total of 4,959 Sun City residents have attended one or more years of college.

43. The other communities which Korngold proposes to serve are adjacent to Sun City. They are all incorporated areas; 1970 Census information for these communities was available at the time the survey was conducted. The City of Peoria, Arizona, is located 2½ miles from Sun City and according to the 1970 Census has a population of 4,972. This represents an increase of 84.8 percent over the population in 1960. Of the total population, a total of 4,654 (97.1%) were Caucasian. There were also 17 Negroes, 39 Indians, 5 Japanese, 9 Chinese and 2 Filipinos. The median age of the male residents of Peoria is 22.7 years and the median age of the female residents is 23.1 years. A total of 41.5 percent of the residents are under 18 years of age, 50.5 percent are 18 to 64 years old and 8.0 percent are over 65 years old.

44. There are a total of 1,347 households in Peoria (an increase of 104.7 percent over 1960) and there are 3.55 persons per household. A total of 4,412 residents are native born and 318 residents are foreign born. In Peoria, 52.6 percent of the residents between the ages of 3 and 34 are enrolled in school. The median number of school years completed by all residents over 25 years of age is 9.0. A total of 1,744 (75.6 percent) male residents of Peoria over 16 years of age and a total of 735 (28.9%) of the female residents of Peoria over 16 years of age are in the labor force. The primary industries in which these persons are employed are as follows: construction (169); manufacturing (357); transportation (19); communications and utilities (32); wholesale and retail trade (343); finance, insurance, business and repair services (133); professional and related services (151); educa-

tional services (108); public administration (42) and other industries (431).

45. The primary types of occupations of the residents of Peoria are clerical positions, craftsmen, foremen and kindred workers, operatives, farm laborers, farm foremen and service workers. The majority of the workers in Peoria are private wage and salary workers (1,259). Other types of workers include government workers (279), self-employed workers (84) and unpaid family workers (15).

46. The median annual income in Peoria is $6,832. The mean annual income is $7,932. The per capita annual income is $2,010. A total of 229 (20.9 percent) families in Peoria have incomes below poverty level. The mean income deficit for these persons is $1,604.

47. The Town of El Mirage is located approximately one mile from Sun City and it had a total population in 1970 of 3,258. Of that total, 3,497 persons (86.9 percent) were Caucasian. Peoria also has residents of other races including Negroes (276), Indians (31), Japanese (9), Chinese (10) and Filipinos (1). The median age of the male residents of El Mirage is 18.6 years and the median age of the female residents of El Mirage is 18.1 years. There are a total of 1,593 male residents and 1,665 female residents. Of the population, 49.5 percent is under 18 years of age; 45.5 percent are 18 to 64 years old and 4.9 percent are over 65. There are a total of 762 households in El Mirage and an average of 4.24 persons per household. A total of 226 residents are foreign born and 2,948 residents are native born.

48. A total of 49.2 percent of the residents of El Mirage between the ages of 3 and 34 are enrolled in school. The median number of years of school completed by all residents over 24 years of age is 7.4. A total of 883 males over 16 years of age and a total of 851 females over 16 years of age are in the labor force. The primary industries in which these persons are employed are as follows: construction (60); manufacturing (148); transportation (26); communications and utilities (19); wholesale and retail trade (106); finance, insurance, business and repair services (31); professional services (33); educational services (17) and public administration (43).

49. The primary types of occupations are farm laborers and farm foremen (272), non-farm laborers (162), operatives (156) and service workers (152). The majority of the workers in El Mirage are private wage and salary workers (684). Other types of workers include government workers (125), self-employed workers (79) and unpaid family workers (5). The median annual income is $5,131 and the mean annual income is $5,774. The per capita annual income is $1,278. A total of 230 (36.9 percent) families in El Mirage have incomes below poverty level. The mean income deficit for these families is $1,812.

50. The town of Surprise, Arizona, which will also be served by Korngold's proposed Sun City radio station, is located approximately 2 and ½ miles from Sun City, Arizona. According to the 1970 Census, the Town of Surprise has a population of 2,427. Within this total, 2,204 persons are Caucasian, 96 persons are Negroes and 127 persons are of other races. The median age is 16.9 years. A total of 53.1 percent of the residents of Surprise are under 18 years of age, a total of 43.2 percent of the residents are between the ages of 19 and 64 years of age, and 3.7 percent of the residents are 65 years of age or older. No census

information concerning school enrollment, nationality of residents, incomes or occupations for the residents of Surprise are given in the 1970 Census.

51. Korngold also intends to serve the Town of Youngtown, Arizona, which is another planned retirement community. Youngtown is located approximately one mile from Sun City and in 1970 had a population of 1,886. Within the total population of Youngtown, 1,881 persons are Caucasian and 5 persons are of other races. There were no Negroes living in Youngtown who were permanent residents. The median age of the residents of Youngtown is 70 years. Only 1.7 percent of the population is under 18 years of age. A total of 71.2 percent of the population is 65 years of age or older. 27.1 percent of the population is between the age of 19 and 64 years of age. The total number of households in Youngtown is 1,071 with a total of 1.76 persons per household. No Census information concerning school enrollment, nationality of residents, incomes or occupations for the residents of Youngtown are given in the 1970 Census.

B. Conduct of Community Leader Survey

52. The community leader survey was personally conducted by Korngold. Sun City, Arizona, is a planned retirement community, and it does not have many of the community service organizations normally found in a community of its size. There are few formal community leaders. The actual leaders of the community were identified by Korngold on the basis of his personal examination of the life style of the Sun City area, his knowledge of the people who are most active in the community and a list of community leaders provided by the Del E. Webb Development Corporation. In addition, Korngold spoke to various residents of Sun City to determine who in their opinion, were community leaders in the area. Initially, he spoke to Judge John J. Snure, who is the Justice of the Peace of the City of Peoria, Arizona. Judge Snure presently resides in Sun City, Arizona. As a result of this interview, Korngold was advised that there were no community leaders in Sun City itself because none of the residents of the community wanted to assume any responsibility. He attributed this lack of leadership to the fact that Sun City is basically a retirement community. Nevertheless, Korngold interviewed other individuals in the community to determine who the community leaders were. Korngold also talked to the local Post Office employees, the publishers, editors and reporters of both local newspapers and Col. J. S. M. Titus at the Community Center at Sun City, Arizona. As a result of these inquiries, Korngold interviewed some twenty persons who he determined are community leaders in Sun City, Arizona: among whom were a fair representation public and civic oriented persons and others one might find in this specialized or unusual type community. In Youngtown, Arizona, which is a longer established community, Korngold interviewed six persons who while not easily identifiable as community leaders, under these conditions, are not *per se* inadequate and, included, a Town Clerk and Town Marshal. In the Town of El Mirage, Korngold interviewed three persons, again, not community leaders of the customary variety, and included the Chief of Police, who would be

such in a small community. In the Town of Surprise, Arizona, Korngold interviewed William J. Riss, who is the Town Marshal. In the City of Peoria, Mr. Korngold interviewed four community leaders who are principally public officials.

C. General Public Survey

53. To conduct a survey of community needs and interests among the general public, Korngold retained Mr. Robert Luders, a member of the Police Department of the City of Peoria, and his wife. Mr. and Mrs. Luders conducted the survey of the general public on the applicant's behalf and under his supervision. The survey was conducted using a random sampling of representative members of the community of Sun City and the surrounding areas. Twenty-nine persons, mostly retired of Sun City, were interviewed as part of the general public survey. Whatever members of the general public were interviewed in the Towns of El Mirage, Surprise, Youngtown and in the City of Peoria, Arizona, elude adequate identity. Records, notes or documents of their identity, number and other demographic information were not made or retained by Korngold and their responses are incorporated in the identification of community needs and interests set forth in Section D below.

D. Community Needs and Interests Identified as a Result of the Survey

54. The information obtained as a result of this survey identified relatively few major community problems in Sun City itself. Interviews with community leaders in surrounding communities identified more substantial problems. In Sun City itself, Korngold identified as the most significant problem, the fact that an average of about two suicides occur in Sun City each week. This information came from Chief L. H. Johnson, Chief of Police of Peoria, whose duties include responding to emergencies in the Sun City community. Other community problems identified in Sun City are:

1. The need for increased financial assistance to widows.
2. The need to relocate a nearby cattle feed yard.
3. Alcoholism.
4. The installation of a community sewer system instead of individual septic tanks.
5. The need for an additional fire department station.
6. The need for Sun City itself to remain unincorporated to keep taxes down.
7. The need for part-time employment for Sun City residents in order to keep them active.
8. The need for increased social security benefits.
9. The need for public transportation from Sun City to Phoenix.
10. The need for a reduction in the price of water service.
11. The need for more extensive religious oriented programs for the general public.
12. The need for more good restaurants.
13. The need for more local oriented news programs.
14. The need for a more efficient means of communication in the case of local emergencies.

55. Korngold also found that some of the Sun City residents were particularly concerned about the children and young adults in the surrounding communities of El Mirage, Surprise and Peoria. These

people felt that the Sun City community should be awakened to the fact that they should try to help these children and minority populations in the surrounding areas. With reference to this concern for these children, the following needs were also identified:

1. The need for increased concern for the welfare of children in the surrounding communities.
2. The need for improved schools in this area.
3. The need to reduce the incidence of drug abuse among young people.
4. The need to provide employment for ethnic minorities.
5. The need for greater job opportunities for residents of the surrounding communities.

56. Also surveyed were the needs of Youngtown, another planned community by Del E. Webb Development Corporation for retirement living. That survey involved the following community needs:

1. The need for a street sweeper to control littering.
2. The need to relocate the nearby cattle feed yard to alleviate air pollution.
3. The need for driver education training to inform residents from out of state concerning local and Arizona traffic regulations.
4. The need for public transportation from Youngtown to Phoenix.
5. The need for more recreational activity (the recreational facilities of Sun City are not open to the residents of Youngtown).
6. The need for more low income housing.
7. The need to provide more employment and manpower training.
8. The need for additional police protection.

57. Korngold then surveyed the town of El Mirage and found the following community problems:

1. Delivery of mail.
2. Water prices are too high.
3. Alcoholism.
4. Drug abuse.
5. Recreational activities needed for old and young.
6. Sewer system.
7. Manpower retraining.
8. Air pollution from stockyard.
9. Movie theatre needed.
10. No swimming pools.
11. New jail is needed.
12. Increased pay for police officers.
13. Public transportation to Phoenix.
14. Low income housing.

58. Korngold surveyed the Town of Surprise and found the following community problems:

1. Town Hall complex needed for government services.
2. Air pollution from stockyard.
3. Low cost housing.
4. Adequate water supply.
5. Community swimming pool.
6. Community center building.
7. Recreational facilities for young and old.
8. Vocational training for young people.
9. Manpower retraining for agricultural workers.

59. Korngold surveyed the City of Peoria. The following community problems were found:

1. Modern court complex and jail facilities.
2. Need better public school facilities due to overcrowding.
3. Vocational training.

4. Public transportation to Phoenix.
5. Adequate tax base for public improvement.
6. Community swimming pool.
7. Organized recreational facilities.
8. Activities for older people.
9. Local radio station to inform community of what is happening daily.

E. Programs Responsive to Community Needs and Interests Identified

60. Korngold proposed the programming set forth below in order to meet these needs and interests:

Viewpoint.—Devoted to local, state and national issues, wherein public, school students and college students from surrounding areas will be invited to participate, and equal time will be given to opposing views. 60 minutes, 11:00 a.m.–12:00 noon—Monday–Friday.

Dealing with Problems

1. Financial assistance.
2. Air pollution from stockyard.
3. Alcoholism.
4. Area remaining unincorporated to keep taxes down.
5. Part-time employment.
6. Increased Social Security benefits.
7. Public transportation to Phoenix.
8. High price of water.
9. Lack of sufficient restaurants.
10. Welfare of children in surrounding areas.
11. Improvement of school district.
12. Drug abuse among young people in surrounding communities.
13. Unemployment in surrounding communities among ethnic minorities.
14. Job opportunities in surrounding areas and need for manpower retraining.
15. Low-income housing needed.
16. Additional police service.
17. Movie theatre needed.
18. Adequate tax base for public improvement.

Educational Review.—Teaching listeners conversational Spanish. The Mexican border is only 130 miles away and knowledge of Spanish is important. The surrounding towns and cities have a substantial population of Mexican-Americans and there is a definite interest on the part of Sun City residents to be able to communicate with their neighbors in these surrounding communities in Spanish. 15 minutes, 7:45 p.m.–8:00 p.m., Monday–Friday.

Dealing with Problems

1. Welfare of children in surrounding community areas.
2. Unemployment in surrounding communities among ethnic minorities.
3. Job opportunities in surrounding areas and need for manpower retraining.

Washington Reports.—Reports from Senators Paul Fannin and Barry Goldwater and Congressman Steiger, 30 minutes 11:00 a.m.–11:30 a.m. Saturday.

Dealing with Problems

1. Financial assistance for widows.
2. Part-time employment.
3. Increased Social Security benefits.
4. Welfare of children in surrounding communities.
5. Unemployment in surrounding communities among ethnic minorities.
6. Job opportunities in surrounding areas and need for manpower retraining.
7. Low-income housing needed.

Play-Times.—Daily activities available to Sun City residents and other activities available in surrounding communities. 5 min 8:30–8:35 a.m.—10:30 a.m.–10:35 a.m.—4:30 p.m.–4:35 p.m., 6:30 p.m.–6:35 p.m.

Dealing with Problems

1. Lack of local oriented news programs.
2. Recreational activities. Sun City facilities are not open to residents of surrounding communities.

Public Health.—Public Health Service Information—15 minutes—2:30 p.m.–2:45 p.m.—Monday.

Dealing with Problems

1. Alcoholism.
2. Increased Social Security benefits.
3. Welfare of children in surrounding community areas.
4. Adequate water supply.

Good Health.—Local physician to give health tips—15 minutes—2:30 p.m.–2:45 p.m.—Tuesday.

Dealing with Problems

1. Alcoholism.
2. Increased Social Security benefits.
3. Welfare of children in surrounding community areas.
4. Adequate water supply.

Dental Health.—Local dentist to give tips on good dental health—15 minutes—2:30 p.m.–2:45 p.m.—Wednesday.

Dealing with Problems

1. Increased Social Security benefits.
2. Welfare of children in surrounding community areas.
3. Adequate water supply.

Homemakers.—Suggestions for the household from professionals and local residents—15 minutes—2:30 p.m.–2:45 p.m.

Dealing with Problems

1. Financial assistance needed for widows.
2. Part-time employment.
3. Adequate water supply.

Farm & Garden.—Tips for the care and cultivation of gardens, lawn care, crops, etc. 15 minutes—2:30 p.m.–2:45 p.m.—Friday.

Dealing with Problems

1. Air pollution from nearby stockyard.
2. Sewerage instead of cesspools.
3. High price of water.
4. Adequate water supply.
5. Unemployment in surrounding communities among ethnic minorities.
6. Job opportunities in surrounding areas and need for manpower retraining.
7. Part-time employment.

Swap-Shop.—Trading Post to sell merchandise, trade merchandise, job openings available, or jobs needed by public—30 minutes—Monday–Saturday—9:00 a.m.–9:30 a.m.

Dealing with Problems

1. Financial assistance for widows.
2. Area remaining unincorporated to keep taxes down.
3. Part-time employment.
4. Unemployment in surrounding areas among ethnic minorities.
5. Job opportunities in surrounding areas and need for manpower retraining.

Concert Hall.—Symphonic and outstanding good music. When Sun City Symphony is playing live concerts the recorded music will be replaced with broadcasts direct from the Sun Bowl, 2 hours—8:30 p.m.–10:30 p.m. Monday–Sunday

Dealing with Problems

1. Lack of local oriented programs.
2. Recreational activities. Sun City facilities are not open to residents of surrounding areas.
3. Recreational activities needed for old and young.

Sports.—Reports covering local sports activities in Sun City and surrounding areas. 15 minutes—5:15 p.m.–5:30 p.m.—Monday–Saturday

Dealing with Problems

1. Lack of local oriented programs.
2. Improvement of school district.
3. Recreational activities in Sun City.

4. Recreational activities needed for young and old.

Business Survey.—Will include reports on Government bonds, commodities including crops and livestock, and stock market reports—15 minutes—4:00 p.m.–4:15 p.m.—Monday–Friday

Dealing with Problems

1. Financial aid to widows.
2. Area should remain unincorporated to keep taxes down.
3. Lack of local oriented news programs.

Religion.—Announcements of religious services being conducted in the various churches in the Sun City and neighboring communities, setting forth the minister's name and title of sermon, together with a 15 minute guest sermon by a different minister each week with inspirational religious music. 60 minutes—7:00 a.m.–8:00 a.m. Sunday

Dealing with Problems

1. Lack of local religious oriented programs for general public and shut-ins.

Job Time.—Listing of job opportunities received from Arizona State Employment Service. 5 minutes—10:00 a.m.–10:05 a.m.—Monday–Friday

Dealing with Problems

1. Part-time employment.
2. Unemployment in surrounding communities among ethnic minorities.
3. Job opportunities in surrounding areas and need for manpower retraining.

COMPARATIVE ASPECTS OF THE APPLICANTS

61. Sun City Broadcasting Corporation is an Arizona corporation formed in July of 1969 for the purpose of applying for a new FM radio station to be located at Sun City, Arizona. The corporation is authorized to issue 100,000 shares of $1.00 par value common stock and 100,000 shares of $1.00 par value preferred stock. Two thousand shares of the common stock have been issued: 1,000 to Russell C. Lash and 1,000 to Frederick L. Madeira. The preferred stock does not carry voting rights with it. Jay S. M. Titus, Craig Mehrens, Edwin Robert White have each subscribed to purchase 1,000 shares of the corporation's preferred stock. The subscriptions of Messrs. Titus, Mehrens and White are callable within one week after the Commission issues the corporation a construction permit for a new radio station in Sun City, Arizona.

62. Russell C. Lash, the corporation's president, and treasurer, and the chairman of its board of directors, resides in Carlisle, Pennsylvania. Lash is 47 years old; he is married and has four children. Lash attended school through the eighth grade, at which time he left school to help support his mother, father and sister. In 1964, Lash and a partner formed the Lash Motor Company in Lewistown, Pennsylvania and operated it until 1966. In 1964, he formed the Lash Buick-Cadillac Company which he presently owns. He is also the president of Ladiera Mobile Homes and Pennsylvania Air-Co., Inc. Lash belongs to the Carlisle Chamber of Commerce, the Bible Baptist Church of Charmonstown, Pennsylvania and is a member of the Aircraft Owners and Pilots Association of Washington, D.C. He holds a private pilot's license for single and multi-engine aircraft and a restricted radio telephone operators permit.

63. Frederick L. Maderia is the corporation's vice-president, secretary and a director. He is a resident of Mechanicsburg, Pennsylvania where he resides with his wife and five children. Mr. Maderia is 41 years old. He was a graduate from the Milton Hershey School in

Hershey, Pennsylvania in 1949, attended Hershey Junior College for two years and received his B.S. in Business Administration from Ryder College in Trenton, New Jersey in November 1952. Subsequently, he received a master of science degree from Trinity University in San Antonio, Texas. Maderia is presently employed by the Mutual Life Insurance Company of New York. He has previously been a part-time instructor in economics at the Messiah College in Grantham, Pennsylvania. From December 1952 until January 1958, Maderia was a member of the United States Air Force which he entered as an enlisted man and achieved the rank of first lieutenant before discharge. He is a member of the Rotary Club of Mechanicsburg, Pennsylvania, the Gideons, and belongs to the Baptist Church in Charmonstown, Pennsylvania.

64. Edwin R. White, subscriber to 1,000 shares of the corporation's preferred stock, will be the proposed station's general manager. White presently resides in Camp Hill, Pennsylvania, but will move to the Sun City area when this application is granted. White has held a first class radio television-telephone license since June of 1970. In September of 1970, he became an employee of WHP AM, FM and TV. He is presently the engineer-in-charge of the AM station's 5 kilowatt transmitter during nighttime directional broadcasting hours. He is also a member of the International Brotherhood of Electrical Workers, AFL–CIO. While at WHP he has assisted in the construction and adjustment of a five tower directional antenna system. White has also participated in the preparation and delivery of broadcasts over the station.

65. Craig Mehrens, a subscriber to 1,000 shares of the corporation's preferred stock, lives in Glavine, Arizona, and is a practicing attorney in Phoenix, Arizona. Mr. Mehrens has lived in Tucson, Arizona and Las Cruces, New Mexico. Mehrens' wife's parents both live in Sun City and he has visited them often. His parents have also recently purchased a home in Sun City and plan to move from Gallup, New Mexico in May of 1972. Mehrens has some clients in Sun City and plans to participate as a stockholder and as the corporation's attorney but does not plan to participate in the day-to-day operation of the station.

66. Mr. Titus is a resident of Phoenix, Arizona. He first came to Phoenix in 1956, as a member of the Air Force. He was transferred from the area for a period of four years, but returned in 1964 when he retired from the Air Force. Since June of 1967, he has been employed by the Sun City Community Association, a non-profit corporation in Sun City. He is the general manager of recreational facilities in Sun City. Titus does not have any previous broadcast experience. In connection with his job he deals with community leaders in Sun City. If the Sun City application is granted, Titus plans to become involved in the development of programming to serve the community. However, Mr. Titus intends to continue working full time for the Sun City Community Association and he will not participate directly in the day-to-day management of the Sun City station. Neither Lash, Maderia, Titus nor Craig Mehrens are associated with, or own, any other facility of mass communications. White, the proposed station's general manager is presently associated with the WHP stations in

Pennsylvania, but will leave that association when he comes to Sun City to manage the applicant's new station.

67. Alvin L. Korngold served in the European Theatre during World War II, and was honorably discharged with the rank of Corporal. He received an AB Degree from New York University, and then attended the law school of Cambridge University in England. He received a Juris Doctor Degree from New York University. Korngold is a member of the bars of the State of Arizona, the State of New York, and various Federal courts. While a resident of New York, Korngold served as a special assistant district attorney in Queens County and as a special assistant Deputy Attorney General for the State of New York. He is a member of the American, Arizona and New York State Bar Association. He is also a member of the National Association of Broadcasters "numerous" local broadcast associations. He has been a member of the American Legion, a post commander of the Jewish War Veterans, and a member of various fraternal organizations, including the Elks and Masons.

68. Korngold entered broadcasting in February 1966, when he left his prior occupation as an active lawyer and became an employee of Station KEVT in Tucson, Arizona. Korngold acquired the station in May 1966. KEVT has done public service activities for the community, particularly regarding the Mexican-American community. Korngold also operates Station KWFM in Tucson. Korngold has also established KAMX in Albuquerque, New Mexico, a Spanish language station. The applicant lives in Tucson, an hour and a half trip by automobile from Sun City. He is married and has three children.

69. Even though Korngold was registered as an Independent, an Arizona County Republican Committee asked him to run for County Attorney in 1968. Although there were primary fights for Congress and County Sheriff, Korngold was not contested. During the campaign he discovered community problems and publicly spoke out on these issues. The record does not reveal which county organization requested Korngold to become a candidate, or whether he was elected.

70. Korngold also has an application pending for a new FM station in Albuquerque, New Mexico and an application pending to provide nighttime FM operations at KEVT in Tucson. In the event Korngold's application is granted, he will hire a manager to operate his station. Korngold will devote his full time to the early work at the Sun City station and when it becomes operational, he expects to devote 5 or 6 days a month to it.

Comparative Coverage

71. The Commission, in paragraph 4 of the designation order in this proceeding [39] noted that the data submitted by the applicants indicates a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the Commission stated that evidence relevant to determining whether a comparative preference should accrue to either of the applicants would be considered. However, the evidence of record demonstrates that the areas and populations served by the two proposals would be nearly identical

[39] FCC 70–1211, released November 18, 1970.

since the transmitter sites are so close together, the effective radiated power for each is 3 Kw, and the heights of the antennas above average terrain are substantially the same (Korngold Ex. 7, p. 1). Sun City has stipulated that Korngold exhibit 7 contains the correct areas and populations to be served by both proposals. Thus, no advantage accrues to either applicant as to proposed coverage.

ULTIMATE FINDINGS AND CONCLUSIONS

72. Both Korngold and Sun City are faced with financial issues and Section 1.65 issues. Korngold's Section 1.65 issue and financial issue will be considered first. Sun City's Section 1.65 issue and financial issue will follow.

73. Korngold has without doubt violated Section 1.65 of the Commission's Rules. Were the violation, in fact, the result of an unintentional, minor, clerical error, as Korngold contends, disqualification would not be warranted. *Harvit Broadcasting Corp.*, 23 RR 2d 328 (1971), *Lester H. Allen*, 17 FCC 2d 439 (1969). However, the record belies this contention.

74. The record is unequivocal that Korngold consistently and knowingly failed to: (1) disclose subsequently filed applications in pending applications; (2) disclose that monies which he asserted in each application would be used to finance it were in fact, already over-committed to previously filed pending applications; (3) disclose new business interests, e.g., "Alvin L. Korngold d/b/a All Spanish Network" and "KWFM, Inc."; and (4) disclose fully liabilities against himself, e.g. the payments on his house in Tucson, the swimming pool "mortgage", and the personal loan for KAMX. The consistent nature of Korngold's failure to keep the Sun City application up to date evinces, by itself, a lack of candor in dealing with the Commission which effectively undermines Korngold's assertion that his failure to amend was the result of an unintentional, minor, clerical error.

75. Korngold also contends that he did not update his application because he did not think it was pertinent. While it is true that Korngold, with the exception of the KEVT application to go nighttime, referenced his pending applications and/or broadcast licenses in latter-filed applications. This does not explain how Korngold, an attorney and, particularly, a licensee of this Commission since 1966, can claim that subsequently filed applications, to be financed with the same monies already committed to previously filed applications, are not pertinent.

76. A further obvious fact is that Korngold's failure to update previously filed applications invariably inured to his benefit. He obtained permits for KWFM (FM) and KAMX–AM without being subjected to Commission inquiry as to his financial qualifications even though on April 16, 1969, when he filed his CP application for KWFM (FM) his net liquid assets were only $18,000 [40] balanced against approximately $73,000 in commitments.[41] Similarly, his Sun City appli-

[40] See Korngold's financial statement filed with his Tucson FM application. This shows cash of $34,000 and cash value of life insurance $8,500, with current liabilities of $24,500.

[41] The $73,000 commitments represented the estimated cost of $56,787 for the Albuquerque AM proposal and $16,373 for the Tucson FM proposal. Both proposals were pending on April 16, 1969.

cation was designated for hearing without a financial issue in spite of the fact that on June 6, 1969, when that application was filed, he had only $18,000 in net liquid assets to meet broadcast commitments of approximately $86,000.[42]

77. Korngold admitted that as of December 4, 1969, when he filed the Albuquerque FM application, he had outstanding Commitments for KAMX, (KWFM(FM), the Sun City application, and the Albuquerque FM application totalling over $90,000. Yet on the financial statement submitted with the Albuquerque application he showed $34,500 in net liquid assets. Under the circumstances, it borders on the absurd and it is incredible to suggest that a licensee of this Commission could claim he did not amend pending applications to reflect subsequently filed applications because the information provided would not be pertinent or that such failure to keep the Commission informed was a minor clerical error. This explanation further exemplifies the degree of candor accorded the Commission by Korngold.

78. At the hearing Korngold claimed that if the Commission granted the four applications he would have been able to finance them. His explanation is a tacit admission that the various financial plans submitted to the Commission were at least inadequate. Instead of relying on the personal assets reflected in the financial statements submitted to the Commission, as he represented he would, Korngold introduced new sources of financing, i.e., bank loans, legal fees, flow of money from Tucson Radio, Inc. Not only has Korngold failed to document the availability of these funds, but the disclosure that reliance would have to be placed on them in order to finance all the pending applications, is an acknowledgement that the financial representations made to the Commission were, taken as a whole, inadequate. An applicant's financial qualifications are not considered or evaluated in a vacuum. *Nelson Broadcasting Co.*, FCC 64R–505, 4 RR 2d 87. Korngold has not provided the Commission with the total picture. It must, therefore, be concluded that Korngold did not provide the Commission with substantial and significant changes [43] in his financial position, because if he did so, he would have been found wanting. A piecemeal approach served Korngold's interests, and a piecemeal approach is what Korngold took.

79. In *Martin Lake Broadcasting Company*, 34 FCC 2d 956, 24 RR 2d 301 (Rev. Bd., 1972), the Review Board ruled that denial of an application for a new AM station was required where the applicant violated Section 1.65. The Board stated, however, that the failure of the applicant to comply with Section 1.65 was not disqualifying in itself, but disqualification was required because of the applicant's misleading explanation concerning this matter (34 FCC 2d 956 at 964, fn. 11). Korngold's explanation of his failure to comply with Section 1.65 evinces a lack of candor necessitating the conclusion that he cannot be relied upon to be forthright in his dealings with the Commission. Other testimony given by Korngold at the hearing bolsters this conclusion. Korngold, who holds himself to be a practicing attorney with

[42] This $86,000 in commitments represented the estimated costs for the Albuquerque AM proposal ($73,000) the Tucson FM proposal ($46,372) and the Sun City proposal ($13,649).

[43] See *Reporting of Changed Circumstances*, 3 RR 2d 1622, 1625 (1964).

experience before the New York and Arizona Bars, (indeed, he prepared in person this very application,) cannot be heard to say he does not know whether a bank took a mortgage on his home as security for a swimming pool loan; or that he does not know how much money he received from a corporation (Radio Tucson, Inc.) of which he is the sole-owner in 1969. He believes he received between $10,000 and $20,000 from Radio Tucson in 1970, but does not know whether this was salary or repayment of a loan. He listed a 90 day note payable to a bank as a long term liability because the bank always renewed it. He offered no explanation as to why notes receivable listed in his financial statements which he says were due him from Radio Tucson are not listed as liabilities in the Radio Tucson financial statement except that the Radio Tucson statement was inaccurate. He, at one point, claimed that his relationship with the Mexican radio stations was not a business interest, but at another claimed it had brought him anywhere from $8,000 to $10,000 in the first two years. Korngold claimed that he did not amend any of his pending applications to reflect the application of Radio Tucson to go nighttime because it was a separate corporation with entirely separate funds. However, he also claimed that if he needed money to finance his applications, he would call on monies owed him by Radio Tucson. Korngold listed the value of KEVT in Korngold Ex. 6 at $320,000 but could not give the name of the broker who offered him this amount. Korngold was asked to document KEVT's assets, but did not avail himself of the opportunity. It should also be noted that although Korngold consistently listed substantial amounts of stocks in his various financial statements, he never relied on these assets for his financial showings and never disclosed any details regarding them. This litany of imperfections, especially on the part of one who is a Commission licensee, needs no further comment. These obvious defects on his application, on the part of one who is also a licensed practicing attorney, force the conclusion that Korngold has not met the burden placed upon him and has not shown himself qualified to be entrusted with this additional broadcast facility.

80. In order to meet the financial issue specified against him by the Review Board, Korngold submitted a new financial proposal. This consisted of a loan commitment from the Arizona Bank of $25,000 each for the Sun City and Albuquerque applications. The original bank letter dated March 1, 1972, was inadequate in that it ran for a period of 45 days. Korngold submitted another letter dated March 30, 1972, correcting this deficiency which was made a part of the record. On the basis of this loan commitment, Korngold has met the financial issue. In amendments filed on June 3 and July 19, 1972, Korngold increased the estimated cost of construction and operation for Sun City and Albuquerque, respectively to $19,773 [44] and $15,455.07 (Findings, paras. 3c and 3f). Based on Korngold's revised showing, he has shown himself to be financially qualified.

81. The fact that Korngold has now met the financial issue does not, of course, affect the conclusion that he should be disqualified on the basis of Section 1.65. Korngold met the financial issue through a loan commitment of March 1, 1972. While Korngold might contend that

[44] Korngold listed this as $16,614 in his amendment but failed to include the cost of leasing equipment ($3,159).

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the loan could have been obtained earlier thereby proving that he was financially qualified from the start and would, therefore, have no motive to conceal financial information from the Commission, such an argument would be, at best, remotely relevant and entirely unsubstantiated by the record facts.

82. Gilbert Lash, a 50% shareholder and President of Sun City, filed an application for an FM construction permit for Carlisle, Pennsylvania, approximately three months after the Sun City application was filed. [45] Lash stated he was not aware of the requirement to amend the Sun City application until he was informed by Sun City counsel, Mehrens. The Sun City application was finally amended on February 14, 1972.

Sun City—1.65 Issue

83. The delay in filing the amendment was occasioned, according to Lash and Mehrens, by the fact that Mehrens was not aware of the Carlisle application until a later date. Lash signed an affidavit, the morning of the hearing session (October 5, 1972), in which he represented that Mehrens learned of the Carlisle application in December 1970 or January 1971. Actually, Lash could not recall when Mehrens was informed. Mehrens represented that he was informed of the Carlisle application in December 1971 or January 1972. He explained that Lash's affidavit contained a typographical error. While there is no clear explanation why Lash signed an erroneous affidavit and no explanation why Lash signed an affidavit specifying any date, he has no recollection of this date at present, and had no recollection of this date a month before when he helped Mehrens prepare for hearing. Lash, an apparently successful businessman of no small means whose ingenuity and dedication raised him from modest beginnings to his present status, can hardly be heard to attribute his ignorance solely to slovenly inattention. Mehrens, an attorney, has even less excuse.

84. Other testimony casts a shadow of doubt on the candor of Sun City's principals. In August 1971, the Review Board added a Section 1.65 issue against Korngold for failing to amend his application to reflect the subsequently filed Albuquerque application. As of that date, it would seem that Lash should have been aware of the requirements of Section 1.65. Mehrens testified, on the other hand, that he did not provide Lash with a copy of this Order, since Mehrens was of the view that it did not apply to Lash. While an applicant is required to comply with Commission Rules, it is understandable that an applicant, unfamiliar with the Commission Rules, may, inadvertently, overlook certain Commission requirements. In these circumstances, where Sun City should have been put on notice as to the requirements of Section 1.65, to urge ignorance of the Rules as a full explanation of non-compliance is, of course, a less than perfect defense. The alacrity with which Lash signed an affidavit dealing with a matter under active inquiry and specifying dates which Lash later states he cannot recall, is no doubt, ineptitude, but does not evince an offending lack of candor. The fact that Mehrens, when faced with the enlargement against Korngold, did not contact or explain and discuss the meaning and effects of that matter with fellow Sun City shareholders to determine their possible interests in

[45] The Carlisle application was dismissed by Order released May 1, 1972 (FCC 72M-570).

other broadcast applications, as a speculative matter, seems unduly fanciful to the imagination and expected normal prudence.

85. Unlike Korngold, Sun City had no real or self-serving motive to conceal its subsequently filed application for financial reasons; since Lash apparently relied, in part, on a bank loan to finance his Carlisle application. The financial showing proffered by Sun City in its application would not be materially affected if Lash relied on the bank loan to finance his Carlisle application. Lash, however, was vague on this point at the hearing and "guessed" he would rely on the bank loan for Carlisle.

86. Though it may, seemingly, be taking unwarranted liberties with common sense notions of human behavior or experience to say that Gilbert, who helped prepare both the Sun City and Carlisle applications, lives in Phoenix and who had a $10,000 contingent fee arrangement with Lash for his Sun City work did not discuss the Carlisle application with Mehrens before December 1971 or January 1972; and that Mehrens who also resides in Phoenix and as legal counsel for Sun City (and a shareholder) did not discuss the addition of the 1.65 issue against Korngold or the filing of the Carlisle application with Gilbert, Sun City's broadcasting consultant, until two years after the Carlisle application was filed and almost six months, after the Board added the 1.65 issue against Korngold; in the light of the sworn denials and in the absence of more convincing evidence to the contrary, the true state of actual events is, at least, inconclusive.

87. None of those matters have the earth-shaking demands of absolutes. Reasonable men can reasonably differ. Thus, though Mehrens, a young Arizona attorney, was found wanting, in several respects, in the expected knowledge of and familiarity with Commission procedures, nothing in his demeanor would suggest that he would trifle with truth under oath. Much the same can be said of Gilbert. To imply, better, to assert that the professed ignorance of Mehrens, Gilbert and Lash is "inconceivable" and "unbelievable", as some would have it, is, no doubt, honest speculation. But it is hardly more; and certainly is not tangible evidence. A mitigating factor, though by no means an exculpatory one, respecting the need to amend a pending application—there being no recognition of incorporation by reference principle under abiding and established precedent—is the disclosure in Lash's Carlisle application of his Sun City application. This would not, of course, excuse the extreme untimeliness of the necessary amendment but, on the other hand, would tend to diminish the appearance of furtive motive to conceal—amounting to a lack of candor.

88. Hence, in spite of the late hour of Sun City's amendment and the seeming confused and befogged explanations during trial of the reasons underlying the delay, were this Decision to be founded, on a comparative basis, Sun City would be assessed a positive demerit for its transgression of Rule 1.65 and, unlike the suggestion of Sun City that its act in failing to timely amend is akin to *damnum absque injuria* in the civil law—were such analogizing necessary—its act or failure timely to act is more related to *injuria sine damno*—a breach of a legal right or duty having occurred with the consequence, after balancing or weighing the evidence, of minimal or nominal damage.

ASCERTAINMENT OF COMMUNITY PROBLEMS

(Korngold)

89. That the principal and contiguous communities in the proposed service area are, geographically, relatively small, certainly not densely populated, seems apparent. Indeed, the principal community, Sun City, is a purposely designed retirement/recreational area seemingly for persons of some means in the afternoon, if not evening, of their years. There are also a few incorporated political subdivisions which would receive service from the proposed facility. Among these would be the city of Peoria and the towns of Youngtown, El Mirage and Surprise. (Concerning Sun City, if that stark, if not chilling, fact or problem persists, attributed to the Chief of Police of the City of Peoria—that there are about two suicides each week in Sun City—that, indeed, would appear a sad city, perhaps, a city of illusion.)

90. Korngold made two surveys of the community needs and interests of Sun City, Arizona, and the surrounding area. The first was conducted prior to the filing of his application on June 6, 1969; the second, subsequent to the release of the Commission's *Primer on Ascertainment of Community Problems* (27 FCC 2d 650 (1971)). His demographic study or information, even taking into consideration the unusual nature of the Sun City community—is wanting in several respects; e.g., town clerks and newspaper articles as sources (CF. *Childress Broadcasting Corp. of West Jefferson*, FCC 72R–306, 25 RR 2d 711 (1972). He did interview some who would qualify as community leaders, e.g., chiefs of police, local judges, ministers of religious faiths, etc.—others, such as town clerks, a local lawyer, an assistant church librarian or a hospital dietitian, ordinarily would not. In spite of the reported fact that the peculiarities of the Sun City development complex, one might expect that even if there were no community leaders *per se* there, other than the development corporation personnel, state or county officials responsible for governmental and civic attributes of the area surely must be present and available. In any event, demographically there seems a dearth of elected officials in the Korngold surveys. This is apparently an obvious imperfection.

91. Korngold's survey of the general public in the area suffers a similar disability. In the main, it was conducted by a presumably off-duty police officer and his wife who neither were, are nor planned to be active personnel in the proposed broadcast facility. For example, the *Primer* provides concerning consultation with members of the general public, "If the consultations are conducted by employees who are below the management-level, the consultation process must be supervised by principals, management-level employees or prospective management-level employees". (Cf. FCC 71–176, Docket #18774 released February 23, 1971 at p. 19, para. 36). While Korngold, the principal, may have supervised the consultations of the police officer and his wife, there is silence in the record whether these persons were indeed employees—real or prospective—of the planned facility or were simply selected chance part-time non-professional researchers. Of the 29 members of the general public surveyed it is not clearly definable whether this group was a planned thought-out representative cross-

section of the public or a group chosen by chance or happenstance. Twenty-five of the 29 were retired persons—the others a physician, a farmer, a beautician and a housewife. Indeed some 17 respondent members of the public could identify no problem in Sun City—perhaps they were innocently unaware of or perhaps the tragic matter of frequent suicide in Sun City is apocryphal—a few other persons could identify a few somewhat less than socially imperative problems.

92. Little fault can be found, on the other hand, with Korngold's topical listing of the problems, needs, tastes and interests of the area surveyed; the proposed programming to meet those topical problems would also appear responsive to the community needs and interests. It is, of course, recognized that the *Primer* does not require listing elicited information after the interviewer's name. What eludes scrutiny is the methodology of matching the determined or elicited needs and interests with the real and representative community leaders and the representative members of the general public there in Arizona. Whether the bulk of the problems ascertained are attributable to the responses of the few community leaders and the few members of the general public, e.g., some 17 of whom found no problems in Sun City where besides a principal problem area some 14 broad problem areas are identified thereunder—escapes ready comprehension. Also, apparently Korngold combined the problems he elicited from both community leaders and members of the general public in the towns of El Mirage, Youngtown and Surprise as well as the City of Peoria; in each of which he did not identify by name, address or occupation the members of the general public of those he interviewed.

93. True, Korngold set out a list of persons interviewed, some, or perhaps, the majority of whom might qualify as community leaders as well as a group of 29 persons associated with the general public of the proposed service area. Though surnames can be deceiving, and Korngold describes that the surrounding communities of El Mirage and Surprise, as well as the City of Peoria, "have many Mexican-American children" (presumably with parents of like ancestry) few, if any, of the interviewees listed seem to be identified with the ethnic group. Perhaps this relates to what Korngold observed as being "very hard" to get such people to talk and give their names and address. In any event, what emerges from the totality of efforts presented by Korngold as his ascertainment of community needs, tastes, interests or problems, has a certain ring of superficiality about it, a kind of hurried end product with noticeable blemishes and imperfections. And, in spite of the unique, perhaps unorthodox, nature of Sun City as a purposely designed and exclusively retirement-oriented and operated community, whatever its exclusiveness, it should, nevertheless, be within the supervision and responsible authority of some political subdivision with elected and appointed officials and leaders. Such persons seem noticeably lacking in Korngold's surveys. Whatever their attributes as persons, dietitians and assistant church librarians, for example, hardly qualify as community leaders in these capacities. And assuming Sun City as exceptional, is it a fact that organizations such as school boards, principals of elementary and secondary schools, Red

Cross, unions, ethnic or minority groups or organizations, among others, are not present in the towns and city in the surrounding proposed service area? Positive efforts to locate or identify such community leader groups are not evident and, thus, a further virtual artificiality to the ascertainment efforts appears.

94. For the aforesaid reasons—and Korngold neither being a novice nor newcomer to broadcasting responsibilities, but is and has been an experienced Commission licensee, his efforts in response to the requirements of the *Primer* are clearly inadequate and, on this further score, he is disqualified to be the licensee of an additional facility.

Comparative Aspects of the Applicants

95. From the foregoing, further consideration of the respective merits of the applicants would seem unnecessary. Because this is not and, usually never is, the final word, only those critical aspects of the customary comparative considerations necessary to a fair and just conclusion, based on substantive evidence of record, will be addressed.

96. In its *Policy Statement on Comparative Broadcast Hearings* (1 FCC 2d 393, 394 (1965)) the Commission noted:

> We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public and, second, a maximum diffusion of control of the media of mass communication.

A further objective of substantial importance is full-time participation in station operation by owners. A concept in pursuit of the practicable service by the simple notion that owners/managers will be more directly attuned to the needed service of their fellow community member. The Commission has emphasized that "full-time participation" is of primary interest. Although, at times, it would appear that the proposed Sun City facility would be operated *de facto* via telephone from Pennsylvania, on this score, i.e. full-time participation, Sun City warrants a preference in that its proposed general manager of day-to-day operations, among other things, will reside in or near to Sun City; but more important, will have a fairly substantial stock ownership, albeit non-voting, in the facility. On the other hand, Korngold, who employs manager-employees and who has multiple broadcast and other business interests, is necessarily precluded from full-time participation. And "to the extent that the time spent moves away from full-time the credit given will drop sharply". (*Policy Statement*, *supra*, p. 395).

97. Korngold's past broadcast experience is, of course, a positive factor but fades in significance under the diversification criteria. Here, Sun City's preference becomes more convincing. None of its principals have other broadcast or other public media interests while Korngold presently owns and operates two stations in the State of Arizona, another in neighboring New Mexico and is seeking a fourth broadcast facility, also in New Mexico. Even taking into consideration the positive demerit assessed against Sun City under its Rule 1.65 issue, balancing the evidential facts and particularly those first enumerated in the preceding paragraph, Sun City would still emerge the favorite, comparatively. While comparative considerations appear as a Never,

Never Land to some scholar critics,[46] the principal community here, Sun City, would be better served in the vitally social concerns of broadcast communication were it to be favored with a broadcaster, whose interests in preserving a great public trust, were more closely tied with its own. On this count, Sun City is clearly preferable.

Accordingly, for the aforesaid reasons and the public interest so requiring, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion under Section 1.276 of the Rules, the instant application for a new FM broadcast station assigned to Sun City, Arizona BE AND IS HEREBY GRANTED to Sun City Broadcasting Corporation; that being so, the mutually exclusive application of Alvin L. Korngold BE AND IS HEREBY DENIED.

JAMES F. TIERNEY,
Administrative Law Judge,
Federal Communications Commission.

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[46] *See Comparative Broadcast Licensing Procedures and the Rule of Law: A Fuller Investigation;* Professor Botein; Georgia Law Review Vol. 6, No. 4, 1972.

ATTACHMENT A.—*This attachment summarizes the information contained in Findings par. 3*

	Albuquerque (KAMX) Apr. 23, 1968	Tucson FM (KWFM) Apr. 16, 1969	Sun City FM June 6, 1969	Sun City FM amendment Oct. 1, 1969	Albuquerque FM Dec. 4, 1969	Sun City FM amendment June 3, 1971	Albuquerque amendment July 19, 1971	Korngold Ex. 6 Dec. 24, 1971
Assets:								
Cash	$32,000	$34,000	$29,000	$31,500	$35,200	$21,600	$21,600	$25,500
Cash value insurance	8,000	8,500	8,500	8,600	3,800			
Stocks and bonds	198,500	252,500	252,500	255,500	275,503			
Notes received	39,803	43,700	43,700	43,700	43,700	43,700	43,700	43,700
Real estate	80,000	90,000	90,000	90,000	90,000	90,000	90,000	90,000
30-day note		10,000	10,000	15,000	15,000			
Auto	4,000	3,400	3,400	3,200	3,100	2,100	2,100	1,900
Value KAMX								125,000
Value KEVT						320,000	320,000	320,000
Value KWFM						120,000	120,000	150,000
Personal affects						25,000	25,000	25,000
Liabilities:								
Current	20,000	24,500	19,500	4,500	4,500	9,000	8,000	12,500
Long term	10,500							
Total estimated costs	56,787	16,372	13,649		12,575	16,614	15,455	

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
AMERICAN BROADCASTING CO.
Concerning Investigations by ABC of Incidents of "Staging" By Its Employees of Television News Programs.

NOVEMBER 26, 1973.

AMERICAN BROADCASTING CO.,
1330 Avenue of the Americas,
New York, N.Y. 10019

GENTLEMEN: This is with further reference to the Commission's letter to you of September 27, 1972, concerning allegations of news "staging" by ABC employees made in hearings before the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce of the House of Representatives, and subsequent correspondence on this subject. A brief summary of the history of this matter will be helpful as a setting for our conclusions.

On August 8, 1972 the Chairman of the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce, referring to hearings recently completed concerning alleged instances of staging and rigging of televisions news programs, requested the Commission's comments on the issue of the presentation of prearranged or simulated events as bona fide news. On September 29, 1972, the Commission responded with a review of its policies in this area, and also advised the Subcommittee Chairman that because some of the allegations heard by the Subcommittee raised questions as to the implementaion of licensee guidelines, and because the allegations appeared to rest upon extrinsic evidence of deliberate distortion or staging, we were addressing letters of inquiry to two network licensees. The Commission wrote to you on September 27, 1972 requesting, with respect to three programs, your comments on the allegations made at the hearings, a statement of whether the actions of your employees were consistent with your policies, a description of your efforts to assure compliance with your policies, and a copy of your report on your investigation of each of the three incidents. The three programs were: (1) *Las Vegas Gambling* news feature, broadcast by ABC on August 6, 1970, dealing with the decline in gambling in Las Vegas; (2) *Seattle Police Wives* news feature, broadcast by ABC on April 10, 1971, dealing with efforts of the Seattle Police Department to familiarize wives of policemen with their husbands' work by letting them ride with their husbands in squad cars, etc.; and (3) coverage by a KABC–TV film crew of a student disturbance at Roosevelt High School in Los Angeles and broadcast of the news story on the same day, March 6, 1970. Our letter of September 27, 1972, noted that we had received a copy of a letter about the latter incident sent

to the Subcommittee by the Vice President and General Manager of KABC–TV.

Your response of October 24, 1972, stated that each of the incidents had been investigated by ABC. With respect to the *Las Vegas Gambling* feature, you stated in essence that ABC News management first became aware that the story might have involved violations of its policies some two weeks after the broadcast; that its investigation revealed that one sequence was staged without appropriate disclosure to the audience, and that "although the on-air result in this case could perhaps be viewed as innocuous." ABC suspended three employees involved in the incident without pay for six weeks to impress upon its staff that its policies must be strictly adhered to. (After union arbitration resulted in reduction of the suspension of one employee to 30 days, the suspensions of the other two were similarly reduced.) After the Las Vegas incident, ABC re-issued the policy statement it had sent in 1969 to all members of its TV news staff with instructions that its news bureau chiefs emphasize its importance to all members of their bureaus.

You stated that your news management did not learn of allegations of staging in the *Seattle Police Wives* story until November 1971, (after the Subcommittee staff had questioned Cameraman Jennings), and that thereafter you made your own investigation into the incident. You concluded that your news policies had been violated in part. You stated that both the reporter and the camerman on the story had at the time of the incident questioned the producer about possible staging and had been assured by him "that proper editing and scripting would take care of the problem"; that, nevertheless, the reporter was thereafter suspended without pay for one week but under the circumstances it was decided that a written reprimand was sufficient for the cameraman (who had been suspended in connection with the Las Vegas incident); and that the producer already had left your employ (in August 1971). You further stated that after learning of this incident, William Sheehan, Vice President and Director of Television News, made personal visits to ABC's domestic news bureaus and carefully reviewed ABC's policies not only with the bureau chiefs but with correspondents, producers, cameramen and editors as well, stressing "that effective implementation of the policies requires that each staff member consider himself personally responsible to bring to the attention of News management any matter which may involve improper staging or re-creation."

With respect to the student disturbance at Roosevelt High School in Los Angeles, your letter of October 27, 1972 enclosed a copy of the letter from the general manager of KNXT–TV to Daniel J. Manelli, Chief Counsel of the Subcommittee, which Mr. Manelli already had forwarded to the Commission. The letter contained statements, or excerpts from or summaries thereof, of the three members of the KABC–TV crew who covered the story, as well as the KABC–TV Executive News Producer and Assignment Editor at the time of the incident. All members of the crew deny having entered the school building where some students were staging a protest; having asked the students to come out of the building after the crew was stopped

outside the door by school officials; having urged students to climb a fence at a later stage of the disturbance, or having asked students to perform any act of violence or to do anything else. The KABC–TV manager concluded on the basis of the foregoing that the KABC–TV crew "was not responsible for the disorders that occurred, and was performing its function or covering an on-the-spot news event in a professional manner and in accordance with ABC News Policy."

In addition to the letter to the Subcommittee summarized above, you enclosed with your response statements from the producer, reporter and cameraman involved in the Las Vegas story and the reporter and cameraman involved in the Seattle story. Your letter concluded with a statement that "we believe that appropriate remedial action has been taken in those few instances where a violation of ABC News policies has come to our attention," and that you "recognize the necessity to reiterate our policies in this area periodically to assure continued compliance."

The staff wrote to you on December 20, 1972, noting that the Commission had previously requested "a copy of your report on each investigation" and requesting that if you possessed any investigative reports in addition to the material already supplied, you forward them to the Commission, along with complete copies of all statements obtained from employees or others regarding the three incidents. By letter dated January 9, 1973, you stated that with the exception of two memos attached thereto, all reports and statements in their entirety regarding the three incidents had been furnished to the Commission. The two attached memoranda—both concerning the high school disturbance—were signed by William Fyffe, KABC–TV's current news director who was not at the station at the time of this incident, and recounted his investigation of the incident. You stated that the memos had served as the basis for the KABC–TV manager's letter to Mr. Manelli of May 30, 1972. They appear to be consistent with the material previously forwarded by ABC regarding this incident.

In answer to a question in the staff's letter of December 20, your letter of January 9 also stated that, with one exception, only ABC employees had been interviewed in your investigation of the three cited incidents.[1]

Since your inquiry into the Seattle and Las Vegas incidents had substantially confirmed the allegations made before the Subcommittee, there appeared to be no necessity for you to interview persons not employed by ABC with respect to these matters. However, the statements of your employees involved in coverage of the Roosevelt High School incident were contradictory to certain evidence given to the Subcommittee. Loren Colwell, security officer at the school, testified that when he and Acting Principal Theodore Siegel confronted the KABC–TV crew on the steps outside the building and refused the crew admission to the building, some of the students inside the build-

[1] In his letter to Mr. Manelli, the KABC–TV manager stated that the manager of City News Service in Los Angeles had been contacted in an effort to find a copy of a "riot advisory" regarding the Roosevelt High School disturbance that had been transmitted by CNS to KABC–TV on the morning of March 6, 1970, but that the manager of City News Service had reported that copies of material were retained by CNS for only one year and therefore all copy for March 6, 1970 had been discarded.

ing shouted "Take our picture" and "somebody in the television crew told them they [the crew] could not come in and for them to come out." Mr. Colwell testified that thereafter some of the students went out the main doors and "They were directed along behind two bungalows, so they would pass by the TV cameras . . ."

As noted above, however, members of your crew denied having asked the students to come outside the building, or having otherwise directed them in their activities.

Mr. Colwell further testified that about an hour later, during a resurgence of the disturbance at a corner of the school grounds, one TV crew "told the kids to come over the fence down there, and they were taking pictures. At one time, they told the kids to stop. . . . They said 'Wait a minute' and then started taking pictures again." Mr. Colwell stated that he did not know which TV camera crew gave such instructions because "There were too many there, and I had other things, right at that time, to take care of."

A letter to the KABC–TV director of news from Joseph Kennedy of the Press Photographers Association of Greater Los Angeles was placed in the record of the Subcommittee hearings alleging that "your crews asked people to climb fences so as to enter the school and stir up trouble amongst those willing to attend school. The charge is that your crews asked people to repeat these actions so that camera angles could be changed. These actions were witnessed by members of our association . . ."

In view of the contradictions between statements of the KABC–TV crew, on the one hand, and those of Mr. Colwell and in the Press Photographers Association letter, on the other, the Commission staff made certain preliminary inquiries into one aspect of the case and requested ABC to make further investigation into the other.

A member of our staff interviewed Mr. Theodore Siegel, who was at the time of the above incident Acting Principal of Roosevelt High School and who, accompanied by Mr. Colwell, met and talked to the KABC–TV crew on the steps of the school. Mr. Siegel stated that when the KABC–TV crew was noted entering the school grounds, he and Mr. Colwell went outside the main entrance, met the crew and Mr. Siegel asked it to "stay out"; that while Mr. Siegel was talking to the crew he noticed the cameraman "edging around me" with the result that the cameraman came into the view of the protesting students inside the building. He stated that "When the kids saw him, they came running out the front door." However, he stated that he heard no member of the crew direct the students to come out or direct them where to go after they came out. He further stated, "After I stopped the Channel 7 [KABC] crew, other stations' camera crews came in a short time (perhaps five minutes) and they began filming the incident. I was not at the fence or gate later on when someone is alleged to have asked students to climb a fence." Mr. Siegal added that his concern was that the *presence* of the camera crew would exacerbate the situation. Thus, his statement is at odds with that part of Mr. Colwell's testimony which alleged that the camera crew had urged the students to come out of the building and directed them where to go thereafter.

With respect to the allegations of Mr. Kennedy of the Press Photographers Association regarding later "staging" by the KABC–TV crew at the fence, our staff requested ABC itself to make further investigation of the matter, including interviews with persons outside its employ who might have relevant knowledge; e.g., Mr. Kennedy and the press photographers he alleged had witnessed the incident at the fence, and members of the Los Angeles Police Department who were present.[2]

Thereafter, ABC reported on its further investigation. It reported that Kennedy (who is employed by the *Los Angeles Times*) stated to it that he could not recall the names of persons who had made the allegations recited in his letter, and could not recall how the information came to his attention. However, Kennedy suggested that ABC contact two other Los Angeles photographers who might have knowledge of the incident.

ABC reported that it interviewed the two other photographers. One, Bill Knight, a cameraman at KTLA–TV who was president of the Press Photographers Association at the time of the incident, stated that he had covered the story but did not hear any film crew asking anyone to climb a fence, although he was told at the time or later by someone whose identity he cannot recall that a KABC–TV crew had urged the students to climb the fence. The other photographer, Rick Browne, now employed by the Associated Press, stated that he recalled a KABC crew filming students climbing the fence at a place where no police were present, and that another photographer or photographers told him that the film crew had asked the students to climb the fence, but that he did not personally hear the ABC crew say anything to anyone. This photographer suggested that ABC contact two other photographers he recalled as being on the scene. ABC stated that it then contacted the two other photographers, both employed at the *Los Angeles Times*, but they stated they were not present at the high school disturbances in question and had no knowledge of the alleged incident.

ABC reported, finally, that inquiry at the Los Angeles Police Department had revealed that the Department had no record of any report by officers that the KABC–TV crew had urged students to climb the fence, and that the police department also reported that, at ABC's request, it had interviewed the officers who were at the disturbance, and that they stated they had witnessed no such activity by the ABC crew.

The Commission's policies with respect to staging or deliberate distortion or slanting of news have been stated a number of times. In *Columbia Broadcasting System* ("Hunger in America"), 20 FCC 2d 143, 151 (1969), we stated that "Rigging or slanting the news is a most heinous act against the public interest—indeed, there is no act more harmful to the public's ability to handle its affairs." And we added, with respect to investigations conducted by licensees, that "The licensee's investigation of substantial complaints referred to it must be a thorough, conscientious one, resulting in remedial action where

[2] Also placed in the Subcommittee record were three news items broadcast by KWFB about the alleged KABC–TV involvement in the Roosevelt High School incident and one item broadcast by KABC denying improper activity by its crew. However, these broadcasts appear to provide no evidence of significance beyond that already obtained from other sources.

appropriate (see *Letter to ABC*, 16 FCC 2d 650 (1969)); efforts to cover up wrongdoing by his news staff would raise the most serious questions as to the fitness of the licensee. See *WOKO, Inc.* v. *FCC*, 329 U.S. 223 (1946)."

We also stated in that ruling (p. 150) that in the future we did not intend to defer action on license renewals because of the pendency of complaints of deliberate distortion or staging of news "unless the extrinsic evidence of possible deliberate distortion or staging of the news which is brought to our attention involves the licensee, including its principals, top management or news management." We further stated:

> * * * if the allegations of staging, supported by extrinsic evidence, simply involve news employees of the station, we will, in appropriate cases . . . inquire into the matter, but unless our investigation reveals involvement of the licensee or its management there will be no hazard to the station's licensed status. Such improper actions by employees without the knowledge of the licensee may raise questions as to whether the licensee is adequately supervising its employees, but normally will not raise an issue as to the licensee's character qualifications.

We also noted that we intended to exercise care in entering the sensitive area of charges of news slanting by news employees (20 FCC 2d at 150–151):

> We would stress that in a situation involving a charge of slanting by a news employee, we intend to exercise care in entering this sensitive area. Thus, as set out in the *Letter to ABC, supra*, we do not consider it appropriate to enter the area where the charge is not based upon extrinsic evidence but rather on a dispute as to the truth of the event (i.e., a claim that the true facts of the incident are different from those presented). The Commission is not the national arbiter of the truth. And when we refer to appropriate cases involving extrinsic evidence, we do not mean the type of situation, frequently encountered, where a person quoted on a news program complains that he very clearly said something else. The Commission cannot appropriately enter the quagmire of investigating the credibility of the newsman and the interviewed party in such a type of case. Rather, the matter should be referred to the licensee for its own investigation and appropriate handling. On the other hand, extrinsic evidence that a newsman had been given a bribe, or had offered one to procure some action or statement, would warrant investigation. So also, should there be an investigation where there is indication of extrinsic evidence readily establishing whether or not there has been a rigging of news (e.g., an outtake or a written memorandum).

We should also note here our recognition in *Letter to ABC*, *supra*, and *Columbia Broadcasting System* (*WBBM-TV*), 18 FCC 2d 124, 132 (1969), that the problem of improper staging of news events can be a most difficult area, and that while there are difficult grey areas and many coming clearly within a licensee's journalistic judgment, the staging of news with which the Commission is concerned is rather the presentation of a purportedly significant event which did not in fact occur, but which is acted out at the behest of news personnel or, as we put it in our letter of September 29, 1972 to Chairman Staggers, "whether the public is deceived about a matter of significance."

Thus, although we have stated that we do not intend to defer renewal of licenses unless the extrinsic evidence indicates involvement of the licensee or its management, we regard as significant, staging or deliberate distortion of news by anyone if the public is deceived about a matter of significance. Indeed, a pattern of repeated acts of this kind by employees may raise questions as to whether the licensee is ade-

quately supervising its employees in this most important area of broadcasting.

To return to the facts of the present case, we take account of the fact that you appear to have made adequate investigation into the *Las Vegas Gambling* and *Seattle Police Wives* incidents as soon as you learned that your policies might have been violated; that you took prompt action against the employees who appeared to have been at fault; and that after each incident came to your attention, you took steps to re-emphasize to your news staff the importance of complying with your policies.

With respect to the disturbance at Roosevelt High School, you questioned all of your own employees who might have knowledge of it, and all denied any improper activities. However, you questioned no one outside your employ except the City News Service manager. In light of the testimony by Mr. Colwell and the allegations made to you in the letter of Mr. Kennedy, we believe you were remiss in initially failing to make further investigation into this matter, e.g., by interviewing the Acting Principal of the high school, Mr. Kennedy and any other photographers who might have knowledge of the incident, and by making inquiry of the police department. As we stated in our *Letter to ABC*, *supra*, we expect a licensee's investigation of substantial complaints referred to it to be "a thorough, conscientious one."

Your second investigation, made at the Commission's request, appears to have covered all principal avenues of inquiry. Although two of the photographers you interviewed state they were told by others that your crew had instructed the students to climb the fence, they could not recall the identity of the other persons and had no personal knowledge of such improper activity. Similarly, Mr. Colwell stated to the Subcommittee that he did not know which of the camera crews present gave the instructions that he heard, and the Los Angeles Police Department stated that its officers at the scene can recall no such instructions been given to the students and its records reveal no reports by its members of such actions. In view of all of the information now available, we must regard the allegations of improper activity on the part of your employees during the Roosevelt High School disturbance as unproved, and we believe that under the circumstances here existing it is "inappropriate to hold an evidentiary hearing and upon that basis (e.g., credibility or demeanor judgments), make findings as to the truth of the situation." *Columbia Broadcasting System*, *supra*, at 147.

One other aspect of the Roosevelt High School incident should be noted: the position of the Acting Principal that the mere presence of television camera crew caused the students inside the building to burst outside and engage in further protests, and that, therefore, the actions of the KABC crew were improper. In response, ABC news personnel state that the crew went to the school only after receiving word from the police of what is described variously by the newsmen as a "riot call" and a "tactical alert" regarding a major disturbance at the school.

The Commission considered the question here raised in its *Letter to ABC*, et al. (Democratic National Convention), 16 FCC 2d 650, 656 (1969). There, with reference to allegations of staging or deliberately distorting the news, we stated,

Here again it is important to make clear the proper area of concern of the Commission. We are not considering "staging" in the sense that persons or organizations may engage in certain conduct because of television—whether a press conference or a demonstration. This issue has been raised, for example, before the National Commission on Causes and Prevention of Violence. We do not denigrate in any way the importance or complexity of the issue. It is a matter calling for the most thorough examination by the media and by appropriate entities not involved in the licensing of broadcast stations. But the judgment when to turn off the lights and send the cameras away is again not one subject to review by this Commission. We do not sit to decide: "Here the licensee exercised good judgment in staying"; or "Here it should have left."

We re-affirm that statement, and thus decline to intervene with respect to whether the KABC crew should have gone to the school in the first instance. Rather, as we stated at 657, *Letter to ABC*, *supra*, "We stress that in the area of distorting the news, we believe that the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events."

With respect to the two incidents in which you acknowledge fault on the part of your employees, we note that there is no evidence that officers or managers of the licensee had foreknowledge of, or were responsible for, the improper actions, and that you took prompt action to discipline employees in the two cases where you found they had been at fault. In assessing the degree of fault that may be attributed to the network, we also take account of the fact that during the span of years covered by these incidents, the network and stations licensed to it have presented thousands of other news reports or documentaries on which we have received no allegations of staging or deliberate distortion. We recognize that in any operation of such magnitude, involving such a large number of employees, some abuses will occur.

In short, in light of the information before us and the Commission's policies in this area as set forth above, we intend to take no further action regarding the matters recited herein. However, as stated above, we believe that your initial investigation of the Roosevelt High School incident was incomplete and more thorough investigations will be expected under such circumstances in the future.

Commissioners Johnson and H. Rex Lee absent; Commissioner Reid concurring in the result.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 74R-32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ANSWER IOWA, INC., CEDAR RAPIDS, IOWA	Docket No. 19760
MANPOWER, INC. OF CEDAR RAPIDS, CEDAR RAPIDS, IOWA	File No. 4724-C2-P-70
For Construction Permits To Establish New Facilities in the Domestic Public Land Mobile Radio Service	Docket No. 19761 File No. 3413-C2-P-70

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 4, 1974)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Answer Iowa, Inc. (Answer Iowa) and Manpower, Inc. of Cedar Rapids (Manpower) for authorization to construct a new one-way radio signalling facility in the Domestic Public Land Mobile Radio Service (DPLMRS) at Cedar Rapids, Iowa. It was designated for comparative hearing by Commission Memorandum Opinion and Order, 41 FCC 2d 384, 38 FR 15869, published June 18, 1973. Now before the Review Board is a petition to enlarge issues, filed by Answer Iowa on October 26, 1973, requesting the addition of issues to determine whether Manpower has failed to comply with Sections 1.514 and 1.65 of the Commission's Rules.[1]

2. In support of its petition, Answer Iowa contends that Manpower's response to Item 44 of its application [2] (FCC form 401) was incomplete and misleading when the application was filed on December 12, 1969. In addition, petitioner contends that Manpower failed to amend its application when the information is originally furnished in response to Item 44 was no longer substantially accurate and complete in all significant respects. Specifically, petitioner maintains that Manpower's response in its application that its sole stockholder, John J. Gavin, was engaged in a telephone answering service and temporary employment business at 858 First Avenue, N.E., Cedar Rapids, Iowa, failed to disclose his other business interests outside of Cedar Rapids. Petitioner alleges that it was not until Mr. Gavin was cross-examined during the hearing held in this proceeding on October 11, 1973, that his interests in Manpower

[1] Also before the Board for its consideration are: (a) the Common Carrier Bureau's response, filed November 8, 1973; (b) opposition, filed November 28, 1973, by Manpower; and (c) reply, filed December 4, 1973, by Answer Iowa. An Initial Decision herein was released on January 22, 1974 (FCC 74D-3).

[2] Item 44 requires information concerning the businesses, employment or activities (other than communications common carrier) in which the applicant and its principals are engaged, including the nature and location of the activity and the hours devoted to each activity.

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franchises in several other communities in Iowa were disclosed. In addition, petitioner contends, Mr. Gavin testified on cross-examination, that, although he had obtained several of the Manpower franchises after Manpower's application for the proposed facility was filed, Manpower never amended its application to reflect these business interests.[3] Petitioner contends that Mr. Gavin's acknowledged responsibility for all billing and payroll matters connected with the Manpower franchises outside Cedar Rapids could affect his commitment to Manpower's proposed facility.

3. In its response, the Common Carrier Bureau contends that petitioner has raised a substantial question of whether Manpower has complied with Sections 1.65 and 21.12(a) of the Rules.[4] The Bureau supports petitioner's allegations that Manpower's application was incomplete and inaccurate when it was filed and that it was never amended in accordance with the Rules in order to furnish the complete information regarding Mr. Gavin's business interests. In the Bureau's view, information concerning these temporary help franchises is significant since it could affect the time Mr. Gavin will be able to devote to Manpower's proposed facility and because it raises a question of whether there were willful nondisclosures in order that Manpower could gain a comparative advantage in this proceeding.

4. In opposition, Manpower contends that its response to Item 44 of its original application was accurate. Specifically, it argues, this response revealed Mr. Gavin's business interests, the address of the business' principal office and the number of hours Mr. Gavin devoted to it. In addition, Manpower states, this information has not changed in any significant respect since the application was filed. Manpower contends that Mr. Gavin's business interests are and remain that of a telephone answering service and a temporary employment business which he conducts from the principal office in Cedar Rapids, where, according to the application, he spends approximately 50 hours a week. Manpower asserts that the number and locations of its principal's franchises are not of decisional significance, unlike the question of the number of hours Mr. Gavin will be able to devote to Manpower's proposed facility. This question, Manpower states, is already encompassed within Issue 1 of the designation Order authorizing an inquiry into the personnel and practices of each applicant. Finally, Manpower contends that even if Mr. Gavin's business interests should be examined further on the record, a misrepresentation issue, as allegedly raised by the Bureau, is not warranted.[5] In reply, however, Answer Iowa contends that a motive for nondisclosure may be present since Manpower heavily relies on Mr. Gavin's participation in its proposed facility for a comparative preference. Moreover, petitioner argues, no explanation was offered at the hearing for the nondisclosures, nor was Manpower's op-

[3] Answer Iowa maintains that Mr. Gavin testified when cross-examined that he had financial interests in Manpower franchises in Waterloo, Burlington, Ottumwa, Mason City, Keokuk, and Marshalltown, Iowa, and that the franchise in Ottumwa, and perhaps other communities was obtained after Manpower's application was filed.

[4] Section 21.12(a) requires use of standard forms in order to assure that necessary information is supplied in a consistent manner by all persons.

[5] Manpower argues that the implication in the Bureau's response that Manpower's failure to include its franchise locations in its original application may have been willful is purely speculative. Furthermore, Manpower argues, the Bureau cannot seek to expand the original scope of the petition in a responsive pleading.

position supported by an affidavit from Mr. Gavin explaining the matter.

5. It appears that the facts upon which the petition is based were unknown to Answer Iowa before the hearing held in this proceeding on October 11, 1973. Therefore, the Board believes that good cause has been shown for the late filing of the petition. See *Western Communications, Inc.* (*KORK–TV*), 41 FCC 2d 376, 27 RR 2d 1313 (1973). However, the petition will be denied on its merits. Although the Board is of the view that Manpower could and should have furnished more details in response to Item 44 of FCC form 401 concerning the scope of its principal's business, its application does, in fact, contain the basic information required by the Commission. Thus, the application reveals the nature of Mr. Gavin's other business, the location of its principal office, and the number of hours he devotes to it each week. The Board does not believe that Manpower's failure to report the franchises outside of Cedar Rapids is of such decisional significance as to warrant either a Section 21.15(a)[6] or Section 1.65 issue.[7] Although Mr. Gavin is responsible for billing and payroll with respect to these franchises, these functions would not require his absence from Cedar Rapids because they are performed at the same office which serves as the site for the proposed paging service. Petitioner offers no reason to believe that Mr. Gavin's planned participation in the instant proposal would be seriously affected by his other business interest, and we can perceive none. Indeed, Answer Iowa's allegation of comparative detriment flowing from nondisclosure of Manpower's temporary help franchises is belied by the Initial Decision herein which specifically considers these facts.[8] For these reasons the petition will be denied.[9]

6. Accordingly, IT IS ORDERED, That the petition to enlarge issue, filed October 26, 1973, by Answer Iowa, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[6] Section 21.15(a) requires that DPLMRS applications ". . . set forth all matters and things required to be disclosed or answered by the application forms and Commission rules" and is accordingly applicable to this case. It is more closely analogous to Section 1.514, which governs broadcast cases, than is Section 21.12(a), relied upon by the Bureau, which merely requires use of standard forms in order to assure that necessary information is supplied in a consistent manner by all persons.

[7] *Charles W. Holt*, 38 FCC 2d 538, 25 RR 2d 1180 (1972), relied upon by the petitioner, is inapposite. Unlike this case, *Holt* involved an applicant who failed to report at all in his application the existence of several non-broadcast enterprises.

[8] See Initial Decision, Findings of Fact, paragraph 7.

[9] The Bureau's allegation that Manpower's failure to include the franchise locations in its original application may have been willful is based purely on surmise and conjecture and therefore must be rejected.

F.C.C. 74-113

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 0 AND 2 OF THE RULES RELATING TO EQUIPMENT AUTHORIZATION OF RF DEVICES	Docket No. 19356

REPORT AND ORDER

(Proceeding Terminated)

(Adopted February 6, 1974; Released February 15, 1974)

BY THE COMMISSION:

INTRODUCTION AND BACKGROUND OF THIS PROCEEDING

1. A Notice of Proposed Rule Making in the above-captioned matter was released on December 3, 1971 and was published in the Federal Register on December 8, 1971 (36 FR 23313). The comment and reply comment period was extended by subsequent order released December 29, 1971 from December 30, 1971 and January 17, 1972 to February 15, 1972 and March 1, 1972, respectively. A list of persons commenting is attached as Appendix A.

2. On July 5, 1968, Section 302 was added to the Communications Act of 1934 as amended (47 USC 302).[1] This legislation authorized the Commission to make reasonable regulations governing the interference potential of equipment capable of causing harmful interference to radiocommunications and to apply these regulations to the manufacture, import, sale, offer for sale, shipment, or use of the subject equipment. The first step in the implementation of this authority was the adoption of what are referred to as our marketing regulations.[2] These regulations, codified as Section 2.801 et seq. of our rules (47 C.F.R. 2.801 et seq.), make it illegal to market equipment capable of causing harmful interference unless any required equipment authorization (type approval, type acceptance or certification) has first been obtained, or where no equipment authorization is required, the equipment complies with the applicable technical specifications prescribed by the Commission.

3. The Commission's new marketing strictures have had a significant impact on manufacturers of RF devices covered by our rules since marketing operations involving such equipment cannot be initiated prior to the receipt of the requisite equipment authorization from the Commission. Additionally, the Commission's marketing rules have

[1] PL 90-379, approved July 5, 1968, 82 Stat. 290.
[2] Docket No. 18426, Report and Order adopted May 13, 1970; 35 FR 7894; 23 FCC 2nd 79.

brought a number of equipment firms within the Commission's equipment authorization program who were not previously involved. This is attributable to the fact that, whereas equipment authorization was on a voluntary basis with respect to manufacturers producing equipment prior to the effective date of the marketing rules, it is now mandatory. Moreover, in an effort to reduce to tolerable levels the conditions of "spectrum pollution" or "electromagnetic smog", the Commission will be taking an increased role in the regulation of RF devices with an interference potential for which the Commission does not presently prescribe technical standards.

4. The Commission fully recognized that the mandatory nature of its equipment authorization program might necessitate reexamination of its procedural rules. Thus, in adopting its marketing regulations, the Commission stated:

> No changes have been made in existing type acceptance, type approval and certification procedures.
>
> However, as indicated above, we are presently reviewing our regulations to determine what changes are necessary and appropriate in light of this new authority and the rules herein adopted. A further rule making proceeding will be instituted to amplify the rules for equipment approval. 23 FCC 2d at 88.

5. As a result of the Commission's review, it was determined that the procedures for granting and administering our equipment authorization program should be made more comprehensive and informative and should be consolidated in one place in our rules. The instant proceeding was instituted to do this. Accordingly in this Order, we have collected and synthesized into one unified subpart most matters pertaining strictly to the procedural aspects of our equipment authorization program. We have added thereto such new regulations that we deemed to be necessary to clarify and make more specific the requirements of this program. These rules are herewith promulgated as Subpart J of Part 2 of our rules and are set out in Appendix C to this Order. It should be noted that the rules adopted herein do not alter any existing substantive requirement or technical specification relating to equipment operation or performance characteristics.

6. We believe that this revision will be helpful in outlining the procedural steps to be followed in acquiring an equipment authorization and that they will make clear to the applicant the conditions attendant to a grant of an authorization and the responsibilities and rights of the grantee. Although most of the requirements are contained in this new Subpart J, it does not mean that all the requirements for a specific equipment will be found therein. Frequently the procedural rules compel the submission of technical data specified in the substantive regulation which may also specify the measurement procedures to be used.

EXISTING PROCEDURAL RULES SUPERSEDED

7. The rules adopted herein as Subpart J supersede the rules in Subpart F of Part 2 and those procedural regulations elsewhere in the Commission's regulations which are in conflict with those in Subpart J. In particular, the procedural regulations in Part 15 dealing with applications for certification (type approval in some cases) of door

opener controls, receivers, auditory training devices and field disturbance sensors are superseded. Similarly the precedural rules in Part 18 dealing with applications for type approval of medical diathermy, ultrasonic and miscellaneous equipment and for prototype certification of industrial heating equipment are superseded. The Commission will amend these parts as soon as possible to incorporate these changes. In addition procedural provisions in other rule parts will be deleted.

COMMENTS RECEIVED IN THIS PROCEEDING

8. A list of parties commenting in this preceding is attached as Appendix A. Gamewell Radio Systems (a Gulf and Western Systems Company) supported the Commission's proposal without reservation. GTE Lenkurt submitted a statement concurring in the GTE Sylvania comments. NAM submitted a statement supporting the AFTRCC [3] comment. AT&T submitted a comment on behalf of itself, Bell Telephone Laboratories and Western Electric Co. The comments received generally supported the Commission's intent to collect in one place all its requirements with respect to equipment authorization. Notwithstanding the general concurrence in this basic purpose, a number of major objections were raised. In addition numerous comments were received dealing with the text of the regulations that had been proposed. The major objections dealt with the question of bilateral certification particularly with respect to industrial, scientific and medical (ISM) equipment, with the time frame within which a grant will be made and with the question of disclosure of the data filed with an application for an equipment authorization. These objections are discussed in detail in the paragraphs below. The comments relative to the text of individual proposed regulations are considered in connection with the discussion of the individual regulations.

BILATERAL CERTIFICATION

9. The Commission has in the past provided for a "self-certification" procedure for most equipment operated without individual license under Parts 15 and 18 of our Rules. Such "self-certification" merely required the user to perform certain engineering tests on the device and attach a label to his device "certifying" that the device had been tested and found to comply. In many cases, notably with respect to receivers and low power communication devices under Part 15, the manufacturer performed these tests voluntarily as a service to his customer and labeled the equipment. This system of "self-certification" has not proved entirely satisfactory in practice. Accordingly, we will now require that where the rules call for the equipment to be certificated, the equipment must receive such certification from the Commission prior to marketing. A grant of certification will be based on a review of test data and other relevant information specified in the rules adopted herein and required in the substantive Part of the rules under which the equipment operates. With respect to receivers, such a program of bilateral certification has already been implemented by voluntary co-

[3] See Appendix A for the acronyms used in this Report.

operation of the manufacturers involved. Accordingly the rules adoped herein formalize a de facto procedure which was recognized as such by some of the parties who commented [4].

10. Other comments objected to bilateral certification on the grounds that increased costs would be incurred. In order for a manufacturer to determine that such a device meets the Commission's technical specifications and can be self-certificated, a series of measurements must be made. The same measurements will, in general, be required under our program of bilateral certification. Accordingly, the only increase in cost to the manufacturer, is the administrative cost of filing the application for certification and deferring marketing until the Commission's grant of certification is received. On the other hand bilateral certification is imposed to carry out the intent of the authorizing legislation (47 U.S.C. 302) to provide reasonable assurance that equipment placed in the hands of the public is not likely to become a source of harmful interference. Under these conditions, the Commission cannot accept the objection to bilateral certification because of alleged increased costs.

11. Although AT&T basically concurs in these rules, it objects to the requirement for bilateral certification of RF devices used in research programs on the grounds that such a requirement will reduce the flexibility available to the user in how the equipment is used and that it will delay changes required to be made in equipment used in in-plant research programs. AT&T urges that provision be made for expedited action when such a need can be demonstrated. The problem of relocating equipment within a plant, or even moving it from one plant to another is a user problem in connection with the filing of Form 724 to advise the Commission of the location of industrial heating equipment and is outside the scope of this proceeding. This problem will be considered when Part 18 is conformed with the rules adopted herein as discussed in paragraph 7 above. In so far as expediting action on requests for certificated equipment, the Commission has always been responsive when a satisfactory showing of need has been presented and will continue to do so in the future.

12. A further objection to our proposal to impose a bilateral certification procedure on industrial, scientific and medical (ISM) equipment operated under the provisions of Part 18 of our Rules, was raised by persons concerned with the manufacture and use of such equipment. In general these comments contended that the equipment authorization procedures presently in use under Part 18 are adequate to provide the protection against harmful interferenee sought by Section 302 of the Communications Act. It was argued therefore that bilateral certification was not necessary and should not be imposed on equipment operating under Part 18. It would appear that many of those commenting on this subject have misconstrued the intent of this proceeding.

13. The regulations in Part 18 currently in effect apply strictly to the user or operator of the equipment. Provision is made in the

[4] GTE-Sylvania noted that this requirement appears to be no more than a recognition of existing practice with respect to manufacturers. AT&T notes that the revision codifies many existing practices not covered in the present rules and will contribute to sound and workable equipment authorization procedures.

present Part 18 rules for the manufacturer to acquire an equipment authorization on a voluntary basis as a service to his customers. Thus type approval is granted on request to manufacturers for medical diathermy equipment operating on the assigned ISM frequencies. A similar type approval procedure is made available on a voluntary basis to manufacturers of ultrasonic equipment subject to Part 18 of our rules. Prototype certification may be voluntarily requested by the manufacturer of industrial heating equipment.

14. The advantage to the manufacturer should be obvious. ISM equipment bearing the type approval number issued by the Commission, or the manufacturer's label certifying that it had been prototype certificated, may be freely operated by the purchaser with confidence that the equipment can reasonably be expected to comply with the technical specifications in Part 18. If prototype certification has been granted by the Commission, the purchaser files an abbreviated registration on Form 724 with the Commission, certifying basically that the equipment was installed pursuant to the manufacturer's installation instructions. Without such type approval or prototype certification, the purchaser must arrange for measurements to be made to demonstrate that the equipment he has purchased complies with the technical specifications in Part 18. The cost of such measurements to the user is considerable and may, in some cases, be as high as the original cost of the equipment. On the other hand, when the cost of testing is borne by the manufacturer and is distributed over a quantity of similar equipment, the cost per equipment (which is passed on to the purchaser) is considerably less.

15. Our intention regarding ISM equipment in this proceeding was to impose, pursuant to Section 302 of the Communications Act (47 U.S.C. 302) an obligation on the manufacturer to provide equipment that can be expected to comply with our technical specifications. For those manufacturers currently applying for and procuring type approval or prototype certification this obligation consists merely in converting the present voluntary procedure into a mandatory requirement. For the other manufacturers of ISM equipment—those who do not produce equipment in quantity or those who produce large equipments that do not lend themselves to measurement on a test site—changes are anticipated.

16. Most of the objections raised against our proposal for bilateral certification for industrial heating equipment deal with the problem posed by the latter group of equipments. The Commission recognized this dilemma when our marketing rules were adopted and as an interim measure exempted many of the ISM equipments from the requirement for procuring an equipment authorization as a prerequisite for legal shipment and sale. In response to these objections, and notwithstanding our professed objective of ensuring that equipment complies with our requirements prior to shipment and sale, we are revising the rules for certification of ISM equipment originally proposed in this proceeding. Those industrial heating equipments which will be produced in quantity and which lend themselves to testing on a test site will become subject to mandatory bilateral certification. Those larger industrial heating equipments which are not produced in quantity, or which are custom built, and which are not susceptible to meas-

urement on a test site, will continue to be tested on-site under the procedures set out at present in Part 18. As stated in our Notice in this proceeding further rule making will be instituted to amend Part 18 to clarify these requirements and to put these new procedures into effect for ISM equipment.

DISCLOSURE OF INFORMATION RELATING TO AN EQUIPMENT AUTHORIZATION

17. In the Notice, we also proposed the amendment of our Freedom of Information Rules as they concern the disclosure of information submitted by an applicant for equipment authorization or otherwise ascertained by the Commission in connection with such application. In adopting our current Rules (Section 0.457(d)) some six years ago, we continued the previously existing confidential status of such data and provided that the technical data submitted with such applications and Commission laboratory tests on the equipment are not available for inspection except as such data is set out in the radio equipment list issued periodically by the Commission. Disclosure of such information required a persuasive showing as to the reasons for inspection of such data set forth in accordance with the provisions of Section 0.461 of the Rules.

18. The revision of 0.457 adopted herein would eliminate the confidential status automatically accorded such data and would make them generally available for public inspection after the effective date of the equipment authorization issued by the Commission. Following such date, such applications and related materials, including technical specifications, test measurements, etc., would be available for inspection upon request. However, since our equipment authorization files are not maintained in a public reference room, we are not making them "routinely available for inspection" as originally proposed but rather we have provided that they shall be available upon request made under Section 0.461 of the rules but without the necessity for a persuasive showing as to the reasons for inspection of such data.

19. The revised rules are consistent with the requirements of the Freedom of Information Act, 5 U.S.C. 552 and judicial interpretation thereof [5] and information in the possession of the Commission shall be available for inspection and disclosure except to the extent that it would disclose trade secrets or other proprietary information. An applicant for equipment authorization may still submit a request for nondisclosure of information or data claimed to be a trade secret or proprietary information, pursuant to Section 0.459 of the Rules, with a statement of the basis for such claim. In such case, the applicant must substantiate the fact that his material merits confidential treatment,[6] and should the Commission approve such claim, the subject information will be maintained on a confidential basis subject to the provisions of Section 0.461.

20. Under the revised rules, the applicant for an equipment authorization for a new device is assured that its existence and design will not be disclosed from Commission records prior to the effective

[5] *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), 436 F. 2d 1363 (2d CIR. 1971), *Wellford* v. *Hardin*, 444 F. 2d 21 (4th CIR. 1971).
[6] *FCC* v. *Schreiber*, 381 U.S. 279 (1965).

date of the equipment authorization granted by the Commission. Premarketing information in the competitive communications equipment field clearly falls within the trade secrets category and Commission recognition of this through a general provision guarding against disclosure at this stage is fully justified under traditional trade secrets standards. The effective date of the Commission authorization will be, upon request, deferred to a reasonable date specified by the applicant, and thus a manufacturer, by specifying an effective date for the authorization which coincides with commencement of his marketing activities can preserve his competitive position. This will also accord with the provision of Section 2.801 of our Rules, which prohibits the marketing of such equipment without Commission equipment authorization.

21. The proposed amendment recognizes that trade secrets and commercial or financial information obtained from any person and privileged or confidential would not normally be made available to the public. The amendment does recognize, however, that in the area of equipment applications it is in the public interest to make available, upon request, information which has lost its confidential character by virtue of the marketing of the equipment to which it refers. Putting an article on the market constitutes a general disclosure to the public which reveals the secret, invention or discovery and divests the article of its confidential character.[7]

22. Some of the comments received in this proceeding suggest that the materials submitted by an applicant for equipment authorization be deemed trade secrets or proprietary simply upon the applicant's designation thereof with limited or no review by the Commission. Such an approach would not be in accord with the existing law nor with the provisions of Section 0.459(b), which requires the applicant to fully support his claim for confidential treatment. This requirement is not an undue burden upon the applicant, for he is in the best position to know the facts and circumstances which support his request for confidentiality. Accordingly, the Commission must insist that requests for confidentiality be individually justified pursuant to Section 0.459.

23. Other comments suggest that confidential treatment be automatically accorded applications for equipment authorization and related materials for a period of one year commencing either with the date of the grant of equipment authorization or with the date that the equipment first goes into public use. While recognizing that there may be unusual circumstances in individual cases which support the confidential treatment of such data after the effective date of the Commission grant of equipment authorization, we are unable to perceive any valid basis for a blanket *a priori* determination of confidentiality extending beyond the effective date of the Commission's grant as set forth in the rule we adopt today. As discussed above, the existence and design of a new device clearly fall within the trade secrets category prior to the commencement of marketing activities in a competitive field. Since such devices cannot be marketed prior to the grant of equipment authorization, nondisclosure is justified during the appli-

[7] *Newell* v. *O.A. Newton & Son Co.*, 177 F. Supp. 291 (S.D.N.Y. 1959).

cation process and until the equipment authorization is granted. It also appears justifiable to continue such confidential treatment for a reasonable time after the grant of equipment authorization to permit the manufacturer to make his own determination as to the appropriate commencement of marketing activities in a competitive field. To accomplish this, the rules adopted herein permit the applicant to suggest the earliest effective date for the Commission's grant, which will fit in with his marketing plans. It must be recognized of course that if a grant is issued with a deferred effective date pursuant to the request of the applicant, this deferred effective date becomes the earliest date that the applicant (or his distributors, vendors or others) may legally ship, sell, offer for sale or otherwise market the equipment in question.

24. The comments also raise the question of the status of materials already submitted and filed with the Commission prior to the effective date of the changes in the rules we are adopting today. Although the notice did not deal directly with this question, it is the Commission's view that equipment authorization information filed with the Commission under rules which accorded them confidential treatment should continue to be accorded confidential treatment and subject to disclosure only under the provisions of Section 0.461 upon a determination by the Commission that disclosure would be in the public interest.

TIME FRAME FOR GRANT OF AN EQUIPMENT AUTHORIZATION

25. Collins, AT&T, Branson Instruments, EIA–BES, EIA–CEG, EIA-Land Mobile and GTE-Sylvania call attention to the fact that the rules proposed in this proceeding have omitted any mention of a time frame within which the Commission would respond to an application for an equipment authorization. It is pointed out that such a provision is presently included in Section 2.571(c) which provides for an automatic grant of type acceptance after 30 days, if the Commission has not acted affirmatively on the application within that period. On the basis of this provision, the argument continues, industry has learned to include the 30 day period for grant of type acceptance in its design and production schedules for bringing a new product into production. It is contended further, that the deletion of this provision would introduce an untenable element of uncertainty into the involved process of putting a product on the market. In the same vein, EIA–CEG and others argue that a time limit [8] be imposed with respect to applications for certification although no such provision is currently in effect.

26. The Commission cannot accept these arguments. With an equipment authorization serving as a de facto authorization to market equipment, the authorization must be based on a positive finding by the Commission, and cannot be based on the mere passage of time. The Commission must accordingly deny the request for the automatic grant of such authorization. On the other hand, the Commission recognizes the problems posed to industry if the issuance of such grants is unduly delayed. It accordingly commits itself to acting promptly on these

[8] EIA Consumer Electronics Group recommends that an application for certification shall automatically be granted in 14 days in the absence of affirmative Commission action prior thereto.

applications. We take this opportunity of assuring industry that we propose to continue acting on applications for equipment authorization within the 30 day time frame that industry has learned to live with. In fairness to all, applications will be processed in order of receipt.

NON-ASSIGNABILITY OF EQUIPMENT AUTHORIZATION

27. In order to establish responsibility for continued compliance over devices produced under an equipment authorization and to facilitate orderly administration in terms of who is producing what devices under which grant, it is obvious that the Commission cannot permit the free exchange, transfer or assignment of equipment authorizations. However, in recognition of customary commercial practices, the Commission realizes that a grantee of an equipment authorization may wish to augment his production capabilities through the use of one or more subsidiary contractors. Also, a particular grantee may wish to permit a second party (manufacturer or vendor) to produce and/or market the device using an established trade name. Accordingly, the rules adopted herein permit licensing (or similar arrangements) of manufacturing or other commercial rights on the part of the grantee of an equipment authorization. Such licensing agreements may be effected subject only to notification of the agreement to the Commission. (See also the discussion in paragraph 37 below.)

28. Two things, however, should be fully understood with respect to the above described arrangements: (1) the grantee of the equipment authorization shall remain responsible to the Commission for the continued conformance of the equipment to the model reviewed by the Commission and shall exercise a high degree of diligence in assuring such conformance; and (2) the device must be marketed under the name and number submitted to the Commission in the original application. Any changes in the name or number of the equipment from those originally specified by the applicant will necessitate the filing of a new application. The rules also require notice to the Commission in cases of a transfer of control of a grantee, as in the case of merger or absorption of the grantee by another entity. This requirement will reestablish responsibility for the equipment in the new controlling party and inform such party of the duties and limitations accompanying a grant of equipment authorization. Depending on the circumstances of the particular case, the Commission may require a new application for equipment authorization from the new entity.

IDENTIFICATION OF EQUIPMENT

29. In Section 2.925 of our proposed regulations, a requirement was set out for the identification of an equipment for which an equipment authorization was required. The need for a distinctive and specific identifier should be obvious and was not questioned in the comments.

30. In our type approval program an FCC Type Approval Number is issued by the Commission for many (but not all) the equipments tested at our laboratories. While this FCC Type Approval Number could be used as the distinctive identifier, we are reserving its use to indicate that the particular equipment had been tested by the Com-

mission. Accordingly, for type approval, we are requiring that the equipment carry both the manufacturer's assigned identifier and the FCC Type Approval Number. For type acceptance and certification the Commission does not assign any identifying numbers but has agreed to accept the specific identifier assigned by the grantee, and this is the number that we require to be inscribed on the equipment.

31. A grant of an equipment authorization is valid only for the equipment bearing the identical model or type number set out therein. An equipment bearing a different model or type number, no matter how slight the difference—including such apparently insignificant changes as the addition of a suffix letter(s)—is considered a new equipment under this procedure and requires its own grant of equipment authorization. This rigidity must be imposed to preclude any possibility of ambiguity, to accommodate the Commission's present electronic data processing equipment which is used in the publication of our Radio Equipment List, and particularly, in anticipation of expanded use of electronic data processing within the next few years for application processing and for storing and retrieving information concerning grants of equipment authorizations.

32. Accordingly the Commission must deny the request to issue an equipment authorization for a family of equipments that are claimed to be nearly identical. If the manufacturer finds it to his advantage to make changes in the model or type number for production, sales or any other reason we must insist that the manufacturer request an individual grant of type approval, certification or type acceptance for such equipment. However, recognizing that many such equipments are in fact electrically and mechanically identical, we have simplified our application requirement for such similar equipments. In lieu of the detailed report of measurements and other information required with the application, the manufacturer may submit a statement indicating:

The model or type number of the previously authorized equipment.

The date when certification, type acceptance or type approval was granted.

How the new equipment differs from the previously authorized equipment.

That the data previously filed with the Commission is representative of and applicable to the new equipment for which an equipment authorization is requested.

Thus the only new data that must be submitted is that which concerns the changes made by the manufacturer. If these involve cosmetic changes, new photographs must be submitted showing the external appearance of the equipment.

DISCUSSION OF INDIVIDUAL REGULATIONS

33. Section 2.903. Amana Refrigeration, Inc. objected to the use of the word "identical" in the proposed Section 2.903(b) which states that type approval attaches to all units which are identical in all respects to the sample tested by the Commission. Amana, recognizing minor differences due to production line tolerances, suggests the substitute phrase: "—mechanically identical in all significant respects." The Com-

mission recognizes the validity of this argument and has added a new provision Section 2.908 to define what we mean by the term identical as being:

> Identical within the variation that can be expected to arise as a result of quantity production techniques.

34. *Sections 2.905 and 2.907.* EIA–BES requests a change in the wording of proposed Section 2.905(b) to permit a manufacturer to make available a sample unit of type-accepted equipment, currently in production for inspection and test. EIA–CEG objects to the requirement in 2.907(a) for the submission of test data and suggests that a summary of data, as presently required by Section 15.69(e)(6) should be sufficient. AFTRCC, SPI, and Mann-Russell Electronics Inc., point out that proposed Section 2.907(b) may be unreasonable in many instances. Due to size and power limitations, it is not always practical to submit to the Commission's laboratory for further testing many equipments that are certificated under Part 18. It would appear that the intent of the proposed provisions in Sections 2.905(b) and 2.907(b) had been misconstrued. To clarify this intent, we have deleted Sections 2.905(b) and 2.907(b) and have added a new Section 2.943 which makes it clear that the Commission reserves the right to require a sample to be submitted for testing when it has reason to question the adequacy of the data or the suitability of the measurement procedure that was used. In addition a proviso is added under which the applicant may explain why such a submission should not be required. The Commission cannot accept the suggestion to use "summary of data" in our regulations. Our experience has been that some manufacturers have supplied a mere statement of compliance in their interpretation of the words, "a summary of the data obtained." It is for this reason that the Commission feels justified in requiring actual test data rather than a summary. Actual test data have been required under the type acceptance rules for many years and applicants have not objected to this practice as unduly burdensome. Moreover, the Commission is in fact accepting a summary of the measurement data with applications for certification of FM and TV receivers when it accepts a report of measurements filed on EIA's standardized report form.[9]

35. *Section 2.909.* In commenting on the wording of proposed Section 2.909(b) which would require the submission of equipment manuals and other printed material with the application for equipment authorization, EIA–BES suggests the addition of the words "when available" for consistency with other sections of the rules. The Commission, recognizing that manuals are not always available at the time application for an equipment authorization is submitted has made provision for submitting such material at a later time. LPB, Inc., a manufacturer of transmitters used in carrier current systems, contends that such systems must be certificated as a system—that certificating merely the transmitter will serve no useful purpose. The Commission agrees. In a separate rule making relating to Part 15 it is revising its regulations to cover this situation. Specific requirements for the component parts of a carrier current system will be set out therein.

[9] This form is described in EIA. Consumer Products Engineering Bulletin No. 4, June 1971.

36. *Section 2.919.* In commenting on proposed Section 2.919(b), EIA–CEG objects to the provision that would make the failure to supply additional documents or information not specifically required by this Subpart, a basis for the denial of an application. EIA–CEG claims that an applicant should not be required to supply data or meet requirements not specifically set out in the rules, and suggests that this provision be limited to documents or information required elsewhere in the rules. IEEE High Frequency Heating Committee points out that proposed Section 2.919(b) is so broad that an application could be denied if the applicant fails to submit any type of information that might be requested regardless of its applicability to the pending application. The Commission has accordingly changed this provision to make it a basis for dismissal of the application instead of a denial.

37. *Section 2.925.* This section deals with the identification of the equipment which is discussed in some detail in paragraphs 23–26 above. The comments do not question the need for a distinctive identifier, but some questions were raised concerning the placement and visibility of the required identification label. In commenting on the requirement for an identification plate or label permanently and conspicuously affixed to equipment so that it is readily visible from a normal position of installation both DORCMA and Mosler Safe request exemptions for garage door openers and intrusion detectors respectively. DORCMA states that the garage door opener receiver is frequently "buried" in the door operator so as not to be visible after installation. DORCMA further states that door opener transmitters are often installed under automobile dashboards. Mosler Safe states that many of its purchasers request unobtrusiveness in the installation of intrusion detectors and moreover, in some cases, these devices may be installed as high as twelve feet from the floor of a protected area. EIA–CEG prefers placing labels on the bottom of radio or television receivers so as not to spoil the aesthetic value of the front or rear of cabinets and points out that space or ventilation is often a consideration for not using the rear surface. Branson Instruments calls attention to the need to identify equipment by its customer's name as many of its customers object to the use of the source manufacturer's name on equipment they purchase from Branson. Purchase agreements of this nature often stipulate "private labeling". The Commission, considering these comments has modified this requirement to permit "private labeling" in the case of certificated equipment and to eliminate the requirement that the label be readily visible after installation.

38. *Section 2.929.* In connection with the nonassignability of equipment authorizations, Mosler Safe, EIA–CEG and EIA–BES object to the proposed Section 2.929(a) which requires that a copy of a licensing or similar agreement be forwarded to the Commission within 30 days after the execution of such agreement. Mosler does not believe the Commission should be in a position to approve or disapprove licensing or similar agreements. EIA–BES objects on the basis that such business agreements or contracts usually contain conditions which are not related to equipment authorization. In view of these objections, this requirement has been revised to require merely that the Commission be notified of the existence of a licensing agreement. On the same subject EIA–CEG contends that the original grantee should

not continue to be responsible to the Commission for equipment produced pursuant to licensing agreements as proposed in Section 2.929(b) unless he can reasonably be assumed to know of a violation. Accepting this argument would be tantamount to permitting a grantee to transfer or assign his grant of equipment authorization and we must insist that the grantee continue to be responsible, for all equipment produced by a second party under such a licensing arrangement. If the grantee finds this requirement burdensome, he is of course free to require that his assignee apply for and receive an equipment authorization in the name of such assignee. Conversely, a manufacturer may not produce an equipment identical to one for which an equipment authorization had been issued to another person and which would bear the identical name and number given in such authorization unless such manufacturer has, in fact, been authorized to do so by the grantee of such authorization.

39. *Section 2.931(a)*. In connection with proposed Section 2.931(a), wherein a grantee warrants that each completed item of equipment will conform to the design and operational characteristics approved by the Commission, Amana Refrigeration, EIA–BES and EIA–CEG object on the basis that compliance is impossible because of manufacturing tolerances and differences in vendor component variations. Amana, therefore, would like to see deletion of the words, ". . . operational characteristics required . . ." instead of ". . . approved . . .". The intent of the rule is not to require all subsequently produced units to conform exactly to the characteristics reported to the Commission for the unit tested. Rather, the objective is to assure that authorized equipment conforms to pertinent requirements of the Commission's rules and that those technical characteristics of the equipment which are subject to Commission rules remain within the ratings established in the application and approved by the Commission at the time of grant, including any subsequent changes that are authorized by the Commission. This requirement is particularly pertinent for transmitting equipment which has been type accepted for licensing. For instance, if no more were required of the grantee of type acceptance than to keep the characteristics of subsequently produced units within Commission rule requirements or limitations, he would be free, in many cases to make very substantial changes in power, emission, circuitry, and other parameters of the transmitters without Commission knowledge or approval. This could result in serious impairment of the Commission's ability to administer licensed radio services. It is essential, therefore, that the technical characteristics of units produced pursuant to an equipment authorization be maintained within the limits or ratings, established by the grantee in his application. However, in consideration of the comments on this rule, we are revising the language to make the intent clearer.

40. *Section 2.931(b)*. In commenting on proposed Section 2.931(b), EIA–BES objects to submission of "design drawings" or "complete and current record of production inspection and test procedures," claiming that "this would place the Commission in the position of reviewing, and perhaps controlling, industry's competitive design and production techniques." The Commission does not agree with this viewpoint. Merely having access to drawings, specifications and test

procedures would not derogate or control a competitive position. Many government agencies, through their inspection procedures, already have this type of access. As proposed, the rule applies only to the drawings, specifications and test procedures "employed to ensure compliance with pertinent technical standards and conformance with the design and operational characteristics of the equipment originally approved." The Commission finds that adoption of this rule would provide it with some degree of assurance that compliance with its technical standards persist beyond the initial grant of the authorization which is based upon data obtained from a single unit of equipment.

41. *Section 2.933.* In commenting on proposed Section 2.933(a)(3), DORCMA expresses the opinion that there is no justification for requiring a new application and fees upon sale or merger of the grantee when there is no change in design, construction, equipment name or model number. DORCMA states that the acquiring firm in the transfer of control of business assumes the liabilities of the acquired company and concludes that the responsibility imposed by Section 2.931 would be assumed by the acquiring firm as a matter of law. We do not deny this fact. However, accepting the legal responsibility required by Section 2.931 carries no assurance that the acquiring company will have the technical and production capability to actually meet this legal responsibility. We recognize that under some circumstances involving sale or merger of the grantee, there would be no necessity or justification for insistence upon new applications and fees. In other cases, however, the sale or merger of the grantee may cause considerable disruption in operations, production facilities, personnel, procurement of components and other factors, all of which could seriously affect the final product. Therefore, we have modified the language of the rule to indicate that the Commission may require the submission of new applications and fees, depending upon the circumstances of the merger or sale. If the acquiring firm is required to file a new application, the purpose would be to demonstrate to the Commission that the acquiring firm has the technical and production capability of meeting the obligations of a Commission grantee. Failure by the Commission to impose this responsibility when necessary, and to obtain assurance that the equipment in fact remains identical to that originally authorized would defeat the very purpose of the equipment authorization program. Insofar as Section 2.933(a)(2) is concerned this does not involve any significant change from the status quo. At the present time, our rules concerning fees for equipment authorization [10] indicate that applications for authorization of equipments bearing different identifications are considered separate applications regardless of whether such equipment may be otherwise identical.

42. *Section 2.936 (2.935 in NPRM).* GTE Sylvania, Amana Refrigeration, EIA-Japan, EIA–BES, EIA-Land Mobile and the Votator Division have all filed comments relative to several paragraphs of the proposed Section 2.935. Some of these organizations object to the access that the Commission would have to control procedure, inspection, test data, materials and testing apparatus (proposed Section 2.935(b)). The Commission by this requirement entertains no desire

[10] 47 C.F.R. 1.1120.

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to control industry's competitive practices. On the contrary, the Commission considers that only by retaining the right of review can it attain a reasonable degree of assurance that the equipment for which it grants authorization will continue to maintain the characteristics upon which the grant was made. There is, however, a strong consensus among almost all of these organizations expressing a strong objection to the proposed Section 2.935(e) which requires making available for inspection, upon the request of the Commission, the sales and marketing records pertaining to "the device" for the previous three years. The objections, for the most part, are based upon the proprietary nature of such information. The Commission yields to these objections and has deleted proposed Section 2.935(e) from the rules adopted herein.

43. *Section 2.937.* LPB, Inc., GTE Sylvania, Amana Refrigeration, EIA-Japan, EIA–CEG, EIA-Land Mobile and the Votator Division have all filed comments on Section 2.937 regarding the responsibility of the grantee to correct equipment defects. Practically all of these comments contend that manufacturers should not be held responsible for alleged interference complaints when the fault may lie with the user, especially since many interference complaints are often caused by improper operation or actual misuse of the equipment. The Commission, recognizing the validity of these objections, has revised the wording of Section 2.937 to clarify the responsibility of the grantee in this area.

44. *Section 2.939.* Comments were filed by Amana Refrigeration, EIA–CEG, EIA–BES, SPI, IEEE and Mann-Russell concerning proposed Section 2.939, regarding revocation or withdrawal of an equipment authorization. In proposed subparagraph 2.939(a)(1), EIA–CEG recommends deletion of the reference to Section 2.935(e). For the reason given in paragraph 36 above, the Commission has deleted this reference. EIA–BES recommends a change in the subparagraph 2.939(a)(2) which deals with revocation of equipment authorization if upon subsequent inspection or operation it is determined that the equipment does not conform to the pertinent technical requirements or to the representations made in the original application. The recommended change would allow for operational or maintenance problems by substituting the words, ". . . is not capable of conforming . . ." in place of ". . . does not conform . . .". The Commission will not adopt the suggested change. The requirement that equipment conform to the pertinent technical requirements or to the representations made in the original application is not unreasonable nor does it mean that the authorization will be withdrawn if there is an isolated operational or maintenance problem. EIA–BES, commenting on subparagraph 2.939(a)(3), which deals with revocation of equipment authorization if it is determined that changes have been made in the equipment other than those authorized by the rules or otherwise expressly authorized by the Commission recommends the addition of the words, ". . . the authorization will not cover the modified equipment". The Commission does not deem it advisable to add the wording suggested. In the case of such unauthorized changes, the equipment authorization no longer applies and the Commission will revoke the authorization. Amana Refrigeration, SPI, Mann-Russell, and IEEE,

in commenting on paragraph 2.939(c), recommend that manufacturers be allowed some period of time to comply with changes in the Commission's technical standards. The Commission has always provided a reasonable amortization period for non-conforming equipment when new technical standards have been promulgated, except in those situations where it had good cause to require immediate compliance with the new standards. However, the text of this regulation was revised to reflect this practice.

45. *Section 2.963.* Amana Refrigeration, EIA–BES and EIA-Japan have filed comments concerning the proposed Section 2.963. Both Amana and EIA–BES contend that instruction manuals may not be available at the time type approval is requested. The Commission has modified this provision and will permit the instruction book to be submitted within 60 days after the grant of type approval. EIA-Japan suggests that application forms be specified for type approval as they are for type acceptance and certification. Subsequent to the release of the Notice of Proposed Rule Making in this proceeding, the Commission issued Form 729, Application for Type Approval. Reference to this form number has been included in Section 2.963.

46. *Section 2.967.* Litton/Atherton, Amana Refrigeration and AFTRCC consider too stringent the proposed paragraph 2.967(a) that requires a new type approval application and grant for any mechanical or electrical change whatsoever. All three of these organizations recommend permissive changes as allowed for type acceptance and certification. The Commission's type approval program differs from those of type acceptance and certification. With the latter two types of equipment authorization the Commission reviews measurements made by manufacturers. With type approval, measurements are made by the Commission's Laboratory. This is done for good reason on those types of equipment which require a greater degree of control. The proposed wording does not prohibit variations which will occur due to normal production tolerances. The reference to mechanical or electrical changes has to do with deliberate design or construction changes. The Commission does not consider this requirement too stringent and in order to maintain proper control in its type approval program, permissive design changes cannot be allowed.

47. *Sections 2.985–2.995 inclusive.* Relatively little comment was received on these sections which enumerate the measured data to be submitted with application for type acceptance. EIA–BES points out, with respect to Section 2.993(a), that it is impractical to make open field measurements of large broadcast transmitters installed in buildings and recommends that the term, "radiated mean output power" may be ambiguous for certain classes of transmitters. For example, it is pointed out, the average power output of a television transmitter changes with brightness of the picture and it is not possible to indicate what the mean power is. EIA–BES recommends therefore that "rated power output" be used in its place. The Commission recognizes the problem in making open field measurements of large broadcast transmitters installed in buildings and the possible ambiguity in the term "radiated mean output power". In view of this, Section 2.993 has been changed to allow measurements that are not made in an open field, but only upon a reasonable showing as to necessity. The Commission

agrees with this recommendation of EIA–BES and has substituted the term "rated power output" in place of "radiated mean power output" in the text of Section 2.993.

48. GTE Sylvania, with GTE Lenkurt concurring, requests that the Commission identify the data in the rules that will be available for release under Section 0.457. Moreover, it requests that any nonspecific requirements such as that in Section 2.995(e) under which the Commission reserves the right to request additional frequency stability data under conditions that are not specified, be limited to valid regulatory purposes and that such data be automatically exempt from disclosure under Section 0.457. GTE, in this connection, points out that, if the Commission is to receive generous and uninhibited cooperation from the manufacturer, it must afford him corresponding protection. The question of disclosure of information has been discussed in paragraphs 17 to 24 of this report and need not be reargued at this point. The Commission would point out that a request for nondisclosure of such information may be submitted pursuant to Section 0.459 of the rules.

49. *Section 2.1001.* EIA-Land Mobile commented that the proposed Section 2.1001 omits a class of permissive change which is included in the existing Section 2.584(c). The omitted class of permissive change includes those which bring the performance of the equipment outside the manufacturer's rated limits as originally filed but not below the minimum requirements of the applicable rules. EIA-Land Mobile believes that this class of permissive change should be retained, contending that it is in the public interest for manufacturer's ratings to exceed the Commission's requirements. The Commission agrees and has included this class of permissive change in the rules adopted herein. GTE Sylvania, with GTE Lenkurt concurring, believes that the definition of a type in Section 2.1001(a) should be stated in functional terms rather than in terms of specific component or equipment type; for example the type of semi-conductor circuitry, Sylvania claims, should be unimportant if the requirements for functional electrical and mechanical interchangeability are met. The Commission does not agree. One method of control to determine when a change in type has been made is an examination by the Commission's staff of the circuit configurations and tube or semi-conductor functions in an equipment. This means of determining when a change has been made is significant, especially since a change in tube or semi-conductor circuitry is often needed to alter the parameters upon which the original type acceptance grant was based. Accordingly the requirement of Section 2.1001 (a) will remain unchanged.

50. Accordingly, IT IS ORDERED effective March 25, 1974, that paragraph (d) of Section 0.457 is amended, that Subpart F of Part 2 is deleted, and that a new Subpart J is added to Part 2. The revised rules adopted herein are set out in Appendices B and C to this Order. Authority for these amendments is contained in Section 4(i), 302 and 303(r) of the Communications Act of 1934, as amended.

51. IT IS ORDERED FURTHER that the requirement for bilateral certification of low power communication devices, which have heretofore been subject to self-certification, shall become effective on September 1, 1974.

52. IT IS ORDERED FURTHER that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

Comments in this proceeding were filed by the following parties:

Aerospace and Flight Test Radio Coordinating Council (AFTRCC).
Amana Refrigeration, Inc.
American Telephone and Telegraph Co. (AT&T) on behalf of itself, Bell Telephone Laboratories Inc. and Western Electric Co., Inc.
Branson Instruments, Inc.
Collins Radio Company.
Door Operator and Radio Controls Manufacturers Assn (DORCMA).
Electronic Industries Association of Japan (EIA Japan).
Electronic Industries Association (EIA).

Separate comments were filed by the following groups of EIA:

Consumer Electronics Group (EIA–CEG).
Broadcast Equipment Section of the Communications and Industrial Division (EIA–BES).
Land Mobile Section of the Communications and Industrial Division (EIA–Land Mobile).
Special Purpose Tubes Section of Tube Division (EIA–Tubes).
Gamewell Radio Systems (a Gulf and Western Systems Co.).
GTE Lenkurt Inc.
GTE Sylvania Inc.
Hoffman—LaRoche Inc.
Institute of Electrical and Electronics Engineers, Committee on High Frequency Heating (IEEE).
Litton Industries, Atherton Division.
LPB Inc.
Mann-Russell Electronics, Inc.
Mosler Safe Co.
Reeve Electronics, Inc.
Society of the Plastics Industry, Inc. (SPI).
Votator Division of Chemtron Corp.
Westinghouse Electric Corp., Electronic Tube Division.

Reply comments were filed by:

General Electric Co.
GTE Sylvania, Inc.
National Association of Manufacturers (NAM).

APPENDIX B

Paragraph (d) of Section 0.457 of Part 0 is amended to read as follows:

§ 0.457 *Records not routinely available for inspection.*

* * * * * * *

(d) *Trade secrets and commercial or financial information obtained from any person and privileged or confidential, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905.* Section 552(b)(4) is specifically applicable to trade secrets and commercial or financial information but is not limited to such matters. Under this provision, the Commission is authorized to withhold from public inspection materials which would be privileged as a matter of law if retained by the person who submitted them, and materials which would not customarily be released to the public by that person, whether or not such materials are protected from disclosure by a privilege. See, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, at pages 32–34.

(1) The materials listed in this subparagraph have been accepted, or are being accepted, by the Commission on a confidential basis pursuant to 5 U.S.C. 552(b)(4). To the extent indicated in each case, the materials are not routinely

available for public inspection. If the protection afforded is sufficient, it is unnecessary for persons submitting such materials to submit therewith a request for non-disclosure pursuant to Section 0.459. A persuasive showing as to the reasons for inspection will be required in requests for inspection of such materials submitted under Section 0.461.

(i) Financial reports submitted by licensees of broadcast stations pursuant to Section 1.611 of this chapter or by radio and television networks are not routinely available for public inspection.

(ii) Applications for equipment authorizations (type acceptance, type approval or certification), and materials relating to such applications, are not routinely available for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant. Following the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request pursuant to Section 0.461.

(iii) Financial reports submitted for CATV systems pursuant to Section 76.405 of this chapter.

(2) Prior to July 4, 1967, the rules and regulations provided that certain materials submitted to the Commission would not be made available for public inspection or provided assurance, in varying degrees, that requests for non-disclosure of certain materials would be honored. See, e.g., 47 CFR (1966 ed.) 0.417, 2.557, 5.204, 5.255, 15.70, 21.406, 81.506, 83.436, 87.153, 89.215, 91.208, 91.605 and 93.208. Materials submitted under these provisions are not routinely available for public inspection. To the extent that such materials were accepted on a confidential basis under the then existing rules, they are not routinely available for public inspection. The rules cited in this subdivision were superseded by the provisions of this paragraph, effective July 4, 1967. Equipment authorization information accepted on a confidential basis between July 4, 1967 and March 25, 1974, will not be routinely available for inspection and a persuasive showing as to the reasons for inspection of such information will be required in requests for inspection of such materials submitted under § 0.461.

(i) Unless the materials to be submitted are listed in subparagraph (1) of this paragraph and the protection thereby afforded is adequate, it is important for any person who submits materials which he wishes withheld from public inspection under 5 U.S.C. 552(b)(4) to submit therewith a request for non-disclosure pursuant to Section 0.459. If it is shown in the request that the materials contain trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under Section 0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection. Ordinarily, however, in the absence of such a request, materials which are submitted will be made available for inspection upon request pursuant to Section 0.461, even though some question may be present as to whether they contain trade secrets or like matter.

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APPENDIX C

1. Part 2 is amended by deleting the present text and title of Subpart F and inserting the word RESERVED.

2. Part 2 is amended by inserting the following new Subpart J.

SUBPART J—EQUIPMENT AUTHORIZATION PROCEDURES TYPE APPROVAL; TYPE ACCEPTANCE; CERTIFICATION

GENERAL PROVISIONS

APPLICATION PROCEDURES

CONDITIONS ATTENDANT TO GRANT OF EQUIPMENT AUTHORIZATION

TYPE APPROVAL

TYPE ACCEPTANCE

CERTIFICATION

FILING FOR APPLICATION REFERENCE

GENERAL PROVISIONS

§ 2.901 *Basis and purpose.*

(a) In order to carry out its responsibilities under the Communications Act and the various treaties and international regulations, and in order to promote efficient use of the radio spectrum, the Commission has developed technical standards for radio frequency equipment and parts or components thereof. The technical standards applicable to individual types of equipment are found in that part of the rules governing the service wherein the equipment is to be operated. In addition to the technical standards provided, the rules governing the service may require that such equipment receive equipment authorization from the Commission by one of the following procedures: type approval, type acceptance, or equipment certification.

(b) The following sections describe the procedures to be followed in obtaining type approval, type acceptance or certification from the Commission and the conditions attendant to such a grant.

§ 2.903 *Type approval.*

(a) Type approval is an equipment authorization issued by the Commission based on examination and measurement of one or more sample units by the Commission at its laboratory.

(b) Type approval attaches to all units subsequently marketed by the grantee which are identical (See § 2.908) in all respects to the sample tested by the Commission or include only changes expressly authorized by the Commission.

§ 2.905 *Type acceptance.*

(a) Type acceptance is an equipment authorization issued by the Commission for equipment to be used pursuant to a station authorization. Type acceptance is based on representations and test data submitted by the applicant.

(b) Type acceptance attaches to all units marketed by the grantee which are identical (See § 2.908) to the sample tested except for permissive changes or other changes expressly authorized by the Commission.

§ 2.907 *Certification.*

(a) Certification is an equipment authorization issued by the Commission for equipment designed to be operated without individual license under Parts 15 and 18 of its rules, based on representations and test data submitted by the applicant.

(b) Certification attaches to units subsequently marketed by the grantee which are identical (See § 2.908) to the sample tested except for permissive changes or other changes expressly authorized by the Commission.

§ 2.908 *Identical defined.*

As used in §§ 2.903, 2.905 and 2.907, the term identical means identical within the variation that can be expected to arise as a result of quantity production techniques.

APPLICATION PROCEDURES

§ 2.909 *Written application required.*

(a) An application for equipment authorization shall be filed on a form prescribed by the Commission.

(b) Each application shall be accompanied by all information required by this Subpart and by those Parts of the rules governing operation of the equipment, and by requisite test data, diagrams, etc., as specified in this Subpart and in those sections of rules whereunder the equipment is to be operated.

(c) Each application including amendments thereto, and related statements of fact required by the Commission, shall be personally signed by the applicant if the applicant is an individual; by one of the partners if the applicant is a partnership; by an officer, if the applicant is a corporation; or by a member who is an officer, if the applicant is an unincorporated association; *provided, however,* that it will be sufficient if the application is signed by the head of an entity's engineering, technical, production, etc., department, with an indication of that representative's title, such as plant manager, etc.

(d) Technical test data shall be signed by the person who performed or supervised the tests. The person signing the test data shall attest to the accuracy of such data. The Commission may require such person to submit a statement showing that he is qualified to make or supervise the required measurements.

(e) The signatures of the applicant and the person certifying the test data

shall be made personally by those persons on the original application; copies of such documents may be conformed. Signatures and certifications need not be made under oath.

§ 2.911 *Fees.*

No application for an equipment authorization will be accepted for processing unless it is accompanied by the fees prescribed in the Commission's schedule of fees in Subpart G of Part 1 of this Chapter.

§ 2.912 *Fees for type approval.*

(a) An application for type approval must be accompanied by the filing fee prescribed in § 1.1120 of this Chapter.

(b) Each grant of type approval is expressly conditioned (1.1102(d)) upon payment of the requisite grant fee prescribed in § 1.1120 of this Chapter. Failure to remit the specified grant fee within the time prescribed will result in rescission of the type approval which will then become null and void.

§ 2.913 *Fees for type acceptance or certification.*

(a) An application for type acceptance or for certification must be accompanied by the combined filing and grant fees prescribed in § 1.1120 of this Chapter.

(b) If the application is withdrawn, denied or dismissed and no grant is issued, the grant fee that had been paid will be refunded pursuant to § 1.1103(c).

§ 2.915 *Grant of application.*

(a) The Commission will grant an application for type approval, type acceptance, or certification if it finds from an examination of the application and supporting data, or other matter which it may officially notice, that:

(1) The equipment is capable of complying with pertinent technical standards of the rule part(s) under which it is to be operated; and,

(2) A grant of the application would serve the public interest, convenience and necessity.

(b) Grants will be made in writing showing the effective date of the grant and any special condition(s) attaching to the grant.

(c) Neither type approval, type acceptance nor certification shall attach to any equipment, nor shall any equipment authorization be deemed effective, until the application has been granted.

§ 2.917 *Dismissal of application.*

(a) An application which is not in accordance with the provisions of this Subpart may be dismissed.

(b) Any application, upon written request signed by the applicant or his attorney, may be dismissed prior to a determination granting or denying the authorization requested.

(c) If an applicant is requested by the Commission to file additional documents or information and fails to submit the requested material within 60 days, the application may be dismissed.

(d) An application for type approval which has been accepted by the Commission in which the equipment required to be tested is not received by the Commission's Laboratory within six months following the date of the application, may be dismissed.

§ 2.919 *Denial of application.*

If the Commission is unable to make the findings specified in § 2.915(a), it will deny the application. Notification to the applicant will include a statement of the reasons for the denial.

§ 2.921 *Hearing on application.*

Whenever it is determined that an application for equipment authorization presents substantial factual questions relating to the qualifications of the applicant or the equipment (or the effects of the use thereof), the Commission may designate the application for hearing. A hearing on an application for an equipment authorization shall be conducted in the same manner as a hearing on a radio station application as set out in Subpart B of Part 1 of this Chapter.

§ 2.923 *Petition for reconsideration. Application for review.*

Persons aggrieved by virtue of an equipment authorization action may file with the Commission a petition for reconsideration or an application for review. Rules governing the filing of petitions for reconsideration and applications for review are set forth in §§ 1.106 and 1.115, respectively, of this chapter.

§ 2.925 *Identification of equipment.*

(a) Each equipment for which an equipment authorization has been granted shall be uniquely identificated with a name and type or model number inscribed on a plate or label. The detailed information to be inscribed on this plate or label is set out in the rules for the particular form of equipment authorization required.

(b) The identification plate or label shall be permanently affixed to the equipment and shall be readily visible to the purchaser at the time or purchase.

(c) Where it is shown that a permanently affixed label is not desirable or feasible, an alternative method of positively identifying the equipment may be used if approved by the Commission. The proposed alternative method of identification and the justification for its use must be included with the application for the equipment authorization.

(d) The type or model number specified in the grant of equipment authorization will be identical to that assigned by the manufacturer or applicant and given in the application for the equipment authorization. This number shall consist of a series of Arabic numerals or capital letters or a combination thereof, and many include punctuation marks and spaces. The total of Arabic numerals, capital letters, punctuation marks and spaces in any assigned type or model number shall not exceed 17.

(e) The type or model number assigned to the equipment shall be one which has not been used previously in conjunction with the same name that will be on the equipment.

CONDITIONS ATTENDANT TO A GRANT OF AN EQUIPMENT AUTHORIZATION

§ 2.927 *Limitations on grants.*

(a) A grant of an equipment authorization is effective until revoked or withdrawn, rescinded, surrendered, or a termination date is otherwise established by the Commission.

(b) A grant of an equipment authorization signifies that the Commission has determined that the equipment has been shown to be capable of compliance with the applicable technical standards if no unauthorized change is made in the equipment and if the equipment is properly maintained and operated. The issuance of an equipment authorization should not be construed as a finding by the Commission with respect to matters not encompassed by the Commission's Rules.

(c) No person shall, in any advertising matter, brochure, etc., use or make reference to an equipment authorization in a deceptive or misleading manner or convey the impression that such equipment authorization reflects more than a Commission determination that the device or product has been shown to be capable of compliance with the applicable technical standards of the Commission's Rules.

§ 2.929 *Nonassignability of an equipment authorization.*

(a) An equipment authorization issued by the Commission may not be assigned, exchanged or in any other way transferred to a second party.

(b) The grantee of an equipment authorization may license or otherwise authorize a second party to manufacture or market the equipment covered by the grant of the equipment authorization provided:

(1) The equipment manufactured by such second party bears the identical name and number as is set out in the grant of the equipment authorization.

NOTE.—Any change in the name or number desired as a result of such production or marketing agreement will require the filing of a new application for an equipment authorization as specified in § 2.933.

(2) The grantee of the equipment authorization shall continue to be responsible to the Commission for the equipment produced pursuant to such an agreement.

(3) Notice that such a licensing agreement has been entered in shall be pro-

vided to the Commission within 30 days after the execution of the agreement. The notice shall indicate with specificity the equipment involved, the date of application and date of grant of the equipment authorization, and shall indicate the provisions that the grantee has made to insure that equipment manufactured by such licensee will continue to comply with the Commission's regulations. The Commission may require the submission of additional information (new measurement data, etc.) depending on the circumstances in the particular case.

§ 2.931 *Responsibility of the grantee.*

(a) In accepting a grant of an equipment authorization the grantee warrants that each unit of equipment marketed under such grant and bearing the name and type or model number specified in the grant will conform to the unit that was measured and that the data (design and rated operational characteristics) filed with the application for type acceptance or certification, or measured by the Commission in the case of type approved equipment, continues to be representative of the equipment being produced under such grant within the variation that can be expected due to quantity production and testing on a statistical basis.

(b) For each model or type of equipment for which an equipment authorization has been issued the grantee shall maintain the records listed below:

(1) A record of the original design drawings and specifications and all changes that have been made.

(2) A record of the procedures used for production inspection and testing to ensure the conformance required by paragraph (a) of this section.

(c) The records listed in paragraph (b) of this section shall be retained for three years after the manufacture of said equipment item has been discontinued or for such longer period that may be specified, or until the conclusion of an investigation or a proceeding, if the grantee is officially notified that an investigation or any other administrative proceeding involving his equipment has been instituted.

§ 2.932 *Modification of equipment.*

(a) A new application for an equipment authorization shall be filed whenever there is a change in the design, circuitry or construction of an equipment or device for which an equipment authorization has been issued, except as provided in paragraphs (b), (c), and (d) of this section.

(b) Permissive changes may be made in a type accepted equipment purusant to § 2.1001.

(c) Permissive changes may be made in a certificated equipment pursuant to § 2.1043.

(d) For changes in type approved equipment the procedure in § 2.967 shall apply.

§ 2.933 *Change in identification of equipment.*

(a) A new application for an equipment authorization shall be filed whenever there is a change in the identification of the equipment with or without a change in design, circuitry or construction.

(b) An application filed pursuant to paragraph (a) of this section where no change in design, circuitry or construction is involved, need not be accompanied by a resubmission of equipment or measurement or test data customarily required with a new application, unless specifically requested by the Commission. In lieu thereof, the applicant shall attach a statement setting out:

(1) The original identification used on the equipment prior to the change in identification.

(2) The date of the original grant of the equipment authorization.

(3) The original type approval number assigned by the Commission, if one was assigned.

(4) How the equipment bearing the modified identification differs from the original equipment.

(5) Whether the data previously filed with the Commission (or measured by the Commission in the case of type approved equipment) continues to be representative of and applicable to the equipment bearing the changed identification.

(6) In the case of type accepted equipment, the photographs required by § 2.983(f).

(7) In the case of certificated equipment, the photographs required by § 2.1033(c).

(c) If the change in identification also involves a change in design or circuitry which falls outside the purview of a permissive change described in §§ 2.1001 or 2.1043, a complete application shall be filed pursuant to § 2.909.

§ 2.934 *Change in name of grantee.*

Whenever there is a change in the name of the grantee of an equipment authorization, notice of such change must be received by the Commission not later than 60 days after the grantee starts using the new name.

§ 2.935 *Change in control of grantee.*

In the case of a transfer of control of the grantee of an equipment authorization, as in the case of sale or merger of the grantee, notice of such transfer must be received by the Commission not later than 60 days subsequent to the consummation of the agreement effecting the transfer of control. Depending on the circumstances in each case, the Commission may require new applications for equipment authorization for each device or equipment held by the predecessor in interest, production of which will be continued by the acquiring party.

§ 2.936 *FCC inspection.*

Each grantee of an equipment authorization shall upon reasonable request, submit the following to the Commission or shall make the following available for inspection:

(a) The device or equipment covered by the grant of equipment authorization.

(b) The record of design drawings and specifications required by § 2.931(b)(1).

(c) The record of the procedures used for production inspection and testing required by § 2.931(b)(2).

(d) The manufacturing plant and facilities.

§ 2.937 *Equipment defect and/or design change.*

When a complaint is filed with the Commission concerning the failure of equipment marketed under an equipment authorization to comply with pertinent requirements of the Commission's rules, and the Commission determines that the complaint is justified and arises out of an equipment fault attributable to the grantee, the Commission may require the grantee to investigate such complaint and report the results of such investigation to the Commission. The report shall also indicate what action if any has been taken or is proposed to be taken by the grantee to correct the defect, both in terms of future production and with reference to articles in the possession of users, sellers and distributors.

§ 2.939 *Revocation or withdrawal of equipment authorization.*

(a) The Commission may revoke any equipment authorization:

(1) For false statements or representations made either in the application or in materials or response submitted in connection therewith or in records required to be kept by § 2.931(b).

(2) If upon subsequent inspection or operation it is determined that the equipment does not conform to the pertinent technical requirements or to the representations made in the original application.

(3) If it is determined that changes have been made in the equipment other than those authorized by the rules or otherwise expressly authorized by the Commission.

(4) Because of conditions coming to the attention of the Commission which would warrant it in refusing to grant an original application.

(b) Revocation of an equipment authorization shall be made in the same manner as revocation of radio station licenses.

(c) The Commission may withdraw any equipment authorization in the event of changes in its technical standards. The procedure to be followed will be set forth in the order promulgating such new technical standards (after appropriate rule making proceedings) and will provide a suitable amortization period for equipment in hands of users and in the manufacturing process.

§ 2.941 *Availability of information relating to grants.*

(a) Grants of equipment authorizations other than receiver certifications will be publicly announced in a timely manner by the Commission. Information about

a receiver certification may be obtained by contacting the Office of the Chief Engineer.

(b) Information relating to equipment authorizations such as data submitted by the applicant in connection with an authorization application, laboratory tests of the device, etc., shall be available in accordance with § 0.457 of this chapter.

§ 2.943 *Submission of equipment for testing.*

(a) The Commission may require an applicant for type acceptance or certification to submit one or more sample units for measurement at the Commission's laboratory.

(b) In the event the applicant believes that shipment of the sample to the Commission's laboratory is impractical because of the size or weight of the equipment, or the power requirement, or for any other reason, the applicant may submit a written explanation why such shipment is impractical and should not be required.

§ 2.945 *Sampling tests of equipment compliance.*

The Commission will, from time to time, call in various equipments for which authorizations have been granted, to determine the extent to which subsequent production of such equipment continues to comply with the data filed by the applicant (or measured by the Commission in the case of type approved equipment). Shipping costs to the Commission's laboratory and return shall be borne by the grantee.

TYPE APPROVAL

§ 2.961 *Cross reference.*

The provisions of this subpart, §§ 2.901 et seq., shall apply to applications for and grant of type approval.

§ 2.963 *Application for type approval.*

(a) An application for type approval shall be filed on FCC Form 729 with all questions answered.

(b) The application shall be filed by the party whose name will be placed on the equipment.

(c) If the applicant is not the manufacturer of the equipment, he shall attach a statement explaining the relationship between the applicant and the manufacurer accompanied by a confirming statement from the actual manufacturer.

(d) The applicant shall attach a statement containing a technical description of the equipment sufficiently complete to develop all the factors concerning compliance with the technical standards of the applicable rules. The description should include the information listed below. If an item is not applicable, this should be stated.

(1) Type(s) of emission.

(2) Frequency range.

(3) Range of operating power and description of means provided for variation of operating power.

(4) Maximum power rating as defined in the applicable rules.

(5) The voltages applied to and currents into the several elements of the final radio frequency amplifying device for normal operation over the power range. Indicate whether these voltages and currents are DC or AC.

(6) Function of each electron tube, semiconductor or other active circuit device.

(7) Complete circuit diagram.

(8) Instruction book(s). If the instruction book(s) is not available when the application is filed a set of draft instructions should be provided and the complete instruction book(s) should be submitted not later than 60 days after the grant of type approval, or such later date as may be specified.

(9) Tune up procedure over the power range or at specific operating power levels.

(10) A description of all circuitry and devices provided for determining and stabilizing frequency.

(11) A description of any circuits or devices employed for suppression of spurious radiation, for limiting modulation, and for limiting the operating power.

(12) A photograph or drawing of the equipment identification plate or label showing the information to be placed thereon.

§ 2.965 *Submission of equipment for type approval testing.*

After an application for type approval has been filed and accepted by the Commission, the applicant will be given instructions concerning the shipment of the equipment to the Commission's Laboratory. After testing is completed, the equipment will be returned to the applicant. Shipping costs to the Commission's Laboratory and return shall be borne by the applicant.

§ 2.967 *Changes in type approved equipment.*

(a) No mechanical or electrical change whatsoever may be made in a type approved equipment without prior approval by the Commission.

(b) A grantee desiring to make a change shall file an application on Form 729 accompanied by the appropriate fees. The grantee shall attach a description of the change(s) and shall indicate whether the change(s) will be made in all units (including previous production) or will be made only in those units produced after the change(s) is authorized.

(c) If the Commission authorizes the change(s) requested, it may require the assignment of a new type or model number.

§ 2.969 *Information required on identification label for type approved equipment.*

In the case of an equipment that has been type approved, the identification plate or label required by Section 2.925 shall contain the following information:

(a) Name of the grantee of the type approval.

(b) The words "TYPE NO." or "MODEL NO." followed by the number assigned to the equipment by the grantee.

(c) The words "FCC TYPE APPROVAL NO." followed by the type approval number assigned by the FCC, if a type approval number has been assigned.

(d) Any other statement or labeling requirement imposed by the rules governing the operation of this equipment.

TYPE ACCEPTANCE

§ 2.981 *Cross reference.*

(a) The general provisions of this subpart, §§ 2.901 et seq., shall apply to applications for and grants of type acceptance.

§ 2.983 *Application for type acceptance.*

An application for type acceptance shall be filed on FCC Form 723 by the party whose name will be placed on the equipment and shall include the following information either in answer to the questions on the form or as attachments thereto.

(a) Name of applicant indicating whether the applicant is the manufacturer of the equipment, a vendor other than the manufacturer (include the name of manufacturer), a licensee or a prospective licensee.

(b) Identification of equipment for which type acceptance is sought.

(c) Information whether quantity (more than one) production is planned.

(d) Technical description of the equipment sufficiently complete to develop all the factors concerning compliance with the technical standards of the applicable rule part(s). The description shall include the following items:

(1) Type or types of emission.

(2) Frequency range.

(3) Range of operating power values or specific operating power levels, and description of any means provided for variation of operating power.

(4) Maximum power rating as defined in the applicable part(s) of the rules.

(5) The dc voltages applied to and dc currents into the several elements of the final radio frequency amplifying device for normal operation over the power range.

(6) Function of each electron tube or semiconductor or other active circuit device.

(7) Complete circuit diagrams.

(8) Instruction book(s). If the instruction book(s) is not available when the application is filed a set of draft instructions should be provided and the complete instruction book(s) should be submitted not later than 60 days after the grant of type acceptance, or such later date as may be specified.

(9) Tune-up procedure over the power range, or at specific operating power levels.

(10) A description of all circuitry and devices provided for determining and stabilizing frequency.

(11) A description of any circuits or devices employed for suppression of spurious radiation, for limiting modulation, and for limiting power.

(e) The data required by § 2.985 through § 2.997, inclusive, measured in accordance with the procedures set out in § 2.999.

(f) A photograph or drawing of the equipment identification plate or label showing the information to be placed thereon.

(g) Photographs (8″ x 10″) of the equipment, of sufficient clarity to reveal equipment construction and layout, including meters, if any, and labels for controls and meters and sufficient views of the internal construction to define component placement and chassis assembly. Insofar as these requirements are met by photographs or drawings contained in instruction manuals supplied with the type acceptance request, additional photographs are necessary only to complete the required showing.

§ 2.985 *Measurements required: RF power output.*

(a) For transmitters other than single sideband, independent sideband and controlled carrier radiotelephone, power output shall be measured at the RF output terminals when the transmitter is adjusted in accordance with the tune-up procedure to give the value of current and voltage on the circuit elements specified in § 2.983(d)(5). The electrical characteristics of the radio frequency load attached to the output terminals when this test is made shall be stated.

(b) For single sideband, independent sideband, and single channel, controlled carrier radiotelephone transmitters the procedure specified in subparagraph (a) of this paragraph shall be employed and, in addition, the transmitter shall be modulated during the test as follows. In all tests, the input level of the modulating signal shall be such as to develop rated peak envelope power or carrier power, as appropriate, for the transmitter.

(1) Single sideband transmitters in the A3A or A3J emission modes—by two tones at frequencies of 400 Hz and 1800 Hz (for 3.0 kHz authorized bandwidth), or 500 Hz and 2100 Hz (3.5 kHz authorized bandwidth), or 500 Hz and 2400 Hz (for 4.0 kHz authorized bandwidth), applied simultaneously, the input levels of the tones so adjusted that the two principal frequency components of the radio frequency signal produced are equal in magnitude.

(2) Single sideband transmitters in the A3H emission mode—by one tone at a frequency of 1500 Hz (for 3.0 kHz authorized bandwidth), or 1700 Hz (for 3.5 kHz authorized bandwidth), or 1900 Hz (for 4.0 kHz authorized bandwidth), the level of which is adjusted to produce a radio frequency signal component equal in magnitude to the magnitude of the carrier in this mode.

(3) As an alternative to subparagraphs (1) and (2) of this paragraph other tones besides those specified may be used as modulating frequencies, upon a sufficient showing of need. However, any tones so chosen must not be harmonically related, the third and fifth order intermodulation products which occur must fall within the −25 dB step of the emission bandwidth limitation curve, the seventh and ninth order intermodulation product must fall within the 35 dB step of the referenced curve and the eleventh and all higher order products must fall beyond the −35dB step of the referenced curve.

(4) Independent sideband transmitters having two channels by 1700 Hz tones applied simultaneously in both channels, the input levels of the tones so adjusted that the two principal frequency components of the radio frequency signal produced are equal in magnitude.

(5) Independent sideband transmitters having more than two channels by an appropriate signal or signals applied to all channels simultaneously. The input signal or signals shall simulate the input signals specified by the manufacturer for normal operation.

(6) Single-channel controlled-carrier transmitters in the A3 emission mode—by a 2500 cps tone.

(c) For measurements conducted pursuant to paragraphs (a) and (b) of this section, all calculations and methods used by the applicant for determining carrier power or peak envelope power, as appropriate, on the basis of measured power in the radio frequency load attached to the transmitter output terminals shall be shown. Under the test conditions specified, no components of the emission spectrum shall exceed the limits specified in the applicable rule parts as necessary for meeting occupied bandwidth or emission limitations.

§ 2.987 *Measurements required: Modulation characteristics.*

(a) Voice modulated communication equipment: A curve or equivalent data showing the frequency response of the audio modulating circuit over a range of 100 to 5000 cps shall be submitted. For equipment required to have an audio low-pass filter, a curve showing the frequency response of the filter, or of all circuitry installed between the modulation limiter and the modulated stage shall be submitted.

(b) Equipment which employs modulation limiting: A curve or family of curves showing the percentage of modulation versus the modulation input voltage shall be supplied. The information submitted shall be sufficient to show modulation limiting capability throughout the range of modulating frequencies and input modulating signal levels employed.

(c) Single sideband and independent sideband radiotelephone transmitters which employ a device or circuit to limit peak envelope power: A curve showing the peak envelope power output versus the modulation input voltage shall be supplied. The modulating signals shall be the same in frequency as specified in paragraph (c) of § 2.989 for the occupied bandwidth tests.

(d) Other types of equipment: A curve or equivalent data which shows that the equipment will meet the modulation requirements of the rules under which the equipment is to be licensed.

§ 2.989 *Measurement required: Occupied bandwidth.*

The occupied bandwidth, that is the frequency bandwidth such that, below its lower and above its upper frequency limits, the mean powers radiated are each equal to 0.5 percent of the total mean power radiated by a given emission shall be measured under the following conditions as applicable:

(a) Radiotelegraph transmitters for manual operation when keyed at 16 dots per second.

(b) Other keyed transmitters—when keyed at the maximum machine speed.

(c) Radiotelephone transmitters equipped with a device to limit modulation or peak envelope power shall be modulated as follows. For single sideband and independent sideband transmitters, the input level of the modulating signal shall be 10 dB greater than that necessary to produce rated peak envelope power.

(1) Other than single sideband or independent sideband transmitters—when modulated by a 2500 cps tone at an input level 16 dB greater than that necessary to produce 50 percent modulation. The input level shall be established at the frequency of maximum response of the audio modulating circuit.

(2) Single sideband transmitters in A3A or A3J emission modes—when modulated by two tones at frequencies of 400 Hz and 1800 Hz (for 3.0 kHz authorized bandwidth), or 500 Hz and 2100 Hz (for 3.5 kHz authorized bandwidth), or 500 Hz and 2400 Hz (for 4.0 kHz authorized bandwidth), applied simultaneously. The input levels of the tones shall be so adjusted that the two principal frequency components of the radio frequency signal produced are equal in magnitude.

(3) Single sideband transmitters in the A3H emission mode—when modulated by one tone at a frequency of 1500 Hz (for 3.0 kHz authorized bandwidth), or 1700 Hz (for 3.5 kHz authorized bandwidth), or 1900 Hz (for 4.0 kHz authorized bandwidth), the level of which is adjusted to produce a radio frequency signal component equal in magnitude to the magnitude of the carrier in this mode.

(4) As an alternative to subparagraphs (2) and (3) of this paragraph, other tones besides those specified may be used as modulating frequencies, upon a sufficient showing of need. However, any tones so chosen must not be harmonically related, the third and fifth order intermodulation products which occur must fall within the −25 dB step of the emission bandwidth limitation curve, the seventh and ninth order products must fall within the −35 dB step of the referenced curve and the eleventh and all higher order products must fall beyond the −35 dB step of the referenced curve.

(5) Independent sideband transmitters having two channels—when modulated by 1700 Hz tones applied simultaneously to both channels. The input levels of the tones shall be so adjusted that the two principal frequency components of the radio frequency signal produced are equal in magnitude.

(d) Radiotelephone transmitters without a device to limit modulation or peak envelope power shall be modulated as follows. For single sideband and

independent sideband transmitters, the input level of the modulating signal should be that necessary to produce rated peak envelope power.

(1) Other than single sideband or independent sideband transmitters—when modulated by a 2500 cps tone of sufficient level to produce at least 85 percent modulation. If 85 percent modulation is unattainable, the highest percentage modulation shall be used.

(2) Single sideband transmitters in A3A or A3J emission modes—when modulated by two tones at frequencies of 400 Hz and 1800 Hz (for 3.0 kHz authorized bandwidth), or 500 Hz and 2100 Hz (for 3.5 kHz authorized bandwidth), or 500 Hz and 2400 Hz (for 4.0 kHz authorized bandwidth), applied simultaneously. The input levels of the tones shall be so adjusted that the two principal freqency components of the radio frequency signal produced are equal in magnitude.

(3) Single sideband transmitters in the A3H emission mode—when modulated by one tone at a frequency of 1500 Hz (for 3.0 kHz authorized bandwidth), or 1700 Hz (for 3.5 kHz authorized bandwidth), or 1900 Hz (for 4.0 kHz authorized bandwidth), the level of which is adjusted to produce a radio frequency signal component equal in magnitude to the magnitude of the carrier in this mode.

(4) As an alternative to subparagraphs (2) and (3) of this paragraph, other tones besides those specified may be used as modulating frequencies, upon a sufficient showing of need. However any tones so chosen must not be harmonically related, the third and fifth order intermodulation products which occur must fall within the −25 dB step of the emission bandwidth limitation curve, the seventh and ninth order products must fall within the −35 dB step of the referenced curve and the eleventh and all higher order products must fall beyond the −35 dB step of the referenced curve.

(5) Independent sideband transmitters having two channels—when modulated by 1700 Hz tones applied simultaneously to both channels. The input levels of the tones shall be so adjusted that the two principal frequency components of the radio frequency signal produced are equal in magnitude.

(e) Transmitters for use in the Radio Broadcast Services:

(1) Standard broadcast transmitters—when modulated 85 percent by a 7500 Hz input signal.

(2) FM broadcast transmitter not used for multiplex operation—when modulated 85 percent by a 15 kHz input signal.

(3) FM broadcast transmitters for multiplex operation under Subsidiary Communication Authorization (SCA)—when carrier is modulated 70 percent by a 15 kHz main channel input signal, and modulated an additional 15 percent simultaneously by a 67 kHz subcarrier (unmodulated).

(4) FM broadcast transmitter for stereophonic operation—when modulated by a 15 kHz input signal to the main channel, a 15 kHz input signal to the stereophonic subchannel, and the pilot subcarrier simultaneously. The input signals to the main channel and stereophonic subchannel each shall produce 38 percent modulation of the carrier. The pilot subcarrier should produce 9 percent modulation of the carrier.

(5) Television broadcast aural transmitters—when modulated 85 percent by a 15 kHz input signal.

(f) Transmitters for which peak frequency deviation (D) is determined in accordance with § 2.202(f), and in which the modulating baseband comprises more than 3 independent speech channels—when modulated by a test signal determined in accordance with the following:

(1) A modulation reference level is established for the characteristic baseband frequency. (Modulation reference level is defined as the average power level of a sinusoidal test signal delivered to the modulator input which provides the specified value of per-channel deviation.)

(2) Modulation reference level being established, the total rms deviation of the transmitter is measured when a test signal consisting of a band of random noise, extending from below 20 kHz to the highest frequency in the baseband, is applied to the modulator input through any preemphasis networks used in normal service. The average power level of the test signal shall exceed the modulation reference level by the number of decibels determined using the appropriate formula in the following table:

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Number of telephone channels that modulate the transmitter	*Number of dB by which the average power level of the test signal shall exceed the modulation reference level*
More than 3 and less than 12	To be specified by the equipment manufacturer subject to FCC approval.
At least 12 and less than 60	$2.6+2 \log_{10} N_c$.
At least 60 and less than 240	$-1+4 \log_{10} N_c$.
240 or more	$-15+10 \log_{10} N_c$.

Where N_c is the number of baseband telephone channels in radio systems employing multichannel multiplex telephony. See § 2.202(e) in this Chapter.

(g) Transmitters in which the modulating baseband comprises not more than three independent channels—when modulated by the full complement of signals for which the transmitter is rated. The level of modulation for each channel should be set to that prescribed in rule parts applicable to the services for which the transmitter is intended. If specific modulation levels are not set forth in the rules, the tests should provide the manufacturer's maximum rated condition.

(h) Transmitters designed for other types of modulation—when modulated by an appropriate signal of sufficient amplitude to be representative of the type of service in which used. A description of the input signal should be supplied.

§ 2.991 *Measurements required: Spurious emissions at antenna terminals.*

The radio frequency voltage or powers generated within the equipment and appearing on a spurious frequency shall be checked at the equipment output terminals when properly loaded with a suitable artificial antenna. Curves or equivalent data shall show the magnitude of each harmonic and other spurious emission that can be detected when the equipment is operated under the conditions specified in § 2.989 as appropriate. The magnitude of spurious emissions which are attenuated more than 20 dB below the permissible value need not be specified.

§ 2.993 *Measurement required: Field strength of spurious radiation.*

(a) Measurements shall be made to detect spurious emissions that may be radiated directly from the cabinet, control circuits, power leads, or intermediate circuit elements under normal conditions of installation and operation. Curves or equivalent data shall be supplied showing the magnitude of each harmonic and other spurious emission. For this test, single sideband, independent sideband, and controlled carrier transmitters shall be modulated under the conditions specified in paragraph (c) of Section 2.989, as appropriate. For equipment operating on frequencies below 890 MHz, an open field test is normally required, with the measuring instrument antenna located in the far-field at all test frequencies. In the event it is either impractical or impossible to make open field measurements (e.g. a broadcast transmitter installed in a building) measurements will be accepted of the equipment as installed. Such measurements must be accompanied by a description of the site where the measurements were made showing the location of any possible source of reflections which might distort the field strength measurements. Information submitted shall include the relative radiated power of each spurious emission with reference to the rated power output of the transmitter, assuming all emissions are radiated from half-wave dipole antennas.

(b) The measurements specified in paragraph (a) shall be made for the following equipment:

(1) Those in which the spurious emissions are required to be 60 dB or more below the mean power of the transmitter.

(2) All equipment operating on frequencies higher than 25 MHz.

(3) All equipment where the antenna is an integral part of, and attached directly to the transmitter.

(4) Other types of equipment as required, when deemed necessary by the Commission.

§ 2.995 *Measurements required: Frequency stability.*

(a) The frequency stability shall be measured with variation of ambient temperature as follows:

(1) From −30° to +50° centigrade for all equipment except that specified in subparagraphs (2) and (3) of this paragraph.

(2) From −20° to +50° centigrade for equipment to be licensed for use in the Maritime Services under Parts 81 and 83 of this chapter and equipment to

be licensed for use above 952 MHz at operational fixed stations in all services, stations in the Local Television Transmission Service and Point-to-Point Microwave Radio Service under Part 21, and equipment licensed for use aboard aircraft in the Aviation Services under Part 87 of this chapter.

(3) From 0° to +50° centigrade for equipment to be licensed for use in the Radio Broadcast Services under Part 73 of this chapter.

(b) Frequency measurements shall be made at the extremes of the specified temperature range and at intervals of not more than 10° centigrade through the range. A period of time sufficient to stabilize all of the components of the oscillator circuit at each temperature level shall be allowed prior to frequency measurement. The short term transient effects on the frequency of the transmitter due to keying (except for broadcast transmitters) and any heating element cycling normally occurring at each ambient temperature level also shall be shown. Only the portion or portions of the transmitter containing the frequency determining and stablizing circuitry need be subjected to the temperature variation test.

(c) In addition to all other requirements of this section, the following information is required for equipment incorporating heater type crystal oscillators to be used in mobile stations, for which type acceptance is first requested after March 25, 1974, except for battery powered, hand carried, portable equipment having less than 3 watts mean output power.

(1) Measurement data showing variation in transmitter output frequency from a cold start and the elapsed time necessary for the frequency to stablize within the applicable tolerance. Tests shall be made after temperature stabilization at each of the ambient temperature levels: the lower temperature limit, 0° centigrade and +30° centigrade with no primary power applied.

(2) Beginning at each temperature level specified in subparagraph (1) of this paragraph, the frequency shall be measured within one minute after application of primary power to the transmitter and at intervals of no more than one minute thereafter until ten minutes have elapsed or until sufficient measurements are obtained to indicate clearly that the frequency has stabilized within the applicable tolerance, whichever time period is greater. During each test, the ambient temperature shall not be allowed to rise more than 10° centigrade above the respective beginning ambient temperature level.

(3) The elapsed time necessary for the frequency to stabilize within the applicable tolerance from each beginning ambient temperature level as determined from the tests specified in this paragraph shall be specified in the instruction book for the transmitter furnished to the user.

(4) When it is impracticable to subject the complete transmitter to this test because of its physical dimensions or power rating, only its frequency determining and stabilizing portions need be tested.

(d) The frequency stability shall be measured with variation of primary supply voltage as follows:

(1) Vary primary supply voltage from 85 to 115 percent of the nominal value for other than hand carried battery equipment.

(2) For hand carried, battery powered equipment, reduce primary supply voltage to the battery operating end point which shall be specified by the manufacturer.

(3) The supply voltage shall be measured at the input to the cable normally provided with the equipment, or at the power supply terminals if cables are not normally provided. Effects on frequency of transmitter keying (except for broadcast transmitters) and any heating element cycling at the nominal supply voltage and at each extreme also shall be shown.

(e) When deemed necessary, the Commission may require tests of frequency stability under conditions in addition to those specifically set out in paragraphs (a) (b) (c) and (d) of this section. (For example measurements showing the effect of proximity to large metal objects, or of various types of antennas, may be required for portable equipment).

§ 2.997 *Frequency spectrum to be investigated.*

In all of the measurements set forth in §§ 2.991 and 2.993 of this part, the spectrum should be investigated from the lowest radio frequency generated in the equipment up to at least the 10th harmonic of the carrier frequency or to the highest frequency practicable in the present state of the art of measuring techniques, whichever is lower. Particular attention should be paid to har-

monics and subharmonics of the carrier frequency as well as to those frequencies removed from the carrier by multiples of the oscillator frequency. Radiation at the frequencies of multiple stages should also be checked. The amplitude of spurious emissions which are attenuated more than 20 dB below the permissible value need not be reported.

§ 2.999 *Measurement procedure.*

The Commission may consider data which have been measured in accordance with established standards and measurement procedures as published by engineering societies and associations such as the Electronic Industries Association, the Institute of Electrical and Electronics Engineers, Inc. and the American National Standards Institute. Specific reference should be made to the standard(s) used. If a published standard is not used the applicant shall submit a detailed description of the measurement procedure actually used. In either case, he shall submit a listing of the test equipment used.

§ 2.1001 *Changes in type accepted equipment.*

(a) Equipment of the same type is defined for the purposes of type acceptance as being equipment which is electrically and mechanically interchangeable. In addition, transmitters of the same type will have the same basic tube or semiconductor line up, frequency multiplication, basic frequency determining and stabilizing circuitry, basic modulator circuit and maximum power rating.

(b) Two classes of permissive changes may be made in type accepted equipment without requiring a new application for and grant of type acceptance.

(1) A Class I permissive change includes those modifications in the equipment which do not change the equipment characteristics beyond the rated limits established by the manufacturer and accepted by the Commission when type acceptance is granted, and which do not change the type of equipment as defined in paragraph (a) of this section. No filing with the Commission is required for a Class I permissive change.

(2) A Class II permissive change includes those modifications which bring the performance of the equipment outside the manufacturer's rated limits as originally filed but not below the minimum requirements of the applicable rules, and do not change the type of equipment as defined in paragraph (a) of this section. When a Class II permissive change is made by the grantee, he shall supply the Commission with complete information and results of tests of the characteristics affected by such change. The modified equipment shall not be marketed under the existing grant of type acceptance prior to acknowledgement by the Commission that the change is acceptable.

(3) When a Class II permissive change is made by other than the grantee of type acceptance, the information and data specified in paragraph (2) of this section shall be supplied by the person making the change. The modified equipment shall not be operated under an authorization of the Commission prior to acknowledgement by the Commission that the change is acceptable.

(c) A grantee desiring to make a change other than a permissive change as described in paragraph (b) of this section, shall file an application on Form 723 accompanied by the required fees. The grantee shall attach a description of the change(s) to be made and a statement indicating whether the change(s) will be made in all units (including previous production) or will be made only in those units produced after the change(s) is authorized.

(d) If the Commission authorizes the change requested, it may require the assignment of a new type number.

(e) Users shall not modify their own equipment except as provided by paragraph (b) of this section.

§ 2.1003 *Information required on identification label for type accepted equipment.*

In the case of an equipment that has been type accepted, the identification plate or label required by § 2.925 shall contain the following information:

(a) Name of the grantee of the type acceptance.

(b) The words "TYPE NO." followed by the number assigned to the equipment by the grantee. If the name plate contains information in addition to that required by this section the words "TYPE NO." may be preceded by the words "FCC DATA:" to facilitate the selection of the identifier used by the Commission in its grant of type acceptance.

NOTE: If the equipment involved is a transceiver containing transmitting and receiving capability and a single identifier is used, the marking of paragraph (b) shall be used. If the transmitter part and the receiver part are assigned separate identifiers, the marking of paragraph (b) shall be replaced with "TRANSMITTER TYPE NO." and "RECEIVER MODEL NO.". These words may be prefixed by the term "FCC DATA", if desired.

(c) Any other statement or labeling requirement imposed by the rules governing the operation of this equipment.

CERTIFICATION

§ 2.1031 *Cross reference.*

The general provisions of this subpart § 2.901 et seq. shall apply to applications for and grants of certification.

§ 2.1033 *Application for certification under Part 15.*

(a) An application for certification shall be filed on FCC Form 722 with all items answered. Items that do not apply shall be so noted.

(b) The application shall be accompanied by the required fees, report of measurements, and such other attachments as specified in Part 15 for the particular equipment.

(c) The application shall be accompanied by a photograph, 8" x 10" in size, showing the front of the equipment. If the identification plate does not appear on this photograph, or is too small to be read, a second photograph, 8" x 10" in size, shall be attached showing the identification plate in sufficient detail so that the name and number can be read. In lieu of the second photograph, a sample label, or a facsimile thereof, may be attached with a sketch showing where this label will be placed on the equipment.

§ 2.1035 *Abbreviated procedure for identical or private label equipment*

(a) Application for certification of a private label equipment or an equipment bearing a new model number which is essentially identical to a previously certificated equipment shall be filed on FCC Form 722. Items that do not apply shall be so noted.

(b) The application shall be accompanied by the required fees.

(c) In lieu of the report of measurements and other attachments required by § 2.1033(b), the application may be accompanied by a statement setting forth.

(1) The name and the model number of the previously certificated receiver.

(2) The date when certification was granted.

(3) A description of how the new equipment differs from the previously certificated equipment.

(4) A statement that the data previously filed is applicable to and representative of the new equipment.

(d) The application shall be accompanied by a photograph, 8" x 10" in size, showing the front of the equipment. If the identification plate does not appear on this photograph, or is too small to be read, a second photograph, 8" x 10" in size, shall be attached showing the identification plate in sufficient detail so that the name and number can be read. In lieu of the second photograph, a sample label, or a facsimile thereof, may be attached with a sketch showing where this label will be placed on the equipment.

§ 2.1037 *Application for prototype certification of ISM equipment.*

(a) An application for prototype certification of ISM equipment may be submitted only for equipment that will be produced in quantity and which can be tested on a suitable test site.

(b) The application shall be filed on FCC Form 722 with all items answered. Items that do not apply shall be so noted.

(c) The application shall be accompanied by the required fees, a report of measurements and such other attachments as are specified in Part 18 for the particular equipment.

(d) The application shall be accompanied by a statement that the model (or type) for which prototype certification is requested will be produced in quantity, that the equipment lends itself to testing on a test site, and that the results of such measurements can be expected to represent the performance of that model (or type) wherever installed.

§ 2.1039 *On-site certification of ISM equipment.*

(a) Part 18 provides for on-site certification of ISM equipment which is not built in quantity or which does not lend itself to measurement on a test site.

(b) On-site certification shall be performed on the equipment after it is installed for operation in accordance with the procedures set out in Part 18 for the particular equipment.

§ 2.1041 *Measurement Procedure.*

The measurement procedures are specified in the rules governing the particular device for which certification is requested.

§ 2.1043 *Changes in certificated equipment.*

(a) Changes may be made in equipment for which certification has been granted provided such change does not affect the characteristics required to be reported, and does not result in a change in name or model number.

(b) A change which affects the characteristics required to be reported requires a new application for, and grant of certification. The Commission may require such modified equipment to be identified with a new model number.

(c) A change which results in a new name and/or model number (with or without change in circuitry) requires a new application for, and grant of, certification. If the change affects the characteristics required to be reported, a complete application shall be filed. If the characteristics required to be reported are not changed the abbreviated procedure of § 2.1035 may be used.

§ 2.1045 *Information required on identification label for certificated equipment.*

In the case of an equipment that has been certificated, the identification plate or label required by § 2.925 shall contain the following information.

(a) Name of the grantee of certification. Alternatively the name of the manufacturer or the private label trade name may be used provided this information was set out in the application for certification. The name used on the identification plate or label shall be identical to that on any exterior surface of the equipment.

(b) The words "MODEL NO." followed by the number assigned to the equipment by the grantee. If the identification label contains other numbers in addition to that required by this section, such other numbers shall be preceded by terms such as "SERVICE NO.", "CATALOG NO." or other similar term, to avoid confusion with the Commission required identifier following "MODEL NO.". The words "MODEL NO." may be preceded by the term "FCC DATA:" to facilitate the selection of the identifying number used by the Commission in its grant of certification.

NOTE: If the equipment involved is a transceiver containing transmitting and receiving capability and a single identifier is used, the marking of paragraph (b) shall be replaced with the words "TYPE NO.". If the transmitter part and the receiver part are assigned separate identifiers, the marking of paragraph (b) shall be replaced with "TRANSMITTER TYPE NO." and "RECEIVER MODEL NO.". These words may be prefixed by the term "FCC DATA", if desired.

(c) Any other statement or labeling requirement imposed by the rules governing the operation of this equipment.

FILING FOR APPLICATION REFERENCE

§ 2.1061 *Submission of technical information for application reference.*

An application for station authorization in some services requires a detailed technical description of the equipment proposed to be used. In order to simplify the preparation and processing of applications by eliminating the need for the submission of equipment specifications with each application, the Commission will accept for application reference purposes detailed technical specifications of equipment designed for use in these services. Manufacturers desiring to avail themselves of this procedure should submit all information required by the application form and the rules for the services in which the equipment is to be used. An application for a station authorization submitted subsequent to such filing may refer to the technical information so filed.

§ 2.1063 *Disclaimer re technical information filed for application reference.*

Receipt by the Commission of data for application purposes does not imply that the Commission has made or intends to make any finding regarding the acceptability of the equipment for licensing and such equipment will not be included on the list of equipment acceptable for licensing. Each applicant is expected to exercise appropriate care in the selection of equipment to insure that the unit selected will comply with the rules governing the service in which it is proposed to operate.

§ 2.1065 *Identification and changes in equipment information filed for application reference.*

(a) Each type of equipment, for which information is filed for application reference purposes, shall be identified by a type number assigned by the manufacturer of the equipment. The type number shall consist of a series of Arabic numerals or capital letters or a combination thereof, and may include punctuation marks and spaces. The total of Arabic numerals, capital letters, punctuation marks and spaces in any assigned type number shall not exceed 17. The type number shall be shown on an identification plate or label affixed in a conspicuous place to such equipment.

(b) If the assignment of a different type number is required as a result of equipment modification, a new identification plate or label bearing the new type number shall be affixed to the modified equipment.

F.C.C. 74–81

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. Charges, Regulations, Classification, and Practices for Voice Grade Private Line Service (High Density-Low Density Rate Structure) Filed With Transmittal Letter No. 11891	Docket No. 19919

MEMORANDUM OPINION AND ORDER

(Adopted January 23, 1974; Released January 25, 1974)

BY THE COMMISSION: COMMISSIONERS REID, WILEY AND HOOKS CONCURRING IN THE RESULT.

1. On January 9, 1973 we ordered an investigation into the lawfulness of new charges, regulations, practices and classifications filed by AT&T Transmittal No. 11891 for voice-grade private line service. We did not specify the procedures to be followed in our investigation, stating that we would shortly issue a further order with respect to procedures, which we are here doing.

2. The proposed tariff revision departs significantly from the traditional nationwide cost and rate averaging which will generally still pertain in the carrier's other services. Although AT&T does not expect the revisions to produce a significant change in the level of revenues to be derived from the services affected, they will affect, in some cases drastically, the charges individual customers must pay for the service they receive. These revisions have been filed to meet the challenge of competition in the provision of voice-grade and similar private line services. As we noted in our order, should these proposed rates be found to be unlawful, their effectiveness pending such a decision could have a lasting and adverse effect on competition and could possibly abort our policy of full and fair competition.

3. Due to the substantial impact of these changes on customer and competitor alike, it is essential that this investigation be completed as close to the end of the suspension period as is possible. Accordingly, we are devising procedures for the expeditious production of an adequate record for decision without abridging the right of the parties to present relevant evidence and effectively challenge evidence with which they disagree. In summary, these procedures provide for the receipt of all evidence in writing with provision for oral hearings if and to the extent necessary, and for issuance of a final decision immediately upon close of the record. We realize that we have generally investigated tariff filings in the past by oral proceedings. We hope, by proceeding initially without oral hearings, to avoid the delay in

final decision which has occurred in past rate proceedings such as the *Private Line Case*, Docket 18128. Such delay, under the circumstances pertaining here, would be intolerable. Although Sections 204 and 205 of the Communications Act do require that we act after hearing, neither the legislative history of these provisions nor that of their models in the Interstate Commerce Act indicate that oral proceedings are required. Neither is there relevant judicial interpretation so holding. In fact, the recent judicial interpretation of substantially similar language governing proceedings in other regulatory jurisdictions is that a statutory hearing requirement does not imply that oral proceedings are required.[1]

4. The Administrative Procedure Act, which governs proceedings before federal regulatory bodies, provides for two basic procedural formats: rulemaking and formal hearings. The investigation of tariffs and prescription of rates is by definition rulemaking and the rulemaking procedures of the APA (5 U.S.C. § 553) do not require oral presentations except "when rules are required by statute to be made on the record after opportunity for agency hearing" in which case the formal hearing procedures apply.[2] While we do not believe our rate making proceedings to be governed by this exception and thus by the formal procedure of the APA, even if the formal hearing procedures were required, they specifically allow for the submission of evidence in writing where a party will not be prejudiced thereby (5 U.S.C. § 556(d)). We are offering all participants in this proceeding an opportunity to request oral proceedings if such are necessary to avoid prejudice. A claim of prejudice must be specific as to the need for oral hearings and specify the issue to which the evidence so obtained will be addressed and the name of the witness or witnesses needing to be cross examined. If we conclude that such a claim is justified, oral hearings will be held to resolve substantial and material issues of fact. Thus, we believe our procedures here are fully consistent with all legal requirements. In fact, we note that a recent study of regulatory procedures criticizes a pervasive unwarranted emphasis on judicial-like process, which works to impede regulatory bodies in the expeditious and effective application of their expertise.[3] The courts too have noted the ineffectiveness of judicial-like process as a basis for regulatory action and have encouraged agencies to tailor their proceedings to the exigencies of their decision making mandate.[4] It is with this back-

[1] *See* United States v. Florida East Coast R. Co., 410 U.S. 224 (1973) and Phillips Petroleum Co. v. F.P.C., 475 F. 2d 842 (10th Cir. 1973) *cert. denied*, January 14, 1974.

[2] The quoted phrase does not prescribe application of the formal hearing procedures of the APA in rulemaking cases simply because the organic statute authorizes agency action "after hearing" or "after opportunity for hearing." The weight of judicial opinion is that something more, such as the phrase "on the record", must occur in a statute to trigger application of the formal hearing procedures. *See* United States v. Florida East Coast R. Co., *supra*, at 234–238. *See also* Phillips Petroleum Co. v. FPC, *supra*, at 851; Siegel v. AEC, 400 F. 2d 778, 785 (D.C. Cir. 1968) and Pacific Coast European Conference v. United States, 350 F. 2d 197, 205 (9th Cir. 1965). We observe that Section 1.1207 of our rules (47 CFR 1.1207) which lists the rulemaking proceedings that are "restricted" for the purpose of application of prohibitions on ex-parte presentations, also indicates that Sections 204 and 205 proceedings, among others, are "required by statute to be decided on the record after opportunity for agency hearing." In the context of our ex-parte rules, this phrase indicates that decision in such proceedings is made on the basis of evidence presented openly as part of a public record and was not intended as a Commission determination that trial-type procedures are required. We will in a separate action make changes in our ex-parte rules to clarify this point.

[3] *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies*, The President's Advisory Council on Executive Organization, January, 1971.

[4] *See* Permian Basis Area Rates Cases, 390 U.S. 247 (1968).

ground that we act here to establish special procedures for this investigation.

5. Although the periods of time within which the various filings are to be made may appear to be short, we note that pursuant to Section 61.38 of our rules the data allegedly justifying these revisions has already been filed. Therefore interested persons may begin immediately to prepare their cases in response to that of AT&T. While time does not allow participants to rely on data that may be obtained in response to interrogatories and information requests in preparing their cases in response, such data may be used in preparing proposed findings of fact. We urge that participants having common interests arrange for joint preparation of filings. Although our rules allow the carrier to supplement material filed pursuant to Section 61.38 of our rules within 45 days, in view of the nature of this filing we find that the public interest requires that we allow AT&T 20 days to supplement such material and to complete its filing of evidence upon which it intends to rely. Also, we have specified the discovery procedures which will be followed. Finally, it is clear from a review of the filings received in this matter that the due and timely exercise of our regulatory function imperatively and unavoidably requires that we issue a final decision upon close of the record without initial, recommended, or tentative decision. Should it develop that the procedures which we are establishing prove inadequate or result in substantial unfairness to any party: we will issue orders in modification thereof.

6. For this proceeding the following will apply:

a. The record for decision will consist of all matters submitted for the record by respondents, interested persons and the Common Carrier Bureau trial staff. Interrogatories and information requests and responses thereto shall be part of the record. Such submittals together with supporting documentation and workpapers will be available for public inspection as they are received.

b. All matters submitted for the record, including answers to interrogatories and responses to information requests, must be identified as to sponsoring party, numbered consecutively and identified with the name of a person by whom or under whose supervision the submittal was prepared.

c. The source of all data must be clearly and specifically noted. Supporting documents which are not readily available and working papers must be presented with the submittals to which they apply. Statistical studies will be submitted and supported in the form prescribed in Section 1.363 of the Commission's rules.

d. Original and five copies of all matters submitted for the record as well as of supporting documentation and workpapers must be filed with the Commission. Matters submitted for the record should be served on all interested persons filing a notice of intent to participate.

e. Interrogatories and requests for information must be filed with the Commission and served on the participants to this proceeding. Objections to interrogatories and information requests should be resolved, if possible, by immediate informal conferences between the persons involved and the Trial Staff. If such

persons are unable to resolve their differences, the Administrative Law Judge should be notified, and on notification should convene an immediate oral conference of the persons involved. After oral presentations by such persons and the Trial Staff the Judge shall forthwith issue her ruling. Appeals from such rulings shall be governed by 47 CFR § 1.301 except that the Judge shall set an expedited procedure.

f. Requests for oral proceedings must be filed with the Commission and must be specific as to the issues requiring further evidence, the persons to be cross-examined and the reason why such oral proceedings are required to avoid prejudice. Oral proceedings, if any, will be held before the Administrative Law Judge who will certify the record of such proceedings to the Commission.

7. The following schedule will be adhered to:

a. Within 20 days of the release of this order AT&T may supplement the materials submitted pursuant to Section 61.38 of our rules. Any such supplementation, together with the material originally filed will form the evidence upon which it intends to rely. At the same time AT&T should place materials already filed into proper form as described in paragraph 6 at "b", above.

b. Interested persons may file with the Commission written interrogatories for AT&T witnesses and requests for information within 15 days following the filing of any supplement to AT&T's direct case. Answers to such interrogatories and requests for information shall be filed within 20 days of receipt thereof.

c. If necessary, further interrogatories and requests for information may be filed within 10 days of filing of answers to the first interrogatories and requests for information. Answers to such second interrogatories and requests for information should be filed within 10 days of the receipt thereof.

d. Interested persons may file material in response to AT&T within 45 days of the release of this order.

e. AT&T may serve interrogatories on participants filing material in response to AT&T within 15 days of the filing of such responses. Answer to such interrogatories shall be filed within 20 days of the receipt thereof.

f. If necessary, further interrogatories by AT&T may be filed within 10 days of the filing of answers to the first interrogatories. Answers to such second interrogatories shall be filed within 10 days of the receipt thereof.

g. AT&T may file material in reply to that submitted by other participants within 35 da[illegible] pt thereof.

h. Proposed findings of fact and conclusion of law may be filed by any participant within 30 days of the receipt of the last filed responses to interrogatories and requests for information.

8. Accordingly, IT IS ORDERED, That this investigation will be governed by the above-described procedures and the procedural requests of Microwave Communications Inc. are GRANTED to the extent indicated above and otherwise DENIED.

9. IT IS FURTHER ORDERED, That American Telephone and Telegraph Company and all carriers listed in AT&T's Tariff F.C.C.

No. 260 as concurring and connecting carriers are hereby made respondents herein, and that all other interested persons wishing to participate may do so filing a notice of intent to participate within 10 days of the release of this order.

10. IT IS FURTHER ORDERED, That a trial staff of the Common Carrier Bureau will participate in this proceeding and shall be separated from the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-90

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Applications of AMERICAN TELEPHONE & TELEGRAPH CO.	
For Authorization to Construct and Operate Five Earth Stations to Provide Domestic Communications Satellite Services; and to Contract for the Use of Communications Satellites and Associated Services Pursuant to Section 214 of the Communications Act.	Files Nos. 25-DSE-P-71, 26-DSE-P-71, 27-DSE-P-71, 29-DSE-P-71, 20-DSE-P-73

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released: February 1, 1974)

BY THE COMMISSION:

1. The Commission has before it a petition for reconsideration of our Memorandum Opinion, Order and Authorization of September 12, 1973 granting the above-captioned applications (42 FCC 3d 654), filed by the Network Project (Project); and an Opposition by AT&T to the petition.[1]

2. The Project claims that we acted in violation of the public interest standard of the Communications Act by failing to require AT&T to use domestic satellite facilities to replace existing long lines facilities where cost savings could be achieved, to offer satellite-only service, and to pass such savings on to the consumer. It further urges that we require AT&T to establish a separate corporate entity to handle and account for the financial transactions of its satellite operations. The Project states that a separate corporation would assist in ascertaining cost savings and in preventing cross-subsidization of competitive private line services. The Project also asserts that failure to impose the foregoing requirements would "vastly enhance AT&T's economic power in the field of private competitive services, in violation of the antitrust laws."

3. In opposing the petition AT&T urges that the Project has raised no matters which were not previously considered and resolved in Docket No. 16495 or by Commission action in passing on domestic satellite applications. It asserts that the stale matters now raised by the Project cannot properly support a request for reconsideration.

4. In the *Second Report and Order* in Docket No. 16495 we con-

[1] A petition for reconsideration filed by GTE Satellite Corporation and GTE Service Corp., which is addressed to different aspects of our September 12th order, is still pending. Our action herein is also without prejudice to the Commission's disposition of the issues posed by our show cause order of December 13, 1973 in Docket No. 19896 (FCC 73-1299) with respect to AT&T's compliance with the condition on its domestic satellite authorizations.

cluded that "AT&T should be afforded access to the satellite technology to determine its feasibility as an efficient and economic means of providing AT&T's basic switched telephone services, as well as to explore potential use of the 18 and 30 GHz frequencies" (35 FCC 2d 844, 851). At the same time, we recognized that the "true extent and nature of the public benefits that satellites may produce in the domestic field remains to be demonstrated," pointing to such uncertainties as whether the technology presently offers costs savings over more advanced terrestrial technology and whether the time delay inherent in voice communications via synchronous satellites is acceptable to the domestic public (35 FCC 2d at 845–846). Indeed, some of our objectives in authorizing domestic satellite facilities to AT&T and others were to gain operational data and experience through demonstrations by such licensees (35 FCC 2d at 846). It would be premature to give consideration to the question of whether AT&T should be compelled to use domestic satellite facilities in lieu of terrestrial facilities before we have had the benefit of such operational data and experience.

5. Moreover, at this initial stage, at least, we think it proper for AT&T to utilize domestic satellites as an alternative means of providing those of its terrestrial services it is authorized to provide via satellite. It is not customary for rates for message toll telephone service (MTT) to vary according to the technology used (e.g., cable, microwave, satellite) and we see no benefit to the public in departing from that practice at this point. If it turns out that cost savings are achieved through the use of domestic satellites, such savings should be passed on to all MTT users. Since we regulate AT&T's rate of return, there is no basis for the Project's concern that any cost savings will be permitted as a "windfall to the company." Finally, the petition overlooks one of the basic benefits which the use of the satellite technology can offer. This is the use of the same satellite facilities to handle peak loads between different points at different times of the day as the peak hour moves westward with the clock. Thus, in essence the same satellite benefits users in all parts of the country without identification of any particular section. This consideration renders the request inapposite.

6. Nor do we find it necessary in the public interest to require AT&T to establish a separate corporate subsidiary to conduct its domestic satellite operations. In Docket No. 16495 we required some of the domestic satellite applicants to form separate corporate subsidiaries for various different reasons: satellite equipment suppliers in order to separate their communications activities from their manufacturing operations (35 FCC 2d at 855; 34 FCC 2d 1, 44–45); the Communications Satellite Corporation so as to ensure that its role in Intelsat would not be adversely affected by its non-Intelsat activities (35 FCC 2d at 853; paragraph 11 of the Memorandum Opinion, Order and Authorization of September 12, 1973 (FCC 73–956); and GTE Service Corporation in light of the circumstance that it was proposing to provide interstate MTT service for the first time (35 FCC 2d at 853–854).[1a] However, we did not impose such a requirement on AT&T or

[1a] Although the *Second Report* in Docket No. 16495 did not require a separate corporation in the case of the RCA applicants, we raised this question in our order of September 12, 1973 granting their interim system, in view of the role of RCA Global Communications, Inc. as an international carrier. However, we deferred decision on this question to a later date. See, FCC 73–960, paragraphs 20–23.

Western Union Telegraph Company which were proposing to use domestic satellites primarily as an alternative transmission means for services they are now providing terrestrially. We are not persuaded by the Project's petition that the public interest be served by now requiring AT&T to provide domestic MTT service through two corporations, one for terrestrial transmission and one for satellite transmission. Such an artificial split might well be disruptive of the efficiency of the integrated MTT network operation.[2] Moreover, we can require AT&T to segregate accounts for its domestic satellite operations, without requiring a separate corporation, if we determine that such a course is desirable.[3] Further, a separate corporation would not eliminate the possibility of cross-subsidy of AT&T's competitive services in view of its extensive terrestrial operations and the temporary nature of the limitation on the services it can provide via domestic satellite (38 FCC 2d 665, 676–680). The cross-subsidy question is at issue in Docket No. 18128, which involves a determination of the reasonableness of the over-all levels of earnings for each of AT&T's interstate services, and hopefully will be resolved there.

7. Thus, we conclude that the Project has shown no sufficient reason for reconsidering or modifying our domestic satellite authorization to AT&T. Its petition for reconsideration will be denied.

8. Accordingly, IT IS HEREBY ORDERED that the petition for reconsideration filed by the Project is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] For example, AT&T will not provide any MTT service exclusively by satellite; Landline tails to and from the earth stations will be required for end-to-end service.

[3] In the *Second Report* we stated that the "prescription of specific accounting rules by the Commission will be given consideration when we have a clearer picture of the structure of this industry and its operation" (35 FCC 2d at 855).

F.C.C. 73-994

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST BY MICHAEL D. BRAMBLE
For Inspection of FCC Investigatory File

MEMORANDUM OPINION AND ORDER

(Adopted September 19, 1973; Released September 25, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH (CHAIRMAN), H. REX LEE, REID, WILEY, AND HOOKS CONCURRED IN THE RESULT. COMMISSIONER ROBERT E. LEE WAS ABSENT.

1. The Commission has under consideration the following correspondence in the above-entitled matter: (1) the March 8, 1973 letter from Stern Community Law Firm on behalf of Michael Bramble (petitioner) for inspection of the Commission's investigatory file compiled in response to his complaint of news censorship and firing by station KBUN (AM); (2) the March 16, 1973 letter opposing petitioner's request filed by counsel for Paul Bunyan Broadcasting Co., licensee of KBUN;[1] and (3) the petitioner's reply by letter of March 27, 1973.[2]

2. Because of the significance of the issues involved in this request, we have decided to act upon the inspection request in the first instance rather than have the Executive Director render an initial decision.[3]

3. The request for the investigatory file arises out of a complaint the petitioner forwarded to the Commission concerning his dismissal as news director of radio station KBUN, Bemidji, Minnesota. Petitioner claimed that the station fired him because he wrote and broadcast news stories that were incompatible with the interests of local advertisers on the station. In mid-November 1972, the Commission conducted a field investigation into the complaint and on March 2, 1973, adopted a letter opinion (39 F.C.C. 2d 992) rejecting petitioner's allegations (Commissioner Johnson dissenting) which concluded by stating as follows:

[1] Section 0.461(b) of the rules does not provide the opportunity to file a response in this situation. We have, nevertheless, fully considered the comments furnished by the licensee.

[2] Section 0.461(b) provides that the Executive Director may authorize the filing of additional pleadings. Prior to filing this pleading, petitioner requested and was granted authorization by the Executive Director to file a reply to the licensee's letter. In addition the Commission has considered the petitioner's letter of April 20, 1973 suggesting that the licensee has modified its position against disclosure and citing, as support, certain language from the licensee's opposition to the petition for reconsideration in this matter, and the licensee's letter of April 25, 1973 suggesting that petitioner has taken the licensee's statements out of context and that the licensee continues to object to disclosure of the requested records.

[3] Petitioner originally requested the documents to assist him in deciding whether to file a petition for reconsideration of the Commission's action on his complaint. On April 5, 1973, petitioner filed a petition for reconsideration. Petitioner's need for the documents is not moot since he may want to use information they contain to supplement his petition. *See* para. 13 *infra*.

On the basis of the Commission's investigation of this case, however, it cannot be determined that the licensee did subordinate public to private interest, or that your employment was terminated because you broadcast a news item critical of a local advertiser rather than because you refused to follow station policy, left the station without notice or explanation, and thereafter refused to discuss the matter with the manager of the station.

4. As a result of the Commission's disposition of his complaint, petitioner has requested authorization to examine the following five categories of material:

(1) All records, notes, transcripts or memoranda describing or recording the interview conducted with petitioner;

(2) Any and all correspondence from the licensee or management of KBUN (AM) to the Commission involving this complaint;

(3) All records, notes, transcripts or memoranda describing or recording interviews with the management, personnel or employees of KBUN (AM);

(4) All records, notes, transcripts or memoranda describing or recording interviews with other persons contacted by the FCC investigators in connection with their investigation of this complaint;

(5) Any memoranda or reports prepared by Commission personnel describing the results of the investigation of this complaint.

5. Petitioner's request recognizes that the documents sought are of the kind described in Sections 0.457(g)(2),(3), 47 CFR § 0.457(g)(2),(3), as records not routinely available for public inspection and, pursuant to the requirements of Section 0.461(a), 47 CFR § 0.461(a), for requesting such documents, he has submitted a "statement of the reasons for inspection and the facts in support thereof." Basically, petitioner contends that the "considerations favoring nondisclosure are minimal in this case" because no "legitimate interest of the licensee or its employees" would be adversely affected by the proposed disclosure and because no Commission interests need protection—the investigation having been completed, Commission action taken and no administrative burden involved in producing the requested documents. In addition, petitioner asserts that there are "strong policy reasons for permitting inspection" which stem in part from his inability to know from the letter responding to his complaint the basis for the Commission's action as well as the further citation in the letter of several factual bases of which he was unaware. He states that his "personal and professional integrity as a broadcaster has been prejudiced by these findings." He also points out that the licensee's willingness to discuss his dismissal with him is irrelevant since the licensee cannot furnish him with the information he has requested, namely the facts the Commission relied upon in deciding his complaint. He also notes that he has not sought reinstatement and that contrary to the licensee's assertion, his interest is not solely "personal" and his complaint was "filed on behalf of the listening audience."

6. The thrust of the licensee's argument is that material of the type requested by petitioner should be withheld pursuant to the intent of Congress in including an exemption for investigatory files in the Public Information Act and in view of applicable judicial precedent

104-025—74——7

and the Commission's previously expressed policy against routine divulgence of investigatory files.

7. The issues presented by petitioner's request involve the meaning and application of two sections of the Public Information Act to the five categories of documents requested. These sections, 5 U.S.C. §§ 552(b)(5) and 552(b)(7), except from the general disclosure requirements of the Act respectively, "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;" and "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Sections 0.457 (e) and (g) of our rules track the language of these two sections and make the same material "not routinely available for public inspection."

8. On their face the requested records come within the investigatory files or the intra-agency memorandum exemptions of the Public Information Act and the Commission's rules. It should be emphasized, however, that this is merely a preliminary classification and that the Act does not require an agency to withhold documents that come within its exemptions. Thus Section 0.461(c)(4) of the Rules, 47 CFR § 0.461(c)(4), provides that when a request is made to inspect records which the Commission is authorized to withhold, the request will nevertheless be entertained and the "considerations favoring disclosure and non-disclosure will be weighed in light of the facts presented."

9. For the reasons given below, we are of the view that no useful purpose would be served by invoking the investigatory files exemption to withhold the requested records from disclosure. The case law interpreting this exemption emphasizes that it should be invoked by an agency only when ". . . disclosure of the files sought is likely to create a concrete prospect of serious harm to its law enforcement efficiency either in a named case or otherwise."[4] In the instant situation, it is clear that disclosure would not prejudice the Commission's investigation or its decision-making process since the Commission has concluded its investigation of the complaint and has issued its determination in this matter. In addition, there is no further enforcement action, contemplated which could be prejudiced by disclosure at this time, and none of our investigatory techniques and procedures would be compromised by disclosure.[5] It is also clear that there are no privacy interests that need to be protected here. The name of the person furnishing the information that prompted the investigation would not be revealed since the petitioner was the complainant in this matter, and the Com-

[4] Weisberg v. United States Dept. of Justice, — F. 2d —, slip opin. at 8 (No. 71–1026, D.C. Cir., Feb. 28, 1973), *reargued en banc*, July 11, 1973. In *Weisberg*, the court held that the agency had not provided sufficient justification for invoking exemption (7). The court's decision in *Weisberg* was based in large part on its earlier decision in Bristol-Myers, Inc. v. Federal Trade Commission, 424 F. 2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), in which the court found that the agency had not established the nature and the likelihood of harm in the particular case necessary to support withholding of records under exemption (7).

[5] *See* Frankel v. SEC, 460 F. 2d 813, 817 (2d Cir.), *cert. denied*, 409, 889 (1972), which upheld the agency's refusal to disclose the requested investigatory files. The court's holding was based primarily on its findings that the SEC had not terminated the possibility of further enforcement action in the particular case. Additionally, the court found that disclosure of the investigatory files requested there would seriously hinder the agency's future enforcement efforts by revealing confidential investigatory techniques and procedures and by disclosing confidential informants thereby inhibiting future voluntary cooperation by witnesses in agency investigations. 460 F. 2d at 816–17. As noted above, we have found none of these results to be expected from release of our investigatory files in the instant case.

mission has no information indicating that anyone interviewed has requested confidential treatment for his statement or that he cooperated with the investigators because he assumed that his response would remain confidential.[6] Furthermore, our review of the witness statements indicates that they contain no information that could be expected to subject the persons interviewed to embarrassment or to reprisals. None of the statements submitted here could be interpreted by a licensee or other party as being adverse in such a way to invite retaliation. It should also be noted that present and former station employees are one of our best sources of information for enforcement purposes. Thus, in order to assure that we continue to have this valuable source of information, statements containing information adverse to the licensee will normally be protected even though the present or former station employees involved may not have requested confidentiality. In short, we believe that the enforcement processes of this agency would not be harmed by disclosing the documents described in the first through fourth categories of the request.[7] We emphasize, however, that our determination to disclose these documents is based solely on the particular circumstances of this request and that our decision here should not be interpreted as in any way implying that statements made to FCC investigators will no longer be protected from routine disclosure under our rules.

10. It should be noted, however, that the fifth category of records requested by petitioner describes two documents in the Commission's investigatory file of the type covered by another exemption to the mandatory disclosure requirements of the Public Information Act. These two documents are the investigative report based on the information gathered during the investigation and a staff memorandum to the Commission. The additional basis for withholding these documents is exemption (5) for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

11. The current state of the law governing the disclosure of internal memorandums makes it very clear that all such internal documents do not come within this exemption and that it does not apply to those consisting only of factual material since these would generally be available for discovery by private parties in litigation with the Government.[8] Rather it is intended to cover only internal memorandums that reflect "deliberative or policy-making processes" of the agency. Moreover, if an internal memorandum contains factual material in a form

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[6] *See, e.g.,* Evans v. Department of Transportation, 446 F. 2d 821 (5th Cir. 1971), *cert. denied,* 405 U.S. 918 (1972), in which the court upheld refusal to disclose information in investigatory files after the investigation and enforcement proceedings had been terminated based in part on the fact that a confidential informant had been involved.

[7] In any case, petitioner is entitled to have copies of his own statement to the investigators. Section 1.10 of our rules provides that "any person submitting data or evidence" in any matter before the Commission has the right to "procure a copy of any document submitted by him, or of any transcript made of his testimony." 47 CFR § 1.10. With respect to the second category of material requested by petitioner, the Commission did not receive any correspondence from the licensee or management of KBUN(AM) involving this complaint.

[8] The courts have uniformly interpreted the language of exemption (5) to state that inter- or intra-agency memorandums or letters are to be made publicly available "if a private party could discover [them] in litigation with the agency." Environmental Protection Agency v. Mink, 410 U.S. 73, 85–86 (1973); *see also* Soucie v. David, *supra* at 1076, Sterling Drug, Inc. v. Federal Trade Commission, 450 F. 2d 698, 705 (D.C. Cir. 1971).

that is severable from the deliberative or policy-making portions of the memorandum, it is not encompassed within exemption (5) of the Act.[9] In the case of the investigative report here, the factual information can be easily severed from those portions of the memorandum containing opinions and recommendations. In the staff memorandum, however, the facts are so intertwined with opinion and recommendation that it would be impossible to sever them without compromising or distorting the remainder of the document.[10] In addition, there is no factual information in the staff memorandum which is not also contained in the portions of the investigative report being made available for inspection.[11] Furthermore, we believe that the basic policy for including the internal memorandums exemption in the Act, i.e., the encouragement of a full and frank exchange of ideas within the agency by protecting the privacy of internal legal and policy deliberations continues to outweigh the need of the petitioner in this particular case to inspect limited portions of the staff investigative report and the whole of the staff memorandum to the Commission. Further, as we have noted, only private and confidential recommendations are not being disclosed and there is no factual information in the material being withheld which is not otherwise available to petitioner in the other records which are being provided for his inspection.

12. In view of the circumstances of this request, we therefore conclude that there is no longer a need to maintain on a confidential basis the statements of the persons interviewed by the Commission's investigators in this matter. Accordingly, petitioner is hereby authorized to inspect these statements as well as the investigative report, except for the portions that have been deleted because they reflect the opinions and recommendations of the staff. Arrangements for inspection of these documents may be made with the Office of the Executive Director.

13. As noted above, the petitioner has filed, in addition to the request for inspection of documents that is now under consideration, a petition for reconsideration of our action in this matter. It is appropriate that the petitioner have an opportunity to supplement his petition for reconsideration in light of any information he may derive from inspection of the documents made available to him in this decision. Accordingly, the petitioner shall have thirty days from the date of release of this order in which to file a supplemental pleading, and the licensee shall have ten days in which to file a reply thereto.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT MULLINS, *Acting Secretary.*

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[9] Environmental Protection Agency v. Mink, *supra* at 91.

[10] "Factual information may be protected only if it is inextricably intertwined with policy-making processes." Soucie v. David, *supra* at 1078. *See also* Environmental Protection Agency v. Mink, *supra* at 92.

[11] Because petitioner's request is being granted pursuant to the disclosure requirements of the Public Information Act, we do not believe it necessary to consider the entirely separate due process reason urged by him to support disclosure in the instant case. To the extent that the letter sent to petitioner did not provide him with the facts on which we decided his complaint, the documents being made available to him by our action here will provide him with the necessary information.

F.C.C. 74–101

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of BROADCAST PLAZA, INC. (ASSIGNOR) AND POST-NEWSWEEK STATIONS, CONNECTICUT, INC. (ASSIGNEE) For Assignment of the License of Station WTIC–TV, Hartford, Conn.	File No. BAPLCT–111

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 5, 1974)

BY THE COMMISSION:

1. The Commission has before it the above-captioned application for consent to assignment of the license of Station WTIC–TV, Hartford, Connecticut from Broadcast Plaza, Inc. to Post-Newsweek Stations, Connecticut, Inc. (hereinafter referred to as assignee or PNSC). The assignee is a wholly owned subsidiary of Post-Newsweek Stations, Inc. which in turn is a wholly owned subsidiary of The Washington Post Company.

2. Post Newsweek Stations, Inc. is presently the parent of the licensees of the following television stations (with the American Research Bureau market ranking indicated):

Call letters and location:	*ARB ranking*[1]
WTOP–TV (Channel 9), Washington, D.C	8
WPLG–TV (Channel 10), Miami, Fla	18
WJXT(TV) (Channel 4), Jacksonville, Fla	72

It is also the parent of the licensee of Station WCKY, Cincinnati, Ohio.

3. In 1968, the Commission decided not to adopt proposed rules specifically restricting multiple ownership of television stations in the country's 50 largest markets. Instead, it determined that the problem of concentration in the Top-50 markets should continue to be dealt with upon the basis of case-by-case consideration within the standards of the multiple ownership rules. Under this policy, the Commission expects a "compelling public interest" showing by those seeking to acquire more than three television stations (or more than two VHF stations) in those markets. The compelling showing must be directed to the critical statutory requirement of demonstrating, with full specifics, how the public interest would be served by a grant of the application—that is, the benefits in detail that are relied upon to overcome the detriment with respect to the policy of diversifying the sources of mass media communications to the public. *Report and Order, Televi-*

[1] As published in the 1972–73, *Television Factbook*, Stations Volume.

sion Multiple Ownership Rules, FCC 68–135, 12 RR 2d 1501 (1968). Since Post-Newsweek Stations, Inc. already has two Top-50 market VHF television stations and Hartford, the city of license of WTIC–TV, is the 12th ARB ranked market, PNSC has submitted the required "compelling public interest" showing in support of its proposed acquisition of WTIC–TV, Hartford, Connecticut.

4. In its showing, PNSC relies on the following "compelling reasons" to overcome the detriment with respect to the policy of diversifying the sources of mass media:

> *One*, the proposed assignment of WTIC–TV will increase the diversity of broadcast media in Hartford by breaking up an existing AM–FM–TV combination; *Two*, the assignee will bring to the operation of WTIC–TV experience and resources particularly suited to strengthening WTIC–TV's service to the public; a fact reflected in the extensive, high quality programming and other proposals and *Three*, grant of the application will not result in any significant concentration of control of the mass media.

DIVERSITY OF BROADCAST MEDIA

5. Stations WTIC AM–FM–TV are currently all licensed to Broadcast Plaza, Inc., which is owned by the Travelers Corporation, a major publicly held Hartford based company with large insurance interests. The assignee will acquire only WTIC–TV. Stations WTIC AM & FM will be sold to a buyer completely unrelated to the assignee or its parent companies, The Ten-Eighty Corporation (BAL–7930, BALH–1864, approved this day). Thus, grant of the assignment will substantially increase the diversity of broadcast ownership in the Hartford area because of the separation of ownership of WTIC–TV from WTIC AM & FM.

6. We have previously held diversity to be a significant factor in approving Top-50 market showings. *Time-Life Broadcast, Inc.*, 33 FCC 2d 1099, 23 RR 2d 1085 (1972) and *Triangle Publications, Inc.* 28 FCC 2d 80, 21 RR 2d 189 (1971). In Triangle, we stated:

> In light of our "one to a market" rule and our efforts to encourage the voluntary separation of AM, FM and TV facilities through the issuance of tax certificates under Section 1071 of the Internal Revenue Code, [separating the ownership of Triangle's three AM–FM–TV combinations and separating Capital Cities' Albany TV from the companion AM–FM outlets] . . . must be regarded as a major public benefit. (28 FCC 2d 80, at 84, 21 RR 2d 189, at 197).

7. Likewise, the increase in diversity of the Hartford market, resulting from assignee's proposal, is a public interest benefit of this application.

STRENGTHENED BROADCAST SERVICE

8. PNSC conducted an extensive two-part survey to determine the programming needs of the WTIC–TV service area. Assignee's principals, management-level employees and proposed management-level employees conducted over 400 formal, in-depth, personal interviews with a representative range of community and area leaders. In addition, over 1,100 members of the general public in the areas served by the station were contacted. As a result of this survey, the assignee proposes to strengthen WTIC–TV's service to the public. This will be accomplished by the following:

(1) An increase in the quality and quantity of WTIC–TV's public affairs programming,

(2) An increase in news programming,

(3) An increase in quality and quantity of WTIC–TV's children's programming,

(4) A commitment to providing programming responsive to minority groups' needs and interests and to implementing an effective equal opportunity employment program.

Proposed Programming

9. PNSC proposes to regularly broadcast nine hours and forty-five minutes per week of public affairs programming (out of 137 total hours). This is five and one half hours per week more than the WTIC–TV's 1972 renewal proposal. In addition, the assignee plans special public affairs programs, which will increase total public affairs programming. The assignee plans to add three new regularly scheduled public affairs programs, including a new hour-long, locally produced program broadcast five days a week, and to expand the duration of a fourth program directed particularly at the Spanish-speaking population in the service area.[2] These programs are:

New England Journal (Monday through Friday, one hour length) Interviews, panel discussions or other features will be presented to explore a public issue or other matter of interest or concern—local, regional or statewide in scope. A special effort will be made to provide coverage of minority and ethnic events and subjects of particular interest to specialized groups. Includes "community bulletin board", business and employment opportunities, consumer information, histories of racial and ethnic groups in the service area and health and welfare issues, particularly the problems of the poor.

Agronsky & Company (Half-hour weekly, produced by WTOP–TV, Washington, D.C.), award winning program in which reporters and commentators representing a spectrum of viewpoints engage in a freewheeling discussion of national and international issues.

Everywoman (Half-hour weekly, produced by WTOP–TV, Washington, D.C.) deals with a wide variety of issues, but focuses in particular on the activities, interests and needs and views of women.

Que Hay De Nuevo/What's New, a bilingual Spanish program dealing with issues of public concern which is now broadcast by WTIC–TV in a ten minute segment each week, Sunday morning, and repeated early Wednesday morning. Applicant expects to expand this program to a full half-hour broadcast each Sunday morning.[3]

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[2] According to 1970 Census data, Spanish-surnamed persons are 13% of the Hartford population. One of the needs discovered in the assignee's community survey was the need for more Spanish language programming.

[3] PNSC also plans to continue the following public affairs programming now broadcast by WTIC–TV:

What's Happening, a local half-hour documentary focusing on area problems and activities which is expected to be broadcast in prime time and repeated on Sunday afternoon.

Congressional Report, a locally produced film interview with Congressmen representing the WTIC–TV service area, broadcast every third week.

About People, a local program presented every third week in cooperation with the Connecticut State Chapter of the Anti-Defamation League of B'nai B'rith, which focuses upon a particular social problem from the perspective of the individual.

Challenge, a local program presented every third week in cooperation with the Human Resources Commission of Hartford, which examines the problems of the unemployed, the under-educated and the exploited poor and various proposals for solving these problems.

What's Happening Update, a local program presented five minutes daily, Monday through Friday, involving guest interviews on events or matters of public interest.

Face the State, a local series in which a newsworthy figure is questioned by a panel of local newsmen and newswomen about current issues or news events.

60 Minutes, the hour-long CBS series, which features Mike Wallace and Morey Saeffer presenting brief documentaries or interviews on a variety of public issues.

Face the Nation, the well-known CBS series, consisting of an interview by journalists of a leading public figure on matters of national or international importance.

News Programming

10. PNSC proposes to broadcast a minimum of 16 hours of news programming per week, or three hours per week more than proposed by WTIC–TV in its 1972 renewal. In addition to the increase in total news, there will be an increase in local and regional news from 25% to 35%–40%. PNSC also intends to expand the one-half hour local news, sports and weather, now broadcast at 6:00 P.M. to a full hour program. Unlike many other stations, WTIC–TV serves a wide area that contains several metropolitan communities such as Hartford, New Haven, Springfield, New Britain and Waterbury, each with its own problems and issues. The proposed hour-long early news format is intended to enable the assignee to provide wide area news coverage. In addition, the assignee plans to increase the New Haven, Springfield and Waterbury news bureaus.

11. PNSC also plans to insert NEWS SIGN, a special five-minute news program for the deaf into the CBS MORNING NEWS. While the audio portion of the segment will broadcast news to the viewers, the video will show the news in sign language for the deaf.

12. Other proposed improvements are providing sign-on headlines on the weekends, modifying the noon news to take into account the needs and interests of area women, and making available Post-Newsweek station's Washington studios for taping reports on Federal government developments of particular interest to the viewers in the WTIC–TV service area. Local and area investigative news reports are also proposed. In addition, as a Post-Newsweek station, WTIC–TV will have access to the reports of the WTOP–TV commentators, who represent a broad spectrum of viewpoints, eg. James J. Killpatrick, Carl Rowan, Hugh Sidey, Edwin Diamond, Dr. Pierre Rinfret.

Instructional and Educational Programming

13. The assignee plans a program series especially designed to enable Spanish-speaking persons to obtain a high school diploma. Because of the many Spanish-speaking persons within their service areas, the Post-Newsweek stations have undertaken to produce a Spanish version of the 60-program series, *Your Future is Now—The High School Equivalency Test*. It is planned that WTIC–TV will produce a number of these programs and that it will present them three mornings each week.

14. PNSC, also, intends to produce local instructional specials of particular interest for the WTIC–TV service area, eg. drama, dance and music performances from the Hartford Arts Festival and a production from Trinity College Chapel, W. Hartford. Through Post-Newsweek Stations, WTIC–TV will be able to present other series and individual programs of an instructional nature, eg. *George Washington's Mount Vernon, Williamsburg: A Colonial Christmas* and *From Bull Run to Appomattox*. In addition, Post-Newsweek stations have acquired in the past and will continue in the future to acquire recorded series such as *Black African Heritage* and the B.B.C.'s *Civilization*.[4]

[4] The assignee also intends to continue to carry *Captain Bob, Camera Three, On Campus/On the Agenda, Sunrise Semester, Untamed World, In the News and Audubon Wildlife Theatre* which are instructional series currently broadcast by WTIC–TV.

Religious Programming

15. The assignee intends to add four new religious programs to the WTIC–TV Sunday morning program schedule. They are:

Spread A Little Sunshine, a local program to be carried on alternate Sundays, will feature the ministers, choirs and musicians of Black churches in the WTIC–TV coverage area. Spread A Little Sunshine will disseminate information about the role of Black churches as a focal point of such diverse interests as politics and family relations and about their extensive community service projects.

My Neighbor's Religion, a locally produced program which will alternate with Spread A Little Sunshine, will inform the larger community about many smaller and less well-known religious groups within the WTIC–TV service area, such as Buddhism, Mormonism, Christian Science, Jehovah's Witness, Taosim, Islam, Bahi, Hinduism, Eastern Orthodox, German Evangelical, Shinto, Shaker, Mennonite and Spiritualism.

Another new weekly series is Mass for Shut-ins. To be produced by WTIC–TV in cooperation with the Catholic Archdiocese of Hartford, this program will present a live Catholic mass each Sunday.

One Reach One, produced by the Episcopal Radio/TV Foundation, will offer Christian solutions to various problems presented in everyday life.[8]

Children's Programming

16. PNSC and the Post-Newsweek stations assert that they have a deep concern for the special problems and responsibilities associated with the broadcast of children's programming. To meet this special responsibility at WTIC–TV, the assignee intends to add two new children's programs, now broadcast by other Post-Newsweek stations—*Doing/Being* and *Arthur and Company*—and a new program—tentatively entitled *Reading*. *Doing/Being* is aimed at the junior and senior high school age group and features young people engaged in some community oriented project. Approximately one-half of these programs will be produced locally by WTIC–TV. *Arthur and Company*, produced by Station WPLG–TV, Miami, poses familiar ethical and behavioral problems which are resolved by puppets. There is also a segment of this program which depicts the life-styles of children growing up in different parts of the United States. *Reading* is an experimental effort to use television to help children read. The dialogue in script form for each program will be issued free to school children on the day of broadcast.

17. PNSC also intends to obtain or produce a number of special children's programs for WTIC–TV such as the *Family Classics* series, *Vision On* (a B.B.C. program for deaf children) and *The Golden Vanity* (an opera for children). In addition, WTIC–TV will adopt the Post-Newsweek station's special policies with respect to commercial content of children's programming. These policies are described below.

Programming to Serve Minority Interests

18. The assignee has pledged to fulfill the minority programming commitments entered into by the assignor with the Hartford Communications Committee in connection with WTIC–TV's last renewal application. In addition, assignee proposes to go beyond that agreement in its programming. The public affairs discussions on the locally produced *New England Journal* are planned to help meet the ascer-

[8] **PSNC will continue to carry WE BELIEVE, LAMP UNTO MY FEET and LOOK UP AND LIVE and will maintain the station's policy against paid religious programming.**

tained need for greater communication and understanding among the various groups of myriad backgrounds in the station's service area. These public affairs discussions will both treat minority problems and discuss general problems from a minority viewpoint. Segments of *New England Journal* will be devoted to the cultural traditions of the various minorities. The religious series *My Neighbor's Religion* will explain and give expression to the diverse beliefs of minorities as well as others.

19. The interests of Blacks will also be served not only by many segments of *New England Journal* and other regular programs, but also by various specials. Post-Newsweek stations have presented specials like *Black Heritage*, *Whitney Young, Jr., a Memorial*, and *Mrs. Martin Luther King's Sermon in London*. In addition, the new religious series *Spread a Little Sunshine* will focus on the services and activities of various Black churches in the area.

20. The interests of Spanish-speaking persons will be served by the expanded *Que Hay de Nuevo/What's New* and the Spanish version of *Your Future is Now—The High School Equivalency Test*. The Spanish speaking viewers will also be served by proposed specials and certain bilingual community announcements.

21. Women's needs and interests are to be served on various segments of *New England Journal*, particularly segments on consumer matters and employment opportunities. Also, *Everywoman* will be devoted to the interests and needs of women.

Other Public Service Benefits

22. The assignee proposes to honor the commitments entered into by the assignor in renewal negotiations with the Hartford Communications Committee which concerns employment of minority group members and women and it makes further proposals (in line with efforts at other Post-Newsweek stations) to achieve minority employment goals. The assignee also proposes programs and advertising standards which it characterizes as "more stringent" than those embodied in the Television Code of the National Association of Broadcasters. An example of this is its policy on non-network children's programming. This policy includes (1) a maximum of eight minutes of commercials in any sixty minute period of non-network children's programming, (2) no commercials within a non-network children's program of one-hour's duration or less, commercials being clustered at the beginning and end of the programs and (3) no appearance of Post-Newsweek children's program personalities in advertising.[6]

Analysis

23. The Commission has previously considered qualitative and quantitative improvements in a television station's public affairs programming and news programming to be "compelling public interest factors" in considering past Top-50 market showings. *Chris-Craft Industries, Inc.*, 24 R.R. 2d 729 (1972), *Time-Life Broadcast, Inc.* supra. *Triangle Publications, Inc.* supra. *John Hay Whitney*, 28

[6] PNSC also proposes a number of changes in the station's Entertainment Programming such as *The Cinema Club*, a film series (to which film notes will be available cost-free) and certain entertainment specials.

F.C.C. 2d 736, 21 R.R. 2d 417 (1971) and *Metropolitan Television Co.*, 13 F.C.C. 2d 479 (1968). The addition of three new regularly scheduled public affairs programs, including an hour-long locally produced program broadcast five days per week, and the expansion of a fourth program directed particularly at the Spanish-speaking population are certainly public interest benefits inuring to the WTIC–TV viewers. The following graphic depiction clearly shows the increase in public affairs and news which would result from assignee's proposals. It also compares PNSC's proposal with the other stations in the market and with the latest median percentages of other network VHF affiliates in, Top-50 markets, with over $5 million in revenues. (*Third Further Notice of Inquiry, In the Matter of Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Process*, Docket No. 19154, released November 30, 1973).

[In percent]

	Assignee's proposal	WTIC–TV's 1972 renewal proposal	Docket 19154 (Nov. 30, 1973) Median-VHF Affiliate—revenue over $5,000,000	WHNB–TV channel 30	WHCT–TV channel 18	WTNH–TV channel 9	WATR–TV channel 20
Public affairs	7.1	6.0	5.3	6.0	6.9	3.4	1.8
News	11.7	10.0	10.3	10.0	3.9	6.5	6.8
Local	18.9	14.6	12.2	14.6	51.2	12.7	2.5
Local 6–11 p.m.	17.1	12.9	11.8	12.9	71.4	10.0	2.9

24. In *John Hay Whitney*, supra., one of the factors the Commission relied on was the assignee's proposal of an additional one-half hour of children's programming each week. Here, the applicant proposes to add three new weekly children's programs, including two hour long programs and an innovative series intended to aid children in learning to read.

25. In *Triangle Publications, Inc.* supra., and *Taft Broadcasting Company*, 17 F.C.C. 2d 876, 16 RR 2d 263 (1963), we recognized the applicant's substantial programming commitment to Black and Spanish-surnamed minority groups to be a public benefit factor. PNSC has specifically developed a number of programs to air the views, problems and culture of Blacks, Spanish-surnamed and other minority groups, as well as women. Assignee has also made significant commitments to upgrade employment opportunities for minorities and women.

26. In addition, PNSC proposes to improve instructional, educational and religious programming to the WTIC–TV service area. This should be considered an important benefit to the viewers in WTIC–TV's service area. The Spanish version of *Your Future is Now—The High School Equivalency Test* should be particularly helpful to the large Spanish-speaking population in the station's service area. The broadcast of religious services from Black churches, a program to inform the viewers about various religious beliefs, the *Mass for Shut-Ins* and *One Reach One* should add a new dimension to the WTIC–TV religious programming schedule.

CONCENTRATION OF CONTROL OF THE MASS MEDIA

27. The assignee has adequately demonstrated that a grant of the application will not result in significant concentration of media ownership. It has submitted data and exhibits demonstrating that there are a plethora of competing media, broadcast and print, penetrating the station's service area.[7] Fifty-three other television stations place, or are authorized to place, a predicted Grade B signal over at least part of WTIC–TV's Grade B coverage area. Seven to sixteen operating television stations place a Grade B or better signal over the city of Hartford, the Hartford SMSA and Hartford and New Haven counties. There are fifteen television stations and one hundred ten radio stations authorized to communities within the WTIC–TV service area, and there is an unused television allocation in both Hartford and New Haven. Of these, eight television stations and sixteen radio stations are licensed to communities within the Hartford SMSA. Assignee has submitted coverage maps graphically showing the contours of the other television stations falling within the contour of WTIC–TV.

28. There are at least twenty-seven daily newspapers, six Sunday newspapers and ninety-three weekly and shopping newspapers published in communities with the WTIC–TV service area. The total circulation within the WTIC–TV service area of the twenty-seven daily newspapers is 1,005,421, and the total weekly circulation of the weekly and shopping newspapers within that area is 458,883. Fourteen of these daily newspapers and five Sunday newspapers are published in either Hartford or New Haven, with total circulation of 299,594 in Hartford County and 252,151 in New Haven County. Residents of the WTIC–TV service area also have access to daily and Sunday newspapers published outside the WTIC–TV service area, including eight that have daily or Sunday circulations of more than 5,000 copies within the area. The daily circulation of *The Washington Post*, in the WTIC–TV service area (published by The Washington Post Company) is 215, which includes 61 in Hartford County and 38 in New Haven County.

29. "Standard Rate and Data Service", lists approximately 250 magazines and publications with a total circulation of almost 4,800,000 in WTIC–TV's service area and over 3,200,000 in the Connecticut Counties within the service area. *Newsweek* magazine, which is published by a wholly-owned subsidiary of The Washington Post Company, has a circulation of 56,883 in WTIC–TV's service area. There are several general circulation publications containing news and public affairs content that have larger circulation than *Newsweek* in the WTIC–TV service area,[8] i.e. *Time*, 104,045, *Scholastic Magazine*, 73,823 and *Reader's Digest*, 284,341. While *Newsweek's* circulation in the service area is certainly significant, in comparison to the circulation and numbers of other publications serving the area and put in the perspective of the total service area population of 3,357,898, the *Newsweek* circulation of 56,883 is certainly not of crucial significance.

[7] The WTIC–TV service area includes all the countries in Connecticut except Fairfield, the Massachusetts counties of Hampden, Hampshire, Franklin and Berkshire and the eastern portion of Suffolk County, New York.

[8] Standard Rate and Data Service, Circulation 1972.

30. PNSC has submitted a study comparing the Post-Newsweek stations, after the acquisition of WTIC-TV, with other multiple owners. It lists eighteen other television multiple owners who have three of more VHF stations in the Top-50 markets (12 have at least four Top-50 market VHF stations). In terms of population served by multiple owners, Post-Newsweek stations, would, after acquisition of WTIC-TV, rank 19th on the basis of combined ADI TV homes, 17th on the basis of population in the standard metropolitan statistical areas of the principal cities of license and 13th on the basis of combined ARB net-weekly circulation.

Nine individual television stations each have a net-weekly circulation greater than the combined net-weekly circulation of all the Post-Newsweek television stations together, assuming acquisition of WTIC-TV.[9]

31. PNSC submits that there is no question as to regional concentration of control resulting from the WTIC-TV acquisition, since WTIC-TV's transmitter is 298, 933 and 1,171 miles, respectively, from the transmitter sites of WTOP-TV, WJXT-TV and WPLG-TV. Assignee also asserts that each of the other Post-Newsweek stations, and especially each of its two existing Top-50 market stations is in a highly competitive market.

(a) WTOP-TV: There are five operating commercial and two operating non-commercial educational stations in the Washington, D.C. area. There are 18 television stations, numerous radio stations and a wide range of printed media voices within WTOP-TV's Grade B contour.

(b) WPLG-TV: There are five operating commercial and three operating non-commercial educational television stations in the Miami area. There are 16 television assignments in its Grade B contour and many radio stations and local and area publications in this region.

(c) WJXT-TV: There are three operating commercial television stations and an operating non-commercial educational station in the Jacksonville, Florida market, in addition to numerous other media voices. Jacksonville was ranked 72nd in net ARB weekly circulation in 1972.

CONCLUSION

32. PNSC proposes many public interest benefits which would result from a grant of the subject application. A grant of the application will significantly diversify mass media ownership in the Hartford area by breaking up an existing AM-FM-TV combination. *Time-Life Broadcast, Inc.*, supra, and *Triangle Publications, Inc.*, supra.

33. The assignee proposes substantial qualitative and quantitative improvements to WTIC-TV's programming. PNSC proposes to more than double the station's regular public affairs programming, in addi-

[9] As reported in the *Television Factbook*, Stations Volume No. 42, 1972-3 Edition: WNBC-TV, New York, 5,679,700; WCBS-TV, New York, 5,636,400; WABC-TV, New York, 5,284,500; WNEW-TV, New York, 5,237,900; WPIX-TV, New York, 3,855,200; WOR-TV, New York, 3,802,900; KNXT-TV, Los Angeles, 3,399,900; KNBC-TV, Los Angeles, 3,346,600; KABC-TV, Los Angeles 3,276,700. The four Post-Newsweek TV stations (including WTIC-TV) have a circulation of 2,956,300.

tion to numerous proposed specials; locally produced, produced at other Post-Newsweek stations and independently produced. *Cris-Craft Industries, Inc., supra., Time-Life Broadcast, Inc., supra.* and *Metropolitan Television Company, supra.* PNSC also plans to increase WTIC–TV's news programming by three hours per week by doubling the station's weekday local prime time evening news programming. Other changes to upgrade the station's news programming and to render more effective wide area coverage are also planned. *Metropolitan Television Co., supra., Time-Life Broadcast, Inc., supra.* and *Cris-Craft Industries, Inc., supra.* Children's programming will also be significantly improved with the planned addition of *Doing/Being, Arthur and Company* and *Reading. John Hay Whitney, supra.* The assignee proposes new or expanded program series to cater to the needs of minority groups and women as well as other proposals to serve these groups. *Triangle Publications, Inc., supra.* New instructional and educational programming will be introduced. Religious programming will be upgraded with the introduction of three locally produced programs, plus a new recorded religious program.

34. As amply demonstrated above, the acquisition of WTIC–TV to the Post-Newsweek station group, will not result in any significant concentration of control of the mass media in the Hartford market because of the number of competitive media voices serving the WTIC–TV service area. In addition, the other markets served by Post-Newsweek television stations also have numerous media exposure and are widely separated from Hartford. *U.S. Communications of Ohio, supra., Cris-Craft Industries, Inc., supra., John Hay Whitney, supra., Triangle Publications, Inc., supra.* and *Metropolitan Television Co., supra.*

35. In view of the foregoing, we conclude that PNSC has made the required compelling showing that the public interest would be served by its acquisition of WTIC–TV, Hartford, Connecticut and that waiver of the Top-50 market policy would be consistent with past Commission actions.

36. Accordingly, based upon our determination that the assignee is legally, financially, technically and otherwise fully qualified and that the public interest, convenience and necessity would be served thereby, IT IS ORDERED, that the above captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-102

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BROADCAST-PLAZA, INC., ASSIGNOR AND THE TEN EIGHTY CORP. AND POST-NEWSWEEK STATIONS, CONN., INC., ASSIGNEES Concerning assignment of licenses of stations WTIC-AM-FM and WTIC-TV, Hartford, Conn.	Files Nos. BAL-7930, BALH-1864, BAPLCT-111

JANUARY 30, 1974.

BROADCAST-PLAZA, INC., *3 Constitution Plaza, Hartford, Conn. 06115*
THE TEN EIGHTY CORP., *c/o Robinson, Robinson & Cole, 799 Main Street, Hartford, Conn. 06103*
POST-NEWSWEEK STATIONS, CONN., INC., *Broadcast House, 40th and Brandywine Streets NW., Washington, D.C. 20016*

GENTLEMEN: This is with reference to the applications for assignment of the licenses of Stations WTIC AM & FM, Hartford, Connecticut, from Broadcast-Plaza, Inc. (BPI) to The Ten Eighty Corporation (1080; File Nos. BAL-7930 and BALH-1864) and the application for assignment of the license of Station WTIC-TV, Hartford, Connecticut from BPI to Post-Newsweek Stations, Connecticut, Inc. (PNSC; File No. BAPLCT-111), which the Commission granted on January 30, 1974.

In considering the applications, the Commission noted that there are presently pending before the Equal Employment Opportunity Commission (EEOC) two discrimination complaints; one against WTIC-TV alone and one against WTIC AM-FM & TV. In addition to proposing affirmative Equal Employment Opportunity Programs, both 1080 and PNSC state that they will:

> * * * promptly terminate any practices engaged in by the assignor in the operation of . . . [the stations] . . . that are adjudicated to be in violation of Title VII of the Civil Rights Act of 1964 as a result of the complaints . . . and that it [they] will take any affirmative action (other than the payment of money damages, if any, which remains the obligation of the assignor) that may be required with respect to . . . [the complaintants] . . . by such adjudication.

In view of the above commitments and the representations contained in assignees' Equal Employment Opportunity Programs, we have determined that the complaints filed with the EEOC should not be a bar to the assignment of the licenses of Stations WTIC AM-FM & TV.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
CARTER PUBLICATIONS, INC.
Concerning Notice of Apparent Liability
for Forfeiture relating to the operations
of Station WPAB, Fort Worth, Texas.

JANUARY 23, 1974.

CARTER PUBLICATIONS, INC.,
Radio Station WBAP,
Box 1780,
Fort Worth, Tex. 76101

GENTLEMEN: This constitutes Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

A field investigation into the operation of WBAP was conducted in May 1973. The investigation revealed several instances of apparent violation of Section 73.112(a)(2) of the Commission's Rules and Regulations in that the licensee failed to make entries on the program logs showing the total duration of commercial matter in each hourly time segment (beginning on the hour), or the duration of each commercial message (commercial continuity in sponsored programs or commercial announcements) in each hour.

During the investigation the licensee supplied the Commission with tape recordings made by the licensee of WBAP programming. A comparison of the program material on the tapes was made with WBAP program logs for the same period; and as a result, the following apparent violations were noted:

(a) On March 15, 1973, at approximately 1:55 a.m. WBAP disk jockey Bill Mack [1] promoted his paid personal appearance at the Pink Panther nightclub for 22 seconds. The evidence indicates that Mack received $200 for his appearance. The program log reflected an entry for "Bill Mack Promo—Live" and an entry of 10 seconds in the "CM time" [commercial matter—duration] column. However, the duration entry had been marked out. On the same morning, at approximately 3:41 a.m., Mack plugged his various commercial appearances at local nightspots for one minute, 57 seconds. (Only "Bill Mack Promo" as noted above was logged.) In each of the cases set out above, there were no entries on the WBAP log to reflect the duration of commercial matter in each announcement in apparent violation of Section 73.112(a)(2) of the Commission's Rules.

(b) On March 23, 1973, at approximately 4:21 a.m. Mack promoted his paid personal appearances at various nightclubs and amusement

[1] Mack's legal name is Bill Mack Smith, but he is referred to herein as Bill Mack to avoid confusion.

attractions. The total duration of the announcement was two minutes, five seconds, during which numerous businesses were mentioned. However, the WBAP program log reflected no entries of any kind that could be associated with the announcement,[2] in apparent violation of Section 73.112 of the Rules. It should be noted that Mack announced that "these are commercial appearances—we're compensated for all commercial appearances."

(c) On April 5, 1973, Mack had as his guest on his show country and western recording artist Donna Fargo. Between 11:00 p.m. and midnight, Mack interviewed Ms. Fargo, discussed her appearance at a local amusement center, Six Flags over Texas, and her new album on Dot Records. Mack ended the interview by playing one of his guest's selections from the album. This conversation and song lasted 11 minutes, five seconds. Following this program segment, a commercial announcement (shown on the log as "Dot Records—Donna Fargo (Tag 3)" containing 60 seconds of commercial matter) was broadcast which promoted Ms. Fargo's appearance at Six Flags and her album. In view of the proximity of the scheduled announcement and the conversation and song played earlier, it is apparent that total commercial duration of 12 minutes, 5 seconds should have appeared on the program log. Since no such entry appeared, the licensee apparently violated Section 73.112 of the Rules.

(d) On April 9, 1973, disk jockey Don Thomson promoted (for 23 seconds) his paid personal appearance (Thomson received $200) at Circle M Western Wear in Azell, Texas. Substantially the same announcement was made at approximately 12:18 p.m. The program log for that day reflects only the entry: "Don Thomson Promo—Live"; thus in omitting any reference in the log to commercial duration, the licensee again apparently violated Section 73.112 of the Commission's Rules.

In a letter dated July 3, 1973, the licensee admitted that "a possible conflict of interest has existed between the duties of WBAP employees and outside activities of certain WBAP announcers who are paid to appear at various dances, shows, etc., which they are permitted to promote on the station." The licensee indicated that it had established a policy to insure compliance with Section 317 of the Communications Act which limited its announcers' promotional activities to one 10 second announcement an hour which was entered on the program logs, and which required the announcers to announce that they were making a "commercial appearance." Since the investigation, the licensee stated that it reviewed its policies and took further steps to insure compliance in the future.

The information noted above (and the WBAP program logs) indicate that the licensee considered the disk jockey promotional announcements as containing commercial matter; thus requiring an entry reflecting the duration of commercial matter in each announcement.[3]

[2] Several "Bill Mack Promos" had been logged, but they were all marked off the log and initialed, apparently by Bill Mack.

[3] Don Day, WBAP program director, stated that he had instructed the disk jockeys on August 11, 1972, that any mentions of personal appearances should be logged as commercial announcements.

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The Commission set forth its policy in the area of logging "plugs" for appearances by station disk jockeys in *KOKA Broadcasting Co., Inc.*, FCC 71–232, 21 RR 2d 981, 983 (1971):

As we have stated, the broadcasting of extraneous, or "ad lib" matter to promote a show or dance represents commercial matter, and must be logged as such. *KISD, Inc.*, 22 FCC 2d 833, 838–839 [18 RR 2d 1187] (1970); *Old Dominion Broadcasting, Inc.* (*WANT*), 24 FCC 2d 813 (1970); *Baron Radio, Inc.* (*WENZ*), 24 FCC 2d 475 (1970) and 25 FCC 2d 395 (1970). In addition, the conjunctive playing of records or artists scheduled to appear at the promoted show or dance also constitutes commercial matter for purposes of the Commission's logging requirements.

In view of the large differences between the logged duration and the actual duration of commercial matter as measured on the tape recordings, we have determined that pursuant to Section 503(b)(1)(B) of the Communications Act of 1934, as amended, you have incurred an apparent liability for forfeiture in the amount of $4,000 for willfully or repeatedly failing to observe the provisions of Section 73.112 of the Commission's Rules and Regulations in the operation of Station WBAP. This proceeding is confined to those violations occurring within one year preceding the issuance of this Notice of Apparent Liability.

Under Section 1.621 of the Commission's Rules, you may take any of the following actions in regard to this forfeiture proceeding:

1. You may admit liability by paying the forfeiture within thirty days of receipt of this Notice. In the case you should mail to the Commission a check or similar instrument for $4,000 made payable to the Federal Communications Commission.

2. Within thirty days of receipt of this Notice you may file a statement, in duplicate, as to why you should not be held liable or why the forfeiture should be reduced. This statement must be signed by the licensee; by a partner, if the licensee is a partnership; by an officer, if the licensee is a corporation; or by a duly elected or appointed official, if an unincorporated association. The statement may include any justification or any information that you desire to bring to the attention of the Commission. After consideration of your reply the Commission will determine whether any forfeiture should be imposed, and, if so, whether the forfeiture should be imposed in full or reduced to some lesser amount. An order stating the result will be issued.

3. You may take no action. In this case the Commission will issue an order of forfeiture after expiration of the thirty-day period ordering that you pay the forfeiture in full.

By Direction of the Commission,
Vincent J. Mullins, *Secretary*.

F.C.C. 74–75

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
CARTER PUBLICATIONS, INC.
Concerning Conflicts of Interest Involving Employees of Station WBAP, Fort Worth, Tex.

JANUARY 23, 1974.

CARTER PUBLICATIONS, INC.,
Radio Station WBAP,
Box 1780,
Fort Worth, Tex. 76101

GENTLEMEN: This concerns the Commission's field investigation into the operation of Station WBAP, Fort Worth, Texas. The investigation revealed apparent conflicts of interest concerning WBAP disk jockeys Bill Mack Smith [1] (known on the air as Bill Mack) and Don Thomson. The evidence indicates that WBAP made a practice of permitting its disk jockeys to promote their own records, products, and personal appearances on the air in a manner which is apparently not in compliance with the Commission's policies, and the public interest.

Evidence obtained in the investigation revealed that until April 27, 1973, the licensee made a practice of permitting Mack and Thomson to promote at no cost without restrictions outside business interests in which they had a personal interest. On numerous occasions Bill Mack promoted his book, *Spins and Needles*, and his record, "Today I'm Bringing You Roses," on WBAP, and offered the items for sale to his listeners.[2] Further, it appears that WBAP permitted both Mack and Thomson to play recordings in which they had a talent or financial interest, records produced or performed by their associates, and records for which they had written "liner" notes for the record albums. Mack was allowed to play a role in a movie and later to feature the movie's producer as a guest on his program.

During the investigation, tape recordings of WBAP programs made by WBAP were submitted to the Commission. An analysis of the tapes shows that some disk jockeys, especially Bill Mack, gave extensive "free plugs" on WBAP. For example, Mack on numerous instances mentioned on his show certain recording artists and where they were currently appearing. On March 22, 1973, Mack spent over a minute plugging The Western Place, a nightclub in Dallas, where

[1] Referred to herein as Bill Mack.
[2] In a separate proceeding we have found the licensee apparently liable for violations of the program log rules concerning its failure to log the correct duration of commercial matter regarding announcements of this type.

Mack appears regularly. There were no entries on the program log reflecting such an announcement. A further aggravating factor in this case is evidence that throughout the time when its employees made "free plugs," the licensee required promoters not associated with it to pay regular rates for their advertising time on WBAP.

In a letter dated July 3, 1973, the licensee responded to certain questions raised during the investigation. In the letter the licensee stated that Bill Mack was employed in 1969 as a disk jockey by WBAP to experiment with country and western music on the station during the time when WBAP operated on the 50,000 Watt clear channel frequency it now holds full-time.[3]

The licensee stated, that because WBAP had no country and western music library, Mack brought his personal library to the station "which formed the nucleus of the music he played." The licensee stated that Mack was given wide latitude in presenting his program because of his "reputation in the industry and his unique knowledge of country and western music." Mack was permitted to select his own music for his program including practically any record he wished to play. However, the licensee stated, management was confident that it could determine whether Mack was abusing his privileges through the thousands of telephone calls and letters the station receives concerning Mack's program. In the letter the licensee admitted that a possible conflict of interest had existed at WBAP "between the duties of WBAP employees and outside activities of certain WBAP announcers who are paid to appear at various dances, shows, etc., which they are permitted to promote on the station." The licensee set out with particularity its policies and procedures to insure compliance with Section 317 of the Communications Act which indicated that "plugs" would be logged as commercial and would be allowed only under the scrutiny of management. The licensee then admitted further possible conflicts of interest and outlined its policies for remedial action:

> A further possible conflict of interest has also existed between the duties as WBAP employees and the outside activities of two WBAP announcers, Bill Mack and Don Thomson, in that they have personal financial interests in records. To insure compliance with Section 317 with respect to this matter, the station has prohibited Thomson from playing any record in which he has a financial interest unless the playing of that record has been authorized by the station's Operations Manager. This policy has been in effect since WBAP switched to a country and western format. Where Thomson's records have been played, we believe his interest in the record is apparent from the playing of the record itself and no specific announcement of his interest was required. In the future, if a record in which Thomson has an interest is played and his interest is not readily apparent from the record itself, an appropriate disclaimer will be broadcast.
>
> With respect to Mack's records, we have instituted the following controls:
>
> a. At the end of his duties each morning, Mack will be required to submit to the Operations Manager a list of all records played while Mack was on duty that were not on the WBAP play list. Mack will also be required to report the number of times each record was played.
>
> b. The Mack program will be periodically recorded and Mack's record list checked against the recording to verify the accuracy of his reports.

[3] On April 22, 1970, the Commission granted an application for modification of license to allow WBAP to operate full-time on 820 kHz—50kW. Prior to that time WBAP shared to 820 frequency with WFAA, Dallas, which now operates full time with 5 kW on 570 kHz.

As in the case of the Thomson records, we believe that Mack's interest is readily apparent from the record itself and no announcement is required. However, appropriate disclaimers will be broadcast where Mack's interest in a record is not so readily apparent. We further believe that the controls we have instituted will insure that Mack continues to make his record selections free of any influence from any financial interest he may have in the records.

The licensee then set forth other programming policies and procedures with respect to the insulation of its employees from the program selection process or the broadcast of announcements which may involve a conflict of interest.

Since the Commission's inquiry, we have adopted a monitoring procedure which is designed to further insure that all announcers adhere to the station's record selection policies.

The Operations Manager, Don Day, is responsible for the selection of the records to be played. Day has no outside financial interests which may create a possible conflict of interest and will not be permitted to acquire any such interest in the future. In addition, Day is now being required to certify that each record he authorizes has been selected "on the basis of my judgment as to the intrinsic worth of the music and the audience's probable interest in it." Day has also been instructed that he is to exercise special care in authorizing the playing of records in which WBAP announcers have a financial interest and that he is not to authorize any such records unless (1) they have been approved for play by other stations, (2) there are appreciable sales of the record or (3) there are appreciable requests for the record.

In the case of Bill Mack, we have decided to continue to permit him to play records on his program that have not been authorized by the Operations Manager. We have, however, adopted stringent additional controls to further insure that his record selections do not involve a conflict of interest.

* * * * * * *

If, as a result of these measures, it is determined that Mack is repeating a record not on the play list, that record will be auditioned by the Operations Manager, who will determine if its continued play will be authorized. If continued play of the record is not authorized, Mack will not be permitted to play it again.

* * * * * * *

Our review has resulted in a series of memoranda * * * which * * * have reconfirmed and clarified our existing policies, and, where appropriate, instituted new policies to insure that all the station's program material continues to be selected on the basis of its merit and that those associated with program material are not in any way influenced by their personal interests in making the decisions.

Although there is no showing that consideration for the broadcast of the "plugs" noted previously was received either by the disk jockey making them or the licensee, such conduct is fraught with serious questions concerning licensee control and supervision over material broadcast. As you admit, substantial questions of conflict of interest have existed at WBAP.

As we have previously stated, licensees have an obligation to prevent improper use of their facilities. In regard to employees who are in a position to influence program content and who also are engaging in outside business activities which may create a conflict of interest with their roles as employees, we stated in our letter to *Crowell-Collier Broadcasting Corporation*, 14 FCC 2d 358 (1966), as follows:

* * * if conflicts of interest in the form of outside economic interests of station personnel are not prohibited, then the personnel involved should be insulated from the process of program selection. When complete insulation cannot be effected, a licensee should take extraordinary measures to insure that no program matter is presented as a result of such practices.

In other words, the licensee of a station . . . must be extremely sensitive to the risks of improper influence. He cannot stop with the promulgation of policies and standards, however praiseworthy, but must be vigilant in their continuing enforcement and strengthening to meet situations as they develop.

We have consistently required licensees to insulate from the process of selecting program content their employees engaged in outside activities which may represent a conflict of interest. See *KOKA Broadcasting Co., Inc.*, FCC 71–232, 21 RR 2d 981 (1971).

We believe in failing to insulate disk jockeys Bill Mack Smith and Don Thomson from the program selection process you fell far short of the degree of responsibility expected of a licensee, and you are strongly admonished for your conduct in this regard.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1231

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
COLUMBIA BROADCASTING SYSTEM, INC.
Concerning Investigations by CBS of Incidents of "Staging" by Its Employees of Television News Programs

NOVEMBER 26, 1973.

COLUMBIA BROADCASTING SYSTEM, INC.,
51 West 52d Street,
New York, N.Y. 10019

GENTLEMEN: This letter is with further reference to the Commission's letter to you of September 27, 1972, concerning allegations of news "staging" by CBS employees made in hearings before the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce of the House of Representatives, and subsequent correspondence on this subject, with particular reference to the July 2, 1973 letter of your Deputy General Counsel setting forth the view of CBS that the Commission may not require CBS to submit its complete files on the investigation conducted by CBS of the alleged incidents of staging. A brief summary of the history of this matter will be helpful as a setting for our conclusions.

On August 8, 1972 the Chairman of the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce, referring to hearings recently completed concerning alleged instances of staging and rigging of television news programs, requested the Commission's comments on the issue of the presentation of prearranged or simulated events as bona fide news. On September 29, 1972, the Commission responded with a review of its policies in this area, and also advised the Subcommittee Chairman that because some of the allegations heard by the Subcommittee raised questions as to the implementation of licensee guidelines, and because the allegations appeared to rest upon extrinsic evidence of deliberate distortion or staging, we were addressing letters of inquiry to two network licensees. The Commission wrote to you on September 27, 1972 requesting, with respect to six programs, your comments on the allegations made at the hearings, a statement of whether the actions of your employees were consistent with your policies, a description of your efforts to assure compliance with your policies, and a copy of your report on your investigation of each of the six incidents. The six programs were: (1) "*Pop Wine*," a CBS news story of June 1971 dealing with the drinking of cheap wine by young people; (2) *Dynamite Story*, broadcast by CBS News in October, 1970, dealing with the ease with which dynamite could be obtained in certain areas; (3) "*Powderpuffs and Handcuffs*," documentary broadcast by Station KNXT in June 1968, and sub-

sequently, concerning the work of female law enforcement personnel in Los Angeles; (4) *Branigan Speech*, a CBS news broadcast in May, 1968 of a brief sequence (26 seconds) of remarks by Governor Branigan of Indiana, then a candidate for nomination for the Presidency; (5) *Orange County Marine Life Story*, a KNXT news broadcast in December, 1966, originally believed to deal with water pollution, but described by you as concerning the poisoning of marine life by students; and (6) "*Rod Serling's Wonderful World of . . . Prejudice*," a KNXT program of January, 1970 which you state was one of a series of "human foibles" produced by the KNXT Program Department.

The CBS response of November 21, 1972 to the Commission's inquiry reported that each of the six incidents had been investigated, with separate investigations by CBS News and the CBS Television Stations Division, including information developed by the CBS Law Department. In essence, CBS stated with respect to the six incidents that, (1) portions of the Pop Wine broadcast had been staged (although conflicts on one allegation could not be resolved), and a CBS news correspondent had been suspended for three months as a result; (2) there was a clear violation of CBS policies in filming the Dynamite Story, and a CBS correspondent (the same one involved in Pop Wine), had been suspended for approximately three and one half months (a separate suspension); (3) on "Powderpuffs and Handcuffs," sheriff's deputies who were shown doing undercover work were actually "deputies who had previously been assigned to undercover duty but were not so assigned at the time of the filming," and the narration could have left an erroneous impression. The allegation that KNXT subsequently broadcast a news program which showed the two sheriff's deputies and described them as prostitutes could not be substantiated; (4) the allegation that CBS News arranged for Governor Branigan to repeat a portion of a campaign speech because the CBS crew had arrived too late to record the original speech could not be substantiated. The recollections of the participants were dim, and none acknowledged making such arrangements; (5) the allegation that in "approximately 1968" dead sea animals were obtained from the University of California to simulate animals killed by pollution could not be susbtantiated, and there is no record of such film being shot or broadcast; (6) the allegations that sequences on the Rod Serling Show purporting to demonstrate prejudice against people with long hair and beards were pre-arranged, had substance because the sequences, taken alone, could have been misunderstood as a record of actual events rather than a "tongue-in-cheek" feature, and management intends to bring this matter to the attention of the general managers of all CBS owned television stations.

CBS further responded to the Commission's letter by describing its efforts to make known to news personnel its operating standards and to enforce compliance with its standards.

Upon receipt of a further request from the Commission for your full investigative report, including all statements obtained from employees and other persons, you furnished additional memoranda prepared by the President of CBS News and the President of the CBS Television Stations Division giving further details on statements made during

your investigation, but you have, particularly by your letter of July 2, 1973, questioned the need for and validity of the Commission's request for additional material. In sum, you challenge the request for statements and memoranda of subordinates as inappropriate and inhibiting to CBS' ability to conduct future investigations of its operations in this area, in view of the need to obtain candid statements from employees upon a basis of confidentiality, and you urge that documents reflecting interviews by or under the supervision of CBS Law Department attorneys and other memoranda prepared by the attorneys in preparation for the House hearings and possible Commission inquiries are protected by the attorney-client privilege and the "work product" doctrine of *Hickman* v. *Taylor*, 329 U.S. 495.

Your letter states initially that there are unresolved questions as to the Commission's proper role with respect to the journalistic practices of broadcasters, but that these basic questions need not be decided in the present context because the Commission's present carefully limited policy on staging has been fully satisfied. You note that the Commission has held that it will not investigate or inquire into allegations of staging in the absence of extrinsic evidence of deliberate staging. You also state that incidents of staging become significant only if the licensee approved or knew of the conduct, or failed to implement a policy against such practices.

With regard to this latter statement, we believe it pertinent to point out more precisely what we stated our policy to be in *Columbia Broadcasting System* ("Hunger in America"), 20 FCC 2d 143, 150 (1969). We stated that in the future we did not intend to defer action on license renewals because of the pendency of complaints of deliberate distortion or staging of news "unless the extrinsic evidence of possible deliberate distortion or staging of the news which is brought to our attention involves the licensee, including its principals, top management or news management." We also stated:

> * * * if the allegations of staging, supported by extrinsic evidence, simply involve news employees of the station, we will, in appropriate cases . . . inquire into the matter, but unless our investigation reveals involvement of the licensee or its management there will be no hazard to the station's licensed status. Such improper actions by employees without the knowledge of the licensee may raise questions as to whether the licensee is adequately supervising its employees, but normally will not raise an issue as to the licensee's character qualifications.

We also noted that we intended to exercise care in entering the sensitive area of charges of news slanting by news employees (20 FCC 2d at 150–151):

> We would stress that in a situation involving a charge of slanting by a news employee, we intend to exercise care in entering this sensitive area. Thus, as set out in the *Letter to ABC, supra*, we do not consider it appropriate to enter the area where the charge is not based upon extrinsic evidence but rather on a dispute as to the truth of the event (i.e., a claim that the true facts of the incident are different from those presented). The Commission is not the national arbiter of the truth. And when we refer to appropriate cases involving extrinsic evidence, we do not mean the type of situation, frequently encountered, where a person quoted on a news program complains that he very clearly said something else. The Commission cannot appropriately enter the quagmire of investigating the credibility of the newsman and the interviewed party in such a type of case. Rather, the matter should be referred to the licensee for its own investigation and appropriate handling. On the other hand, extrinsic evidence that a newsman had been given a bribe, or had offered one to procure some action or statement,

would warrant investigation. So also, should there be an investigation where there is indication of extrinsic evidence readily establishing whether or not there has been a rigging of news (e.g., an outtake or a written memorandum).

However, we also pointed out (20 FCC 2d at 151) that "Rigging or slanting the news is a most heinous act against the public interest—indeed, there is no act more harmful to the public's ability to handle its affairs." And we added, with respect to investigations conducted by licensees, that "The licensee's investigation of substantial complaints referred to it must be a thorough, conscientious one, resulting in remedial action where appropriate (see *Letter to ABC*, 16 FCC 2d 650 (1969)); efforts to coverup wrongdoing by his news staff would raise the most serious questions as to the fitness of the licensee. See *WOKO, Inc.* v. *FCC*, 329 U.S. 223 (1946)."

Thus, although we stated that we did not intend to defer renewal of licenses unless the extrinsic evidence indicated involvement of the licensee or its management, we regard as significant staging or deliberate distortion of news by anyone if the public is substantially deceived about a matter of significance. Indeed, a pattern of repeated acts of this kind by employees may raise questions as to whether the licensee is adequately supervising its employees in this most important area of broadcasting.

To return to the statement of your position, we take account of your review of CBS' policies against staging and your belief that you have conducted "extensive investigations and rendered thorough, comprehensive reports to the Commission," including scripts of the broadcasts and extracts from film logs, where available.

We shall deal first with your contention that a requirement that you submit additional CBS investigative materials would be inappropriate in light of the lawyers' "work product" doctrine of *Hickman* v. *Taylor*, *supra*, and the attorney-client privilege in addition to constituting an undue invasion of the journalistic function. We have considerable doubt that *Hickman* v. *Taylor* is significantly relevant in the present context. That case involved the scope of discovery procedures under the Federal Rules of Civil Procedure, with particular reference to the extent to which a party might inquire into oral and written statements of witnesses or other information secured by an adverse party's counsel in the course of preparation for possible litigation after a claim had arisen. The Court agreed that the attorney-client privilege was not involved, but held that discovery as of right did not apply to statements of witnesses whose identity was well known and whose availability was unimpaired, in the absence of any showing that denial of such production would unduly prejudice the preparation of the case or cause any hardship or injustice. The material was held to fall outside the proper area of discovery and to unduly interfere with the opposing counsel's preparation of his case. Even here, the Court laid down no absolute rule, and stated that not all written materials obtained or prepared by counsel were free from discovery in all cases, although the Court did indicate its view that no showing of necessity could be made in that case to justify production of the attorney's written or oral impressions of witnesses' oral statements. We do not find this ruling particularly helpful here because the Commission is not an adverse party in litigation with CBS seeking statements of witnesses to help it pre-

pare its case, but rather an agency with a responsibility to determine whether a licensee has conducted a complete investigation. The use to which the witnesses' statements are to be put, and the entire context, are therefore entirely different.

We also note that there is considerable doubt whether the attorney-client privilege applies to the statements of subordinate employees of a corporation taken by counsel for the corporation. We note that the Supreme Court saw no application of the privilege in *Hickman* v. *Taylor*, *supra*, although the case involved statements of the party's employees taken by the party's counsel, and it appears that there is a conflict among circuits as to whether the attorney-client privilege applies to statements taken by counsel from subordinate, as opposed to "control group," employees of a corporation. See *Harper & Row Publishers, Inc.* v. *Decker*, 423 F. 2d 487, 490–492 (C.A. 7, 1970), affirmed by a divided Court, 400 U.S. 348.

In any event, the reliance by a licensee upon either the qualified work product privilege or the attorney-client privilege, is not, in our view, a satisfactory response to a Commission request for a full report of a licensee's investigation of alleged improper staging. If, as we believe, the Commission has the right, where the circumstances call for it, to review the adequacy of a licensee's investigation, we cannot permit this process to be frustrated by a statement that employees of the licensee were interviewed by corporate or outside counsel and the claim that these statements are therefore protected against Commission inquiry. Whatever privilege exists the licensee has the power to waive, and we do not think assertion of such a privilege in this context is compatible with a licensee's duty to be forthcoming with information relevant to its operation under the statutory public interest standard. Similarly, we cannot accept the view that Commission oversight of the licensee's investigation will necessarily unduly inhibit the licensee's ability to conduct its investigations or contravene the First Amendment interest in nondisclosure of confidential journalistic material. Such a claim may of course be presented in the context of a particular situation, and we will give it careful consideration. Thus, a licensee could request that irrelevant matter be excised in the interest of protecting uninhibited internal discussions which do not bear directly upon the matter at hand. However, we are not prepared to accede to a blanket claim of confidentiality for a licensee's investigatory files, including statements to counsel, and we think licensees should be prepared to conduct investigations of alleged improper staging in such a manner that they will not respond to a request for full documentation concerning the investigation by falling back upon a general claim of privilege. Adherence to this approach will permit us to continue to rely upon licensee responsibility for investigating most allegations of staging, a course we still believe desirable.

Having rejected your contentions that legal precedent and general policy considerations would justify the withholding of additional investigative materials in this case, we turn now to the question whether, under the circumstances presently existing here—including additional information already furnished by CBS in response to staff requests for further investigation of two incidents—and in light of the Commission's overall policies regarding inquiry into news broad-

casts, further documentation of the CBS investigation of the six incidents is now required.[1]

With respect to the Pop Wine and Dynamite stories, CBS investigation has essentially substantiated the allegations of staging, and CBS has taken disciplinary actions with respect to the person responsible who still is in its employ. Consequently, we see no need for requiring further information with respect to these two incidents. Similarly, further inquiry with respect to the Rod Serling program appears unnecessary in light of the fact that CBS concedes that "the particular sequences of the program, taken alone, might have been misinterpreted by some viewers as representing actual facts rather than a contrived illustration" and the network states that it intends to take "extra precaution . . . in the future to avoid such misimpression," [2] and that this was not a news program and therefore was not subject to the network's guidelines on such programs.

The allegation with respect to the Governor Branigan speech led to an investigation in which CBS apparently interviewed all of its own people with knowledge of the episode and concluded that no disciplinary action was warranted in view of the dim recollections of employees regarding the 1968 event and the fact that no employee acknowledged having asked the Governor to repeat a portion of his speech for the CBS cameras. However, CBS states that three employees believe that a portion of the speech *was* repeated at the request of CBS personnel, and the President of CBS News acknowledges that "Viewed as a whole, this episode is not free from difficulty." We do not disagree with the CBS conclusion that the evidence at this time does not justify disciplinary action, and we are not certain that the public was deceived about a significant matter, even if we assume that CBS personnel did ask the Governor to repeat some of his remarks. This matter would appear to fall within the difficult grey areas of alleged staging to which we referred in *Letter to ABC* (Democratic National Convention), 16 FCC 2d 650 (1969) and *Columbia Broadcasting System* (*WBBM–TV*) ("Pot Party"), 18 FCC 2d 124 (1969). We do note, however, that CBS might well have made an effort to interview Governor Branigan on the matter, or explain why it did not do so.

The "Powderpuffs and Handcuffs" documentary and the Orange County Marine Life news story present more difficult issues because with respect to each of these matters it appears that CBS could have done considerably more than it apparently did in its initial investigation, and failure of CBS to produce all of its investigative material makes it difficult to assess the adequacy of the CBS investigation.

In answer to our inquiry regarding testimony given the Subcommittee on "Powderpuffs and Handcuffs," CBS first responded on No-

[1] We should note here our recognition in *Letter to ABC*, 16 FCC 2d 650, 656–659 (1969) and *Columbia Broadcasting System* (*WBBM–TV*), 18 FCC 2d 124, 132 (1969), that the problem of improper staging of news events can be a most difficult area, and that while there are difficult grey areas and many coming clearly within a licensee's journalistic judgment, the staging of news with which the Commission is concerned is rather the presentation of a purportedly significant event which did not in fact occur, but which is acted out at the behest of news personnel or, as we put it in our letter of September 29, 1972 to Chairman Staggers, "whether the public is deceived about a matter of significance."

[2] Our own view is that CBS has understated the misleading nature of the segments in question, but the facts are fairly clear.

vember 21, 1972, that although two young women pictured and described on the program as "female deputy sheriffs working undercover for the vice squad" were not assigned at the time of the filming to undercover duty, they had previously been assigned to such duty. CBS stated further that it had concluded that "the narration of the segment could have left the impression that the deputies were full time undercover agents at the time of the filming," but that the producer of the broadcast was no longer employed by CBS when the violation came to its attention and, therefore, disciplinary action was not possible. CBS also stated at that time that no substantiation could be found for the allegation that a portion of the documentary film later had been used in a newscast to portray the two women deputies "as ladies of loose morals carrying VD and capable of spreading it, or just prostitutes in general." (Page 122, Subcommittee hearing transcript.)

However, Chief Counsel for the House Subcommittee furnished the staff with affidavits of the two women deputy sheriffs, which denied that they *ever* had been assigned to undercover duty and provided substantial evidence that a portion of the documentary film had been used in a misleading way on a subsequent news program. The staff forwarded copies of the affidavits to CBS and requested further investigation on the matters.

Thereafter, CBS interviewed the two women deputies (apparently for the first time) and made further investigation into other aspects of the case. In a memorandum dated February 12, 1973 and forwarded to the Commission, D. Thomas Miller, President of CBS Television Stations, stated that (i) contrary to the former CBS statement, the two women deputies never had been assigned to undercover duty and had never been trained to do undercover work; (ii) some scenes in the documentary were "staged" in the sense that the women deputies performed certain acts at the direction of Producer Ken Rosen, which was not made clear to the viewing public and therefore was contrary to CBS policy; (iii) on the basis of the affidavits of the two deputies forwarded to CBS by the Commission, CBS had now been able to pinpoint the subsequent use of segments of the original film in a news story broadcast seven days after the original broadcast of the documentary. The film log referred to the news story as "Hippies & VD" and the story dealt with efforts to combat hepatitis and venereal disease in the "hippy centers of Southern California," but the narration covering the re-used segments of film of the women deputies walking along the Strip (one of the "centers") did not refer to them as "ladies of loose morals" or "just prostitutes in general." The writer-narrator of the news story now believes that the film segments from the "Powderpuffs" documentary were used in the news story because "the cameraman was unable to shoot any 'cover footage' which would establish the 'hippie center' theme." Mr. Miller stated that although he was "fairly well convinced that this misuse took place, fixing blame on individuals [for actions taken in June 1968] is not possible," but that CBS would reprimand the management of the KNXT News Department, inform persons who might have contributed to the situation of the seriousness of the violation, and set up temporary proce-

dures "which we hope will prevent a repeat of this error while we search for the best solution to the problem of misuse of film footage."

We turn, finally, to the so-called "Orange County Water Pollution Story," which a CBS sound man testified had been broadcast on KNXT in "approximately 1968" and had portrayed dead sea animals lying on the beach at Emerald Bay as having been killed by water pollution resulting from sewage or industrial waste, whereas in fact the creatures were pickled specimens borrowed from a laboratory at the University of California.

In its response of November 21, 1972 to Commission inquiry, CBS stated that it had obtained no information which substantiated this charge, there was no record at KNXT of such film being shot or broadcast and "the KNXT personnel who might have been involved were interviewed and none recalled any such incident or news report." CBS further stated that a member of the staff of the University of California, Irvine, "who would appear to have been the logical source of such specimens," stated that "the University, which maintains such records, has no record of releasing any sea animals to KNXT."

Since the Subcommittee testimony of Donald J. Keener, former CBS–KNXT sound man, and the CBS response appeared entirely contradictory to each other, the Commission made a brief investigation of its own. Mr. Keener stated that although CBS had contacted him regarding the matter following his appearance before the Subcommittee, it had never asked him to identify the newsreel cameraman assigned to the story with him, and that the cameraman was J. Paul Meeks, now employed by NBC in Los Angeles. When interviewed, Mr. Meeks stated that (i) he remembered the borrowing and filming of the sea specimens on the beach but did not know the context in which the film was presented on the air; (ii) CBS had never questioned him about the matter; (iii) the incident occurred during the last six months of 1966, since that was the only period in which he covered news for KNXT in Orange County. Interviews with two members of the staff of the University revealed that although the University itself maintained no collection of such specimens, a former faculty member, now at another University, had maintained such a collection. When queried, the former faculty member confirmed that he had on occasion lent such specimens to others, although he could not remember the particular incident in question. The former KNXT Orange County reporter who Mr. Keener said was assigned to the story, James Cooper, stated that he could not remember the incident and that Mr. Keener was not working with him in 1968, although he had been in 1966.

The staff furnished CBS with the substance of the above information and asked that it make further investigation. On April 6, 1973, CBS forwarded to the Commission another memorandum by D. Thomas Miller, stating in essence that CBS had made further investigation based on the information furnished by the Commission; that the story to which Mr. Keener referred was broadcast on December 9, 1966 rather than in 1968 and concerned the *poisoning* of sea life at Laguna Beach rather than *pollution* at Emerald Bay; that these facts explained why the story was not uncovered in the previous investigation; that the only records still existing regarding the story were attached, i.e., the film log listing the story as "Laguna Pool Poisoning"

and the script introducing the sound-on-film story. The script merely stated that "the State Department of Fish and Game is investigating 'octopus poaching' along the shores of Laguna Beach." Mr. Miller stated that the film itself was destroyed years ago and there is no transcript of Cooper's sound track or audio recording of the matter broadcast.

Mr. Miller further stated that its second investigation had revealed that the subject matter of the story was not water pollution from sewage or industrial waste, but the concern of Laguna Beach City Councilman (later Mayor) Glenn Vedder over the indiscriminate slaughter of marine life by people (usually high school students) who were poisoning tidal pools in order to kill octupi or other sea life, which then would be taken home or to class for study; that the same former University of California professor who told the Commission he had lent such sea specimens to others from time to time had written a letter to the Councilman on the subject; that Reporter James Cooper learned of the matter, and arranged to borrow the specimens from the professor and shoot a sound-on-film sequence at Laguna Beach with Councilman Vedder, and that Mr. Vedder's recollection is that Mr. Cooper did not misrepresent the borrowed specimens as actual marine life on the beach or otherwise misrepresent facts.

In a subsequent interview with the Commission staff, Mr. Vedder substantially confirmed CBS' new account of the incident. Although no record exists of what Reporter Cooper actually said on the film, and Mr. Keener's recollection still is that the dead sea specimens were presented in a misleading manner (in fact, he cannot recall the presence of Mr. Vedder during the filming), the notations of film used in the script furnished by CBS for the Laguna Beach "octopus poaching" story of December 9, 1966 indicate that Mr. Vedder was shown on the film along with beach scenes, and the description of the story on the film log was "PEOPLE POISON SEA LIFE IN ROCKY POOLS AT LOW TIDE."

In view of the fact that CBS acknowledges fault in the production of the "Powderpuffs" documentary and has furnished additional information at the Commission's request, and in view of the fact that the second CBS investigation into the Orange County story and the Commission's own inquiry indicate that at this time—almost seven years after the fact—no further evidence is available, we doubt the value of further Commission review of additional CBS investigatory materials. We further conclude that no more consideration of the six incidents themselves is required. This conclusion is directed largely by the consideration frequently voiced by the Commission that this is a sensitive area and that we are constantly concerned that our processes do not inhibit licensees' freedom or willingness to present programming dealing with difficult areas facing our society. *Columbia Broadcasting System* ("Hunger in America"), *supra.*

We note here that there is no evidence that officers or managers of the licensee had foreknowledge of, or were responsible for, the staging incidents and instances of misrepresentation which CBS acknowledges to have occurred.[3] In assessing the degree of fault that may be attrib-

[3] Gordon Manning, Vice President of the CBS News Division, arrived late at the Governor Brannigan rally with Walter Cronkite, and both apparently were present when the Governor was filmed by CBS, but, according to the CBS report of its investigation, Mr. Manning denies having asked the Governor to reenact the speech and states that he was unaware that the Governor had made a speech at the same location previously.

uted to the network, we also take account of the fact that during the span of years covered by these incidents, the network and stations licensed to it, such as KNXT, have presented thousands of other news reports or documentaries on which we have received no allegations of staging or deliberate distortion. We recognize that in any operation of such magnitude, involving such a large number of employees, some abuses will occur. We also note that CBS appears to have adequately investigated most of the incidents involved, and has taken disciplinary action where it found infractions of its policies.

However, we are seriously concerned because of the evidence that in two of the six cases CBS did not make a thorough investigation of its own, and discovered facts of significance only after the Commission confronted it with evidence contrary to its original statements and requested further investigation. We do not find a deliberate coverup by CBS of facts regarding these incidents. However, we believe we have ample evidence that CBS failed adequately to investigate all of them and that it should be censured for this failure—particularly in view of the fact that the Commission previously found that CBS had not made an adequate investigation or submitted an adequate investigative report to the Commission regarding charges that its employees staged a "Pot Party." *Columbia Broadcasting System* (*WBBM–TV*), *supra*.

Here again, in the case before us, the evidence indicates inadequate investigations in at least two of the cases. Before making its report to the Commission, CBS apparently did not even interview the two women deputies whose portrayal in "Powderpuffs and Handcuffs" was the subject of the testimony given the Subcommittee. If it had done so, it would have been able to obtain the information it later furnished the Commission on the matter. Similarly, CBS did not even contact the cameraman involved in the Orange County beach incident, although he still was in the Los Angeles area and it could readily have learned his identity. CBS asserts that the fact that the Subcommittee witness stated that the incident occurred in "approximately 1968" prevented it from locating the story in its records. However, even a telephone call to the cameraman on the story would have revealed that it was filmed in the latter part of 1966, and thus would have enabled CBS to make the considerably more thorough investigation which it appears to have made when requested to do so by the Commission on the basis of the Commission's own inquiry.

In short, although, in light of the considerations set forth above, we intend to take no further action regarding the matters cited herein, we wish to make clear (1) that we believe you to have been derelict in the conduct of some of your investigations in this case and (2) that we do not believe that your reliance on the attorney-client privilege and the "work product" doctrine provides a satisfactory basis for proceeding where the Commission leaves to the licensee the task of investigation alleged incidents of staging and must necessarily rely upon a complete report of the licensee's efforts.

Commissioners Johnson and H. Rex Lee absent; Commissioner Reid concurring in the result.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

F.C.C. 74–93

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	CAC–898, OH075;
COMMUNITY TCI OF OHIO, INC., MARTIN'S	CAC–1076, OH164;
FERRY, OHIO, YORKVILLE, OHIO, TILTONS-	CAC–1078, OH165;
VILLE, OHIO, RAYLAND, OHIO, STEUBENVILLE,	CAC–1079, OH166;
OHIO, MOUNDSVILLE, W. VA.	CAC–1077, OH107;
For Certificates of Compliance	CAC–1080, WV162

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 7, 1974)

BY THE COMMISSION:

1. Community TCI of Ohio, Inc., operates cable television systems at the above-captioned communities located in the Wheeling, West Virginia-Steubenville, Ohio, major television market (#90).[1] The systems now provide their subscribers with the following television broadcast signals:[2]

Martin's Ferry and Steubenville, Ohio		*Yorkville, Tiltonsville and Rayland, Ohio*
KDKA-TV	(CBS, channel 2), Pittsburgh, Pa	KDKA-TV.
WTAE-TV	(ABC, channel 4), Pittsburgh, Pa	WTAE-TV.
WIIC-TV	(NBC, channel 11), Pittsburgh, Pa	WIIC-TV.
WQED	(Educational, channel 13), Pittsburgh, Pa	WQED.
WTRF-TV	(NBC, channel 7), Wheeling, W. Va	WTRF-TV.
WSTV-TV	(CBS/ABC, channel 9), Steubenville, Ohio	WSTV-TV.
WKYC-TV	(NBC, channel 3), Cleveland, Ohio	
WKBN-TV	(CBS, channel 27), Youngstown, Ohio	
WYTV	(ABC, channel 33), Youngstown, Ohio	
WFMJ-TV	(NBC, channel 21), Youngstown, Ohio	

Moundsville, W. Va.	
KDKA-TV	(CBS, channel 2), Pittsburgh, Pa
WTAE-TV	(ABC, channel 4), Pittsburgh, Pa
WIIC-TV	(NBC, channel 11), Pittsburgh, Pa
WQED	(Educational, channel 13), Pittsburgh, Pa
WTRF-TV	(NBC, channel 7), Wheeling, W. Va
WSTV-TV	(CBS/ABC, channel 9), Steubenville, Ohio
WDTV	(CBS, channel 5), Weston, W. Va
WWVU	(Educational, channel 24), Morgantown, W. Va
WBOY	(NBC, channel 12), Clarksburg, W. Va

Community has filed applications for certificates of compliance to add to each of the above-captioned systems the following television broadcast signals:

WKBF–TV (Ind., Channel 61), Cleveland, Ohio.
WAUB (Ind., Channel 43), Lorain, Ohio.

[1] Steubenville also falls within the Pittsburgh, Pennsylvania, market (#10).

[2] Martin's Ferry, Yorkville, Tiltonsville, and Rayland are served by a single headend. Steubenville and Moundsville each have separate headends. Differing dates of commencement of service account for the difference in signal carriage. Martin's Ferry and Steubenville commenced operation prior to 1966. Yorkville, Tiltonsville, and Rayland were activated after the promulgation of our 1966 cable television rules.

Additionally, Community requests certification for the following signal on the Ohio systems only:

WOUC–TV (Educ., Channel 44), Cambridge, Ohio.

The applications are unopposed. Carriage of these signals is consistent with Sections 76.61 and 76.63 of the Commission's Rules.

2. Each of Community's systems here under consideration has a 12-channel capacity. Section 76.251(c) of the Commission's Rules provides that existing systems in major markets wishing to add two distant independent signals to their carriage must also provide public and educational access channels until March 31, 1977, at which time a full complement of access channels must be made available.[3] Therefore, should Community's applications be granted, the systems will require channel capacity as follows:

Community:	*Number of channels*
Martin's Ferry	15
Steubenville	15
Moundsville	13
Yorkville	11
Tiltonsville	11
Rayland	11

Community has asked that the Commission grant its applications for Martin's Ferry, Steubenville, and Moundsville upon the condition that compliance with Section 76.251(c) be achieved at the time the signals applied for are actually added to the systems. Community has promised to comply by expansion of the systems' channel capacity or by deletion of one or more currently carried signals whose carriage is not mandatory under our Rules. Community argues that Section 76.251(c) does not contemplate the provision of access channels until such time as signals which are authorized to be added are actually placed on a system. In support of its argument, Community quotes the original Section 76.251(c) which stated, in pertinent part, "that if such systems receive certificates of compliance to add television signals to their operations at an earlier date, [prior to March 31, 1977] they shall comply with paragraph (a)(4) through (a)(11) of this section *at the time of such addition*" (emphasis added). *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 242 (1972). The amended section, Community argues, was meant to express the same policy; that access channels need be provided only at the time new signals are actually added.[4]

3. Upon grant of its applications, Community will be required to provide one public access channel and one educational access channel for each community served. Community recognizes its obligation to initiate access services, but has requested a temporary waiver of Section 76.251(c) to allow it to provide one public access channel and one educational access channel to be shared by the communities of Martin's Ferry, Yorkville, Rayland, and Tiltonsville, which are served by a

[3] Since WOUC–TV requested carriage pursuant to Sections 76.61(a)(2) and 76.63(a) of our Rules, the provisions of Section 76.251(c) are not triggered. Footnote 32 of Paragraph 87, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 358 (1972).

[4] Section 76.251(c) presently reads " . . . if such systems receive certificates of compliance to add television signals to their operations at an earlier date, . . . for each such signal added, such systems shall provide one (1) access channel. . . ."

common headend.[5] In support if its waiver request, Community points out that; (a) the systems in the four communities serve a total of 3,728 subscribers of which 2,613 reside in Martin's Ferry; (b) the total population of the four communities is 15,153 of which 10,757 live in Martin's Ferry; (c) Martin's Ferry is the hub of economic and social activity in the area, and the farthest of the other three communities, Rayland, is only six miles distant; (d) the four communities are served by only two school districts, one for Martin's Ferry and one which is shared by the three smaller communities; and (e) cable service to the four communities commenced in the mid-1960's, over four years before the access rules were promulgated, and a strict application of the access rules at this time would be inequitable in that it would require a complete technical restructuring of the four systems. In light of the foregoing, Community believes that the waiver it proposes will adequately meet the access needs of the four communities and is consonant with the considerations expressed in Paragraph 90 of the *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 359 (1972).

4. With regard to Community's request for a conditional grant of its applications for Martin's Ferry, Steubenville, and Moundsville, we see no public interest to be served by requiring that access channels be available as soon as a certificate of compliance is issued, so long as new signals are not added until such access channels *are* available. Therefore, since Community has undertaken to provide the requisite access channels at the time new signals are added to its systems, the policy of our access rules will be achieved and a conditional grant is not necessary. However, before Community adds the new signals, it should inform the Commission specifically whether it plans to expand capacity or delete specified signals in order to accommodate the new signals. The Commission has no objection to Community's proposal to suspend temporarily carriage of out-of-market signals until its systems are rebuilt. Such signals have no right to carriage under our rules, and we will not disturb Community's grandfathering rights. *See Montachusett Cable Television, Inc.*, FCC 73–1057, 43 FCC 2d 445 (1973).

5. In the *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 359 (1972), we noted the hardships that would be incurred if existing conglomerate systems serving separate communities from a common headend were required at this time to undergo radical redesigning and rebuilding in order to provide separate access facilities for each community. Accordingly, we have granted temporary waivers of Section 76.251(c) upon detailed showings that it would be technically and economically unfeasible to construct separate access facilities at this time, and that individuals living in the communities served would not, to any significant extent, be deprived of access services they would receive if separate facilities were provided. *See Gerity Broadcasting Company*, FCC 73–281, 40 FCC 2d 58 (1973); *Sammons Communications, Inc.*, FCC 73–1134, 43 FCC 2d 613 (1973); and *TelePrompTer of Portsmouth, Inc.*, FCC

[5] Community has promised to supply additional facilities sufficient to satisfy local demand for use of access channels. In any case, the full complement of access channels which are specified by Section 76.251 will be provided on or before March 31, 1977.

73–1207, —— FCC 2d —— (1973). Consistent with these precedents, we believe that Community has adequately demonstrated the need for a temporary waiver of Section 76.251(c).

In view of the foregoing, we find that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the request for temporary waiver of Section 76.251 made by Community TCI of Ohio, Inc., IS GRANTED.

IT IS FURTHER ORDERED, That the above-captioned applications, (CAC–898 and CAC–1076 through 1080), filed by the Community TCI of Ohio, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-95

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
COMMUNITY TCI OF MISSOURI, INC., GRANDVIEW, Mo.	CAC-1482 M0070
RAYTOWN TELECABLE CORP., D.B.A. COMMUNITY TCI OF MISSOURI, INC., RAYTOWN, Mo.	CAC-1483 M0071
LEE'S SUMMIT TELECABLE CORP., D.B.A. COMMUNITY TCI OF MISSOURI, INC., LEE'S SUMMIT, Mo.	CAC-1484 M0072
COMMUNITY TCI OF KANSAS, INC., LENEXA, KANS.	CAC-1506 KS085
BELTON TELECABLE CORP., D.B.A. COMMUNITY TCI OF MISSOURI, INC., BELTON, Mo.	CAC-1507 M0073
For Certificates of Compliance.	

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 7, 1974)

BY THE COMMISSION:

1. Community TCI of Missouri, Inc., and Community TCI of Kansas, Inc., wholly owned subsidiaries of Tele-Communications, Inc., have filed the above-captioned applications for certificates of compliance to commence cable television service at Grandview, Raytown, Lee's Summit, and Belton, Missouri, and Lenexa, Kansas, all located in the Kansas City, Missouri, major television market (#22)[1]. Community TCI will construct each system with a 27-channel capacity and proposes to carry the following television broadcast stations:

Grandview, Raytown, and Lee's Summit, Mo.		*Belton, Mo.*
WDAF-TV	(NBC, channel 2), Kansas City, Mo.	WDAF-TV.
KCMO-TV	(CBS, channel 5), Kansas City, Mo.	KCMO-TV.
KMBC-TV	(ABC, channel 9), Kansas City, Mo.	KMBC-TV.
KCPT	(Educational, channel 19), Kansas City, Mo.	KCPT.
KBMA-TV	(Independent, channel 41), Kansas City, Mo.	KBMA-TV.
KQTV	(ABC/NBC, channel 2), St. Joseph, Mo.	
KPLR-TV	(Independent, channel 11), St. Louis, Mo.	KPLR-TV.
KWGN-TV	(Independent, channel 2), Denver, Colo.	KWGN-TV.

[1] The populations of the communities are:

	Persons
Grandview	17,480
Raytown	32,965
Lee's Summit	16,188
Belton	9,667
Lenexa	5,499

Lenexa, Kans.

WDAF–TV	(NBC, channel 4), Kansas City, Mo.
KCMO–TV	(CBS, channel 5), Kansas City, Mo.
KMBC–TV	(ABC, channel 9), Kansas City, Mo.
KCPT	(Educational, channel 19), Kansas City, Mo.
KBMA–TV	(Independent, channel 41), Kansas City, Mo.
KQTV	(ABC/NBC, channel 2), St. Joseph, Mo.
KPLR–TV	(Independent, channel 11), St. Louis, Mo.
KWGN–TV	(Independent, channel 2), Denver, Colo.
KTWU	(Educational, channel 11), Topeka, Kans.
WIBW–TV	(CBS, channel 13), Topeka, Kans.
KTSB	(NBC, channel 27), Topeka, Kans.

Prior to March 31, 1972, Community TCI, pursuant to former Section 74.1105 of the Commission's Rules, filed notices of proposed service at each of the subject communities. Since these notices complied with our former rules, were unopposed, and were properly served, Community TCI was "authorized" to carry all of the above-requested signals except Stations KPLR–TV and KWGN–TV. Consequently, carriage of the above-listed signals, except for Stations KPLR–TV and KWGN–TV, is "grandfathered" pursuant to Section 76.65 of the Commission's Rules. Carriage of Stations KPLR–TV and KWGN–TV is consistent with Section 76.61(b) of the Commission's Rules.

2. Evans Broadcasting Corporation, licensee of Station KDNL–TV, St. Louis, Missouri, has filed oppositions to Community TCI's applications.[2] KDNL–TV, while acknowledging that Community TCI's proposed carriage of the distant independent signals of KPLR–TV and KWGN–TV is consistent with the Commission's Rules, argues that cable systems should not be permitted to import distant independent VHF signals unless the systems also agree to import any distant independent UHF signal located in the same market as the distant VHF independent signal. Specifically, KDNL–TV, a UHF independent station, objects to Community TCI's proposed carriage of independent Station KPLR–TV, its VHF "competitor" in the St. Louis market. KDNL–TV contends that its ability to compete in its own market (St. Louis) with KPLR–TV would be diminished should the Commission allow KPLR–TV to be imported into a distant market (Kansas City), to the exclusion of KDNL–TV. KDNL–TV requests that Community TCI should be required to delete KPLR–TV from its proposed systems, or required to add KDNL–TV, "at the expense, if necessary, of deleting the other, more distant VHF independent station, KWGN–TV."

3. In response to KDNL–TV's objections, Community TCI points out that its proposed signal carriage is fully consistent with the Commission's Rules and asserts that KDNL–TV has failed to present a sufficient showing in support of its position to justify the Commission

[2] Originally, Metromedia, Inc., licensee of Station KMBC–TV, Kansas City, Missouri, also filed objections to all of the above-captioned applications. Metromedia questioned whether Community TCI proposed to provide the requisite local access production facilities as required by Section 76.251 of the Commission's Rules. In response to Metromedia's opposition, Community TCI explained in detail its access proposal, which is fully consistent with Section 76.251 of the Rules. Subsequently, Metromedia requested that its opposition be dismissed, which will be done herein. Additionally, the City of Grandview, Missouri, filed a "Response to Application for Certificate of Compliance" in which it expressed reservations about Community TCI's proposed operations at Grandview (CAC–1482), based upon Community TCI's franchise granted March 29, 1967. Subsequently, Community TCI and the City of Grandview entered into negotiations which appear to have settled any difficulties. The City no longer objects to Community TCI's application, and the Commission expects that Community TCI will fulfill its obligations to the City as long as they are not in conflict with our Rules. Accordingly, the City of Grandview's "Response" will be dismissed.

deviating from its Rules. Noting that the distance from St. Louis to the general area of its proposed cable operations is about 250 miles, Community TCI states that KDNL–TV is credited with absolutely no circulation in the counties in which its proposed systems will operate. In sum, Community TCI contends that KDNL–TV's assertion that it will suffer competitive in-market harm because KPLR–TV is carried on cable systems some 250 miles from St. Louis is at best speculative, and without any supporting data.

4. KDNL–TV's objections must be rejected. Initially, we reiterate that Community TCI's proposed carriage of Stations KPLR–TV and KWGN–TV is consistent with Section 76.61(b) of our Rules. Since, pursuant to Section 76.61(b), absent any leapfrogging problems, the choice for the first and second distant independent stations is at a cable system's discretion, *compare, Video Link, Ltd.*, FCC 73–1301, — FCC 2d — (1973), KDNL–TV's oppositions must essentially be considered requests for special relief. However, in Paragraph 113 of the *Cable Television Report and Order*,[3] we explained that "there must be a substantial showing to warrant deviation from the go, no-go concept of our Rules." The "substantial showing" standard was clarified in *Gerity Broadcasting Co.*, FCC 72–651, 36 FCC 2d 69 (1972), in which we held such showings must "contain specificity of fact, showing injury to the public" before special relief could be granted. *See See-Mor Cable TV of Sikeston, Inc.*, FCC 73–796, 42 FCC 2d 261 (1973), *Fort Smith TV Cable Co.*, FCC 73–151, 39 FCC 2d 573 (1973), *Spectrum Cable Systems, Inc.*, FCC 73–257, 40 FCC 2d 1019 (1973), *recons. denied*, FCC 73–1342, — FCC 2d — (1973). KDNL–TV's pleadings fall well short of this requirement and are, as Community TCI suggests, at best, too speculative to warrant special relief.

5. The Commission believes it appropriate to note certain variations in Community TCI's franchises from the standards of Section 76.31 of the Commission's Rules. Community TCI's franchises were all awarded prior to March 31, 1972,[4] after public proceedings. The initial term of the franchises is 20 years, except for Grandview, which is for 15 years. Initial subscriber rates are established which can only be changed with the consent of the various governing bodies. Construction schedules are specified. An annual fee of 5 percent must be paid to the communities, except for Lenexa, which requires 7 percent. Further, Community TCI commits itself to maintaining a local business office or agent to handle all inquiries or complaints, which will be acted upon as soon as possible. Only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, and measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72–1105, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73–293, 40 FCC 2d 493 (1973), we find that these franchises substantially comply with Section 76.31 of the Rules in a manner sufficient to justify a grant of the above-captioned applications until March 31, 1977.

[3] FCC 72–108, 36 FCC 2d 143, 187 (1972).
[4] Grandview franchise—March 29, 1967; Raytown franchise—October 17, 1967; Lee's Summit franchise—November 21, 1967; Lenexa franchise—October 21, 1971; Belton franchise—February 6, 1967.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection to Applications for Certificates of Compliance" filed December 1, 1972, by Metromedia, Inc., IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Response to Application for Certificate of Compliance" filed January 19, 1973, by the City of Grandview, IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Objections of Evans Broadcasting Corporation, KDNL–TV, St. Louis, Missouri," filed January 17, 1973, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–1482, 1483, 1484, 1506, 1507) filed by Community TCI of Missouri, Inc., and Community TCI of Kansas, Inc., ARE GRANTED, and the appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 74–100

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of EASTERN CONNECTICUT CABLE TELEVISION, INC., PUTNAM, CONN., KILLINGLY, CONN., PLAINFIELD, CONN. For certificates of Compliance	CAC–1621 (CT052); CAC–1622 (CT053); CAC–1623 (CT054)

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 6, 1974)

BY THE COMMISSION:

1. Eastern Connecticut Cable Television, Inc. has filed applications for certificates of compliance to begin cable television service at Putnam, Killingly, and Plainfield, Connecticut, located within the Boston-Cambridge-Worcester, Massachusetts (#6) and Providence, Rhode Island-New Bedford, Massachusetts (#33) television markets. The systems propose to offer subscribers the following television signals:[1]

WJAR–TV (NBC, Channel 10), Providence, Rhode Island
WPRI–TV (CBS, Channel 12), Providence, Rhode Island
WSBE–TV (Educ., Channel 36), Providence, Rhode Island
WSMW–TV (Ind., Channel 27), Worcester, Massachusetts
WTEV (ABC, Channel 6), New Bedford, Massachusetts
WCVB–TV (ABC, Channel 5), Boston, Massachusetts
WBZ–TV (NBC, Channel 4), Boston, Massachusetts
WNAC–TV (CBS, Channel 7), Boston, Massachusetts
WSBK–TV (Ind., Channel 38), Boston, Massauchsetts
WKBG–TV (Ind., Channel 56), Cambridge, Massachusetts
WGBH–TV (Educ., Channel 2), Boston, Massachusetts
WGBX–TV (Educ., Channel 44), Boston, Massachusetts
WTIC–TV (CBS, Channel 3), Hartford, Connecticut
WTNH–TV (ABC, Channel 8), Hartford, Connecticut
WEDN (Educ., Channel 53), Norwich, Connecticut
WOR–TV (Ind., Channel 9), New York, New York
WPIX (Ind., Channel 11), New York, New York

Carriage of these signals is consistent with Section 76.61 of the Commission's Rules. Objections to these applications have been filed by Broadcast Plaza, Inc., licensee of Station WTIC–TV, Connecticut Television, Inc., licensee of Station WHNB–TV, New Britain, Connecticut, and Connecticut Educational Television Corporation, licensee of Station WEDN. Eastern Connecticut has replied.

[1] According to the FCC Forms 325 submitted by Eastern Connecticut, population is approximately as follows: Putnam, 8,412; Killingly, 11,298; Plainfield, 16,733. Each of Eastern Connecticut's proposed systems will have a 30-channel capacity (See Paragraph 4, *infra*). The systems will provide all required access cablecasting services.

2. In their oppositions, both Broadcast Plaza and Connecticut Television argue that Eastern Connecticut's franchises fail to comply with Section 76.31 of the Commission's Rules. In *Valley Cable Vision, Inc.*, 38 FCC 2d 959, *recons. denied*, 40 FCC 2d 191 (1973), we held that franchises granted by the State of Connecticut are in substantial compliance with our franchise standards. Although the subject cable television systems were not parties to that decision, the franchises are identical to, and were issued at the same time, as the franchises considered in *Valley Cable Vision, supra*. Therefore, these objections will be denied.

3. Connecticut Educational Television Corporation (CETC) objects to the proposed carriage of Educational Stations WSBE–TV, WGBH–TV, and WGBY–TV. CETC is concerned that the carriage of these signals will have an adverse impact on its ability to raise operating and capital fund contributions, resulting in impairment of its statewide service. Carriage of Stations WSBE–TV, WGBH–TV, and WGBY–TV is consistent with Section 76.61(a) of the Rules. Since these signals are therefore deemed to be "local," they may or, on request, must be carried. CETC has not presented factual evidence of economic harm that pursuades us that a departure from our carriage rules is appropriate. See, e.g., *Bridgeport Community Antennae Television Company*, FCC 73–1341, — FCC 2d — (released January 8, 1974), *Big Valley Cablevision, Inc.*, 40 FCC 2d 662 (1973); and *Information Transfer, Inc.*, 38 FCC 2d 335 (1972). We, therefore, must reject CETC's arguments.

4. Section 76.251(a)(2) of the Rules requires cable systems operating within major television markets to be capable of providing one channel suitable for transmission of Class II or Class III signals for each Class I channel utilized. Eastern Connecticut's systems propose to have a 30-channel capacity. Seventeen of these will be utilized for Class I signals, leaving thirteen channels for Class II or III use. Section 76.251(a)(2) would require Eastern Connecticut to offer 17 Class II or III channels, four more than are planned. To the extent that its proposal differs from that required by the Rules, Eastern Connecticut requests a waiver. Eastern believes that in view of the size of the communities to be served, it is unlikely that even the proposed number of Class II and III channels will be utilized. In any event, Eastern Connecticut states that it will comply with the channel expansion requirements of Section 76.251(a)(8), and this will be sufficient to provide the necessary flexibility for system expansion, if needed. Eastern Connecticut will provide all other required access services. In light of these assurances, and noting that Eastern's systems will have substantially more than our minimum requirement of 20 channels and are only four channels short of the equivalent bandwidth requirement, we are satisfied that Eastern Connecticut's proposals will adequately satisfy any present and reasonably forseeable demand for these channels. Therefore, we will grant the requested waiver.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications and waiver request would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the objection filed by Broadcast Plaza, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Objections of Connecticut Television, Inc." ARE DENIED.

IT IS FURTHER ORDERED, That the "Objections to Application for Certificate of Compliance," of Connecticut Educational Television Corporation ARE DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–1621, 1622, 1623) filed by Eastern Connecticut Cable Television, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–39

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
NATIONAL BROADCASTING CO., INC.
Concerning the Fairness Doctrine

JANUARY 9, 1974.

NATIONAL BROADCASTING CO., INC.,
RCA Building, 30 Rockefeller Plaza, New York, N.Y. 10020

GENTLEMEN: This will refer to your letter to the Commission, dated December 21, 1973, in response to the Commission's *Memorandum Opinion and Order*, FCC 73–1232, adopted November 26, 1973 and released December 3, 1973. That order directed you to submit a statement indicating how you intend to fulfill the fairness doctrine obligations arising out of the NBC Television Network's broadcast of the documentary "Pensions: The Broken Promise" on September 12, 1972. Your response advises the Commission that "NBC is filing, with the United States Court of Appeals for the District of Columbia Circuit, a Petition for Review of the Commission's Memorandum Opinion and Order," and does not indicate that NBC is taking any steps to achieve fairness. Since the legislative process concerning pension reform appears to be in an active stage, with the possibility that final action by Congress could be taken this spring, you are advised that the Commission expects prompt compliance with its ruling. You may, of course, seek a stay of the ruling if you believe that there are grounds for such relief.

Commissioner Reid concurring in result.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
HORACE P. ROWLEY, III
Concerning a Motion for Declaratory Ruling Under the Fairness Doctrine

FEBRUARY 1, 1974.

HORACE P. ROWLEY, III, ESQ.,
416 East 81st Street, New York, N.Y. 10028

DEAR MR. ROWLEY: This is in response to your "motion for declaratory ruling," dated January 18, 1974, concerning "the allocations of procedural burdens between the public and broadcasters in Fairness Doctrine cases."

The Commission's present procedures and policies concerning the filing and review of fairness doctrine complaints are set forth in its Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance," 29 Fed. Reg. 10416. The Commission has been engaged in a broad-ranging Inquiry into the efficacy of the fairness doctrine and other related Commission public interest policies, including fairness doctrine complaint procedures, and a report thereon is expected in the near future. Pending conclusion of this Inquiry and the issuance of its report, the Commission believes that no ruling is warranted on your request at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
for Chief, Broadcast Bureau.

F.C.C. 74-105

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (CAPE CORAL, KEY WEST, AND PUNTA GORDA, FLA.)	Docket No. 19736 RM-1934, RM-1963, RM-2061

REPORT AND ORDER

(Proceeding Terminated)

(Adopted January 30, 1974; Released February 5, 1974)

BY THE COMMISSION:

1. The Commission has before it the Notice of Proposed Rule Making adopted May 9, 1973 (FCC 73-490, 38 Fed. Reg. 12935) proposing an amendment of Section 73.202(b) of the Rules, the FM Table of Assignments. The rule making was instituted on the basis of three petitions, two of which proposed the assignment of the same FM channel to two communities resulting in a channel conflict. The conflicting petitions were filed by Dr. E. Paul Eder (RM-1934) proposing the assignment of Channel 261A to Cape Coral, Florida, and Broadcast Systems, Inc. (RM-2061) proposing the assignment of Channel 261A to Punta Gorda, Florida. The third petition filed by David W. Freeman and William A. Freeman, Jr. (RM-1963), proposed the assignment of Channel 296A to Key West, Florida, and is not directly related to the other two petitions but will be discussed separately in this document.

2. *Cape Coral, Florida (RM-1934) and Punta Gorda, Florida (RM-2061).* The Notice observed that since the distance between Cape Coral and Punta Gorda is approximately 25 miles, Channel 261A could be assigned to only one of the two communities (required spacing is 65 miles). To resolve the conflict, we, in our Notice, proposed to assign Channel 280A to Cape Coral as suggested by Broadcast Systems, Inc. and Channel 261A to Punta Gorda or Port Charlotte. These assignments can be made to Cape Coral and Punta Gorda or Port Charlotte without requiring any other changes in the FM Table of Assignments, and in conformance with the Commission's minimum mileage separation rule.

3. Cape Coral (10,193 population) is located in Lee County (105,216 population) on the west bank of the Caloosahatchee River.[1] There are no broadcast facilities assigned to Cape Coral. The nearest community with such facilities is Fort Myers (27,351 population), the seat of Lee County and located approximately seven miles northeast on the east

[1] All population figures cited are from the 1970 U.S. Census unless otherwise specified.

bank of the Caloosahatchee River. Fort Myers has three AM and three FM stations (1 A and 2 C's). Punta Gorda (population 3,879) is the seat of Charlotte County (population 27,559). It has a daytime-only AM station (WCCF) and a Class A FM station (Channel 224A, WCCF–FM).

4. The preclusion study shows that the assignment of Channel 261A to Cape Coral, Punta Gorda or Port Charlotte would preclude future assignments only on Channel 261A in a limited area. As to Channel 280A, it can be assigned to Cape Coral or to an area a short distance east or south of the community; it cannot be used at Punta Gorda or Port Charlotte. The assignment of Channel 280A to this area would preclude future assignments only on Channel 280A; the adjacent channels would not be affected.

5. A supporting comment was filed by E. Paul Eder stating his acceptance of the suggested proposed Channel 280A to Cape Coral and reiterated his intention to apply for a construction permit for that channel, if assigned, and to construct and operate the station. There were no opposing comments.

6. In our Notice we requested that information be submitted as to the feasibility of an assignment to Port Charlotte, an unincorporated community, which has a population of 10,769 and has no broadcast facility. Port Charlotte is located on the north side of Peace River, approximately four miles northwest of Punta Gorda (located on the south side of Peace River). In supporting comments Broadcast Systems, Inc., states it has no objection if Channel 261A was assigned to Port Charlotte instead of Punta Gorda as it originally proposed. It states that Punta Gorda-Port Charlotte is mutually one community, so it is extremely unlikely that one community would be disadvantaged by the assignment of Channel 261A to the other. It notes that there are no statistics, demographic data or other information which strongly favor making the assignment to one or the other since the two places share in common the need for the service for reasons which are identical. There were no opposing comments.

7. We have given careful consideration to the proposals in this proceeding, and believe that, since Cape Coral has a population of 10,193 and does not have a broadcast facility, Channel 280A should be assigned there to provide for a first local broadcast service. We further believe that it is more appropriate and in the public interest to assign Channel 261A to Port Charlotte, a larger community than Punta Gorda. Port Charlotte has no broadcast facility and it would provide for a first local broadcast service to the community, while Punta Gorda now has an AM and an FM station.

8. *Key West, Florida (RM–1963)*. The petitioners, David W. Freeman and William A. Freeman, Jr., propose the assignment of Channel 296A to Key West, Florida (population 27,563), in order to make a third FM assignment available there for which they can apply. Their supporting comments reaffirm their intention to apply for the channel upon its assignment to that community. Key West has two unlimited-time AM stations (WKIZ and WKWF) and two Class C FM channels (Channels 223, Station WFYN–FM, and Channel 238). An application for a construction permit for the use of this channel (BPH–8078) was granted on July 3, 1973. This grant was set aside on September 26,

1973, and the application was designated for hearing on November 21, 1973. The only other FM assignment in Monroe County (population 52,586) is at Marathon (Channel 232A), some 45 miles east of Key West. Opposing comments were filed by Florida Keys Broadcasting Corporation (Florida Keys), licensee of Stations WKIZ(AM) and WFYN-FM, Channel 223, Key West, Florida. Florida Keys also filed an objection to grant the aforementioned application for the use of Channel 238 pending the final resolution of the present rule making proceeding. It notes that it does not object to both a grant of the subject application and assignment of the proposed Class A FM channel at Key West; rather, it states, its interest herein is to have the Commission consider the application and proposed rule making in concert, with due examination of the aggregate, deleterious effects a grant of both may have on broadcast service at Key West.

9. In its opposing comments, Florida Keys Broadcasting Corporation contends that the assignment of a third FM channel at Key West would "overradio" the modest population center and that the Key West economy cannot support fourth and fifth broadcast services coupled with proposed intermixture of Class A and Class C facilities. It states that the military has undertaken a continuing program of disestablishment or relocation of military personnel, training programs and naval ships from the area. It notes that there has been a significant population loss in Key West, due to a serious outmigration of the area's young people, which has resulted in a severely depressed economy. It further contends that the petitioner has failed to demonstrate a need for the proposed service. Florida Keys points out that the assignment proposed herein would exceed the one to two FM channels normally assigned to a community of less than 50,000 persons such as Key West, and that the Commission has denied requests when parties failed to show a need for a third assignment, citing *Kingston, New York*, 5 RR 2d 1548 (1965); *Santa Maria, California*, 8 F.C.C. 2d 402 (1967).

10. In reply comments petitioners contend that Key West receives no service outside of the three stations which exist, two owned by the same operator (Florida Keys), which duplicate their live programs almost in their entirety, thereby in reality Key West now receives only two radio services. Petitioners point out that they would not impair the financial strength of Florida Keys but perhaps would bring it within normal return for a station operating in this type of market in normal competitive situations. They aver that it is not their intention, if granted a permit, to broadcast the top 40 market program, but to engage in a more community-oriented broadcast program. Petitioners state that Florida Keys admits, in its application for license for renewal, the inability to reach the black population of the area. Petitioners contend that Florida Keys does not attempt to service this area, nor the Spanish speaking population in their employment or their broadcasting practices; no programs are carried in Spanish, in spite of the fact that there is a large Spanish speaking population; and no programs are broadcast to the large fishing industry of information they could use other than weather forecasts. They point out that the Class A assignment would serve Key West and surrounding areas which have a total population of an excess of 40,000 people.

11. Florida Keys reiterates in its reply comments that Key West has been shown to be a depressed area—inordinately dependent on a military population which is being relocated, and unable to improve its situation by developing alternative means of economic support; that economic conditions of the area plainly disclose its inability to support fourth and fifth full-time broadcast facilities; and that the Florida Keys station WFYN–FM is already experiencing serious difficulty in securing the scarce advertising revenues necessary to maintain its economic viability, and the situation is worsening. Decisions concerning FM channel assignments are based on consideration of public interest factors. Although Florida Keys argues that a Class A channel should not be assigned to Key West because the community cannot support another radio station, it presents no data as to what effect, if any, operation of a third FM station would have on the operations and programming of the existing stations there. We believe that any such economic issue would be more appropriately considered in connection with an application for a construction permit for use of the channel.

12. Further, in urging a denial, Florida Keys has cited cases where the Commission has denied requests for a third channel to communities with population of less than 50,000 persons, but it is noted that the cases therein involved a question of need for channels in other communities located within the precluded areas. Here the preclusion study shows that the assignment of Channel 296A to Key West would foreclose future assignment only on the requested channel in the area along the Florida Keys, and that, due to lack of other communities in this area of the country, it could be assigned to Key West without foreclosing future assignment to any other communities. Thus the assignment of Channel 296A to Key West would result in the efficient use of the FM frequencies. As to the question of intermixture of a Class A channel with the two Class C channels, we have on other occasions made such an assignment, and the petitioners are aware of the coverage limitation of a Class A station and appear willing to take the risk of operating such a station. Thus we believe that it is in the public interest to assign Channel 296A to Key West, Florida.

13. In view of the foregoing, and pursuant to the authority contained in Sections 4(i), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, IT IS ORDERED, That, effective March 15, 1974, the FM Table of Assignments, Section 73.202(b) of the Rules, IS AMENDED to read as follows for the cities listed below:

City:	*Channel Number*
Cape Coral, Fla	280A.
Port Charlotte, Fla	261A.
Key West, Fla	223, 238, 296A.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,

VINCENT J. MULLINS, *Secretary.*

104–025—74——10

F.C.C. 74-111

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 73 TO DELETE SECTION 73.644(a)(10)

ORDER

(Adopted February 6, 1974; Released February 15, 1974)

BY THE COMMISSION:

1. In an action taken today,[1] the Commission amended paragraph (d) of Section 0.457 of its rules dealing with the disclosure of information to the public. The revised rules are consistent with the requirements of the FREEDOM OF INFORMATION ACT, 5 U.S.C. Section 552 and judicial interpretation thereof.[2]

2. Subparagraph (a)(10) of Section 73.644 states that information filed by applicants seeking advance approval of subscription television systems will not be open to the public.[3] This provision is contrary to the general policy set forth in the amendment of Section 0.457(d) adopted today, which provides that information filed with an application for an equipment or system authorization (such as advance approval of a subscription television system) shall be open to the public after the grant of type acceptance or system approval is issued. The amendment provides further that the applicant may request nondisclosure of information claimed to be a trade secret or proprietary information, pursuant to Section 0.459 of the rules, with a statement of the basis for such claim.[4] If the request is adequately justified, the Commission will grant nondisclosure for the period of time specified by the applicant.

3. In view of the conflict between Section 73.644(a)(10) and the amended Section 0.457(d), and since trade secrets and proprietary information can be granted confidentiality on the basis of a justified request by the applicant, Section 73.644(a)(10) of our rules may be deleted as no longer required.

4. This action is taken to conform the requirements for advance approval of subscription television systems with our current policy on disclosure of information as expressed in the amended Section 0.457(d), which was promulgated pursuant to a formal rule making proceeding. Accordingly the prior public notice and effective date

[1] Report and Order in Docket No. 19356, (FCC 74-113).
[2] *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796 (1969), *Wellford* v. *Hardin*, 444 F. 2d 21 (1971).
[3] The text of subparagraph (10) reads as follows: "(10) Files containing information about subscription television systems submitted by applicants for approval of these technical systems pursuant to the rules in this part will not be open to the public".
[4] 47 CFR 0.459; *FCC* v. *Schreiber*, 381 U.S. 279 (1965).

provisions of the Administrative Procedure Act do not apply. Authority for this amendment is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

5. In view of the above, IT IS ORDERED, That effective March 25, 1974, Section 73.644(a)(10) of Part 73 of the FCC rules is HEREBY DELETED.

THE FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-96

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re HIGHLAND CABLE TV, INC., HILLSBORO, OHIO Request for Waiver of Section 76.91 of the Commission's Rules	SR-107107

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 5, 1974)

BY THE COMMISSION:

1. On October 26, 1971, Highland Cable TV, Inc., operator of a cable television system at Hillsboro, Ohio, filed a "Petition for Waiver of Section 74.1103(e) of the Commission's Rules".[1] This petition was filed in response to a request made by Scripps-Howard Broadcasting Company, licensee of Station WCPO-TV, Channel 9 (CBS), Cincinnati, for network program exclusivity against Station WHIO-TV, Channel 7 (CBS), Dayton. Both stations are carried on the cable system at Hillsboro. Scripps-Howard Broadcasting Company, licensee of WCPO-TV, has opposed the petition.

2. Station WCPO-TV places a predicted Grade A contour over Hillsboro, and is therefore entitled to network program exclusivity against the lower priority predicted Grade B signal of Station WHIO-TV. Highland seeks a waiver of the exclusivity rules on the basis of the following arguments: (a) duplication of its signal causes no real economic impact on WCPO-TV; (b) Hillsboro is oriented toward Dayton as much as it is toward Cincinnati; and (c) the cable system is so small that it cannot economically provide exclusivity protection.

3. We rule on Highland's arguments as follows: (a) a television broadcast station is entitled to program exclusivity against lower priority stations without demonstrating a special economic need; (b) program exclusivity is dependent on the predicted contours of a television station, not on community orientation or ties; and (c) the cost of equipment and labor necessary to provide program exclusivity is not normally an adequate basis for relieving a cable operator of its obligation to provide program exclusivity; moreover, the petitioner has not attempted to supply specifics to support its general hardship claim.

In view of the foregoing, the Commission finds that a grant of the requested waiver of former Section 74.1103(e) of the Rules, (now

[1] Former Section 74.1103(e) of the Rules has been replaced by Section 76.91 of the Rules. We will, therefore, treat the present controversy as arising under Section 76.91.

Section 76.91 of the Rules) would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Waiver of Section 74.1103(e) of the Commission's Rules", filed October 26, 1971, by Highland Cable TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That Highland Cable TV, Inc. IS DIRECTED to comply with the requirements of Section 76.91 of the Commission's Rules on its cable television system at Hillsboro, Ohio, within thirty (30) days of the release date of this Memorandum Opinion and Order.

THE FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74R-24

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of	
LAMAR LIFE BROADCASTING CO., JACKSON, MISS.	Docket No. 18445 File No. BPCT-4320 BRCT-326
CIVIC COMMUNICATIONS CORP., JACKSON, MISS.	Docket No. 18846 File No. BPCT-4305
DIXIE NATIONAL BROADCASTING CORP., JACKSON, MISS.	Docket No. 18847 File No. BPCT-4317
JACKSON TELEVISION, INC., JACKSON, MISS.	Docket No. 18848 File No. BPCT-4318
CHANNEL 3, INC., JACKSON, MISS.	Docket No. 18849
For a Construction Permit	File No. BPCT-4319

ORDER

(Adopted January 21, 1974; Released January 23, 1974)

BY THE REVIEW BOARD:

1. The Review Board having under consideration: (a) a further petition to reopen hearings to receive additional evidence of decisional significance, filed November 23, 1973, by The Office of Communication of the United Church of Christ (UCC);[1] (b) a petition to reopen the record, filed December 28, 1973, by Jackson Television, Inc. (Jackson);[2] and (c) a petition for leave to amend, filed December 28, 1973, by Jackson.[3]

2. IT APPEARING, That, by Memorandum Opinion and Order, FCC 74R-11, released January 11, 1974, the Review Board dismissed an earlier petition to reopen hearings to receive additional evidence of decisional significance, filed by UCC, on the ground that UCC lacks standing to participate in this proceeding; and

3. IT FURTHER APPEARING, That, in the aforementioned Memorandum Opinion and Order, the Review Board also remanded the instant proceeding to the Administrative Law Judge for further hearing on additional issues; that the instant proceeding is no longer before the Board (see Section 1.291 of the Commission's Rules); and that it would be appropriate to refer the above-mentioned Jackson petitions to the Administrative Law Judge;

[1] Also before the Board are the following related pleadings: (a) opposition, filed December 4, 1973, by the Broadcast Bureau; (b) opposition, filed December 18, 1973, by Dixie National Broadcasting Corporation; and (c) reply, filed January 3, 1973, by UCC.

[2] Also before the Board is an opposition, filed January 10, 1974, by Dixie National Broadcasting Corporation.

[3] Also before the Board are the following related pleadings: (a) opposition, filed January 10, 1974, by Channel 3, Inc.; and (b) opposition, filed January 10, 1974, by Dixie National Broadcasting Corporation.

4. IT IS ORDERED, That the further petition to reopen hearings to receive additional evidence, filed November 23, 1973, by the Office of Communication of the United Church of Christ, IS DISMISSED, and that the petitions to reopen the record and for leave to amend, each filed December 28, 1973, by Jackson Television, Inc, ARE REFERRED to the Administrative Law Judge for consideration.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-97

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MAHONING VALLEY CABLEVISION, INC., HUBBARD TOWNSHIP, OHIO For a Certificate of Compliance	CAC-2573 OH310

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 6, 1974)

BY THE COMMISSION:

1. On May 15, 1973, Mahoning Valley Cablevision, Inc., proposed operator of a cable television system at Hubbard Township, Ohio (located in the 79th television market)[1] filed an application requesting certification for carriage of the following television signals:

WFMJ-TV (NBC, Channel 21), Youngstown, Ohio
WKBN-TV (CBS, Channel 27), Youngstown, Ohio.
WYTV (ABC, Channel 33), Youngstown, Ohio
WKBF-TV (Ind., Channel 61), Cleveland, Ohio
WUAB (Ind., Channel 43), Lorain, Ohio
WVIZ-TV (Educ., Channel 25), Cleveland, Ohio
WKYC-TV (NBC, Channel 3), Cleveland, Ohio
WEWS (ABC, Channel 5), Cleveland, Ohio
WJW-TV (CBS, Channel 8), Cleveland, Ohio

Simultaneously, Mahoning filed a petition for special relief requesting partial waiver of Section 76.31 of the Commission's Rules. Mahoning's application is unopposed, and its carriage proposal is consistent with Section 76.63 of the Rules.

2. Mahoning has filed for special relief because it contends that Ohio Townships cannot issue cable television franchises. In support of its contention, Mahoning furnishes a letter it received from Mr. J. Walter Dragelevich, Prosecuting Attorney of Trumbull County, Ohio, who acts as legal advisor to the county. Mr. Dragelevich's letter states, in pertinent part:

> [I]t is our considered legal judgment that any company seeking to furnish cable television facilities to the townships within Trumbull County are [sic] free to do so without securing prior approval of the township trustees.

Further, Mahoning has supplied a copy of Opinion No. 73-002 issued January 10, 1973, by William J. Brown, Attorney General, State of Ohio, in response to an inquiry made by Daniel T. Spitler, Prosecuting Attorney of Wood County, Ohio. Attorney General Brown's opinion states:

> In specific answer to your question it is my opinion and you are so advised that a corporation engaged in the cable television business need not obtain authority from a township before beginning construction of its system within the township.

[1] Hubbard Township, Ohio has a population of 8,619.

Accordingly, Mahoning requests special relief pursuant to Section 76.7 of the Commission's Rules to qualify under Par. 116, *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 366 (1972), which provides for case by case consideration where it is claimed that there is no franchise or other appropriate authorization available for the cable operator to submit in an application for a certificate of compliance. In such cases, the applicant is expected to make an acceptable alternative proposal for assuring that the substance of our rules, and specifically Section 76.31, is complied with.

3. In support of its request for special relief, Mahoning refers to the existing franchise for the City of Warren, Ohio, which contains provisions which meet the requirements of Section 76.31. Applicant pledges that it will comply with all the requirements of the Warren franchise and with all present and future pertinent Commission regulations. Although there is a 3% franchise fee for Warren, no such fee will be paid to Hubbard Township.

4. The situation in this case is identical to other cases in which the Commission has granted certificates of compliance to Mahoning to operate cable television systems in various Ohio Townships.[2] We stated in those decisions:

> We believe that we should not "freeze" cable development in localities where a supervising governmental entity is not now present, but rather should examine the applicant and its representations to determine whether on balance permission to proceed would serve the public interest.

We have made such an examination, and find that a grant of this application is appropriate. Therefore, a certificate of compliance will be issued until March 31, 1977, subject to the same conditions that we have imposed in the other cases: This grant is made subject to any further orders of the Commission designed to resolve general problems inherent in non-franchised cable operations, or to address any special problems that may be brought to the Commission's attention involving cable operations in the subject community.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application (CAC–2573, OH310) filed by Mahoning Valley Cablevision, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] *Mahoning Valley Cablevision, Inc.*, FCC 73–347, 40 FCC 2d 439; *Mahoning Valley Cablevision, Inc.*, FCC 73–243, 39 FCC 2d 939.

F.C.C. 74-61

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MICRO-CABLE COMMUNICATIONS CORP., HERMISTON, OREGON For Certificate of Compliance	CAC-744 OR044

MEMORANDUM OPINION AND ORDER

(Adopted January 23, 1974; Released January 30, 1974)

BY THE COMMISSION: COMMISSIONERS REID AND WILEY CONCURRING IN THE RESULT

1. Micro-Cable Communications Corporation operates a cable television system at Hermiston, Oregon. The system is located in a smaller television market, and serves approximately 795 subscribers with the following signals:[1]

KATU (ABC, Channel 2), Portland, Oregon
KEPR-TV (CBS, Channel 19), Pasco, Washington
KNDU (NBC, Channel 25), Richland, Washington
KOIN-TV (CBS, Channel 6), Portland, Oregon
KGW-TV (NBC, Channel 8), Portland, Oregon
KVEW (ABC, Channel 42), Kennewick, Washington
KOAP (Educ., Channel 10), Portland, Oregon
KPTV[2] (Ind., Channel 12), Portland, Oregon
KTVR (ABC/NBC, Channel 13), LaGrande, Oregon

On June 28, 1972, Micro-Cable filed an application for certificate of compliance, seeking authorization to carry Television Station CHEK-TV, Victoria, British Columbia, and requesting that special relief be granted if we found the proposed carriage inconsistent with our Rules. Oppositions to the application have been filed by NWG Broadcasting Company, licensee of Station KEPR-TV, Pasco, Washington, and by Apple Valley Broadcasting, Inc., licensee of Television Broadcast Station KVEW, Kennewick, Washington.

2. KEPR-TV and KVEW argue that the application must be denied because the addition of CHEK-TV would provide Micro-Cable

[1] The community of Hermiston has a population of 5,232. The cable system commenced operations in November, 1969, and currently has 12 channels available for carriage of broadcast and access services. Of these channels, eight are used for television signal carriage and one for automated program originations. Seven FM radio stations are carried.

[2] KPTV is carried by microwave carrier (TeleCommunications of Oregon, Inc.) on a "piggy-back" basis with KOAP. The carrier provides full-time programming of KOAP, with KPTV carried as supplemental programming when KOAP is dark. During the fall, winter, and spring, KOAP's programming pre-empts KPTV's from 9:00 a.m. to 11:00 p.m., Monday-Friday, and from 4:00 p.m. to 11:00 p.m. on Sundays. KPTV is carried from 7:30 p.m. to 11:00 p.m. on Saturday nights, with the consent of KOAP. From September through May, 35 percent of KPTV's total programming and 14 percent of its prime time programming is available in Hermiston.

with a second independent signal and thus be in excess of the complement provided for in Section 76.59 of the Rules,[3] and that in any case, CHEK–TV is not an independent as defined in Section 76.5(n) of the Rules.[4] In support of its contention, KEPR–TV has submitted program surveys taken during the weeks of June 15–22, 1972, and October 8–15, 1972, which show that CHEK–TV carried at least 11 hours of network programming during prime time for the weeks sampled. The oppositions contend that Micro-Cable has not offered to delete its intermittently carried independent, KPTV, and that local stations should not be forced to absorb the impact of importation of CHEK–TV. Both oppositions note that CHEK–TV releases U.S. network programming prior to the time it is available to U.S. stations and ask that a grant of the application be conditioned on deletion of all pre-released network programming.

3. In reply to the oppositions and in support of its petition for waiver, Micro-Cable argues that since KPTV is seen on the KOAP channel only irregularly, the station is not the "one independent" envisioned by the Commission as a fulfillment of the minimum service standard. Micro-Cable claims that it is powerless to increase KPTV's share of the programming at the expense of KOAP, and argues that it would be undesirable to do so in view of Commission policy encouraging the carriage of educational television stations.[5] Furthermore, subscribers have voiced dissatisfaction at receiving essentially the same service as that available over the air, it is claimed, and a resolution of the Common Council of Hermiston requesting the carriage "in order to allow the views of our Canadian neighbors to be brought to the attention of our American citizens" is offered to substantiate the claim of public interest. Regarding the adverse impact that CHEK–TV might have on the objecting stations, Micro-Cable argues that any fragmentation resulting from providing CHEK–TV to its 795 subscribers would be insignificant, less harmful, in fact, than that resulting from carriage of one U.S. independent signal full time. It is noted that CHEK–TV is already being carried by cable systems neighboring Hermiston. However, to allay the fears of the objecting stations, the cable system has offered a compromise proposal: it will voluntarily provide network pre-release protection seven days before and seven days after a scheduled broadcast by the local station, apart from simultaneous network non-duplication protection. Finally, the general manager of Micro-Cable has submitted a eight-week survey of the programming of CHEK–TV taken from July 1, 1972, through August 25, 1972, showing that CHEK–TV generally carries an average

[3] Section 76.59(b) provides in relevant part:
"Any such cable television system [i.e., a system located in a smaller market] may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of one independent television station . . ."

[4] Section 76.5(n) defines an independent station as "[a] commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the three major national television networks."

[5] Micro-Cable indicates that a separate channel delivering KPTV to Hermiston would necessitate two microwave hops, at a monthly cost of $1,300, and the five other cable systems along the route have declined to share the expense of the channel. In contrast, CHEK–TV is available through the facilities of a microwave carrier on a hilltop 15 miles away, at a cost of $300 per month.

of 7.8 hours per week of U.S. network programming during prime time and therefore qualifies as an independent.

4. We believe the public interest considerations expressed in *Vilas Cable, Inc.*, FCC 73–379, 40 FCC 2d 637 (1973), justify a grant of the requested waiver.[6] In *Vilas*, the Commission permitted a smaller market cable system, located in a small community, to carry the non-network programming of two network affiliates, in lieu of a single independent station, upon a showing that the cost of utilizing microwave transmission to obtain an independent would be prohibitive. Although the subject request involves different facts, we believe the rationale underlying Paragraph 18 of the *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 333, cited in *Vilas*, is applicable. In essence, this rationale favors granting special relief, where necessary, to permit cable systems to meet the minimum levels of signal carriage diversity permitted by the carriage rules. Although the instant case differs from *Vilas* in that some independent programming is already being carried, we believe the cause of diversity would best be served by permitting carriage of CHEK–TV; however, consistent with *Vilas*, we will permit Micro-Cable to carry only CHEK–TV's non-network programming, thereby assuring that the local network stations receive maximum program exclusivity. The residual programming of CHEK–TV, combined with the occasional programming of KPTV currently being provided (*supra*, n. 2), should offer the residents of Hermiston the variety of programming contemplated by the "one independent" rule. And we believe that the degree of program exclusivity to be afforded, coupled with the smallness of Micro-Cable's system, adequately protects local stations against any audience fragmentation that might result from the part-time carriage of CHEK–TV. We emphasize the following matters: As noted in *Vilas Cable*, *supra*, waivers such as these will only be granted after close scrutiny of the facts and a compelling showing by the applicant; secondly, grant of the subject certificate is conditioned on Micro-Cable carrying only the non-network programming of CHEK–TV, and not increasing the amount of KPTV programming currently provided; and thirdly, in view of our action herein, we need not consider whether CHEK–TV qualifies as an independent signal under the Rules. *But see King Videocable Company*, FCC 73–146, 39 FCC 2d 600 (1973).

In view of the foregoing, the Commission finds that a grant of the subject application for certificate of compliance would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Application for Certification and Alternative Petition for Special Relief," filed by Apple Valley Broadcasting, Inc., licensee of Television Broadcast Station KVEW, Kennewick, Washington, IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certification and Alternative Petition for Special Relief," filed by NWG Broadcasting Company, licensee of Station KEPR–TV, Pasco, Washington, IS DENIED.

[6] *See also Lyons CATV, Inc.*, FCC 73–1137, — FCC 2d — (1973).

IS IS FURTHER ORDERED, That the above-captioned application (CAC–744) IS GRANTED, subject to the conditions stated in paragraph 4 above, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

45 F.C.C. 2d

F.C.C. 74-66

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	CAC-1112 WV156
MORGANTOWN CABLE CO., MORGANTOWN, W. VA.	CAC-1113 WV157
MORGANTOWN CABLE CO., ROWLESBURG, W. VA.	CAC-1114
MORGANTOWN CABLE CO., STAR CITY, W. VA.	WV158
MORGANTOWN CABLE CO., GRANVILLE, W. VA.	CAC-1115
For Certificates of Compliance	WV155

MEMORANDUM OPINION AND ORDER

(Adopted January 23, 1974; Released January 30, 1974)

BY THE COMMISSION:

1. On August 31, 1972, Morgantown Cable Company, Inc. (Morgantown Cable), a division of TelePrompTer Cable Services, Inc., filed the above-captioned applications to add Television Broadcast Station WPIX (Ind.) New York, New York, to its existing 12-channel cable television systems at or near Morgantown, West Virginia.[1] The applications are opposed by Northern West Virginia Television Broadcasting Company (NWV), licensee of Station WBOY-TV, Clarksburg, West Virginia, WUAB Inc., licensee of Television Broadcast Station WUAB, Lorian, Ohio, The Hearst Corporation (Hearst), licensee of Station WTAE-TV, Pittsburgh, Pennsylvania, and Broadcast Industries of West Virginia, Inc. (BIWV), former licensee of Television Broadcast Station WDTV, Weston, West Virginia. Three of the communities that Morgantown Cable serves are located within the Clarksburg, West Virginia smaller television market.[2] All four systems presently carry the following television broadcast signals:[3]

[1] According to the 1972 FCC Forms 325 filed by Morgantown Cable, the date the systems commenced operations, population of the communities, and subscriber distribution are as follows:

Community	Year of commencement of operations	Subscribers	Population
Morgantown	1956	7,631	29,431
Rowlesburg	1953	243	829
Star City	1964	423	1,386
Granville	1962	250	1,427

[2] Rowlesburg is located outside of all markets. Hence, the carriage provisions of Section 76.57 would apply and carriage of WPIX on that system is consistent with the Commission's Rules.

[3] Morgantown Cable's carriage of WPGH-TV (Ind.), Pittsburgh, Pennsylvania, is authorized, but that station is presently off the air.

KDKA–TV (CBS, Ch. 2), Pittsburgh, Pennsylvania
WTAE–TV (ABC, Ch. 4), Pittsburgh, Pennsylvania
WIIC–TV (NBC, Ch. 11), Pittsburgh, Pennsylvania
WQED (Educ., Ch. 13), Pittsburgh, Pennsylvania
WBOY–TV (NBC, Ch. 12), Clarksburg, West Virginia
WWVU (Educ., Ch. 24), Morgantown, West Virginia
WSTV–TV (CBS/ABC, Ch. 9), Steubenville, Ohio
WDTV (CBS, Ch. 5), Weston, West Virginia
WTRF–TV (NBC, Ch. 7), Wheeling, West Virginia

2. Because the Morgantown systems, with the exception of Rowlesburg, are located within a smaller television market, carriage of a single distant independent signal is governed by Section 76.59(b)(2) of the Commission's Rules.[4] Accordingly, if Morgantown Cable selects its independent signal from a top 25 market, it must do so from one of the two closest such markets, where such signal is available. WPIX is located in the New York, New York market (#1), which is the eighth closest top 25 market.[5] Consequently, Morgantown Cable has requested special relief, pursuant to Section 76.7 of the Rules, to permit carriage of WPIX on its Morgantown, Star City, and Granville systems.

3. Morgantown Cable argues that carriage of WPIX is the "only economically feasible way to bring any independent programming to Morgantown". In support of its position, it maintains that: there are no other independents presently available either off-the-air, or by microwave, and the cost of building microwave facilities would be prohibitive; carriage of WPIX will not affect the markets of the other closer top 25 market independents because of their great distance from Morgantown (between 158 and 257 miles) and their failure to extend their markets into Morgantown; the Commission has previously stated that in determining whether to permit the carriage of distant independent signals, geographic proximity is not always a decisive factor. *Sun Cable T–V*, 27 FCC 2d 261 (1971); the importation will not significantly affect the market of either of the two local stations because one is an educational station, and cable subscribers constitute less than 5% of the potential audience of the other; and,

[4] Section 76.59(b)(2) provides, in pertinent part:
(b) Any such cable television system may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of . . . one independent television station. . . .
(2) *Independent station.* A cable television system may carry any independent television station: *Provided, however,* That if a signal of a station in the first 25 major television markets (see Section 76.51(a)) is carried pursuant to this subparagraph, such signal shall be taken from one of the two closest such markets, where such signal is available.
NOTE: *It is not contemplated that waiver of the provisions of this subparagraph will be granted.* (Emphasis added.)

[5] The following is a list of closer top 25 market available independents:

City	Rank	Top 25 independent stations	Distance from Morgantown (miles)
Cleveland, Ohio	(8)	WKBF–TV, WUAB	158
Washington, D.C.	(9)	WDCA–TV, WTTG	166
Baltimore, Md.	(14)	WBFF, WMET–TV	180
Buffalo, NY	(24)	WUTV	232
Newport, Ky.	(17)	WXIX–TV	246
Detroit, Mich.	(5)	WKBD–TV, WXON	247
Philadelphia, Pa.	(4)	WPHL–TV, WTAF–TV, WKBS–TV	257

considering Morgantown's small size, and the increased diversity of programming available from the carriage of WPIX, there are equitable considerations which justify a conclusion that Morgantown Cable should be certified to carry WPIX.

4. We find that Morgantown Cable's carriage proposal is inconsistent with Section 76.59(b)(2) of the Rules. In adopting the Rules, particular concern was expressed that, in the absence of leapfrogging restrictions, a few of the largest major market independents would be carried to the exclusion of other stations. It was the Commission's intention to allow greater participation by television stations in the benefits of cable carriage.[6] Leapfrogging to the eighth closest market to pick up a New York signal would not further this policy. Moreover, the Commission in reconsidering the leapfrogging provisions stated:[7]

> The rule adopted strikes the appropriate balance, and we reassert that we do not contemplate its waiver. We do not intend to return to the process whereby waiver is requested in case after case because of microwave savings; to do so would undermine the leapfrogging rule.

Morgantown has made no showing of unusual circumstances to wargrant special relief. *Sun Cable T–V*, *supra*, cited in the *Reconsideration* and in Morgantown Cable's argument, is clearly distinguishable from the present case. *Sun Cable* involved a 400-subscriber cable system located outside of all markets and Grade B contours. In addition, the system was described as "failing" and, as such, was entitled to special consideration. Morgantown Cable's argument that none of the closest top 25 market stations has extended its market into Morgantown and its argument that carriage of WPIX will not affect the two local stations are irrelevant to the Commission's stated policy of encouraging diversified cable carriage of independent stations. Finally, Morgantown Cable need not carry WPIX to achieve diversity of programming, but can select an independent whose carriage does not violate the anti-leapfrogging rules.

In view of the foregoing, the Commission finds that a grant of the subject applications, with the exception of Rowlesburg, would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the above-captioned applications filed by Morgantown Cable Company for Morgantown, Star City, and Granville, West Virginia (CAC–1112, 1114, and 1115), ARE DENIED.

IT IS FURTHER ORDERED, That the application filed by Morgantown Cable Company for Rowlesburg, West Virginia (CAC–1113), IS GRANTED and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the oppositions filed by Northern West Virginia Television Broadcasting Company, WUAB Inc., The Hearst Corporation, and Broadcast Industries of West Virginia, Inc. ARE GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[6] Para. 92, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 179 (1972).
[7] Para. 25, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 326, 335 (1972).

F.C.C. 74-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
NEWCHANNELS CORP., LIVERPOOL, N.Y.	CAC-31 NY326
NEWCHANNELS CORP., GEDDES, N.Y.	CAC-32 NY327
NEWCHANNELS CORP., DEWITT, N.Y.	CAC-33 NY328
NEWCHANNELS CORP., EAST SYRACUSE, N.Y.	CAC-34 NY329
NEWCHANNELS CORP., TOWN OF MANLIUS, N.Y.	CAC-63 NY330
NEWCHANNELS CORP., MINOA, N.Y.	CAC-64 NY331
NEWCHANNELS CORP., FAYETTEVILLE, N.Y.	CAC-65 NY332
NEWCHANNELS CORP., TOWN OF CAMILLUS, N.Y.	CAC-66 NY333
NEWCHANNELS CORP., VILLAGE OF CAMILLUS, N.Y.	CAC-67 NY334
NEWCHANNELS CORP., SALINA, N.Y.	CAC-106 NY346
NEWCHANNELS CORP., VILLAGE OF MANLIUS, N.Y.	CAC-306 NY369
NEWCHANNELS CORP., FULTON, N.Y.	CAC-1159 NY433
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted January 23, 1974; Released January 31, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING

1. NewChannels Corporation, proposed operator of eleven cable television systems in the above-described Syracuse area communities (located in the Syracuse, New York television market (#35)), has submitted eleven applications for certificates of compliance, for the following television signals:[1]

WSYR-TV (NBC, Channel 3), Syracuse, New York
WNYS-TV (ABC, Channel 9), Syracuse, New York
WHEN-TV (CBS, Channel 5), Syracuse, New York
WCNY-TV (Educ., Channel 24), Syracuse, New York
WOR-TV (Ind., Channel 9), New York, New York
WPIX (Ind., Channel 11), New York, New York
WUTV (Ind., Channel 29), Buffalo, New York

[1] These first eleven communities are suburbs situated around the City of Syracuse. The City of Fulton is about 25 miles away. All of the systems will have 35-channel capacities.

NewChannels has also filed an application for certificate of compliance to operate a cable system at Fulton, New York (also located in the Syracuse market). In addition to the signals noted above, NewChannels has asked for certification of the following signals for Fulton:

WNEW–TV (Ind., Channel 5), New York, New York
WCBS–TV (CBS, Channel 2), New York, New York
WNJU–TV (Ind., Channel 47), Linden, New Jersey
CKWS–TV (CBS, Channel 11), Kingston, Ontario
CJOH–TV (CTV, Channel 13), Ottawa, Ontario

NewChannels' applications are opposed by Onondaga UHF TV Inc., permittee of Station WONH–TV, Syracuse, New York,[2] Outlet Company, licensee of Station WNYS–TV, Syracuse, New York,[3] and Meredith Corporation, licensee of Station WHEN–TV, Syracuse, New York, and NewChannels has replied.

SIGNAL CARRIAGE IN THE ELEVEN SYRACUSE SUBURBS

2. Onondaga UHF TV Inc., and Meredith Corporation object to the importation of WOR–TV and WPIX into the Syracuse market. W.R.G. Baker Television Corporation opposes the carriage of WOR–TV, WPIX, and WUTV. The stations base their argument on the Hearing Examiner's Initial Decision in *General Electric Cablevision Corporation, et al.*, FCC 68D–32, 12 RR 2d 1171 (1968), which they allege determined that the importation of distant signals into the Syracuse market would result in undesirable economic impact on local stations. This decision was appealed to the Review Board, which held consideration of the matter in abeyance pending the outcome of the Commission's *Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397*, 15 FCC 2d 417 (1968). On August 10, 1972, the Review Board terminated the hearing without a final decision.

3. The Examiner's initial decision in the *General Electric* matter did not establish cable impact in the Syracuse market. Under the rule existing at the time (Section 74.1107), the burden rested on the cable television system to rebut a presumption that the importation of distant signals would have a deleterious effect on local television stations, and the Examiner found that the cable television systems had not succeeded in overcoming the presumption. The fact that this proceeding was never completed severely limits the weight that can be given to this finding. And under the present cable rules, the burden rests on the objecting party (not the cable system) to prove with specific financial data that there is a need for remedial action. Paras. 71–72, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 169. The opposing parties have not submitted such financial evidence or otherwise persuaded us to accept their contention. See *Spectrum Cable Systems, Inc.*, FCC 73–257, 40 FCC 2d 1019. Thus, this economic impact argument must be rejected.[4]

[2] Onondaga UHF TV Inc., has not filed an opposition to CAC–306 or CAC–1159.
[3] W.R.G. Baker Television Corporation, former licensee of Station WNYS–TV, filed the oppositions to the eleven Syracuse suburbs.
[4] Onondaga UHF TV's Station WONH–TV will of course be entitled to carriage on NewChannels' systems when the station goes on the air.

SIGNAL CARRIAGE IN FULTON

4. Meredith and Outlet object to NewChannels' proposed carriage on its Fulton system of the three New York City independents WOR–TV, WNEW–TV and WPIX, CKWS–TV, Kingston, Ontario, and CJOH–TV, Ottawa, Ontario. Outlet also objects to the proposed carriage of WCBS–TV, New York, New York. Meredith bases its objection on the Hearing Examiner's decision in the Syracuse market proceedings discussed above. This reliance is misplaced. The Fulton situation is very different from the other eleven cable systems. The Commission specifically granted to NewChannels' Fulton system a waiver of the hearing provision of former Section 74.1107 of the Commission's Rules, thereby excluding it from the Syracuse market hearing and authorizing carriage of its television signal request. *General Electric Cablevision, Corp.*, FCC 67–295, 7 FCC 2d 593, *reconsideration denied in part and granted in part*, FCC 67–1381, 11 FCC 2d 150. Outlet notes that an appeal of these decisions by its predecessor in interest W.R.G. Baker, is pending before the United States Court of Appeals for the District of Columbia Circuit,[5] and therefore contests the "grandfathered" status of these signals pending the outcome of this case.[6] Outlet presents no legal justification for its arguments. Absent a juridical or Commission stay, there is no basis for holding in abeyance the effect of a final Commission determination. Consequently, we find that the Fulton carriage proposal was authorized pursuant to the above-described Commission decisions and, hence, is grandfathered on the Fulton system in accordance with Section 76.65 of the Rules.

GENERAL OBJECTIONS

5. The remaining objections raised by W.R.G. Baker to all of the applications are: (a) that NewChannels' request for a temporary waiver of the franchise requirements of Section 76.31 of the Commission's Rules does not specify the areas in which the franchises are deficient; and (b) that the extent of concentration of media control exercised by Newhouse Broadcasting Corporation (the parent company of NewChannels) in the Syracuse market is presently under investigation at the Commission and in the courts (see paragraph 4 above). Accordingly, until this question is resolved by these bodies, no certificates of compliance should be issued for any NewChannels cable system in the Syracuse market. These objections are rejected for the following reasons:

(a) All of the franchises in question were awarded prior to March 31, 1972. Therefore, only substantial consistency with the franchise provisions of Section 76.31 need be demonstrated at this time, according to the note to Section 76.13(a)(4). All of the franchises appear to have been awarded after public proceedings and are virtually identical. The franchises contain provisions which: specify initial rates; provide that rates increases must be based on increased costs, and notice of in-

[5] *W.R.G. Baker Television Corporation* v. *Federal Communications Commission* (Case No. 21,599).

[6] On March 22, 1972, the Court of Appeals ordered that this matter be held in abeyance pending final disposition of the Syracuse market hearing. As previously indicated, that proceeding was terminated by the Review Board on August 10, 1972.

creased rates must be filed with the local authority in writing; and require that "the Company shall further comply with and be subject to all applicable regulations and laws affecting community antenna television promulgated by Onondaga County [Oswego County for Fulton], New York State or United States regulatory agencies." The franchise fees and durations are as follows: Salina and the Town of Camillus, 4% and 15 years; Liverpool, the Town of Manlius, the Village of Camillus, and Fulton, 3% and 25 years; Minoa and East Syracuse, 3% and 30 years; Fayetteville and Village of Manlius, 4% and 20 years; DeWitt 5% and 15 years; and Geddes, 6% and 15 years. Most of the franchises provide for an increase in the franchise fee up to the highest fee paid by any cable television system in the county with a limit of no more than 5% (DeWitt's fee could reach the 6% fee of Geddes). It should also be noted that all the communities involved in this proceeding have indicated support for NewChannels' applications, and each community stated that it will promptly amend its franchise to comply fully with the requirements of Section 76.31 of the Rules, rather than waiting until 1977 (which would be permissible).

(b) Section 76.501 (former Section 74.1131) of the Rules precludes television licensees from co-owning cable systems and television stations within the station's predicted Grade B contour. However, in the *Reconsideration of the Second Report and Order in Docket No. 18397*, FCC 73–80, 39 FCC 2d 377, the divesture date of such prohibited cross-ownership interests was extended until August 10, 1975. Additionally, in paragraph 51 of the *Reconsideration* the Commission invited the filing of waiver petitions of this mandatory divestiture requirement. NewChannels did in fact file requests for waiver of this rule for all of the subject cable systems.[7] However, on November 15, 1973, NewChannels filed a letter in which it undertook to withdraw these waiver requests "on the date on which favorable Commission action becomes final" with respect to the 12 applications for certificates of compliance under examination herein.[8] This action would require dissolution of the broadcast-cable cross-ownership links with respect to these systems by August 10, 1975.[9] Since the concentration of control issue raised by W.R.G. Baker essentially involves Newhouse's broadcast, newspaper, and microwave interests in the Syracuse market and since this question is also involved in other matters pending before the Commission (see footnote 8 below), we believe that NewChannels' withdrawal of its cable cross-ownership waiver requests for the 12 subject communities will effectively sever whatever cable connection may exist between these communities and the concentration issue, and permits the processing of the certificate applications at this time. In making this judgment, we are cognizant of the fact that the citizens of these communi-

[7] CSR–406(X) is the waiver petition for the Syracuse suburbs and CSR–410(X) applies to Fulton. Both petitions have been opposed by WNYS–TV and by the National Citizens Committee for Broadcasting.

[8] Such action by NewChannels would not affect its waiver requests for existing systems in the Syracuse market: Oneonta Video (CSR–412(X)), Town and Village of Laurens; Sidney Video (CSR–413(X)), Towns and Villages of Unadilla and Sidney; and Cabletron (CSR–414(X)), Rome and Griffiss AFB.

[9] We note that NewChannels and Newhouse are among the parties challenging the Commission's cross-ownership rules in the United States Court of Appeals for the Ninth Circuit. *Gill Cable Inc.* v. *Federal Communications Commission*, Case Nos. 73–1344, 73–1466, and 73–1840). Of course, if this appeal is successful, no divestiture would be necessary.

ties have been awaiting cable television service for more than eight years, and that NewChannels have been vigorously attempting to provide that service throughout this period.

ACCESS WAIVER REQUEST

7. As to its access cablecasting plans for the 11 Syracuse suburbs, NewChannels proposes two headend locations which will serve the communities as follows:[10]

> DeWitt, East Syracuse, Town of Manlius, Minoa, Fayetteville, and the Village of Manlius will be served by a headend located in the Town of Manlius and will be called the "East System".
>
> Liverpool, Salina, Geddes, Town of Camillus, and the Village of Camillus will be served by a headend located in the Town of Camillus and will be called the "West System".

Each conglomerate "system" would offer two public access channels, one government access channel, and one educational access channel. NewChannels indicates that the communities involved are almost totally contiguous and occupy an area that is ten by twenty-three miles wide.[11] The access production facilities would be located so that any subscriber would be able to reach them within a twenty-minute ride. The populations of the communities in the proposed "East System" are as follows: DeWitt—22,758; East Syracuse—4,708; Town of Manlius—13,333; Minoa—1,784; Fayetteville—4,702; and Village of Manlius—2,781. In the proposed "West System," they are: Liverpool—3,308; Salina (franchise granted for only a portion of the community)—17,000; Geddes—12,254; Town of Camillus—21,799; and Village of Camillus—1,401. NewChannels argues that the proximity of these communities to each other and their shared interest as commuters and shoppers in Syracuse and the metropolitan Syracuse area, coupled with their small individual sizes, make its access proposal not only reasonable, but also conducive to an exchange of views among citizens of the various communities.

8. We find that NewChannels' access proposal is consistent with the public interest. The sharing of access channels and production facilities under the circumstances described above is consistent with our decision in *Saginaw Cable TV Co.*, FCC 73–121, 39 FCC 2d 496. See also Para. 90, *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 359. All communities involved in this proceeding were served with copies of the access proposal, none responded unfavorably and, as noted above, all have indicated their support for NewChannels' applications. We also note that NewChannels will have as many as 28 channels ultimately available for access purposes in each of the two conglomerate "systems" for which waiver is sought.

[10] No waiver is being sought for the Fulton system.

[11] Geographically, the Town of DeWitt includes the Village of East Syracuse; the Town of Manlius wholly includes the Village of Manlius, Minoa, and Fayetteville; the Town of Salina includes Liverpool; and the Village of Camillus is wholly within the Town of Camillus. Furthermore, all of the communities are located in Onondaga County, and Fayetteville and the Town and Village of Manlius share a common school district, as do East Syracuse and Minoa, in the proposed "East System", and Liverpool and Salina and the Town and Village of Camillus in the proposed "West System."

In view of the foregoing, we find that a grant of NewChannels Corporation's applications for certificates of compliance would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection to Applications for Certificate of Compliance" filed by W.R.G. Baker Television Corporation, IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance" filed by Outlet Company, IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Applications for Certificate of Compliance" filed by Onondaga UHF TV Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Applications for Certificate of Compliance" and the "Partial Opposition to Application for Certificate of Compliance" filed by Meredith Corporation, IS DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–31–34, 63–67, 106, 306, and 1159) filed by NewChannels Corporation, ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–106

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
NEW SOUTH RADIO, INC.
Concerning Notice of Apparent Liability
for Forfeiture for violation of Fairness
Doctrine by Station WACT

JANUARY 30, 1974.

NEW SOUTH RADIO, INC.,
Licensee of Radio Station WACT,
P.O. Drawer 126,
Tuscaloosa, Ala. 35401

GENTLEMEN: This letter constitutes a Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

In correspondence to the Commission dated March 7, March 23, April 19, May 15 and May 20, 1973, Mr. Morris Gardner (hereinafter complainant) alleged that during the February 22, 1973 "Getting It Said" program on WACT, three unidentified phone callers broadcast various remarks which constituted personal attacks against him.

Complainant stated that he called in on the above-mentioned radio talk show in order to present his view that he did not believe that integration of the races is necessary in order to have brotherly love; that the issues of race relations and integration are controversial issues of public importance; that race relations and integration rank among the top ten concerns of Americans today [1]; that following his remarks three listeners called to attack his honesty, character and integrity; that the listeners characterized petitioner as a mental patient, who was always in trouble with the police, a vagabond and a "sick" man.

Complainant further alleges that WACT failed to follow the Commission's procedures (under Section 73.123 of its rules and regulations) in that within seven days of the broadcast of the personal attack it failed to notify the person attacked, failed to send a tape, transcript or accurate summary of the attack, or offer a reasonable opportunity to reply to the attack. Petitioner notes that his attempts to obtain reply time were rebuffed by the show's producer.

In responding to a Commission inquiry, you contend by letter of May 2, 1973 that no personal attack occurred because "integration-versus-segregation" is not a controversial issue of public importance; that the question of integration-versus-segregation is no more a controversial issue than is the existence of God; that, although there may

[1] He cites *The Gallup Opinion Index*, January 1973, p. 15–16.

be a controversy as to how integration is to be achieved, that, "Whatever integration controversy existed . . . has long since been settled by the courts and legislatures of this land"; and that irrespective of whether a controversial issue was discussed the remarks by the above three listeners did not constitute an attack on petitioner personally, but only his ideas and the clarity of his thinking.

Although wide discretion is afforded the licensee in determining whether a personal attack was broadcast during the discussion of a controversial issue of public importance, WACT's judgment in this matter appears to have been unreasonable. Complainant, in his petition of April 19, 1973, has well-documented the obvious controversiality of the integration issue. The decisions and enactments of courts, agencies and legislatures have no more rendered uncontroversial the "integration-versus-segregation" issue than similar decisions have arrested the controversy over the abortion or death penalty issues. Merely because the laws of the country have proscribed certain conduct (such as discrimination) and hence thrown the weight of official governmental policy in favor of one side of a controversial issue, that issue is not automatically removed from the category of a controversial public issue. To hold otherwise would be inconsistent with the First Amendment's purpose of promoting the widest possible public debate on controversial issues of public importance and would work to immunize established governmental policy from continued scrutiny by the public. See *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Red Lion* v. *FCC*, 394 U.S. 367 (1969); *BEM* v. *FCC*, 412 U.S. ——— (1973).

Moreover, the relationship between the "integration-versus-segregation" issue and the "best-method-of-integration" issue advanced by WACT is so overlapping as to make the classification as to controversiality indistinguishable. It further appears that the caller's statement which alleged that petitioner has "never done anything but loaf the streets and get into things and if you don't believe it you check with the police department . . . and they know so much on him they could bury him now," appears to be more than an unfavorable reference, but indeed attacks the "honesty, character, integrity or like personal qualities" of petitioner. It would appear, therefore, that you willfully or repeatedly violated Section 73.123(a) of the Commission's Rules by failing within one week after the attack to notify Mr. Gardner of the attack, furnish him with a script, tape or summary of the attack, and offer him a reasonable opportunity to respond.

It is noted that, following the Commission's inquiry of April 30, 1973, you agreed, on May 2, 1973, to offer Mr. Gardner an opportunity to respond to the "comments made by the listeners of Station WACT." However, the Commission expects licensees to adhere to all requirements of the personal attack rule, including the seven-day requirement of notification. "In any event we cannot temporize with licensee indifference to the seven-day requirement, for to do so would undermine that portion of the rule—and it is an important aspect." *WIYN, Inc.*, 35 FCC 2d 175, 178 (1972).

For failure to comply with the obligations attending the broadcast of a personal attack, you are subject to forfeiture pursuant to Section 503(b)(1)(B) of the Communications Act as amended. In view of the

serious nature of these violations, the Commission has determined that you have incurred an apparent liability in the amount of one thousand dollars ($1,000) for willful or repeated failure to observe the requirements of Section 73.123(a) of the Commission's Rules.

Under Section 1.621 of the Commission's Rules, you may take any of the following actions in regard to this forfeiture proceeding:

1. You may admit liability by paying the forfeiture within thirty days of receipt of this Notice. In this case you should mail to the Commission a check or similar instrument for $1,000 made payable to the Federal Communications Commission.

2. Within thirty days of receipt of this Notice you may file a statement, in duplicate, as to why you should not be held liable or why the forfeiture should be reduced. The statement must be signed by the licensee; a partner, if the licensee is a partnership; by an officer, if the licensee is a corporation, or by a duly elected or appointed official, if an unincorporated association. The statement may include any justification or any information that you desire to bring to the attention of the Commission. After consideration of your reply the Commission will determine whether any forfeiture should be imposed, and, if so, whether the forfeiture should be imposed in full or reduced to some lesser amount. An order stating the result will be issued.

3. You may take no action. In this case the Commission will issue an order of forfeiture after expiration of the thirty-day period ordering that you pay the forfeiture in full.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

F.C.C. 74R-27

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of PAYNE OF VIRGINIA, INC., VIRGINIA BEACH, VA.	Docket No. 19095 File No. BPH-6754
VIRGINIA SEASHORE BROADCASTING CORP., VIRGINIA BEACH, VA. For Construction Permits	Docket No. 19096 File No. BPH-6901

APPEARANCES

Harry G. Sells, on behalf of Payne of Virginia, Inc.; *Jason L. Shrinsky*, *James A. Koerner* and *Arthur Stambler*, on behalf of Virginia Seashore Broadcasting Corporation; and *Gerald Zuckerman* and *Richard M. Riehl*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted January 23, 1974; Released January 30, 1974)

BY THE REVIEW BOARD: NELSON, PINCOCK AND KESSLER.

1. This proceeding involves the mutually exclusive applications of Payne of Virginia, Inc. (Payne) and Virginia Seashore Broadcasting Corporation (VSBC) for construction permits to establish a new Class B FM broadcast station to operate on Channel 235 (94.9 MHz) in Virginia Beach, Virginia.[1] By Memorandum Opinion and Order, FCC 70-1210, 35 FR 17967, published November 21, 1970, the Commission designated the applications for hearing [2] to resolve financial and *Suburban* issues against both applicants and a standard comparative issue. Subsequently, the Review Board added an issue "to determine whether Virginia Seashore Broadcasting Corporation has failed to completely disclose material information to the Commission in its application, as required by Section 1.514 of the Commission's Rules, and, if so, the effect of such conduct on its requisite and/or comparative qualifications to be a Commission licensee." Memorandum Opinion and Order, 28 FCC 2d 66, 21 RR 2d 525, released March 22, 1971. On November 14, 1972, the late Administrative Law Judge Charles J. Frederick released an Initial Decision (FCC 72D-74), recommending a grant of Payne's application. He concluded that both applicants had met the financial and *Suburban* issues designated against them. The Presiding Judge concluded, however, that VSBC had violated Rule 1.514 and

[1] Channel 235 is allocated to Chesapeake-Portsmouth-Virginia Beach, Virginia. See Report and Order in Docket No. 18423, 34 FR 6525, 15 RR 2d 1598 (1969).

[2] This proceeding originally involved three applicants. The third application was filed by Sea Broadcasting Corporation (Sea), which later merged with VSBC. The merger was approved, and Sea's application was dismissed by the Presiding Judge by Order, FCC 71M-1143, released July 12, 1971.

that VSBC's pleadings and exhibits addressed to the Rule 1.514 issue were inconsistent with the testimony of the stockholders given at hearing. It was concluded that these inconsistencies alone constituted sufficient grounds to disqualify the applicant. For the foregoing reasons, the Judge recommended a grant of Payne's application.

2. The proceeding is now before the Review Board on exceptions filed by VSBC and on limited exceptions filed by Payne and the Broadcast Bureau.[3] VSBC excepts to the Presiding Judge's resolution of the Rule 1.514 issue; to his resolution in Payne's favor of the *Suburban* issue designated against it; to his failure to give VSBC a significant preference under the comparative coverage (efficiency) issue; and to his failure to make comparative findings and prefer VSBC. The Board has reviewed the Initial Decision in light of VSBC's exceptions, the arguments of the parties, and our examination of the record. Oral argument was heard by a panel of the Review Board on November 20, 1973.[4] We are in accord with the ultimate conclusions reached by the Presiding Judge and with his resolution of the financial and *Suburban* issues specified against both applicants. The Board, however, disagrees with the Presiding Judge's determination to disqualify VSBC under the Rule 1.514 issue. Furthermore, we do not believe the Presiding Judge made adequate findings and conclusions under the standard comparative issue. Except as modified herein and in the rulings on VSBC's exceptions contained in the attached Appendix, the Presiding Judge's findings of fact and conclusions of law are adopted.

3. *Rule 1.514 Issue.*—The facts underlying the Rule 1.514 issue are undisputed by the parties. Briefly, Daniel E. Hydrick, Jr., then 20% stockholder,[5] vice-president, and director of VSBC, represented in VSBC's original application that he would be general manager of VSBC's proposed station. In an application for a new standard broadcast station for Charlottesville, Virginia, filed some 20 months prior to the filing of VSBC's application, Hydrick had also been designated as the proposed station's full-time general manager. In response to a petition to enlarge filed by Sea to explore the apparent discrepancy, VSBC stated that Hydrick, who, VSBC argued, obviously could not be full-time general manager of both stations, would be general manager for the applicant who first secured a grant of its application. At the hearings, two VSBC stockholders [6] testified that their understanding was that Hydrick would be general manager of the Virginia Beach station. Hydrick later testified [7] that he intended to be general manager

[3] Also before the Board are: (a) brief for oral argument, filed November 19, 1973, by Payne; and (b) motion to strike, filed November 21, 1973, by VSBC.

[4] The brief for oral argument, filed by Payne on November 19, 1973, is an unauthorized pleading and will, therefore, be dismissed. See Sections 1.276 and 1.277 of the Commission's Rules.

[5] After VSBC merged with Sea (see note 2, *supra*), Hydrick's stock interest in VSBC was reduced from 20% to 10.2%.

[6] The two stockholders are Bruce E. Melchor, Jr. and Reid M. Spencer.

[7] At the hearing the Presiding Judge struck all of the testimony given by Hydrick (Tr. 315, 319, 324) because of VSBC's alleged failure to recall Hydrick to testify in the comparative stages of the hearing. Nonetheless, the Judge utilized Hydrick's testimony in his Initial Decision. See paragraphs 21 and 22 of the Findings and paragraph 7 of the Conclusions of the Initial Decision. Payne has filed a limited exception contending that it was not given an opportunity to cross-examine Hydrick because of VSBC's failure to recall him to the stand. The record reflects, however, that Payne had ample opportunity to cross-examine Hydrick with respect to the Rule 1.514 issue, and, in fact, did so (see Tr. 188). In light of the foregoing and the fact that the Presiding Judge did utilize Hydrick's testimony in his Initial Decision, we will consider the testimony as part of the record.

of both stations and would hire a person to handle day-to-day operations at one of the two stations. The Presiding Judge concluded first "that VSBC has violated Section 1.514 of the Rules and is not qualified to be a licensee" and, second, that "VSBC's pleading and exhibit are totally inconsistent with its oral testimony as well as contrary to the testimony of the stockholders." In the Judge's opinion, "this alone [was] sufficient to disqualify the applicant." Paragraph 10 of the Judge's Conclusions.

4. First, the Board agrees with the Presiding Judge that VSBC did violate Rule 1.514. Merely indicating that Hydrick would be full-time general manager without further explanation in light of his designation as full-time general manager of the proposed Charlottesville station was not a complete response to the Commission's question in the application.[8] Although VSBC's explanations were inconsistent, the record does not support the conclusion that VSBC filed an intentionally misleading application. Significantly, VSBC voluntarily disclosed in its application that Hydrick was 50% owner, officer, and director of the Charlottesville-Albermarle Broadcasting Corp. Although this is not dispositive, it negates an intention on VSBC's part to deceive the Commission. See *Lake Erie Broadcasting Co.*, 43 FCC 2d 886, 888, 28 RR 2d 1305, 1307 (1973). Moreover, at the time VSBC filed its application, it had no motive to misrepresent Hydrick's position since the only other mutually exclusive application on file at that time was for another community. Concededly, VSBC's first explanation, *i.e.*, that Hydrick would be station manager for whichever applicant was first to receive a grant of its application, is not in accord with Hydrick's testimony at the hearing that he would be full-time general manager at both stations and would hire an employee to handle the day-to-day operations at one of the two stations. However, the Board does not believe that the rule violation and the inconsistencies between VSBC's pleading and exhibit and the testimony of VSBC's principals, considered either together or separately, are sufficient to disqualify VSBC in the absence of additional evidence showing "the existence of fraud, concealment, or other serious misconduct". *Gross Broadcasting Company*, 41 FCC 2d 729, 731, 27 RR 2d 1543, 1545 (1973). In the instant case, the record does not reveal that VSBC attempted to deliberately conceal or mislead the Commission with respect to the facts surrounding the designation of Hydrick as general manager in the two applications and, therefore, that VSBC lacked the requisite qualifications to be a Commission licensee. See *Gross Broadcasting Company, supra; Lake Erie Broadcasting Company, supra*, and the cases cited therein. Rather, in our view, the evidence establishes only that VSBC was careless and did not give due consideration to the implications of its answers in this regard. Consequently, we disagree with the Judge's absolute disqualification of VSBC. Nevertheless, we believe that VSBC's rule violation is serious, especially in light of the inconsistencies

[8] Section IV–A, Part VI, paragraph 27 asks, "State the name(s) and position of the person(s) who determines the day-to-day programming, makes decisions, and directs the operation of the station covered by this application and whether he is employed full-time in the operation of the station." To this question, VSBC answered: "Daniel E. Hydrick, Jr., Vice President and General Manager (full time). Mr. Hydrick will be responsible for the administration of the station and its programming."

pointed out above, and reflects adversely on VSBC's comparative qualifications. See paragraph 10, *infra.*

5. *Suburban Issue.*—In our opinion, Payne has complied with the intent, purpose and objectives of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). Payne's survey was amended and supplemented on three different occasions.[9] It can be determined from Payne's demographic showing that a broad cross-section of population groupings was consulted, including representatives from government, education, religious groups, public service organizations and military personnel. Payne's evaluation of these interviews with community leaders produced a list of approximately sixteen needs and interests of the area to be served. To meet these needs and interests, Payne proposes ten specific programs and plans to broadcast editorials as necessary. Payne's general public survey, however, is markedly deficient. *Cf. Voice of Dixie, Inc.*, 41 FCC 2d 550, 27 RR 2d 980 (1973), review granted, FCC 73–967, released September 24, 1973; *WPIX, Inc.* (*WPIX*), 34 FCC 2d 419, 24 RR 2d 59 (1972). In its *Suburban* showing, Payne claims that its general public surveys were derived from the on-going survey of public concerns it conducts in conjunction with its present AM station in Chesapeake, Virginia (WCPK). It did not provide, however, a list of names or the specific number of persons interviewed, who interviewed them, or when they were interviewed. Although Payne's survey of the general public does not comport with *Primer* requirements and is deemed to be superficial, the Board, nevertheless, believes that when it is considered with Payne's community leader survey, the totality of the surveys establish that the objectives of the *Primer* have been met, *i.e.*, community problems and needs have been ascertained, a dialogue with community leaders has been established, and appropriate programming to meet the needs and problems ascertained has been proposed. Therefore, we agree with the Presiding Judge that Payne sustained its burden of proof under the *Suburban* issue although its showing is deemed to be a minimal one. Having determined that both applicants are basically qualified to be Commission licensees, we now turn to a comparison of the applicants under the standard comparative issue.

6. *Standard Comparative Issue.*—The two primary objectives toward which the comparative process is directed are: (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). See *Terre Haute Broadcasting Corp.*, 25 FCC 2d 348, 19 RR 2d 487 (1970). In our opinion, neither party warrants a preference for diversification of control of mass communications media. On the one hand, Payne is the licensee of a daytime-only radio Station WCPK (AM), in Chesapeake, Virginia, and Charles Payne, president and majority stockholder (51%) of the applicant, has an 8.333% ownership interest in Station KKDA (AM), Grand Prairie, Texas. VSBC, as a corporate entity, has no other broadcast interests; however, Sea, a

[9] Payne's initial survey was filed with its application on June 5, 1969. Another survey was filed on November 20, 1969. In order to comply with the Commission's *Primer*, Payne filed another survey on June 17, 1970. Its last survey was filed on May 25, 1971.

49% stockholder of VSBC, is the licensee of radio Station WVAB (AM), Virginia Beach, Virginia. We believe that this 100% versus 49% ownership of other media is balanced by the fact that Payne's station is located in Chesapeake (which is contiguous to Virginia Beach) whereas Sea's is located in Virginia Beach, the proposed community of license in this proceeding.[10] In our view, these factors balance each other out; therefore, neither party warrants a preference for diversification. See *Flower City Television Corp.*, 9 FCC 2d 249, 10 RR 2d 1059, reconsideration denied 10 FCC 2d 718, 11 RR 2d 771 (1967), affirmed *sub. nom. Star Television, Inc.* v. *FCC*, 135 U.S. App. D.C. 71, 416 F. 2d 1086, 15 RR 2d 2036 (1969).

7. Payne is, however, entitled to a moderate preference under the best practicable service criterion. Under this factor, the Commission considers, *inter alia*, integration of ownership and management, past broadcast record, and efficiency. The integration criterion, by itself, is "of substantial importance" in the comparative analysis, *Policy Statement*, *supra*, 1 FCC 2d at 395, 5 RR 2d at 1909, and can be "a particularly significant, sometimes decisive, factor in many comparative cases." *Lorain Community Broadcasting Co.*, 13 FCC 2d 106, 114 n. 19, 13 RR 2d 382, 392 n. 19, reconsideration denied 14 FCC 2d 604, 14 RR 2d 155, rehearing dismissed 15 FCC 2d 388, 14 RR 2d 968 (1968), review denied 18 FCC 2d 686 (1969), affirmed *sub. nom. Allied Broadcasting, Inc.* v. *FCC*, 140 U.S. App. D.C. 264, 435 F. 2d 68, 19 RR 2d 2071 (1970). In the instant case, this factor is decisive.

8. Charles Payne is the proposed general manager of Payne's FM station. At present Mr. Payne is general manager, sales manager and program director of Station WCPK, Payne's Chesapeake station. Payne's wife, Kay W. Payne, who is vice-president, secretary, director and 39% stockholder of the applicant, plans to perform the same functions at the proposed FM station that she performs at Payne's Station WCPK, such as local news coordination, programming, trafficking and bookkeeping. In the Initial Decision, the Presiding Judge concluded that the Paynes would devote "full-time" to the station. However, Payne testified that he intended to continue as Station WCPK's general manager, sales manager, and program director and, therefore, would devote only half the broadcast day to the FM station. In fact, Payne testified that while he would be at the FM station each day, he would spend only three hours a day there. Consequently, Payne proposes 90% ownership integration into management on a half-time basis. Payne's integration proposal is qualitatively enhanced by Mr. and Mrs. Payne's local residence, civic participation and broadcast experience. The proposed general manager of VSBC's station is Jack H. Harris, a 7% stockholder in VSBC. Harris also plans to continue to devote 10–15 hours per week to his present duties as executive vice-president of Station WVAB, Virginia Beach, Virginia. Harris is a long-time resident of Virginia Beach, has been active in numerous civic organizations, and has past broadcast experience dating back to 1943. Bruce E. Melchor, Jr., secretary-treasurer, director and stockholder of VSBC, and Reid M. Spencer, director and stockholder, each

[10] Charles Payne's interest in the Grand Prairie, Texas, station is so small and the distance from Virginia Beach, Virginia, so substantial that the interest has little decisional significance.

plan to devote only 10 hours per week to the station in public relations. In the Board's opinion, Payne's proposal to integrate 90% of its ownership into management, even on a part-time basis, outweighs VSBC's to integrate only 7% of its ownership into management, also on less than a full-time basis.[11] *Cf. East St. Louis Broadcasting Co., Inc.*, 29 FCC 2d 170, 21 RR 2d 992 (1971). In sum, even though the Paynes are entitled to an integration preference, the preference can only be moderate because of their plans to devote less than full-time to the station. See *Lewis Broadcasting Corp.*, 11 FCC 2d 889, 12 RR 2d 627 (1969); *Nelson Broadcasting Company*, 3 FCC 2d 84, 7 RR 2d 146 (1966). *Cf. Snake River Valley Television, Inc.*, 26 FCC 2d 380, 20 RR 2d 644 (1970), review denied FCC 71–549, released May 26, 1971.

9. The Board does not believe that either applicant warrants a preference on the basis of the more efficient utilization of the frequency. Payne would serve 67,443 more persons than VSBC; however, a minimum of five other services are available to essentially all of these persons. Also, the "white" and "gray" areas and populations that would be served by Payne are minute. On the other hand, VSBC would provide a service to 433 persons who now have only one FM radio service and an additional service to 10,044 persons presently receiving less than five FM services. In our opinion, the advantages afforded by each applicant's engineering proposal balance each other out.[12]

10. Finally, although the Board would not disqualify VSBC for failing to comply with Commission Rule 1.514,[13] we nonetheless believe that the rule violation together with inconsistencies in the pleading and exhibit and testimony offered by VSBC, demonstrate a carelessness or negligence on its part which warrant giving it a substantial demerit on a comparative basis. *Cf. Vogel-Ellington Corp.*, 41 FCC 2d 1005, 27 RR 2d 1685 (1973); *A. V. Bamford*, 41 FCC 2d 835, 27 RR 2d 1659 (1973).

11. *Summation.*—We have concluded that both applicants are qualified. On a comparative basis, neither applicant warrants a preference for diversification of control of mass communications media. Payne's proposal offers the best practicable service to the public because of the preference to which it is entitled under the factor on integration of ownership with management and because of the substantial demerit assessed against VSBC for its failure to comply with the Commission's Rule 1.514 and inconsistencies. In light of the foregoing, we conclude that the public interest, convenience and necessity would be served by a grant of Payne's application for an FM broadcast station at Virginia Beach, Virginia.

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[11] Although Spencer and Melchor plan to devote approximately 10 hours per week to station operations, only slight credit can be given to their participation. In this connection, the Commission's *Policy Statement, supra,* states: "To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." 1 FCC 2d at 395, 5 RR 2d at 1909.

[12] VSBC asserts that it was not given an opportunity at the hearing to challenge the coverage figures submitted by Payne which took into consideration the then-pending applications for Channels 229 and 295 in Elizabeth City, North Carolina, and which were utilized by the Presiding Judge in determining coverage under the standard comparative issue. There is no merit to this argument. The record clearly reveals that VSBC's counsel did cross-examine Payne's engineer and, therefore, had ample opportunity to cross-examine him on his showing and on the effect a grant of the applications would have on VSBC's coverage figures.

[13] See paragraphs 3–4, *supra.*

12. Accordingly, IT IS ORDERED, That the motion to strike, filed November 21, 1973, by Virginia Seashore Broadcasting Corporation, IS GRANTED, and the brief for oral argument, filed November 19, 1973, by Payne of Virginia, Inc., IS DISMISSED; and

13. IT IS FURTHER ORDERED, That the application of Payne of Virginia, Inc. (BPH–6754) for a new FM broadcast station to operate on Channel 235 at Virginia Beach, Virginia, IS GRANTED, and the application of Virginia Seashore Broadcasting Corporation for the same authorization IS DENIED.

SYLVIA D. KESSLER,
Member, Review Board,
Federal Communications Commission.

APPENDIX

RULINGS ON EXCEPTIONS OF VIRGINIA SEASHORE BROADCASTING CORPORATION

Exception No.	*Ruling*
1	Denied for the reasons stated in footnote 12 to this Decision.
2	Denied. The record clearly shows that the Channel 229 facility in Elizabeth City, N.C., will serve all of the sparsely served areas.
3	Denied. The Judge's finding is accurate.
4	Denied. The transcript citation does not support the exception. In addition, the effect of a proposal to duplicate programming will be considered and weighed under the standard comparative issue *only* when an appropriate request has been made and permission granted to adduce such evidence. See *Jones T. Sudbury*, 8 FCC 2d 360, 10 RR 2d 114 (1967); and *Bangor Broadcasting Corp.*, FCC 71R–141, 21 RR 2d 953 (1971). Since the question of duplicated programming was never raised in this proceeding, the Presiding Judge did not err in failing to consider Payne's plans to duplicate some of its AM programing on its proposed FM station.
5, 6	Denied. The Presiding Judge's finding is supported by the record. Melchor testified that he did not "recall" that Hydrick had mentioned being listed in the Charlottesville application as general manager, although he did recall Hydrick's informing him of his interest in the Charlottesville application. (Tr. 157.)
7, 8	Denied. The Presiding Judge's interpretation of Spencer's testimony is in accord with the actual words he used in his testimony. (Tr. 167.)
9	Denied. The record supports the Presiding Judge's findings. Hydrick's testimony (*i.e.*, "I think there is an error on these [VSBC's Ex. No. 9]. It should have read: 'Mr. Hydrick's intention was that he would be the general manager of both stations.' The term manager is just a term.") supports the finding that the VSBC's exhibit did not contain Hydrick's plan to be general manager at both stations.
10, 11, 12, 14	Denied. Payne's *Suburban* showing, filed initially with its June 5, 1969 application, was amended and supplemented on three subsequent occasions; consequently, the facts that the first survey was of Chesapeake, Virginia, that parts of the same survey were utilized in a renewal application for Station WCPK, and that the June 17, 1970, survey was done prior to the release of the Commission's *Primer on Ascertainment of Community Problems by*

Exception No.	*Ruling*
	Broadcast Applicants, 27 FCC 2d 650, 21 RR 2d 1507 (1971), does not detract from the fact that the showing in its totality meets the principal objectives of *Primer* requirements. Furthermore, Payne's demographic showing is adequate to determine whether a cross-section of community groupings was contacted. See paragraph 5 of this Decision.
13, 21	Granted. Charles Payne's son, who was not a management-level employee, conducted ten community leader surveys for Payne. This is clearly contrary to the requirements set forth in the *Primer, supra,* (Q and A 11(a)); nevertheless, since it appears that he only interviewed ten persons out of the numerous community leader surveys conducted by Payne, the Board does not believe that this renders the total community leader survey deficient.
15, 16, 17, 18, 20	Denied. The record supports the Presiding Judge's findings. Charles Payne's testimony, that random calls are made in conjunction with Station WCPK and are conducted on a continuing basis, was unrebutted. (Tr. 92.) The record also shows that the eight random calls submitted with the June 5th survey were a "sampling" of the calls concluded by WCPK (Payne's Ex. No. 9). Finally, the record shows that random calls were initiated by Payne.
19, 25	Denied as being of no decisional significance.
22	Denied. The Initial Decision does state that Payne is the licensee of Station WCPK (AM), Chesapeake, Virginia. See paragraph 24 of the Judge's Findings.
23	Granted. The Initial Decision should have reflected Charles Payne's 8.333 percent ownership interest in radio Station KKDA, Grand Prairie, Tex. But see paragraph 6 of this Decision.
24	Granted. The record reveals that Kay Payne will devote only half of her time to the management-level positions she intends to fill at the proposed FM station. But see paragraph 8 of this Decision.
26, 27	Denied for the reasons stated in paragraph 5 of this Decision.
28	Denied for the reasons stated in paragraph 9 of this Decision.
29, 30	Denied for the reasons stated in paragraph 8 of this Decision.
31	Denied for the reasons stated in paragraph 6 of this Decision.
32, 41	Denied. The record supports the Presiding Judge's conclusions.
33, 36, 38	Denied. The record supports the Presiding Judge's conclusion. Hydrick testified that previous statements by VSBC concerning his proposed dual management positions did not truly reflect his intentions to be manager at both stations.
34, 40	Denied for the reasons stated in paragraph 3 of this Decision.
35	Denied. The record does not support the conclusion that VSBC's stockholders were aware of Hydrick's plan to be station manager at Charlottesville.
37	Granted for the reasons stated in paragraph 4 of this Decision.

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Exception No.	*Ruling*
39	Granted to the extent that the record does not support the conclusion that Hydrick intentionally misrepresented facts to the Commission; denied in all other respects because Hydrick's testimony was inconsistent with previous statements made by VSBC to the Commission.
42, 43	Denied for the reasons stated in the whole of this Decision.

RULING ON EXCEPTION OF THE BROADCAST BUREAU

1	Denied for the reasons stated in paragraph 9 of this Decision.

RULING ON LIMITED EXCEPTION OF PAYNE OF VIRGINIA, INC.

1	Denied. See footnote 7 to this Decision.

F.C.C. 72D–74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of PAYNE OF VIRGINIA, INC., VIRGINIA BEACH, VA.	Docket No. 19095 File No. BPH–6754
VIRGINIA SEASHORE BROADCASTING CORP., VIRGINIA BEACH, VA. For Construction Permits	Docket No. 19096 File No. BPH–6901

APPEARANCES

Harry G. Sells on behalf of Payne of Virginia, Inc.; *Jason L. Shrinsky*, *James A. Koerner*, and *Arthur Stambler* on behalf of Virginia Seashore Broadcasting Corporation; *Gerald Zuckerman* and *Richard M. Riehl* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE CHARLES J. FREDERICK

(Issued November 9, 1972; Released November 14, 1972)

PRELIMINARY STATEMENT

1. As originally designated, this proceeding involved three mutually exclusive applicants with each seeking authority to construct a new FM facility in Virginia Beach, Virginia (FCC 70–1210, released November 18, 1970). The field was narrowed to two when Virginia Seashore Broadcasting Corporation (VSBC) and Sea Broadcasting Corporation (Sea) merged. The following triable issues are now extant:

(1) To determine whether Payne of Virginia has available the additional $24,350 required for construction and first-year operation of its proposed station without reliance on revenues to thus demonstrate its financial qualifications.

(2) To determine whether Virginia Seashore has available the additional $31,076 required for construction and first-year operation of its proposed station without reliance on revenues to thus demonstrate its financial qualifications.

(3) To determine the efforts made by Payne of Virginia to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

(4) To determine the efforts made by Virginia Seashore to ascertain the community needs and interests of the area to be

served and the means by which the applicant proposes to meet those needs and interests.

(5) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(6) To determine in the light of the evidence adduced pursuant to the foregoing issue, which, if any, of the applications for construction permit should be granted.

2. The Review Board enlarged the issues to include the following: To determine whether Virginia Seashore Broadcasting Corporation has failed to completely disclose material information to the Commission in its application, as required by Section 1.514 of the Commission's Rules, and, if so, the effect of such conduct on its requisite and/or comparative qualifications to be a Commission licensee.

3. Prehearing conferences were held on January 11, March 23 and June 30, 1971. The hearing convened on October 5, 1971. Additional hearing sessions were held on November 15 and on December 2, 1971, when the record was closed. The Presiding Judge has been assisted by excellent findings from the Broadcast Bureau on the financial issues, the Section 1.514 issue, and the coverage aspects of the comparative issue.

FINDINGS OF FACT

4. This proceeding involves the mutually exclusive applications of Payne of Virginia, Inc. (hereinafter Payne) and Virginia Seashore Broadcasting Corporation (hereinafter Seashore or VSBC), each requesting a construction permit for a new Class B FM station to operate on Channel 235 (94.9 MHz)[1] with an effective radiated power of 50 kilowatts in Virginia Beach, Virginia. Payne proposes to operate with an antenna height above average terrain of 467 feet and Seashore, 500 feet. Payne's proposed transmitter site lies 3.1 miles northwest of Seashore's site.

Community to be Served

5. According to the 1970 U.S. Census, Virginia Beach is an independent city with a population of 172,106,[2] of which 166,729 are classified as urban and 5,377 as rural. It is located between Norfolk, Virginia and the Atlantic Ocean and is a part of the Norfolk-Portsmouth Urbanized Area (pop. 668,259) and the Norfolk-Portsmouth Standard Metropolitan Statistical Area (pop. 680,600). It is the third largest city in Virginia, next to Norfolk and Richmond. One standard Broadcast station WVAB (1550 kHz, 5 Kw, D, II) and no FM or TV stations are authorized in Virginia Beach.

Coverage

6. The predicted 1.0 mv/m contours of the two proposals form semicircular areas over land, the remaining portions falling over the Atlantic Ocean. Both transmitter sites are situated some 15 miles south of Cape Henry. Seashore's site is located one-half mile inland and

[1] Channel 235 is allocated to Chesapeake-Portsmouth-Virginia Beach, Virginia.
[2] Population figures herein are based on 1970 U.S. Census data. Official Notice of this Census is requested.

Payne's, 2.5 miles inland. Payne's contour extends about 32.5 miles in all directions and Seashore's about 33.5 miles. A displacement of 3.1 miles in transmitter sites causes each proposal to serve areas not served by the other. Payne's differential area encompasses a crescent-shaped area with a maximum width of 3 miles and extends clockwise along the periphery of the contour over an arc from a point southwest of Virginia Beach to a point north of the city. The bulk of the population in this area is comprised of 30,765 persons in Newport News (total pop. 138,177) and 38,113 persons in Hampton, Virginia (total pop. 120,779). Seashore's differential area has the shape of a half crescent with a maximum width of 3 miles at a point on the Atlantic coast southeast of Virginia Beach and extends inland along the periphery of the contour to a point southwest of Virginia Beach. The bulk of the population in this area is comprised of 9,144 persons in Elizabeth City, North Carolina (total pop. 14,069). Comparative coverage of the two applicants is shown in the following table:

Applicant	Population	Area (square miles)
Payne	852,759	1,348
Seashore	785,316	1,311
Served by Payne only	[3] 77,513	75.3
Served by Seashore only	[4] 10,070	38.0
Net difference	67,443	37.3

[3] Population changes in this area since 1960 are as follows: Hampton increased from 89,258 to 120,779 or 35 percent. Newport News increased from 113,662 to 138,177 or 22 percent.

[4] Population changes in this area since 1960 are as follows: Poplar Branch MCD decreased from 2,622 to 2,487 or 5.1 percent. Shiloh MCD decreased from 1,725 to 1,676 or 2.8 percent. Elizabeth City increased from 4,062 to 14,069.

Availability of Other Services

7. No FM stations provide FM service (1.0 mv/m or greater) to all portions of Payne's differential area. One FM station (CP), Ch. 229, Elizabeth City, N.C.[5] provides FM service to all of Seashore's differential area. Thirteen serve portions of Payne's differential resulting in a minimum of none and a maximum of twelve FM services therein. Five serve portions of Seashore's differential area for a minimum of one and a maximum of five. The sparsely served portions are as follows:

Present FM service	Payne		Seashore	
	Population	Area (sq. mi.)	Population	Area (sq. mi.)
0	31	0.5	0	0
1	93	1.5	[6] 433	26.5
2	31	.5	9,329	10.0
3	0	.1	282	1.0
4	24	1.0	0	.1
5			0	.4

[6] Based on equal distribution of population within minor civil divisions. Based on a house count, the figure is 459.

[5] Construction permit was granted on March 13, 1972.

The sparsely served areas of Payne (0 to 4 services) fall in marshland on Mockhorn Island 30 to 35 miles north of the Payne site. The areas proposed to be served by Seashore that receive one other FM service are located 30 to 35 miles south of the Seashore site, 85% of the land is lying in sparsely inhabited wilderness where population has decreased 6% over the past 30 years. Of the 9,329 persons in Seashore's differential coverage area that receive two FM services (from WTAR–FM, Norfolk, Va. and (CP), Ch. 229, Elizabeth City, N.C.), 9,144 [7] reside in Elizabeth City, N.C.

8. Daytime AM service is available to Payne's differential area from at least five stations. Thus, daytime aural service (FM plus AM) is available from a minimum of 5 to a maximum of 12 or more stations. At night, AM Stations WRVA, Richmond, Va. or WTAR, Norfolk, Va. provide primary service (0.5 mv/m or greater) to the areas receiving 3, 4 and 5 FM services. Thus, nighttime aural service is available from none to twelve or more stations.

9. Daytime AM primary service (2.0 mv/m or greater to urban areas in Elizabeth City, N.C. and 0.5 mv/m or greater to rural areas) is available to all of Seashore's differential area from Stations WGAI and WCNC in Elizabeth City, N.C. Rural portions therein are served by Stations WTAR and WRAP in Norfolk. In addition, all of it receives FM service (1.0 mv/m or greater) from (CP), Ch. 229, Elizabeth City, N.C. Thus, daytime aural service is available from at least 4 stations. The minimum area lies in Elizabeth City where 9,144 persons receive service from AM Stations WGAI and WCNC and FM service from WTAR–FM, Norfolk and (CP), Ch. 229, Elizabeth City, N.C. At night, AM primary service is available to Elizabeth City from Stations WGAI and WCNC and to rural portions from Stations WTAR, WGAI and WCNC. Combined with FM service, portions of the area receive one aural service while other portions receive as many as 7 aural services at night.

10. The areas receiving none to three aural services at night are as follows:

Present aural service	Payne		Seashore	
	Population	Area (square miles)	Population	Area (square miles)
0	31	0.5	0	0
1	93	1.5	359	20.5
2	31	.5	100	6.0
3	0	.1	0	.25
4	24	1.0	*9,611	11.25

*This comprises 95 percent of the population in Seashore's differential area.

The areas receiving none to three aural services at night are located in either marshland or sparsely inhabited swamp wilderness. Of the 9,611 persons who receive four aural services within Seashore's differential area at night, 9,144 reside in Elizabeth City.[8]

[7] 14,069 served by Seashore less 4,925 served by Payne.
[8] 14,069 less 4,925.

Issue 1—Payne's Financial Qualifications

11. The financial issue designated against Payne of Virginia, Inc., does not question the applicant's cost estimates. Because Payne had failed to satisfy the Commission that more than $44,300 was available to construct and operate the new station, the issue inquires only into the availability of the additional $24,350 needed to meet Payne's own cost estimate of $68,650. (The Commission held that Payne would require $68,650 to construct and operate its proposed station for one year.) However, Payne subsequently sought leave to amend its application to specify increased cost estimates. The amendment was accepted with the proviso that the financial inquiry would encompass Payne's increased cost estimates. In other words, Payne must demonstrate the availability of funds sufficient to meet its increased cost estimates instead of the $24,350 figure specified in issue 1.

12. Payne will require $110,298 to construct and operate its station for one year. Of this amount, payment of approximately $30,000 will be postponed beyond the first year by virtue of a deferred credit agreement between Payne and its equipment supplier. Therefore, Payne still must demonstrate that an additional $80,298 is available.

13. Mr. Charles F. Payne, a 51% stockholder in the applicant, has agreed to loan the applicant $19,000. Moreover, the Virginia National Bank and the People's Bank of Chesapeake have agreed to loan the applicant $100,000 and $50,000 respectively; both banks are aware of the other's commitment. The Virginia National Bank loan is to be amortized over 10 years ($10,000 annually) with interest at one-half percent above the prime rate. The bank requires the personal guarantee of Payne's stockholders who accordingly have agreed to guarantee repayment of all bank loans. The People's Bank of Chesapeake will loan Payne up to $50,000 amortized over five years ($10,000 per year) with interest at one-half percent over the prime rate. It is found as fact that Payne will have sufficient funds available from the bank loans (after making provision for repayment of the loans) to meet its financial needs.

Issue 2—Virginia Seashore's Financial Issue

14. VSBC estimated that its costs of construction and first-year operation would total $137,576. Although the Commission did not question the cost estimates, it noted that VSBC demonstrated that it had $6,500 in existing capital and a $100,000 bank loan available to finance the station. Thus, VSBC was $31,076 short and is required to establish that the additional funds will be available.

15. VSBC has secured a bank loan commitment of $150,000 to replace the original $100,000 loan. The First Colonial Bank has agreed to loan the applicant $150,000 repayable over 5 years with interest of 1% above the prime rate. Repayment of principal will not be required until 16 months after the loan is made. The bank has required that the loan be endorsed by VSBC's stockholders, all of whom have agreed to endorse the loan. The increased bank loan will be sufficient to provide VSBC with the additional $31,076 it needs, and it is so found.

The Section 1.514 Issue

16. VSBC filed its application on October 6, 1969. At that time (and until the merger with Sea) Daniel E. Hydrick, Jr., was a 20% stockholder in VSBC.[9] Mr. Hydrick prepared and executed VSBC's application. VSBC's application specified Hydrick as its proposed full-time general manager. In February of 1968, Charlottesville-Albermarle Broadcasting Corporation filed an application for a new standard broadcast station in Charlottesville, Virginia. Mr. Hydrick was a 50% stockholder, officer and director of that applicant. The Charlottesville application, which was pending when the VSBC application was filed, also specified Hydrick as its proposed full-time general manager.

17. It is appropriate, therefore, to determine how Hydrick could be proposed as a full-time general manager of two stations in communities over 100 miles apart. In its opposition to the Petition to Enlarge [10] which raised the question, VSBC maintained that it did not expect the Commission to believe that Hydrick would be full-time general manager of two stations. VSBC argued that Hydrick had alternative plans—he would be the manager in Charlottesville if that application (which was designated for hearing) were granted; if the Charlottesville application were denied, Hydrick would manage the Virginia Beach facility (Official Notice was taken of VSBC's Opposition to the Petition to Enlarge at Tr. 200).

18. In an exhibit sponsored by Hydrick and exchanged in advance of the hearing, it was again stated that Hydrick's intention was that he would be the manager of one of the two stations—depending on the outcome of the Charlottesville hearing. In other words, if the Charlottesville application were granted, the VSBC application would be amended to specify another manager. If the Charlottesville application were denied, Hydrick would become manager of VSBC's station in Virginia Beach. Hydrick assumed that the fate of the Charlottesville application would be resolved prior to action on VSBC's application. A VSBC exhibit indicates that Hydrick "did not believe it possible for either the FCC or any other party to believe that he could serve full-time as manager of two stations so widely separated".

19. When the VSBC application was filed, the corporation consisted of five 20% stockholders. Bruce E. Melchor, Jr., who was one of VSBC's original stockholders, testified prior to Hydrick. He does not recall that Hydrick mentioned being listed in the Charlottesville application as general manager. Melchor knew that Hydrick had another application pending, but Hydrick did not mention what his plans were with respect to the other application. Hydrick did not indicate that he might not be the general manager at Virginia Beach. As far as Melchor was concerned, Hydrick would be VSBC's general manager even if the Charlottesville application were granted. Melchor indicated that of the five stockholders, Hydrick was the obvious choice for general manager because of his broadcasting experience.

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[9] Mr. Hydrick now is a 10.2% owner of VSBC. He is also an officer and director of the applicant corporation (VSBC Ex. 1, p. 1).

[10] The Petition to Enlarge was filed by Sea—now a stockholder in VSBC.

20. Reid M. Spencer also testified prior to Hydrick. He indicated that since Hydrick was the only stockholder with radio experience he was the logical choice to be VSBC's general manager. He recalls that Hydrick mentioned the fact that he had another application and that he was to be the general manager at that station *as well as in Virginia Beach*. Hydrick never indicated, however, that he might not be general manager at Virginia Beach until VSBC merged with Sea Broadcasting. Upon merger of VSBC and Sea Broadcasting, Jack Harris replaced Hydrick as proposed general manager. Harris is a Sea stockholder. When asked whether Hydrick told his fellow stockholders that he would be the general manager at whichever station was granted first, Spencer indicated that it never crossed his mind that Hydrick would have managerial duties at the other station. It was stipulated that, had the remaining two original stockholders of VSBC testified, they would have given essentially the same testimony as Spencer and Melchor.

21. Hydrick testified after Spencer and Melchor. He stated that if the Charlottesville application were granted, he would have been the general manager of that station. He would *also* have been the general manager of the station in Virginia Beach. Hydrick conceded that he could not have been a full-time general manager at both facilities. He would, however, have supervised the administration and programming at both stations and would have hired a station manager to oversee the day-to-day operation at Virginia Beach. This inconsistent testimony was given after the exchange of written exhibits including the one discussed in Finding 15 *supra* wherein Hydrick stated it was his intention to be manager of *one of the two stations* depending on the outcome of the two proceedings. Hydrick conceded that neither the Opposition to the Petition to Enlarge nor VSBC's exhibits contained this explanation of his plans.

22. Hydrick testified and it is found that he told his fellow stockholders that he was the proposed full-time general manager in the pending Charlottesville application and that he might not be able to be a full-time general manager at Virginia Beach. He also told them that they could not afford to have him work full time at the Virginia Beach station every day.

Issue 3—Payne's Community Survey

23. Payne filed its application for the proposed FM station on June 5, 1969. Prior to that date an extensive community survey was done by its President, General Manager and majority stockholder, Mr. Charles F. Payne. He conducted a further survey which was filed with the Commission. In accordance with the "Primer" another community survey was conducted by Payne and filed with the Commission on June 17, 1970. A still further survey was conducted by Payne and his son who was employed by the station. This survey was filed with the Commission on May 25, 1971. The New Norfolk 70 Statistical Digest (1970), by the Chamber of Commerce, was one of the primary sources used. The original survey for its application was filed on June 5, 1969.

24. The applicant in its operations of Radio Station WCPK conducts on a continuing basis random telephone calls and encourages listeners to call in concerning the problems, interests and desires of the area. A sampling of these calls is set forth. It was found in the early survey that the key areas of needs and interests the station might serve were in the following major fields with the named persons interviewed:

Governmental

Mr. Wilbur Sears, Chief of Police (Chesapeake).
Mr. G. A. Treakle, Mayor (Chesapeake).
Mr. Roy Martin, Mayor (Norfolk) Civics and Finances.

Educational

Mr. E. W. Chittum, Superintendent of Schools (Chesapeake).
Col. Allan Mitchell, Director of Chesapeake College.

Religious

Rev. Henry Napier, Minister of Raleigh Heights Baptist Church (Chesapeake) and President of Chesapeake Ministerial Association.
Rev. Glenn Kellam, Minister of Mt. Pleasant Methodist Church (Chesapeake).

Service Organizations

Mr. Sid Oman, President, Chesapeake Chamber of Commerce.
Mr. Lawrence H. Dougherty, Board Member, Norfolk Chamber of Commerce and other organizations.
Mrs. Sylvia Old, Director of Fine Arts Commission (Chesapeake).
Mr. Richard Guy, Prominent Civic Leader and Attorney (Virginia Beach).
Mr. Bob Davis, Exec-Dir Tidewater Council, Boy Scouts of America (Norfolk).
Mr. Lewis Wood, Kiwanis Club, Portsmouth, re Communications between people and their government.
Mrs. Noma Brice, Board Member, Norfolk Symphony Orchestra and other organizations.

25. Payne's principal(s) in addition to the sampling telephone calls and personal interviews conducted with the public of the entire area, conducted many personal interviews with prominent citizens and leaders of the community. All ethnic groups, affluent as well as poor, were contacted. Some of this survey is set forth in the application and pages 17–54 of Payne Exhibit No. 6–E. Thirty-four interviews of all the interviews with these prominent people are set forth therein. Representatives of government, education, religious, public service organizations and military were contacted. Payne evaluated all surveys and stated:

The principals of the Applicant have concluded that the existing programming of Station WCPK meets the needs, interests, tastes and desires of the people and the area to be served. Station WCPK–FM proposes substantially the same kind of programming. Station WCPK–FM will expand the public service of Station WCPK (AM) by being the first local nighttime service to Chesapeake and Virginia Beach area. The principals of the Applicant have concluded that the significant needs and interests of the area it will serve include the following:

1. WCPK has and will continue to maintain a 24 hour news watch and broadcast complete area, state, regional, national and international news service from its ABC network and from the Station's own news gathering forces. Emphasis will be placed on the local news of Chesapeake, Virginia Beach and Portsmouth.

2. American Broadcasting Company news and public affairs programming.

3. Continued cooperation with and assistance to all educational institutions in the area including elementary and high schools, and Chesapeake College, Old Dominion College, Frederick College (Portsmouth) and VPI Extension Service, Virginia Beach. News from all of these local colleges, high schools, elementary schools and PTA's are continually being broadcast.

4. We shall continue to promote, encourage, and assist all governmental agencies in Chesapeake, Portsmouth and Virginia Beach to use our facilities in order to reach our audience to promote better relations between all government agencies and the citizens. WCPK–FM proposes to broadcast live coverage of the weekly area City Council meetings.

5. As to agricultural and marine needs, WCPK–FM proposes to present detailed weather information which is of greatest significance to the suburban farmer. WCPK presently carries direct detailed weather rebroadcasts from Environmental Science Services Administration (ESSA). WCPK–FM proposes to carry the same weather broadcasts in their entirety and will be the only FM station carrying these broadcasts in their entirety both day and night.

6. The religious programs of Station WCPK are well accepted and desired, and WCPK–FM plans to continue the same type of basic religious programming of the Station.

7. Complete cooperation with and assistance to all branches of the Military Services. The following military bases are located in our area:

Norfolk Naval Air Station
Armed Forces Staff College
U.S. Coast Guard
U.S. Marine Corps
Portsmouth Navy General Hospital
Cinclant-Div. of NATO
Fort Story—Army Base
Navy Amphibian Base
Langley Air Force Base
Naval Air Station—Oceana
Fort Monroe
Fort Eustis
National Guard
Various recruitment offices

WCPK–FM will render fulltime service to all members of the armed forces residing in Chesapeake, Portsmouth and Virginia Beach by broadcasting news of interest, public service announcements and announcements of all events of these installations and events of interest to the general public.

8. The many shore and seaside attractions of the area increase the local population considerably during the summer months, and with this in mind, the Applicant will cooperate extensively with the local Chambers of Commerce to keep visitors informed of attractions as well as coming events. And, complete seaside weather casts will be constantly broadcast, including special weather warnings, surf conditions, tide information and marine safety information.

9. The need of the public to be informed of what's happening in the community, the nation and the world.

10. The need to hear expert analysis and opinion of local, national and world issues.

11. The need of the public to know how it is being represented by its spokesmen.

12. The interests of social, charitable, civic, cultural and political groups to plead their special causes.

13. The need of the general public for information in time of emergency.

14. The need of the general public for a popular form of entertainment.

15. The need of minority groups to express themselves.

16. The needs of individual people to ask experts direct questions on issues and problems.

Station WCPK–FM like WCPK (AM) will continually take steps to ascertain the needs, interests and problems of the area and when warranted, will institute new or changed programming to meet the needs and problems. Station WCPK–FM will bring unduplicated additional good music to the area, and additional public service on a fulltime basis to the entire area.

Then, after evaluating all the surveys Payne adopted certain programming designed to meet the needs, interests and desires of the area.

The following programs will be broadcast by the Applicant. These programs are designed to meet the needs and interests of the area being served.

1. Live coverage of Area City Council meetings for re-broadcast in the evening for widest coverage. Weekly—approximately 1 hour in length.

2. WCPK–FM Reports—This will be a public affairs program to be broadcast two or three times daily . . . additional as needed. It will vary in length from 2 to 5 minutes. This program will feature interviews with newsmakers involved in community activities to keep the listeners well informed of all problems, desires and needs of the area.

3. Navy Wife of the Week—A salute to the "Navy Wife of the Week" is approximately 2 minutes in length and will be broadcast approximately 15 times a week.

4. Washington Report—Tapes from area Congressmen in Washington. Weekly—5 to 10 minutes in length.

5. Richmond Report—Weekly report from area representatives to State House in Richmond. Approximately 5 to 10 minutes in length.

6. ABC Network Reports—a daily feature.

7. Community Service Bulletin Board—to be broadcast at least 35 times weekly. This will keep all of our listeners informed of all civic, religious, governmental and other activities of the area.

8. Schools in Action—Weekly report from Superintendent E. W. Chittum.

9. Detailed Space Exploration—Coverage of space experiments as they occur.

10. Chesapeake Citizen of the Week—broadcast daily, Monday through Saturday, approximately 2 to 5 minutes in length.

11. Editorials as necessary.

12. Other programs as needed and desired.

26. On November 20, 1969 Payne filed as an amendment to its application a supplemental community survey consisting of twenty-two additional surveys it had conducted to make sure a cross-section of all people in the entire area to be served were contacted and interviewed. Community leaders and prominent citizens, as well as members of the general public, were contacted. These people need not be listed, but it is apparent as a fact and it is so found that they are from all walks of area activity: farmers, civil leaders, housewives, and so on.

27. Several more surveys were conducted. The total results are massive. All surveys and interviews were conducted by or under the direction of Charles F. Payne, President, General Manager and majority stockholder (51%). He conducted all of the interviews except eight and all of his interviews except approximately ten were by personal interview. His son, who was a student at Southern Methodist University and employed by Station WCPK on a management level, conducted the eight interviews not conducted by Charles Payne. Payne lives at 109 South Chicasaw Cluster, Virginia Beach, Virginia. He is president, treasurer, of one or more local charitable, civic, and commercial groups. He also serves on the Board of Trustees of Chesapeake College. Payne is Co-Chairman of the President's Advisory Committee of Virginia Wesleyan College. There are other of his activities too numerous to burden this Initial Decision. His past broadcast experience upon a high level of responsibility is quite impressive over a long period of years.

28. Mrs. Katy W. Payne is the wife of Mr. Charles F. Payne and she lives at 109 South Chicasaw Cluster, Virginia Beach, Virginia. She is Vice-President, Secretary, Director and 39% stockholder of the applicant, Payne of Virginia, Inc. She presently devotes her full

time and attention to the operation of Radio Station WCPK and will devote her full time and attention to the proposed FM station. Her duties are in public affairs and local news coordination. She also assists in the program department, traffic and bookkeeping departments and directs most of inside station administration. She will carry out these same functions in the operation of the proposed FM station. Mrs. Payne has no other radio or broadcast interests. She will personally guarantee all loans for the construction and operation of the proposed FM station from the Virginia National Bank and People's Bank of Chesapeake. There is no question as to her financial responsibility.

29. Mr. Ralph E. Dippell, Jr. is Vice-President, Director and 10% stockholder of the applicant, Payne of Virginia, Inc. He resides at 5227 Farrington Road, Westmoreland Hills, Maryland.

30. Mr. Dippell is an FCC recognized Consulting Engineer and a partner in the firm of Cohen and Dippell, Munsey Building, Washington, D.C.

31. Mr. Dippell has represented and rendered all the engineering assistance to Radio Station WCPK since its inception. He prepared the original application for construction permit for Station WCPK. He assisted in the preparation of the required Engineering Statement to accompany a Petition for Rule Making to allocate this FM channel to Virginia Beach. He prepared the application for construction permit for this proposed FM station. He is and will remain on call to render all engineering assistance in the initial construction and operation of the proposed FM station. He has no other radio or broadcast interests. He will personally guarantee all loans for the construction and operation of the proposed FM station from the Virginia National Bank and People's Bank of Chesapeake. There is no question as to his financial responsibility.

32. It is found that Payne of Virginia has met its burden under the ascertainment issue.

Virginia Seashore Broadcasting Corporation

33. Officers, directors and stockholders of Virginia Seashore Broadcasting Corporation are as follows: Nicholas G. Wilson, President and 10.2% stockholder; Daniel E. Hydrick, Jr., Vice-President, director and 10.2% stockholder; Bruce E. Melchor, Jr., Secretary-Treasurer, director and 10.2% stockholder; Reid M. Spencer, director and 10.2% stockholder; Joshua P. Darden, Jr., 10.2% stockholder; Sidney S. Kellam, director; Jack H. Harris, director of Sea Broadcasting Corporation, 49% stockholder. Sidney S. Kellam and Jack H. Harris are the controlling stockholders of Sea Broadcasting Corporation. Virginia Seashore has an Executive Committee composed of Jack H. Harris and Bruce E. Melchor, Jr. This Executive Committee has primary responsibility for the operation of the proposed station.

34. Virginia Seashore has no other broadcast or other mass media interests. Sea Broadcasting Corporation is the licensee of WVAB, a Standard Broadcast Station at Virginia Beach, Virginia. Mr. Kellam and Mr. Harris, directors of Virginia Seashore, hold and vote a total of 82.5% of Sea Broadcasting's stock. Mr. Hydrick is a 65.5% stock-

holder and an applicant for an new AM station at Newport News, Virginia; this application is mutually exclusive with another application for Smithfield, Virginia. A Joint Petition, looking toward the dismissal of Mr. Hydrick's Newport News application was filed with the Commission on March 10, 1972. (Official Notice Granted.) No other officer, director or stockholder of Virginia Seashore has any other interest in any medium of mass communication. A corporation in which Mr. Harris and Mr. Kellam previously had interests, Beach Publishing Corporation, owned the *Virginia Beach Sun*, a newspaper formerly published in Virginia Beach. However, all of the stock in this corporation was sold to Dear Publications (in which Virginia Seashore principals have no interests) on May 4, 1971.

35. Mr. Bruce E. Melchor, Jr. is a resident of Norfolk, Virginia and is Vice-President of Allegheny Beverage Corporation; he had been General Manager of the Norfolk and Richmond division of that company for over three years (at the time of proposed findings). He is also part owner of two land development corporations and President of Virginia Caravan Company. None of these ownership and investment interests requires any significant amount of his time. His civic activities include service as Regional Representative of the Belgian American Chamber of Commerce, Director of the Tidewater Better Business Bureau, and the Roanoke College Annual Fund. He has served as Director of the Sertoma Club, the Norfolk Central YMCA, the Norfolk Chamber of Commerce, and the Norfolk Girls Club.

36. It is Mr. Melchor's intention to devote at least 10 hours per week, on a daily basis, to the operation of the proposed FM station, serving on the Executive Committee and as Public Affairs Director. His duties will include discovering and evaluating the continuing needs, problems, and interests of the community and working closely with the General Manager (with whom he sits on the Executive Committee) to develop programs designed to meet those needs.

37. Mr. Reid M. Spencer is a resident of Norfolk, Virginia and a lifelong resident of that area. He is a partner in the law firm of Wolcott, Redfern, Spencer, and Rivers. In addition he is part owner of two corporations which merely hold title to some real estate. He is a member of the American Bar Association, the American Trial Lawyers Association, and the Virginia Trial Lawyers Association. He is also a member and past director of the Norfolk-Portsmouth Bar Association. For two years Mr. Spencer was a member of the Virginia State Bar Ethics Committee and served for one year as Chairman of the Grievance Committee.

38. Mr. Spencer's civic activities include a year as Assistant City Attorney in Norfolk and seven years as Assistant Commonwealth Attorney for the City of Norfolk. He is presently a member of Ocean View Lodge No. 335, AF and AM, Norfolk Consistory, Scottish Rite, 32nd degree, Khedive Temple, AAONMS. Also, he is a member and former director of the Oceans View Lions Club and has served as Vice-President and President of the Lions Club. Past activities include Chairman of the National Foundation of March of Dimes, Director of the Muscular Dystrophy Association, Education Committee Chair-

man of the Norfolk Citizen Advisory Committee, membership on the Norfolk Electoral Board and a large number of other organizations.

39. It is Mr. Spencer's intention to devote approximately 10 hours per week to the affairs of the station as Community Relations Director. Mr. Spencer testified that his duties as Community Relations Director would include coordination with and assistance to Mr. Melchor in keeping in touch with the numerous groups and organizations in the area. This time to be devoted to station affairs will be in addition to the time spent at luncheons and other gatherings of these groups which he estimated would require an additional 10 hours per week.

40. Jack H. Harris is a resident of Virginia Beach, Virginia, having lived in the immediate area for 48 of his 53 years. He is, and has been since 1967, Executive Vice-President and General Manager of Station WVAB, Virginia Beach. His broadcast experience dates back to 1943 when he began as an announcer at WSAP, Portsmouth, Virginia. He then became Vice-President and General Manager of WNOR, Norfolk, Virginia, a position he held until 1967. Mr. Harris's other business interests include a land investment firm, a mobile home firm and another investment firm; however, he is not active in these businesses and they do not require more than a few hours a month of his spare time.

41. Mr. Harris is a Board Member of the Virginia Beach Chapter of the American Cancer Society and Vice-President of the Virginia Democratic Club. He has served as President of the Tidewater Association of Credit Management and as a Board Member of the Downtown Kiwanis Club. He has also been President of the Tidewater Association of Radio Stations.

42. It is Mr. Harris's intention to resign his present position of General Manager of WVAB, retaining his title of Executive Vice-President, and to devote a minimum of 40 hours per week to the proposed station's operation as manager. Besides serving on the Executive Committee with Mr. Melchor, he will carry on the daily operations of the station, including programming, personnel, sales, etc. A new manager for WVAB will be named. Mr. Harris plans to devote 10–15 hours per week to his duties as Executive Vice-President of WVAB.

Issue 4—Virginia Seashore Ascertainment

43. Prior to conducting its surveys, Virginia Seashore studied material of the U.S. Census Bureau and other sources with respect to manufacturing activities, farms, hospitals, military, educational institutions, churches, public service organizations, minority groups, local economics and other demographic information. Almost all information which might lead to an understanding of the make-up of the community was studied.

44. Community leaders were interviewed by Mr. Jack H. Harris, Director, Member of the Executive Committee, representative of Sea Broadcasting Corporation (a 49% stockholder) and proposed General Manager, by Mr. Reid M. Spencer, Director, 10.2% stockholder and proposed Community Relations Director, and by Mr. Bruce E. Melchor, Jr., Secretary-Treasurer, Director, 10.2% stockholder and proposed Public Affairs Director. Over 70 community leaders from all

segments of the population in Virginia Beach and throughout the proposed Virginia Seashore coverage area were interviewed in person. Two additional community leaders were interviewed by Mr. Harris over the telephone.

45. In addition to these interviews with community leaders, a random telephone survey of the general public was conducted by Mr. Harris and three other individuals acting under Mr. Harris' direction and supervision. The persons to be called were selected from the telephone directory at random. A total of some 33 persons were interviewed in this random fashion.

46. Problems and needs of the area, found by Virginia Seashore to exist as a result of its interviews were chiefly concerned with Economic Development, Education, Military-Civilian Relations, Recreational Facilities, Police-Community Relations, Drugs and Drug Usage, Youth Involvement and Race Relations. Programs designed to fulfill these needs include People Line, Know Your City, Youth Speaks Out, Safety Patrol, Community Bulletin Board, View-Point, The Bible Speaks To You, Master Control, City Council Report, and a number of other programs. These programs are the most important of the programs proposed to meet the area's needs.

47. Virginia Seashore has fulfilled all of the requirements of the Commission's *Primer*, including initial determination of the make-up of the community, dialogues with community leaders, a random telephone survey of the general public, evaluation of the problems and needs found to exist and proposal of specific programs designed to meet those needs and problems. On the basis of this showing, it is concluded that Virginia Seashore has fully met its burden under this issue.

Section 1.514 Issue

48. In its Memorandum Opinion and Order, the Review Board stated that this issue was directed only to those questions which may arise from Mr. Hydrick's designation as General Manager in two applications, one for Charlottesville and one for Virginia Beach, both Virginia. Section 1.514 of the Commission's Rules requires that an applicant must provide all material information called for by the form on which the application is filed. Applied to this particular case, the only question is whether Virginia Seashore's failure to disclose in the Virginia Beach application the fact of Mr. Hydrick's previous designation as General Manager of the proposed Charlottesville station was a material omission. His 50% ownership interest had, of course, been disclosed in Section II of the application.

49. The Charlottesville application was filed by Charlottesville-Albemarle Broadcasting Corporation in which Mr. Hydrick had a 50% ownership interest, in February of 1968. It was mutually exclusive with an application filed by Massanutten Broadcasting Company for a station at Broadway-Timberville, Virginia. Thus, Mr. Hydrick was aware at the time of filing that application, that the choice between the applicants would be decided under Section 307(b) of the Act.

50. The Virginia Seashore application for a new station at Virginia Beach, Virginia was filed in October of 1969. Hydrick, then a 20%

stockholder of Virginia Seashore, was proposed as General Manager in this application pursuant to an understanding with the other stockholders and his commitment that he would guide and administer the station. However, Mr. Hydrick had informed the other stockholders of Virginia Seashore that the Virginia Beach station could not afford to hire him as a station manager, spending all day every day at the station.

51. Mr. Hydrick testified that his intention at the time of filing the Virginia Seashore application was that if the Charlottesville application were to be granted—assuming, of course, that the application were not dismissed—he intended to manage that station on a day-to-day basis and to employ a full-time station manager for the proposed Virginia Beach station. However, Mr. Hydrick considered that he would still be General Manager of the Virginia Beach station and it is alleged that he fully intended to give whatever guidance and administration he felt was necessary or appropriate in accordance with his commitment to the other stockholders. On the other hand, it is claimed that if—as was more likely since Mr. Hydrick had already entertained thoughts about dismissal—the Charlottesville application were not granted, Mr. Hydrick would manage the Virginia Beach station in that he would provide guidance and administration on less than a full-time basis.

52. In Mr. Hydrick's view, and by his definition, a "Station Manager" is a manager who is on the scene at the station virtually all of the time while a "General Manager" is a manager who need be on the scene only part of the time.

53. The other stockholders of Virginia Seashore had been made aware of Mr. Hydrick's involvement with and commitment to the Charlottesville application. Their understanding of Mr. Hydrick's commitment to them and to Virginia Seashore is questionable.

CONCLUSIONS

1. It has already been found hereinbefore that both applicants have met the financial issues against them and the same here concluded for form's sake.

2. Both parties have shown conclusively and with abundant evidence that they have discharged their burdens under the "ascertainment" issues.

3. Evidence was introduced (and has been set forth, *supra*) relating to areas and populations. Comparative coverage was not made the subject of an issue by the Commission. However, should the Commission wish to entertain the subject, the following excerpts from the Broadcast Bureau's findings and conclusions would be pertinent. The Presiding Judge is not awarding a comparative merit or demerit:

Payne of Virginia, Inc. and Virginia Seashore Broadcasting Corporation each propose to construct a new Class B FM broadcast station on Channel 235 (94.9 MHz) with an effective radiated power of 50 kilowatts at Virginia Beach, Virginia. Payne's antenna would have a height of 467 ft. above average terrain and Seashore's 500 ft. The two applications are mutually exclusive.

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A comparison of the two proposals is summarized in the following table:

	Payne	Seashore
Population of applicant's community	172,106	172,106.
Local facilities	1 a.m. daytime	1 a.m. daytime.
Total coverage (1.0 mv/m)	852,759 persons	785,316 persons.
Differential area	77,513 persons [1]	10,070 persons.[2]
Other services in differential area:		
No FM service	31 persons	0 persons.
1 FM service	93 persons	433 persons.
2 FM services	31 persons	9,329 persons.
3 FM services	0 persons	282 persons.
4 FM services	24 persons	0 persons.
4 aural services daytime	(Minimum of 5)	9,144 persons.[3]
No aural service at night	31 persons	0 persons.
1 aural service at night	93 persons	359 persons.
2 aural services at night	31 persons	100 persons.
3 aural services at night	0 persons	0 persons.
4 aural services at night	24 persons	9,611 persons.[3]

[1] 30,765 reside in Newport News and 37,765 in Hampton, Va.
[2] 9,144 reside in Elizabeth City, N.C.
[3] 9,144 reside in Elizabeth City, N.C.

From the foregoing tabulation, it is seen that Seashore would provide a fifth aural service to more than 9,000 persons day and night compared to 24 by Payne at night. In addition, except for Payne's small nighttime aural "white area" involving 31 persons, Seashore exceeds in nighttime aural "gray" and two-service areas. Accordingly, under the standard comparative issue, Seashore warrants a preference with respect to coverage.

The facts show no comparative advantage as far as local residence is concerned, because the entire area encompassing applicants' residences is an integral cultural and geographical whole. With 90% of stock owned by Mr. and Mrs. Payne who shall devote full time to the station, Payne of Virginia wins a preference over Seashore.

The 1.514 Issue

4. Applicants are required to make full disclosures in their applications. Hence, when it was pointed out in a Petition to Enlarge that Daniel Hydrick, a VSBC principal, was a proposed full-time general manager not only in VSBC's application for Virginia Beach but also in an application that he had filed for Charlottesville, the Review Board added an issue calling upon VSBC to explain the apparent contradiction.

5. VSBC, when it opposed enlargement, acknowledged that Hydrick could not possibly be a full-time general manager in two different communities. VSBC explained that Hydrick would have managed the Charlottesville station if that application were to be granted before the VSBC application. If Charlottesville were not granted, Hydrick would manage the VSBC application in Virginia Beach. The Opposition to the Petition to Enlarge was affirmed by Hydrick. Likewise, an exhibit exchanged by VSBC and sponsored by Hydrick indicated that Hydrick would be manager of one of the two stations.

6. Hydrick's fellow stockholders indicated that he was the logical choice as general manager since he was the only stockholder with broadcasting experience. They were aware that he had another application pending. *The stockholders, however, contradicted the position taken by VSBC in its Opposition to the Petition to Enlarge as well as*

in the written exhibit that Hydrick was to sponsor when they testified that they were not under the impression that a grant of the Charlottesville application would result in Hydrick not being VSBC's general manager.

7. Hydrick testified after Spencer and Melchor. In his testimony at the hearing, he discarded his previous representations. Now he testified that indeed he had intended to be general manager of both facilities—although not full time. Now, Hydrick indicated that he had planned to supervise the programming and administration of both stations with the help of a station manager in Virginia Beach.

8. VSBC violated Section 1.514 of the Commission's Rules by failing to disclose the full circumstances surrounding the specification of Hydrick as the full-time general manager of the proposed facility. The fact that Hydrick has also been designated to manage another station should have been brought to the attention of the Commission. Certainly, the Commission cannot be expected to search its files in order to determine whether an application is accurate. Counsel for VSBC seeks absolution on the alleged grounds that stockholders were aware of Hydrick's rather ill-defined status. If true, that only makes matters worse by imparting guilt over many instead of, say, one. Besides, the question is not one of intra-applicant scienter, but one of Commission knowledge.

9. When the apparent inconsistency between the Virginia Beach and Charlottesville application was brought to the attention of the Review Board, VSBC offered an explanation—Hydrick would manage one of the two stations. The same explanation was submitted by VSBC in its written exhibit. When VSBC's stockholders contradicted this explanation by indicating that, as far as they were concerned, Hydrick would manage their station in Virginia Beach regardless of the outcome of the Charlottesville application, Hydrick took the witness stand and then proceeded to change his prior written representation to the Commission. Now he represented orally that he intended to manage both stations, but not on a full-time basis. Consequently, it must be concluded that VSBC not only filed a misleading application, but misrepresented the facts in its opposition to the enlargement request. Moreover, its written exhibit sought to perpetuate the misrepresentation. It is clear that Hydrick never told either the Commission or his fellow stockholders that he might not manage their station—yet that is exactly what VSBC proclaimed in its pleading and its exhibit. When faced with all of these inconsistencies, Hydrick at the hearing compounded the misrepresentations by adding another inconsistency.

10. Consequently, it is concluded that VSBC has violated Section 1.514 of the Rules and is not qualified to be a licensee. VSBC's pleading and exhibit, are totally inconsistent with its oral testimony as well as contrary to the testimony of the stockholders. This alone is sufficient to disqualify the applicant. See *Grenco, Inc.*, FCC 72 D–19, released March 14, 1972 (Initial Decision), at page 39, paragraph 39.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party to the proceeding, or the Commission reviews the Initial Decision on its own motion in accordance with the

provisions of Section 1.276 of the Rules, the application of Payne of Virginia, Inc. for a construction permit for a new Class B FM station to operate on Channel 235 (94.9 MHz) IS GRANTED and the application of Virginia Seashore Broadcasting Corporation for the same facilities IS DENIED.

CHARLES J. FREDERICK,
Administrative Law Judge,
Federal Communications Commission.

F.C.C. 74–104

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Objection of the
DEPT OF TRANSPORTATION, STATE OF FLORIDA
Concerning Application for Construction Permit by So. Capital Television, Inc. to Operate on Channel 27, Tallahassee, Fla.

JANUARY 30, 1974.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,
% Mr. Grover C. Jones,
605 Suwannee Street.
Tallahassee, Fla. 32304

GENTLEMEN: This refers to (a) the application (BPCT–4562) of Southern Capital Television, Inc., for a construction permit for a new commercial television broadcast station to operate on channel 27, Tallahassee, Florida, and (b) your objection to a grant of the application, filed pursuant to section 1.587 of the Commission's rules.

Your objection to a grant of Southern Capital Television. Inc.'s, application is based on your view that the proposed tower height and location would constitute a hazard to air navigation since it is under an established airway. You state that because of Florida's flat terrain and changeable weather, aircraft are frequently forced to fly at altitudes below 1,000 feet. While the applicant has proposed to operate from an antenna height above mean sea level of 1,049 feet, you have indicated your willingness to approve a tower of 749 feet above mean sea level at the proposed site. It is clear that your refusal to issue a permit for the construction of the tower is based solely on air safety considerations.

The Commission has received official notification from the Federal Aviation Administration that, after a hearing in which you participated, it has issued a determination that the tower would not constitute a hazard to air navigation. Thus, the FAA has had an opportunity to consider the matters raised in your objection and it has concluded that the applicant's tower proposal would not result in a hazard to air safety. Moreover, you have not furnished the Commission with any new information to enable the Commission to conclude that the FAA determination was incorrect. The Commission has followed a policy of relying upon the expertise of the FAA in the matter of air hazard and in the absence of substantial evidence to the contrary, the Commission has not challenged the FAA's determination. Consequently, the Commission has this day denied your objection and granted the application of Southern Capital Television, Inc.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74R–25

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SOUTHERN RADIO & TELEVISION CORP., GOLDSBORO, N.C. For Renewal of License for Station WFMC	Docket No. 19857 File No. BR–2681
SOUTHERN RADIO & TELEVISION CORP., GOLDSBORO, N.C. For a License for Station WOKN (FM)	Docket No. 19858 File No. BLH–5784

MEMORANDUM OPINION AND ORDER

(Adopted January 21, 1974; Released January 23, 1974)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSTAINING. BOARD MEMBER PINCOCK DISSENTING WITH STATEMENT.

1. This proceeding involves the applications of Southern Radio and Television Corporation (Southern), Goldsboro, North Carolina, for renewal of its license for standard broadcast Station WFMC and for a license for FM Station WOKN. By Memorandum Opinion and Order, FCC 73–1133, 38 FR 30774, published November 7, 1973, the Commission designated both of these applications for hearing in a consolidated proceeding on issues which included the following:

> (d) To determine whether, during the general election of November 7, 1972, the applicant violated Section 315(c) of the Communications Act by failing to obtain from certain candidates or their representatives written certificates stating that payment of advertising charges for advertising on WFMC would not violate any limitation on campaign spending specified in paragraph (1), (2) or (3) of Section 104(a) of the Campaign Communications Reform Act, whichever paragraph was applicable.

Before the Review Board is a petition to delete this issue, filed November 23, 1973, by Southern.[1]

2. The Campaign Communications Reform Act (Title I of the Federal Election Campaign Act, Public Law 92–225, 86 Stat. 3) seeks to prevent the excessive use of media advertising by candidates for federal elective office. Section 104(a) of the CCRA establishes limits on spending for such purposes, and Section 104(b) provides that no newspaper, magazine, or outdoor advertising facility may charge for publishing a candidate's advertisements unless he first certifies that the sum to be paid will not cause him to exceed his spending limit. Section 104(c) amends Section 315(c) of the Communications Act so as to place the same restrictions upon broadcasting stations.

[1] Also before the Review Board are the following related pleadings: (a) opposition, filed December 3, 1973, by the Broadcast Bureau; and (b) reply, filed December 10, 1973, by Southern.

3. Southern's petition is based on the Opinion of the United States District Court for the District of Columbia in *American Civil Liberties Union* v. *Jennings* (Civil Action No. 1967–72, decided November 14, 1973). In that Opinion, Southern contends, Section 104(b) of the CCRA was held "facially unconstitutional" because it imposes impermissible prior restraints. Since the wording of Section 315(c) of the Communications Act, under which Southern is charged, is identical to that of the subsection of the CCRA struck down by the Court (except that the former applies to broadcasters and the latter to print media), Southern reasons that the two "suffer from the same infirmities" and that, therefore, both are unconstitutional. As a result, petitioner claims, the issue specified against it cannot stand.

4. The Broadcast Bureau, in opposition, asserts that since the Court limited its holding in *ACLU* so as to affect only Section 104(b) of the CCRA, Southern's petition is equivalent to a request that the Board declare Section 315(c) of the Communications Act unconstitutional. However, the Bureau continues, neither the Board nor the Commission has such authority; rather, each is required to enforce the provisions of the Communications Act unless and until they are modified by Congress or the federal courts. Moreover, the Bureau states, until such modifications occur, these provisions are still binding on licensees. For these reasons, the Bureau requests that Southern's petition be denied.

5. Southern, in reply, urges the Board not to construe the Court's holding in *ACLU* too narrowly. It is apparent, petitioner claims, that the only reason Congress segregated broadcasting from other media in Section 104 of the CCRA was to "provide congruity within the statutes by retaining all broadcast regulation under a single superscription." In *ACLU*, Southern continues, the Court recognized these "statutory niceties" for what they were and did not distinguish among the various types of media. Quoting from the Opinion at page 18, Southern asserts that it was the whole of the CCRA, and not just Section 104(b), that the Court found offensive; accordingly, Southern concludes, the decision must be said to apply to all communications media, including broadcast facilities.

6. Although the Opinion in *ACLU* leaves room for doubt as to the breadth of the Court's ruling, it is clear from the Judgment and Order issued in the case on November 21, 1973, that the decision affects only Section 104(b) and not the entire Campaign Communications Reform Act. Section 104(c) of the CCRA and Section 315(c) of the Communications Act therefore technically retain the full force of law. The Review Board believes, however, that it is at least debatable whether the *ACLU* decision implicitly negates the appropriateness of a hearing under the issue which Southern seeks to delete, and that this is a matter which the Commission (though not the Board) may decide as a matter of its own policy. Therefore, in order to resolve the new and novel questions presented by the instant petition and to expedite the ultimate result in this proceeding, the Board is of the opinion that the public interest would be best served by certifying this matter to the Commission for its determination.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 0.361 of the Commission's Rules and Regulations, the petition to delete issues, filed November 23, 1973, by Southern Radio and Television Corporation, and pleadings related thereto (see note 1, *supra*), ARE CERTIFIED to the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

DISSENTING STATEMENT OF BOARD MEMBER DEE W. PINCOCK

I would not certify this matter to the Commission. In my view, the ruling of the United States District Court for the District of Columbia in *American Civil Liberties Union* v. *Jennings* (Civil Action No. 1967–72, decided November 14, 1973) does not include a determination that Section 104(c) of the Campaign Communications Reform Act, which amended Section 315(c) of the Communications Act, is unconstitutional. Thus, in my opinion, the issue designated by the Commission need not be deleted.

F.C.C. 74-107

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF STARKVILLE BROADCASTING CO., INC., LICENSEE OF RADIO STATION WSSO, STARKVILLE, MISS.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 5, 1974)

BY THE COMMISSION: CHAIRMAN BURCH DISSENTING AND ISSUING THE ATTACHED STATEMENT; COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. The Commission has under consideration (1) its Notice of Apparent Liability to Starkville Broadcasting Company for forfeiture of $2,000, dated October 17, 1973, and (2) the response of the licensee to the Notice of Apparent Liability dated November 27, 1973, requesting a reduction of the proposed forfeiture.

2. Station WSSO, Starkville, Mississippi, is licensed to the Starkville Broadcasting Company (hereinafter Starkville). The Notice of Apparent Liability in this matter was issued to Starkville for its apparent failure to comply with the sponsorship identification requirements set forth in Section 317(a) of the Communications Act of 1934, as amended, and Section 73.119(a) of the Commission's Rules in that it willfully or repeatedly failed to identify properly the sponsors of paid political messages.

3. In reply to Commission inquiries Starkville stated that WSSO broadcast the following announcement from April 4 to May 8, 1973:

> **WSSO has been authorized to announce the following people as candidates for the office of:**
> **Mayor: [two candidates named].**
> **Candidates for Alderman, Ward 1, are: [4 candidates named].**
> **Candidates for Alderman, Ward 2, are: [3 candidates named].**
> * * * * * * *
> **Candidates for Alderman, Ward 6, are: [2 candidates named].**
> **Candidates for Alderman-at-Large are: [3 candidates named].**

The licensee further stated that of the 23 candidates running in the primary election, twenty were listed in the announcement; that the

announcement included the names only of those candidates who paid $30 to be listed; that due to an oversight by the station's production department this announcement was broadcast a total of 36 times without sponsorship identification during the period April 4, 1973 through April 20, 1973; and that on April 20 when it was realized that the statement "WSSO has been authorized to announce the following people as candidates" might not fulfill Commission Rules, the station "The preceding—a paid political announcement, paid for by the candidates listed" was added.

4. In response to the Commission's Notice of Apparent Liability for forfeiture, Starkville states that it failed to observe Commission rules in this matter and is ready to accept full responsibility. The licensee also states that a total of 75 announcements were broadcast, "only 36" of which did not include a proper sponsorship identification; that the announcements were logged as political; that the omission of proper sponsorship identifications was not willful; that it acted in good faith when the omission came to its attention; and that the public was informed that the announcements were paid for by the candidates listed in the broadcasts after April 20.

5. The licensee declares that the complainant's wife was a candidate in the election; that she was asked whether she would like to participate in the announcement and was told that the cost was $30; that she declined but did purchase other spot announcements; and that she never complained to the licensee about the announcements in question. The licensee concludes by stating that a forfeiture of $2,000 is excessive considering the facts stated above and Starkville's financial problems. The licensee states that its FM station* has lost money for the past years; that the gross income for the FM station was $6,200 last year; and that salaries alone cost $6639.36.

6. We find that the licensee violated Section 317 of the Act and Section 73.119 of the Commission's Rules as cited in the Notice of Apparent Liability. However, we believe that under the circumstances of this case a reduction in the amount of the forfeiture to $1,000 is warranted.

7. In view of the foregoing, IT IS ORDERED, That the Starkville Broadcasting Company, licensee of Station WSSO, Starkville, Mississippi, FORFEIT to the United States the sum of one thousand dollars ($1,000) for its repeated failure to observe Section 317(a) of the Communications Act of 1934, as amended, and Section 73.119(a) of the Commission's Rules and Regulations. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

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*WSMU–FM programs separately from WSSO.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to the Starkville Broadcasting Company, licensee of Station WSSO, Starkville, Mississippi.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

DISSENTING STATEMENT BY CHAIRMAN BURCH

(In the Matter of Reconsideration of Forfeiture Against Station WSSO)

I perceive no justification for the remission of 50 per cent of the fine in this case. Admittedly, the Commission has every right to review staff recommendations, but such review failed to disclose any rational basis for reduction of the fine.

F.C.C. 74-109

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of TELERENT LEASING CORP. ET AL. Petition for Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-Furnished Equipment to the Nationwide Switched Public Telephone Network	Docket No. 19808

MEMORANDUM OPINION AND ORDER

(Adopted January 31, 1974; Released February 5, 1974)

BY THE COMMISSION:

1. By Memorandum Opinion and Order released on September 7, 1973 (FCC 73-901) we instituted this proceeding, pursuant to Sections 4(i), 4(j), and 403 of the Communications Act and Sections 1.1 and 1.2 of our Rules, to afford interested persons an opportunity to submit briefs and oral argument on the question of whether and to what extent the actions taken by the Commission on interconnection of customer-provided communications equipment to the nationwide switched public telephone network have pre-empted state action in this area. Our action was prompted by a petition for declaratory rulings filed on August 8, 1973 by North American Telephone Association (NATA), a trade association, and a number of its members in North Carolina and Nebraska, engaged in the manufacture, distribution, leasing, sale, installation and maintenance of communications terminal equipment and systems for connection with the switched telephone network. That petition, in turn, was occasioned by recent actions of the States of North Carolina and Nebraska.

2. On June 29, 1973 the North Carolina Utilities Commission gave notice of a proposed rule (R9-5) which would generally prohibit interconnection of customer-owned or customer-provided equipment to the communications system of any telephone company doing business in North Carolina. Under the proposed rule, any such telephone company could provide such interconnection for interstate services only over facilities distinct and separate from those used for intrastate services. By letter dated July 18, 1973 to the Nebraska Public Service Commission, the Attorney General of Nebraska rendered an advisory opinion that our *Carterfone* decision (13 FCC 2d 420; reconsideration denied, 14 FCC 2d 571 (1968)) did not prevent a telephone company from prohibiting interconnection of customer-provided equipment for intrastate use. He also advised, in effect, that a hotel or motel could

not interconnect privately-owned communications equipment with a telephone company without certification as a common carrier by the Public Service Commission upon a finding that the telephone company in the area had refused or failed to provide adequate service.

3. In our Order of September 7 herein, we stated our opinion that "the above described advisory opinion of the Attorney General of the State of Nebraska and Rule R9–5 proposed by the North Carolina Utilities Commission have created uncertainty concerning whether and, if so, to what extent actions we have taken, and policies we have promulgated, in *Carterfone* and related cases with respect to interconnection of customer-provided communications equipment to the nationwide switched public telephone network have pre-empted State action in this area." Such actions and policies may be summarized briefly as follows:

CARTERFONE AND RELATED CASES

4. Our *Carterfone* decision (13 FCC 2d 420) involved a device used to interconnect mobile radio systems to the interstate and foreign message toll telephone system. We found that the Carterfone device filled a need, that its use did not adversely affect the telephone system, and that its use was nevertheless prohibited by provisions in an American Telephone and Telegraph Company (AT&T) tariff for interstate service. We held that the AT&T tariff was unreasonable and unlawful within the meaning of Section 201(b) of the Communications Act in that it prohibited the use of interconnecting devices which do not adversely affect the telephone system. In so holding we relied on *Hush-A-Phone Corp.* v. *U.S.*, 99 U.S. App. D.C. 190, 193, 238 F. 2d 266, 269 (D.C. Cir. 1956), holding that an AT&T tariff prohibition of a customer-supplied "foreign attachment" was an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." See also *Hush-A-Phone Corp. et al.* v. *AT&T*, 22 FCC 112 (1957). In *Carterfone* we did not prescribe the terms of a new tariff, but left that to the initiative of the telephone companies, pointing out that they were in no wise precluded from adopting reasonable standards to prevent harmful interconnection. In denying reconsideration, we recognize that the economic effects of interconnection upon the carriers' rate structure might well be a pertinent public interest question, but found no substantial showing in the record to demonstrate economic harm (14 FCC 2d 571, 572–573).

5. As a result of our *Carterfone* decision, AT&T filed new and revised tariffs, presently in effect, which permit the interconnection and use of customer-provided terminal devices or communications systems to the telephone message toll and exchange network subject to certain conditions. One such condition is that any network control signalling unit (NCSU) must be furnished, installed and maintained by the telephone company (except for certain military installations and remote or hazardous locations). In our decision permitting such tariffs to go into effect without formal investigation or hearing, we held that the tariff bar against any customer providing his own NCSU in connection with telephone company facilities was not in conflict

with our *Carterfone* ruling, which dealt with interconnections and not replacements of any part of the telephone system. *AT&T "Foreign Attachment" Tariff Revisions*, 15 FCC 2d 605, 609–610 (1968) reconsideration denied, 18 FCC 2d 871, 872 (1969). Similarly, we have held that the present restrictions in the interstate tariffs for message toll telephone service (MTS) and wide area telephone service (WATS) against customers providing interconnection arrangements (CA's) for direct connection of customer-provided equipment (e.g., electrocardiograph, telephotograph and recording devices) to the telephone system also did not violate our *Carterfone* decision. See *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539, 542.

6. In our decision permitting the AT&T tariff to go into effect, we instituted informal proceedings to obtain technical and operational data to assist our evaluation of the public interest factors involved in possible liberalizing revisions of NCSU and CA provisions of the tariffs for MTS and WATS (15 FCC 2d at 610–611, 18 FCC 2d at 872). We also contracted with the National Academy of Sciences (NAS) and Dittberner Associates to conduct technical studies on the question of whether such revisions are technically feasible in view of our concern that the telephone network be protected from harm. The reports submitted to us by NAS and Dittberner, and numerous comments from interested persons, indicated that consideration should be given to revisions in MTS and WATS offerings under a standards and enforcement program that would protect the telephone network from three types of harm: (a) protection from excessive voltage and signal levels, (b) improper network signalling and (c) line imbalance. Accordingly, we created two advisory committees, pursuant to Executive Order 11007, to study the possibilities of initiating such a standards program for certain selected classes of equipment, namely, customer-provided PBX's, automatic dialers and recording and answering devices. *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539, 540 (1972).

7. On June 14, 1972 we instituted a formal proceeding (Docket No. 19528) to determine whether and with what terms, conditions or limitations the interstate MTS and WATS tariffs should be revised or the Commission should adopt rules to permit customers for switched telephone network services to have the option of providing their own NCSU and CA in lieu of those now provided by the telephone companies. We convened a Federal-State Joint Board pursuant to Section 410(c) of the Communications Act to submit recommendations to us in this matter, stating (*Interstate and Foreign MTS and WATS*, 35 FCC 2d at 541):

> We believe that special procedures are required for the reason that any action that we might take herein to provide the optional MTS or WATS services as heretofore described would appear to require, as a practical matter, that complementary changes be made in the offerings of local telephone exchange and intrastate toll services. For example, if this Commission should decide that, insofar as interstate or foreign MTS and WATS are concerned, the telephone companies should allow customers the option of providing their own network control signalling units for those provided by the telephone companies, implementation of such a decision would require, as a practical matter, that the same options are also available in connection with local exchange and intrastate MTS and WATS. This is because almost all such units are used in common for both

interstate and local and intrastate communications. Accordingly, we believe that we should not undertake the final resolution of the issues herein without the closest coordination and cooperation between this Commission and state regulatory agencies which have regulatory responsibility for local and intrastate communications services. Therefore, we shall refer these proceedings to a Federal-State Joint Board pursuant to Section 410(c) of the Act.

8. We also made clear that the Joint Board proceeding does not look toward any modification of our *Carterfone* holding, but rather is to determine whether there is a public need to go beyond what we ordered in *Carterfone*, stating (35 FCC 2d at 542):

> We believe that the soundness of our *Carterfone* decision has been amply demonstrated. New markets have been opened to the innovative enterprise of many companies; the public has benefitted from having a wide range of choices available when the individual user selects the terminal device or private system which will best serve his particular communications need; and there has been no actual demonstrable harm to the telephone system or its users. Accordingly, this proceeding will not be concerned with any question relating to whether or not modifications should be made in that decision or in any of the provisions in the interstate MTS and WATS tariff provisions filed in compliance therewith. Our proceeding herein is concerned with the pending and unresolved basic issues now before us as to whether, and to what extent, there is a public need to go beyond what we ordered in *Carterfone* and permit customers to provide, in whole or in part, the aforementioned NCSU's and CA's in interstate MTS and WATS and, if so, what terms and conditions should apply to protect the telephone system and services of others.

POSITIONS OF THE PARTIES

9. Pursuant to our Order of September 7, 1973 herein, interested persons filed comments on October 1 and reply comments on October 23, 1973. Oral argument before the Commission *en banc* was held on October 30, 1973.[1] The positions of various parties may be summarized briefly as follows:

PETITIONERS NATA ET AL. AND THOSE SUPPORTING THEIR POSITION

10. Petitioners NATA *et al.* claim that the North Carolina proposed Rule R9–5 and the Nebraska advisory ruling (*supra*, paragraph 2), are in conflict with *Carterfone* and present a threat to the federally declared right of telephone users to provide their own interstate interconnection devices. Because there is no interstate message toll service offered except over equipment used for both interstate and intrastate service, a state prohibition against interconnection would require carriers providing interstate service in the state to take action contrary to existing interstate tariffs, in violation of the Communications Act and federal law. Moreover, the lack of separate intrastate and interstate telephone facilities dictates that Commission regulation in this area must be exclusive in order to ensure uniform treatment of all customers nationwide. A Commission ruling now on the basic issue of jurisdiction is appropriate and desirable to remove the uncertainty created by the North Carolina and Nebraska actions—an uncertainty which questions the integrity of *Carterfone* and the pending Federal-

[1] The "Motion to Correct Transcript of Oral Argument", filed by the National Association of Regulatory Utility Commissioners, is hereby granted, as well as that filed by Southern Pacific.

State Joint Board proceeding (Docket No. 19528) and which has caused a decline in the market for interconnect equipment in North Carolina and Nebraska. Petitioners request the Commission to reaffirm *Carterfone* and the right of users to interconnect communications equipment and systems in accordance with applicable interstate tariffs, to declare federal superintendence in the area of interstate interconnection, and to make more explicit its preemption of such interconnection matters from inconsistent and burdensome state regulations and actions.

11. The views of the petitioners are supported by other manufacturers of interconnect equipment,[1a] users of customer-provided terminal equipment and their representatives,[2] various specialized common carriers,[3] and the Department of Justice. They urge that the Commission has comprehensive jurisdiction over interstate and foreign communications under Sections 1, 2(a), 3(a) and (b), 201–205, and 410(c) of the Communications Act,[4] including jurisdiction to regulate interconnection of customer-provided equipment with common carrier facilities capable of interstate service even though the facilities are used also for intrastate service.[5] The Commission's decision in *Carterfone* and the interstate tariffs filed pursuant thereto establish the existence of a definitive and positive federal policy on interconnection which preempts this area from conflicting state regulation.[6] Indeed,

[1a] E.g., Computer and Business Equipment Manufacturers Association; General Electric Company; Electronic Industries Association; Ericsson Centrum, Inc.; Phone-Mate, Inc.; International Business Machines Corp.; Independent Data Communications Manufacturing Association; International Telephone and Telegraph Corp.

[2] E.g., Aeronautical Radio, Inc. and Air Transport Association of America; American Petroleum Institute; Computer Timesharing Services Section; Utilities Telecommunications Council; Association of American Railroads; National Retail Merchants Association, Inc.

[3] E.g., Microwave Communications, Inc. and MCI Telecommunications Corp.; Data Transmission Company; Southern Pacific Communications Company; N-Triple-C, Inc.

[4] In support of the Commission's comprehensive authority over interstate communications, Justice and other parties cite:

General Telephone Co. of California v. *FCC*, 413 F. 2d 390, 398 D.C. Cir. (1969), *cert. den.* 396 U.S. 888; *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 659–70 (1972); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *General Telephone Co. of Southwest* v. *United States*, 449 F. 2d 846, 853–55 (5th Cir. 1971); *Ivy Broadcasting Co.* v. *AT&T*, 391 F. 2d 486 (2d Cir. 1968); *United States* v. *AT&T*, 57 F. Supp. 451, 454 (S.D. N.Y. 1944), affirmed *sub nom Hotel Astor Inc.* v. *U.S.*, 325 U.S. 837 (1945); *Ambassador, Inc.* v. *United States*, 325 U.S. 317, 323 (1945).

[5] In support of FCC jurisdiction over equipment used for interstate communication, even though also used for intrastate, parties cite:

AT&T—Railroad Interconnections, 32 FCC 337, 339 (1962); *Fallon Travelodge* v. *Churchill County Telephone and Telegraph System*, 14 FCC 2d 972 (1968); *Use of Recording Devices*, 11 FCC 1033, 1047 (1947); *Jordaphone Corp. of America* v. *AT&T*, 18 FCC 644 (1954); *Hush-A-Phone Corp.* v. *AT&T*, FCC 53–1242 (1955) 22 FCC 112, 113 (1957); *U.S. Department of Defense* v. *General Telephone Co.*, 38 FCC 2d 803, 807–814 (1973), aff'd FCC 73–854; *AT&T—TWX*, 38 FCC 1127, 1133 (1965); *Katz* v. *AT&T*, 8 RR 919 (1953); *Colorado* v. *United States*, 271 U.S. 153 (1926); *GTE Service Corp.* v. *FCC*, 474 F. 2d 724, 736 (2d Cir., 1973; *Chastain* v. *AT&T*, FCC 73–791 (1973).

[6] For the proposition that the FCC's exercise of jurisdiction pre-empts conflicting or inconsistent state regulation, the parties cite, *inter alia:*

Houston, East/West & Texas Ry. v. *United States*, 234 U.S. 342 (1914)—the "Shreveport Rate Cases"; *Southern Ry. Co.* v. *Reid*, 222 U.S. 424 (1912); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963); *Head* v. *New Mexico Board*, 374 U.S. 424, 430 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *United States* v. *New York Central R.R.*, 272 U.S. 457, 463–464 (1926); *Farmers Educ. & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525, 531–35 (1959); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 130–32 (1945); *Burbank* v. *Lockheed Air Terminal, Inc.* 411 U.S. 624 (1973); *Rice* v. *Chicago Bd. of Trade*, 311 U.S. 247, 253–254 (1947); *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972); *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133, 148–149 (1930); *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954); *Carter* v. *AT&T*, 250 F. Supp. 188 (D.C. Tex. 1966); *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 19 (1961); *FPC* v. *Louisiana Power and Light Co. et al.*, 406 U.S. 621 (1972).

Congress recently recognized the Commission's inherent pre-emptive authority over interstate/intrastate facilities when it amended section 410 of the Act to require that a Federal-State Joint Board be consulted in separation matters and to permit a Joint Board to consider other common carrier matters of joint interest. The Senate Report on this amendment, noting that common plant facilities are used for interstate and intrastate telephone calls, stated that in assigning the cost of this plant for rate making purposes "the Federal Government preempts the States in the area of Federal jurisdiction." (S. Rept. No. 92–303, 92 Cong., 1st Sess. (1971).) The Department of Justice asks the Commission to make clear that all carriers are and will remain subject to all FCC rulings and tariffs pertaining to interconnection regardless of any purported state rulings to the contrary and would be liable under federal law for failure to abide by FCC rulings and tariffs.

STATE REGULATORY INTERESTS

12. The North Carolina Utilities Commission (NCUC) urges that Sections 2(b) and 221(b) of the Communications Act reserve to the states the right to regulate intrastate telephone exchange service even where a portion of such service consists of interstate or foreign communication. The rulemaking proceeding presently pending before the NCUC involves an investigation into the effect of subscriber-provided equipment upon intrastate service and its economic effect upon the telephone using and consuming public. The NCUC has not reached any decision with regard to interconnection; publication of the proposed rule was only to establish the scope of the proceeding. There is no actual controversy yet, and it would be premature and beyond the Commission's statutory authority under the Administrative Procedure Act (5 U.S.C. 554(e)) to issue a declaratory order. Further, the Federal Communications Commission is not an appropriate forum to determine conflicts between a state and federal statute.[7] Moreover, since the regulation of interconnect equipment falls within the categories of communications that Congress excluded from federal control under Section 2(b) of the Communications Act, the FCC cannot claim preemption of the field through its statutory grant of authority. *Carterfone* did not open the door to indiscriminate installation of interconnect equipment and does not foreclose state action on interconnect equipment where it is shown to have an adverse effect on the telephone network.

13. Similar views were expressed by the National Association of Regulatory Utility Commissioners (NARUC) and various State commissions.[8] They urge that the actions complained of by petitioners relate solely to intrastate telephone communications services, and therefore are beyond the jurisdiction delegated to the FCC by the

[7] NCUC cites: *Arkansas Power & Light Co.* v. *FPC*, 156 F. 2d 821, 833 (D.C. Cir. 1946); *Harvey Aluminum, Inc.* v. *NLRB*, 335 F. 2d 749, 754 (1964).

[8] E.g., Missouri Public Service Commission, Georgia Public Service Commission, Public Utilities Commission of Ohio, Maryland Public Service Commission, Michigan Public Service Commission, Oregon Public Utility Commissioner, Washington Utilities and Transportation Commission, Public Service Commission of Wyoming, Alabama Public Service Commission, Tennessee Public Service Commission.

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Communications Act.[9] In claiming that Congress vested in the State Commissions exclusive jurisdiction over intrastate telephone service, including interconnection with respect to intrastate telephone communication, they rely on Sections 2(b) and 221(b) of the Communications Act and the legislative history. See S. Rep. No. 781, 73rd Cong., 2d Sess., p. 3 (1934) noting that the Act "reserves to the States exclusive jurisdiction over intrastate telephone and telegraph communication"; and remarks of Senator Dill, especially at 78 Cong. Rec. 8823 (1934), stating:

> Now, taking up the bill, title I, containing the general provisions of the bill, creates a commission for the regulation of all radio and telephone and telegraph communications. We have attempted in title I to reserve to the State commissions the control of intrastate telephone traffic. We have kept in mind the fact that the Interstate Commerce Commission, through the Shreveport decision and the decisions in other similar cases, has gone so far in the regulation of railroads that the so-called "State Regulation" amounts to very little.
>
> We have attempted, in this proposed legislation, to safeguard State regulation by certain provisions to the effect that where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply.

NARUC further asserts that the petition is an impermissible collateral attack on State administrative processes and should be dismissed.[10] And, finally NARUC takes the position that the relief requested by petitioners cannot be granted in a summary proceeding and should be considered by the Federal-State Joint Board in Docket No. 19528. NARUC states that "it cannot be doubted that the widespread commonality of use of terminal equipment and systems for both interstate and intrastate communications makes Federal-State cooperation on interconnection matters more appropriate than Federal-State confrontation."

14. Two States take a somewhat different position. The Public Service Commission of the State of New York states that a limited declaratory ruling may be warranted on the basis of the facts alleged in this proceeding to avoid potential conflicts based on the common use of inter- and intrastate facilities by customer-owned attachments. However, in issuing such a ruling the Commission should recognize that the jurisdiction of the several States over intrastate communications encompasses a regulatory responsibility for customer-owned equipment and that it would be inconsistent with the public interest to preempt the role of the several States in this area. The Public Service Commission of the State of California urges that the FCC has not yet acted to pre-empt State action on interconnection and should not do so now. If the States are left free to develop their policies individually until such time as a comprehensive interconnection program is instituted, a State commission may develop a more reasonable, practical

[9] They cite: *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945); *Parker* v. *Brown*, 317 U.S. 341, 359–360 (1943); *Rice* v. *Board of Trade of City of Chicago*, 331 U.S. 247, 254 (1947); *Panhandle Eastern Pipeline Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 517–519 (1947).

[10] Citing *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237, 243, 245–247 (1952); *Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Commission*, 465 F. 2d 237 (3rd Cir. 1972), *cert. den.* ____ U.S. ____ 35 L. Ed. 2d 609 (1973); *Public Utilities of the State of California* v. *United Air Lines, Inc.*, 346 U.S. 402 (1953); *Alabama Public Service Commission* v. *Southern Railway Company*, 341 U.S. 341 (1951).

and workable interconnection program as compared to those requirements presently in the interstate tariffs. The California Commission has recently initiated a proceeding to develop regulations designed to provide for independent testing and certification of equipment for interconnection with the telephone network, and should be free to proceed until a comprehensive federal program is instituted.

TELEPHONE COMPANIES

15. Bell System Companies (AT&T), various independent telephone companies,[12] and the United States Independent Telephone Association express views similar to those of NCUC and NARUC on the question of jurisdiction. They urge that Congress has specifically reserved to the States the exclusive authority to regulate intrastate and telephone exchange communication services,[13] and has conferred on this Commission something less than the full authority it was within the powers of Congress to grant.[14] AT&T further asserts that the past practice of the States in regulating telephone companies in general and interconnection in particular, as well as the local nature of the connections in question (since about 97 percent of telephone messages are intrastate), bar federal pre-emption.[15] The Commission's decisions in *Carterfone* and related cases have not pre-empted State action in this area, regardless of what was meant by the Commission, and the Commission should now defer to the judgment of the State regulatory agencies. Indeed, in *Jordaphone*, 18 FCC 644, 670–671 (1954), the Commission exercised its asserted jurisdiction in a way to support, not supplant, State jurisdiction. Moreover, it would not be appropriate for the Commission to issue a declaratory ruling since the North Carolina Rule R9–5 is only a proposed rule, and the advisory opinion of the Nebraska Attorney General is not a definitive determination of State law.[16]

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[12] GTE Service Corporation on behalf of its affiliated telephone companies; United Telecommunications, Inc. on behalf of Carolina Telephone and Telegraph Company and United Telephone Company of the Carolinas, Inc.; and Continental Telephone Corporation.

[13] In addition to relying on Sections 2(b) and 221(b) of the Communications Act and the legislative history cited by NARUC, AT&T refers to: H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934); 78 Cong. Rec. 10314 and 10316 (1934); Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 135–136 (1934); Hearings on S. 2910 Before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 8, 153 (1934); H.R. Rep. No. 910, 83d Cong., 1st Sess. 1 (1953); Statement of the Senate Committee on Interstate and Foreign Commerce, S. Rep. No. 1090, 83d Cong., 2d Sess. 1–2 (1954).

[14] By way of support AT&T cites: *Sterling Manhattan Cable Television, Inc.* v. *New York Tel. Co.*, 38 FCC 2d 1149, 1156 (1973); *Doniphan Tel. Co.* v. *AT&T et al.*, 34 FCC 950, aff'd 34 FCC 949 (1963); *Southwestern Bell Tel. Co.* v. *United States*, 45 F. Supp. 403, 406 (W.D. No. 1942); *Kitchen* v. *FCC*, 464 F. 2d 801 (D.C. Cir. 1972).

[15] AT&T cites principally: *Head* v. *New Mexico Board*, 374 U.S. 424 (1963); *Rice* v. *Chicago Board of Trade*, 331 U.S. 247 (1947); *FTC* v. *Bunte Bros.*, 312 U.S. 349 (1941); *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939); *Southwestern Bell*, *supra*, 45 F. Supp. at 406; *California* v. *Zook*, 336 U.S. 725 (1949); *Penn Dairies* v. *Milk Control Comm'n*, 318 U.S. 261 (1943); *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329 (1951); *Maurer* v. *Hamilton*, 309 U.S. 598 (1940).

[16] In arguing that the FCC has not pre-empted the field, other telephone company interests rely on the following in addition to cases cited by AT&T: *Panhandle Pipe Line Co.* v. *Comm.*, 332 U.S. 507, 513 (1947); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440; *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963); *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959); *TV Pix* v. *Taylor*, 304 F. Supp. 459 (D. Nev. 1968), aff'd *per curiam*, 396 U.S. 556 (1970); *Chrysler Corp.* v. *Tofany*, 419 F. 2d 499 (2d Cir. 1969); *Swift & Co.* v. *Wickham*, 364 F. 2d 241 (2d Cir. 1966), *cert. den.* 385 U.S. 1036; *Colorado Anti-Discrimination Comm.* v. *Continental Airlines*, 372 U.S. 714, 724 (1963); *Parker* v. *Brown*, 317 U.S. 343, 353 (1943).

REPLY COMMENTS

16. The reply comments of the parties largely reiterate and expand on the views set forth in the comments. A few new points warrant brief mention.

17. The Department of Justice and others note that NARUC and AT&T, in quoting from Senator Dill's remarks on *Shreveport* during the debate on the 1934 Act, did not set forth the next two sentences of Senator Dill, as follows (78 Cong. Rec. 8823 (May 15, 1934)):

> We have in mind, for instance, cases where a city has telephone service connecting into a number of States, such as we have right here in Washington, running out into Maryland and out into Virginia, and in New York the service runs into New Jersey, and I think perhaps into Connecticut, though I am not sure about that. There are many cases in the country where, without some saving clause of that kind, the State Commissions might be deprived of their power to regulate; and the State commission representatives were jealous, the preparation of this bill, that those rights should be protected; and we have attempted to do that.

They maintain that Senator Dill was concerned with the preservation of traditional state jurisdiction over local rates and service, not with the provision of equipment to be used in conjunction with both intrastate and interstate service. Moreover, the legislative history demonstrates that, whatever else Congress may have intended to preserve in the way of state jurisdiction, Congress specifically placed upon local telephone companies the duty of complying with Sections 201–205 of the communications Act—the sections pursuant to which the *Hush-A-Phone* and *Carterfone* decisions were rendered.[17] The legislative history also evidences a concern with effective national regulation.[18]

18. The Department of Justice appends statements by representatives of the General Services Administration and the Federal Aviation Administration, which describe how any prohibition against interconnection of customer-provided equipment would impede present and projected communications programs of the U.S. Government. NATA, CBEMA, and others urge that there is no prematurity precluding a Commission declaratory ruling to remove an uncertainty that presently threatens the affected industries, the public's use of interstate communications facilities, the fundamental integrity of the Commission's processes, and the ability of the Commission to discharge its statutory responsibilities in the future. It is further asserted that the power Congress conferred upon the Commission to regulate the use of telephone equipment employed in the provision of interstate communication is not restricted by Sections 2(b) and 221(b), and that the breadth of the *Shreveport* doctrine is unnecessary to sustain FCC jurisdiction over customer-supplied equipment used for interstate purposes.[19]

19. NCUC asserts that *Carterfone* has no effect on the North Carolina proposed rulemaking procedure because it deals only with attachments to the existing system, whereas North Carolina's main concern is with replacements or substitutions of utility company furnished

[17] Citing: H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10313 (1934) (Remarks of Cong. Rayburn); 78 Cong. Rec. 8846–7 (1934).
[18] Citing, S. Rep. No. 781, 73rd Cong., 2d Sess. 2 (1934); H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 3 (1934); 78 Cong. Rec. 10316–17 (1934).
[19] *Common Carrier Tariffs for CATV Systems*, 4 FCC 2d 257, 260 (1966).

equipment. Moreover, *Carterfone* only requires that adverse effect to the system be established in order to prohibit interconnect devices and no action prohibiting customer-provided equipment would be taken by NCUC unless adverse effect was established by the evidence. Further NCUC contends it is not proposing the creation of two separate systems for intrastate and interstate telephone service—which is not feasible or desirable. By the reference in proposed Rule R9–5 that interstate service was exempt, NCUC was primarily making a jurisdictional declaration. However, there are some totally interstate facilities (e.g., CATV lines, TV and radio circuits, dedicated private lines, signaling lines) which NCUC has no interest in reaching.

20. NARUC, AT&T and others assert that the *Shreveport* line of cases cited by proponents of the petition has no applicability to the instant situation in view of the legislative history of Section 2(b) and the deliberate refusal of Congress to grant the FCC pre-emptive powers of the type sanctioned by *Shreveport*. They further urge that Section 410(c) was designed to make the Federal-State Board procedure particable and did not in any way substantively limit the States' authority under pre-existing law. AT&T asserts that in most Commission decisions relied on by the proponents of pre-emption, the Commission limited its determination to interstate and foreign service and avoided any claim of general power to pre-empt State regulation of intrastate communications.[20]

DISCUSSION AND CONCLUSIONS

21. Before addressing the specific legal and jurisdictional issues involved in this proceeding, we first take note of the questions raised as to the appropriateness of a declaratory ruling by the Commission designed to clarify the jurisdictional scope and effect of our *Carterfone* ruling and the tariffs filed in implementation thereof. In this regard, we are not obliged to, nor do we deem it appropriate to, await some definitive action by a State or a carrier which creates a conflict between Federal and State regulation having the ingredients of a conventional "case or controversy" before issuing such a ruling. As an administrative agency, we are vested by statute with broad and discretionary powers to devise and use procedures, such as the issuance of declaratory judgments, as may be reasonably appropriate to discharge our statutory responsibilities with respect to effective regulation of interstate and foreign communication, including the clarification of the scope and effect of rulings issued by us in the performance of those responsibilities. (See *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 142–43 (1940); Section 4(j) of the Communications Act; *NBC* v. *U.S.*, 319 U.S. 190, 219 (1943); *GTE Service Corp.* v. *F.C.C.*, 474 F. 2d 724 (C.A. 2, 1973); *Philadelphia Television Broadcasting Co.* v. *F.C.C.*, 258 F. 2d 282 (C.A.D.C. 1964)).

22. We believe that it is particularly appropriate in the instant case to take action by way of a declaratory judgment in order to remove or alleviate the uncertainty and confusion that has been created with

[20] Citing, e.g.: *Use of Recording Devices*, 11 FCC 1033, 1037, 1054 (1947); *Jordaphone Corp.*, 18 FCC 644, 670–671 (1954); *AT&T–TWX*, 38 FCC 1127, 1132–34 (1965); *DOD* v. *General Telephone Co.*, 38 FCC 2d 803, 813–814 (Review Board 1973), *review den.*, FCC 73–854 (Aug. 8, 1973).

respect to the application and effects of our *Carterfone* ruling by the NCUC proposed Rule R9–5 and the advisory opinion of the Attorney General of Nebraska. We believe that it would be contrary to the public interest to await the formal adoption and implementation of those State actions before dealing with the conflicts and confusion that such threatened actions have already generated. The course being pursued by NCUC and the Attorney General of Nebraska, and possibly by other States,[20a] is a source of great controversy and confusion for manufacturers and users of customer-provided communications equipment and also casts doubt on the continuing efficacy, application and effects of *Carterfone* and the effective tariffs on file with this Commission in implementation of *Carterfone*. We would be remiss in the discharge of our broad statutory responsibilities to remain passive in the face of the policy and regulatory confusion which permeates the entire field of interconnection as a result of these State actions.

23. Concerning the recommendation that these matters be referred to the Federal-State Joint Board that we have created pursuant to Section 410 of the Communications Act, we do not believe the Joint Board to be an appropriate forum for the resolution of the jurisdictional issue raised by the North Carolina and Nebraska actions. The Joint Board is an appropriate vehicle for the consideration of technical and economic aspects of the interconnection policies and tariffs. It is not a proper or appropriate vehicle for determining the statutory jurisdiction of this Commission and the legal effects of policies promulgated by us in furtherance of our statutory responsibilities.

24. We turn now to the merits of the questions concerning the extent to which our *Carterfone* ruling and the implementing interstate tariffs have preempted and foreclosed conflicting or inconsistent actions by the States or the carriers in the interconnect area.

25. Those parties who argue that *Carterfone* has preemptive effect upon State action rely, in essence, upon those provisions of the Communications Act which give the Commission comprehensive and pervasive powers and responsibilities with respect to the regulation of interstate and foreign communication and common carriers engaged in the furnishing of such communication. Those parties who argue that the *Carterfone* ruling has no preemptive effects rely upon certain provisions of the Communications Act, notably Sections 2(b) and 221(b), which place certain limitations upon the Commission's jurisdiction. A realistic evaluation of the merits of these arguments, in light of the statutory scheme of the Communications Act, requires at the outset that we take account of the nature of the telephone system and telephone service to which such statutory scheme of regulation applies.

26. It is undisputed that we are dealing with a nationwide network of interconnected telephone exchanges. These exchanges provide the single means by which telephone subscribers have access to the telephone system for making or receiving local telephone calls within an

[20a] We discuss in paragraphs 54–56 the recent actions by the Oklahoma Corporation Commission.

exchange area, intrastate calls to or from subscribers served by other exchanges in the same state, and interstate or foreign calls to or from subscribers served by exchanges in other states or foreign countries. In other words, exchange plant, particularly subscriber stations and lines, is used in common and indivisibly for all local and long distance telephone calls. There is no interstate message toll telephone service either offered or practically possible except over exchange plant used for both intrastate and interstate and foreign service.

27. That the Commission has plenary and comprehensive regulatory jurisdiction over interstate and foreign communications services and facilities of common carriers and all of the terms and conditions upon which such services and facilities are offered to the public is evident from the provisions of the Communications Act. It appears equally evident from those provisions that in those instances where the rendition of interstate and foreign service is dependent upon plant facilities which are also used for exchange or other intrastate services, the Federal role must be controlling. These conclusions follow from a consideration of the express purposes sought to be achieved by the Congress and the specifics of the statutory scheme formulated by the Congress to accomplish those purposes.

28. Congressional purposes are clearly indicated in the first paragraph of the Communications Act of 1934 wherein it is stated that the Commission was created for "the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." (Section 1). The intent is further stated in the next section which provides that the Communications Act shall "apply to all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communications . . ." (Section 2(a)). In the third section it is made clear that the Commission's authority over interstate communication by wire or radio covers not only the "transmission" of messages but also "all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission" (Section 3(a) and (b)). Sections 201 and 202 outlaw unjust, unreasonable and discriminatory practices by any common carrier in connection with its furnishing of interstate and foreign communication. The Act also requires the common carrier to file with this Commission "schedules showing all charges for itself and its connecting carriers for interstate or foreign wire or radio communication . . . and showing the classifications, practices, and regulations affecting such charges" (Section 203(a)). No carrier "shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act . . . and no carrier shall . . . extend to any person any privilege or facilities, in such communication, . . . except as specified in such schedule" (Section 203(e)). The Commission is empowered to conduct hearings concerning the lawfulness of any new or existing charge, classification, regulation or practice of a common carrier (Section 204) and to pre-

scribe just and reasonable ones (Section 205). For purposes of these Sections of the Act (Sections 201–205), Congress explicitly granted this Commission jurisdiction over all common carriers engaged in interstate or foreign communications, including "connecting carriers" who are exempt from certain provisions of the Act other than Sections 201 through 205 [21] and 301.

29. Other provisions of the Communications Act vest the Commission with a wide range of powers to facilitate implementation of the substantive requirements and proscriptions of Sections 201 to 205. What is particularly noteworthy here is that in apparent recognition of the indivisible character of carrier plant and operations these other provisions make no distinction in terms of their application between the intrastate and interstate services, operations and activities of a carrier. Thus, Section 219 empowers the Commission to prescribe the form and content of the annual and monthly reports to be filed by carriers with respect to all aspects of their business and operations. Section 220 empowers the Commission to prescribe the form of any and all accounts and records to be kept by the carriers, as well as the depreciation charges to be entered by the carriers in their accounts. Sections 221(c) and (d) of the Act give the Commission authority to classify the property of carriers and to determine what property shall be considered as used in interstate and foreign toll service. After making such classification, the Commission may in its discretion value only that part of the property of the carrier determined to be used in interstate and foreign telephone toll service. Here again, the Act makes clear the primacy of Federal jurisdiction with respect to property clearly used to provide interstate and intrastate services and facilities. Finally, in keeping with the all-embracing scheme of the Communications Act that the Commission should regulate interstate and foreign communication "so as to make available a rapid, efficient Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." (Section 1), the provisions of Section 218 direct the Commission to keep itself informed as to the manner and method in which the business and management of the carriers are conducted and as to technical developments and improvements in wire and radio communication to the end that the benefits of new inventions and developments may be made available to the people of the United States.

30. Acting within the general context of the provisions of the Communications Act and Section 201(b) in particular, the Commission in *Carterfone* declared unlawful the prohibition in AT&T's interstate tariffs against the use of all customer-owned equipment and ordered AT&T to file appropriate revisions to its interstate tariffs which would remove this "unwarranted interference with the telephone subscriber's right to use his telephone in ways which are privately beneficial without being publicly detrimental." In response to this ruling, AT&T

[21] "Connecting carriers" engage in interstate and foreign service only through physical connection of their facilities with the facilities of other carriers with which they have no direct or indirect corporate or other affiliations. Connecting carriers are nevertheless expressly subject to the substantive requirements of Sections 201 through 205 of the Act, except they are relieved of the tariff filing requirements of Section 203. However, their participation in interstate and foreign services is governed by the same terms and conditions of the tariff schedules filed with the Commission by the carriers with which they connect. (See Sections 3(u) and 2(b) of the Act).

filed the revised tariffs which are now effective and which the Commission accepted as being consistent with the *Carterfone* ruling. *AT&T "Foreign Attachment" Tariff Revision*, 15 FCC 2d 605 (1968).

31. Because *Carterfone* and the implementing tariffs operate upon the terms and conditions under which subscriber-owned equipment may be interconnected to the telephone network, and because that network is used in common for intrastate and interstate services, AT&T recognized that uniform interconnection practices must apply to both services. Hence, the Bell System companies promptly filed conforming revisions to their "foreign attachment" tariffs on file with the several State commissions applicable to intrastate services. No carrier, State commission or other party pursued judicial review of the Commission's *Carterfone* ruling or challenged the jurisdiction of the Commission to make that ruling or to accept the tariffs filed in response thereto.

32. The proponents of the North Carolina proposed rule, relying principally upon Sections 2(b) and 221(b) of the Communications Act contend, variously, that Congress reserved to the States the exclusive right to regulate exchange and other intrastate services including the use of customer-owned equipment in connection with such services; that this asserted exclusive right bars any preemptive effect of Federal action in matters of customer interconnection; and that the States are not barred from taking action concerning customer interconnection even though such action may derogate or conflict with the Federal ruling.[21a] The proponents of this position are less than clear as to the practical effects upon telephone service resulting from conflicting Federal and State rulings except to suggest that separate facilities could be provided for interstate and intrastate services or that the Commission should simply defer to the State commissions as to the appropriate rule.

33. It is our conclusion that this construction of Sections 2(b) and 221(b) is erroneous for the following reasons:

34. First, as we discussed at the outset, the Commission's powers to regulate interstate and foreign communications services are comprehensive and pervasive and embrace the terms and conditions under which customers shall be reasonably permitted to use their own equipment in connection with such services. The provisions of Section 2(b) and 221(b) are to be construed in light of this overall statutory scheme. For, the "Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation" (*United States* v. *Storer Broadcasting Company*, 351 U.S. 192, 203 (1956)). As the Court of Appeals for the District of Columbia Circuit recognized in *General Telephone Co. of California* v. *F.C.C.* (413 F. 2d 390), the Act "must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole" (413 F. 2d at 398). For, "fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication" (*id*, at 401).

[21a] We note that counsel for AT&T conceded at oral argument that Section 221(b) is not determinative of the jurisdictional question (Tr. 102–103).

35. Second, because of the commonality of telephone company plant and facilities used to provide intrastate and interstate services and the indivisibility of such plant and facilities, rules governing interconnection of customer-owned equipment must be the same for interstate and intrastate services. Here it is to be stressed that customer-owned equipment which is now available and in demand is either incapable of distinguishing in its use and operation between intrastate and interstate calls, or where such capability technically exists, it would make no sense from an economic or operational standpoint for the customer to arbitrarily confine its use to interstate service.

36. Third, this Commission has repeatedly exercised jurisdiction over facilities and instrumentalities used in interstate communication despite the circumstance that such facilities are used also to provide intrastate service. See *AT&T–TWX*, 38 FCC 1127 (1965); *DOD* v. *General Telephone Co.*, 38 FCC 2d 803, 807–812 (Review Board 1973), aff'd FCC 73–854 (1973); and the precedents cited in these two cases.

In an early Commission case, *Use of Recording Devices*, 11 FCC 1033 (1947), we rejected arguments of the carriers that, under Sec. 2(b)(1) and 221(b) of the Act, "the jurisdiction of the Commission to make an order regulating the use of recorders is limited to use in connection with facilities which are exclusively interstate" (11 FCC at 1046) and stated that this argument ignored "the basic grant of jurisdiction to this Commission over interstate and foreign communications by wire or radio (see Communications Act, see 1 and 2(a)) and it pays no heed to the fact of operation of telephone recording devices" (11 FCC at 1047).

We stated further that regulation of interstate and foreign message telephone service "necessarily involves all the facilities, charges, classification, practices, service and regulations used in the rendition of the service, and regulation of such service must be able to deal with all or any of the matters so involved if it is to be effective" (11 FCC at 1047).

In 1953 we stated in the *Katz* case that:

"The fact that the same instruments are used for both interstate and intrastate services and that intrastate service is subject to state and local regulation does not alter the Commission's duties and obligations with respect to interstate telephone facilities. Were the Commission to exercise its jurisdiction only where the telephone facilities in question were exclusively interstate in character, it would result in virtually complete abdication from the field of telephone regulation by the Commission" *Katz* v. *ATT*, 8 RR 919 at 923 (1953).

Later in *Jordaphone Corp. of America* v. *ATT*, 18 FCC 644 (1954), we rejected the carriers' contention that because tariff regulations prohibiting the use of customer-owned automatic answering devices affected intrastate and exchange telephone service, the Commission was without jurisdiction to entertain a complaint alleging the unreasonableness of such regulations. Although we required the carriers to file revised tariffs allowing the use of answering devices where authorized by state or local authorities, we stated:

"Despite the fact that the individual telephone installation is used more extensively for intrastate telephone communications than for interstate and foreign toll telephone service, it is clear that this Commission, pursuant to sections 1 and 2(a) of the Communications Act of 1934, as amended (47 U.S.C. 151, 192(a)), has jurisdiction insofar as the 1.2 percent interstate and foreign toll message calls are concerned" 18 FCC at 670.

We also stated that while we hesitated to exercise jurisdiction in such a way as to preclude exercise of jurisdiction by state or local bodies, we would do so where, "The record reveals a very clear need for such action so far as interstate telephone service is concerned" 18 FCC at 670.

We expressly found such a need in the *ATT–TWX* and *DOD* v. *GTE* cases quoted above. We stated in *ATT–TWX* that:

"To the extent the carrier provides station equipment for use in connection with both interstate and intrastate communication, the Commission has authority to

regulate the charges for interstate use of those facilities in order to insure lawful performance of the interstate service" (38 FCC at 1132) and that

"We find nothing in section 2(b)(1) which imposes any limitation upon our full authority over interstate communication service. For us to conclude that, because facilities and instrumentalities are used in intrastate as well as in interstate communication service, we do not have jurisdiction or that we should not exercise it, would leave a substantial portion of the interstate communication service unregulated. We do not believe Congress so intended" (38 FCC at 1133).

Our decision in that case concludes that ". . . on the basis of statements and comments presented herein by the parties it is not practicable to establish separate interstate and intrastate schedules of charges . . ." 38 FCC at 1134. A similar conclusion was reached in *DOD* v. *GTE*.

The courts have held that transmission facilities located entirely within one state are not immune from Commission regulation if those facilities are used for interstate communications. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (6 cm.) *cert. denied*, 371 U.S. 820 (1962); *California Interstate Co.* v. *F.C.C.*, 328 F. 2d 556 (D.C. Cir. 1969). The Courts have also held that Commission regulation of interstate communication does not end at a local switching apparatus but runs to the ultimate destination of the transmission. *U.S.* v. *ATT*, 57 F. Supp. 451 (S.D. N.Y. 1944), aff'd. sub nom. *Hotel Astor, Inc.* v. *U.S.*, 325 U.S. 837 (1945). And in *Ivy Broadcasting Co.* v. *A.T.T.*, 391 F. 2d 486 (2d Cir. 1968) the Court held that when a local transmission facility is included in an interstate transmission network, the regulation of the interstate uses of that facility lies exclusively with the F.C.C.

37. Fourth, the legislative history of the Communications Act clearly shows that in enacting Sections 2(b) and 221(b), the Congress was primarily concerned with the preservation of traditional State jurisdiction over intrastate rates and services, i.e., to make certain that the Federal Communications Commission could not regulate intrastate rates and services in the manner that intrastate transportation's rates and services were being regulated by the Interstate Commerce Commission. Clearly, Congress sought to exclude the FCC from regulation of truly intrastate service, including those local exchange services referred to in Section 221(b) where such local exchange area straddles a state border and to this limited extent constitutes interstate service. But the latter is the only aspect of interstate service that the Congress felt warranted in reserving to the States.[22] There is nothing in the Communications Act or its legislative history which supports the position taken by the proponents of the North Carolina proposed rule that Section 2(b) and/or 221(b) reflects a Congressional intent that where common exchange plant is used to provide both exchange and other intrastate services as well as interstate services, a State may, in effect, determine the terms and conditions upon which such common plant is to be used for interstate service. It is one thing to exempt intrastate services from Federal jurisdiction. It is quite a different matter to argue that by virtue of this exemption plant used in common for both intrastate and interstate services is beyond Federal jurisdiction and that subscribers can be subjected to a melange of regulations, determined by each of 50 separate jurisdictions, as to the terms and conditions upon which they shall have access to and use of the telephone network for interstate services. If each State were to be free

[22] See e.g., 78 Cong. Rec. 8823 (May 15, 1934); 78 Cong. Rec. 8846–8847 (1934); H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 2, 3 (1934); 78 Cong. Rec. 10313 (1934); S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10316–17 (1934). See also, *Southwestern Bell Telephone Co.* v. *United States*, 45 F. Supp. 403, 404 (W. D. Mo. 1942).

to establish its own rules governing interconnection for the purposes of intrastate services, uniform nondiscriminatory interstate service throughout the country would be rendered difficult if not impossible. Because of the indivisibility of the network, it is impossible, from a practical economic and operating standpoint, for a common carrier to comply with conflicting Federal and State regulation.[23] Moreover, if a State were to bar interconnection of customer-provided equipment for intrastate service in derogation of a Federal rule, the carrier would be placed in an untenable position of having to violate either the State ruling or the Federal ruling. All of these results would frustrate the Congressional purpose in establishing the Commission to "make available . . . a rapid, efficient, Nation-wide . . . communication service with adequate facilities at reasonable charges . . ." (Section 1).

38. For all of the foregoing reasons, this Commission has primacy in authority over the terms and conditions governing the interconnection of customer-provided equipment to the nationwide telephone network. No State regulation can oust this Commission from its clear jurisdiction over interstate communications and the regulation of the terms and conditions governing such communication, including the right of subscriber interconnections. A "holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulation is a physical impossibility for one engaged in interstate commerce." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142–143 (1963). See also cases cited in footnote 6 above.

39. Although we have asserted Federal primacy in this area, it does not follow that the State commissions have no proper interest or that they are to be denied a participating role and thus become merely onlookers to purely unilateral action by the FCC. Congress, at the time that it enacted the Communications Act, recognized the potential impact of the regulatory power given to this Commission over intrastate matters and the States' regulation thereof, particularly in those instances where service to the public involved the use of common plant and facilities. Accordingly, Congress established a statutory mechanism to make it possible that State concerns and viewpoints would be duly reflected in the Commission's actions in areas of common regulatory concern. Specifically, Section 410 of the Communications Act makes provision for State participation in Commission proceedings through several types of procedures including the use of Federal-State joint boards to preside over hearings and to make recommendations to the Commission as to the ultimate decision the FCC should reach in the particular matter. In 1971, Congress further amended the Act by adding a provision (Section 410(c)) making mandatory, rather than permissive, the use of the Federal-State Joint Board procedures to resolve separation issues with respect to common carrier property. It is relevant to note in this case that this amendment, enacted just

[23] And clearly it would make no economic or operational sense to provide separate facilities for intrastate and interstate services in order to comply with conflicting rules.

two years ago, again stressed the primacy of the Federal jurisdiction by reserving to this Commission the final decision-making powers.[24]

40. In the current situation, we have respected the interest of the States in this matter of interconnection, as well as the effect of any ruling which we may make upon intrastate services. Accordingly, as noted above, to accommodate to the fullest extent possible all reasonable and legitimate concerns of such State jurisdictions we have established a Joint Board pursuant to the provisions of Section 410 to address itself to the question of whether customer interconnection should be liberalized beyond that now permissible under our *Carterfone* ruling and the implementing tariffs, and, if so, what conditions, rules, regulations and other requirements should be imposed in connection with such further liberalization. *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539, 542 (1972).

41. Turning now to the effects of the actions we have taken in the interconnect area on State action in the same area, we point out that our actions do not foreclose any State from taking action of its own in the interconnect area so long as such action does not derogate the interstate ruling. A principal thrust and aim of the interstate tariff filed in compliance with our *Carterfone* ruling is to make certain that the telephone network and the employees operating and maintaining that network will be protected from any harm that may be occasioned by the use of customer-owned equipment or systems. Hence, the tariff requirement that such equipment or systems can be directly connected to the telephone facilities only through protective interface devices offered by the telephone companies pursuant to those tariffs. Neither the *Carterfone* ruling nor these tariffs prevent any State from providing *additional* options to customers with respect to interconnection provided that they are alternatives to, rather than substitutes for, the requirements specified in the interstate tariffs, and provided further that such regulations accomplish the protective objectives of the interstate tariff regulations and in no way permit interference with or impairment of interstate services. Any such additional option authorized by State action would, of course, be required under Section 203 of the Communications Act, to be properly reflected by the telephone companies in their tariffs on file with this Commission applicable to interstate service. Under such a procedure, this Commission would have an opportunity to consider each such additional customer option in terms of its effects upon interstate service. A case in point is represented by the New York Public Service Commission's action with respect to an additional interface arrangement offered by the Rochester Telephone Company (Opinion No. 72-18, Case 26064 (August 21, 1972)).

[24] The Senate Committee Report (p. 2) notes that while the Federal and State "jurisdictions are separate for interstate and intrastate services, the plant facilities are to a great extent the same for both." The Report also recognizes that the Federal Government pre-empts the States in the area of Federal jurisdiction, stating:

"Although the States regulate, in the aggregate, 70 percent of Bell's plant investment, no one State has jurisdiction over as much as the approximately 30 percent regulated by the Federal Communications Commission, and the interests of the various States can be different. More importantly, the Federal Government pre-empts the States in the area of Federal jurisdiction. Thus, if the Commission declares its rate base to include certain costs, these costs are not used in determining a State's rate base; conversely, if the Federal Communications Commission does not use certain costs, the State may be left with these costs in determining its rate base—and correspondingly higher rates for local services to the local consumer." (S. Rept. 362, 92d Cong., 1st Sess. p. 3).

42. Nor do our actions in the interconnect area foreclose any State from the full exercise of its investigatory powers with respect to the effects of interconnection as related to the quality of telephone service or the regulation by the State of intrastate rate structures and revenue requirements for services subject to its jurisdiction. This Commission has been monitoring interconnection to ascertain the nature and extent of any harm caused thereby. We have also been monitoring the manner and effectiveness with which the telephone companies are administering their tariff regulations, with particular reference to the availability and efficiency of the interface protective arrangements required by such tariffs. We would expect the State commissions to do likewise in discharging their responsibilities with respect to the maintenance of efficient intrastate service. A continued and systematic exchange of information on these matters between the FCC and the several states would be mutually beneficial and in furtherance of our common objective of promoting the public interest in efficient service. Also, this type of Federal-State interaction would enhance the ability of this Commission to take prompt appropriate corrective measures indicated to be warranted by the information generated.

43. There is one additional matter which should be addressed at this time even though it does not relate directly to the issues before us. This is the concern expressed by telephone companies and certain elements of the regulatory community with respect to what they believe to be potential harmful effects of interconnection on telephone service and intrastate rates and revenue requirements applicable to basic exchange services. In general, it has been urged that to the extent our policy established a competitive market for terminal equipment and systems, it forces the carriers to reduce their rates in order to compete in this market for such equipment. This, in turn, it is alleged, causes a loss of revenue to the carriers which prior to competition had been available to offset revenue requirements related to basic exchange services, and thereby requires higher rates for such basic services. It is urged that until these consequences are fully explored and evaluated as to their effects on the costs and availability of basic exchange service there should be no further liberalization of interconnection. It has also been suggested that until the *Carterfone* policy and its effects have been reevaluated, there should be a moratorium on permissible interconnection of any kind.

44. In our Notice of Inquiry in Docket No. 19528, we gave no specific consideration to questions as to whether and to what extent there might be adverse economic consequences from further liberalization of customer interconnection by the ultimate adoption of any of the proposals before us in that proceeding. We therefore specified in our First Supplemental Notice in Docket No. 19528 that we would "cover such issues in an appropriate manner by further supplemental notices in the near future."

45. In light of representations made to us in connection with the instant proceeding, we propose to broaden our review of potential adverse effects to include alleged economic effects which may result from currently permitted use of customer-provided equipment. We shall, at an early date, formulate and release specific issues designed to elicit

the necessary information and provide a framework for proper decision-making.

46. Any such expansion of the issues in Docket No. 19528 or in a separate proceeding is not to be construed as an indication that we have any reason to question the merits of our *Carterfone* policy or the public benefits we perceive to have resulted from that policy thus far. Our purpose will be instead to afford an opportunity to the critics of customer interconnection to substantiate and document by meaningful and probative evidence the specific nature and extent of the economic or other detriments they allege are or will be the consequence of customer interconnection as it is presently authorized or as it might be liberalized in accordance with any of the proposals now being considered in Docket No. 19528. We will also expect them to make a persuasive showing as to whether, to what extent, and in what specific areas the markets for interconnect equipment and systems have the unique characteristics which would warrant relegating that market to monopoly supply by the telephone companies rather than to competitive sources of supply.

47. In fairness to all parties concerned, we deem it in order to state our view at this time that under a free enterprise system, particularly in this instance where there is an existing and growing competitive market for customer-provided interconnect equipment, any governmental action designed to prohibit or restrict the competitive operation of such a market would be of questionable validity and legality unless supported by compelling and cogent public policy considerations. Our purpose in enlarging the proceedings in Docket 19528 (or in a separate proceeding) will be to ascertain whether such public policy considerations are present as to warrant the extension of the natural monopoly concept to the interconnect market.

48. We now address certain significant issues relating to Title III of the Act that were not specifically covered in the briefs and oral argument. These questions relate to the implications of the proposed rule of NCUC upon our exclusive jurisdiction under the Act to license radio facilities.

49. Both Sections 2(b) and 221(b) of the Act, which are relied upon heavily by the proponents of the NCUC rule, begin with language that makes it clear that State action must yield to the sole jurisdiction and power of the Commission to license radio facilities in the public interest. This licensing jurisdiction applies to radio facilities irrespectve oi whether they are to be used for interstate or intrastate purposes. In North Carolina, as in every other State, the telephone companies and many of their interconnecting customers are users of radio facilities licensed by this Commission. Under Title III of the Act all licensees are subject to the requirements that they operate in the public interest and in accordance with national policies as expressed in the Act and as developed by our regulatory actions. (See e.g., *Guardband Decision*, 12 FCC 2d 841 (1968); 14 FCC 2d 269 (1968); 409 F. 2d 322 (1969)).

50. Thus, our findings herein that the Federal role is paramount and controlling in the area of interconnection to the nationwide telephone network is premised not only upon the provisions of Title I and

Title II, of the Act as heretofore discussed, but also upon the provisions of Title III and the national policies reflected therein.

51. A key provision of the proposed rule of the NCUC is that "The telephone company shall own, service and be fully responsible for and accountable to the Utilities Commission and to its customers for adequate service and maintenance of *all equipment used in telephone service* in North Carolina" (emphasis added). *Telerent Leasing Corp.* 43 FCC 2d 487, at page 491. This NCUC rule, if adopted and made effective, would mean that all private mobile and other radio systems licensed by us in North Carolina would no longer be interconnected with the switched telephone system and this would be in direct conflict with our policy of liberal licensing of private radio systems and our policy under *Carterfone* of harmless interconnection of all such radio systems with the common carrier network. Indeed, the interconnect facilities involved in the *Carterfone* case were private mobile radio systems which were being furnished by the customers themselves in substitution for radio systems otherwise available from telephone companies as part of their telephone service offerings to the public.

52. With respect to that portion of the advisory ruling by the Attorney General of the State of Nebraska that a hotel or motel could not interconnect privately-owned communications equipment with the facilities and services of a telephone company without certification as a common carrier, the following observations appear to be in order. We do not believe that hotels or motels should be treated any differently from other businesses so far as the ownership, operation and interconnection of their own equipment or systems are concerned. With respect to interstate service, we perceive no reason why a hotel or motel should be obliged to lease from the telephone company rather than own its own internal equipment or system. Nor do we perceive why its lease of facilities from the local telephone company rather than its ownership of such facilities procured from other sources should affect any determination of its status as a regulated entity under State law or of its right to interconnection.

53. We recognize, however, that under the statutes or judicial rulings of a particular State, hotels or motels may, under appropriate circumstances, be subject to State regulation as common carriers or public utilities and require certification as such. Whether this is the situation in the State of Nebraska, we are not called upon to ascertain nor would it be appropriate for us to judge. This is a question that must be determined in the first instance within the State jurisdiction. We merely note in passing that national policy under *Hushaphone* and *Carterfone* requires that all customers, including hotels and motels be free to obtain their own systems from either the telephone company or non-telephone company sources and to interconnect such systems with the national network for interstate communications, subject only to reasonable requirements to prevent harm to the network, its employees or service of others. Furthermore, if any hotel or motel is definitely termed a common carrier by state law, such hotel or motel could apply to us for interstate carrier-to-carrier interconnection under Section 201(a) of the Act and could seek division of revenue with the telephone companies participating in such interconnect service. It could

also seek such other relief as may be necessary to enable it to render interstate communications service. We will retain jurisdiction in this matter to consider the effect of State action in this area.

54. Finally, we take notice of the General Order of the Corporation Commission of the State of Oklahoma, issued January 14, 1974, which adopts rules governing telephone companies and telecommunications in Oklahoma. Rule 16 (a) provides that:

> (a) Authority to Interconnect: No telephone company shall connect or permit connection of any of its lines, facilities or equipment with any lines, facilities or equipment owned, furnished, maintained or serviced by another person furnishing telephone or telecommunications service, unless that person has been granted a certificate of convenience and necessity therefor by the Commission.

Rule 16 (b) states:

> (b) Customer Owned Equipment: This rule shall not prevent the connection of equipment owned exclusively by the customer, and not owned, furnished, maintained or serviced by any other person, when such customer owned equipment is installed and connected in accordance with the approved rules and conditions of service of the telephone company.

55. Rule 16 (a) on its face encompasses more than the interconnection of customer provided equipment and extends to interconnection between the facilities of a telephone company and the system of another carrier, such as a specialized or domestic satellite carrier offering interstate services. As such it poses a clear conflict with the Communications Act and our interconnection policy in the specialized carrier and domestic satellite fields. With respect to the provision of interstate and foreign communications, Sections 214 and 201 (a) of the Communications Act grant this Commission exclusive authority to issue certificates of convenience and necessity and to order interconnection between carriers. Moreover, we have imposed a requirement that telephone companies shall furnish to specialized and satellite carriers such interconnection facilities as are essential to the provision of their authorized interstate services, pursuant to tariffs filed with this Commission. *Specialized Common Carrier Services*, 29 FCC 2d 870, 940 (1971); *Second Report and Order* in Docket No. 16495, 35 FCC 2d 844, 856 (1972); *AT&T*, 42 FCC 2d 654, 655–661 (1973). The telephone companies involved are not excused from prompt compliance with our interconnection policy and orders because of the rule adopted by the Oklahoma Commission.

56. Further, with respect to Rule 16 (b), we note that our *Carterfone* ruling and the implementing tariffs do not distinguish between customer-owned and customer-leased equipment. For purposes of interstate service, we see no reason why there should be any absolute bar against interconnection of customer-leased equipment maintained or serviced by the lessor. In the case of computer equipment leased from IBM Corp., for example, the lessor may be much better qualified to maintain and service the equipment than the customer. Accordingly, in this area also the Oklahoma rule squarely conflicts with the Federal ruling.

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57. In light of all of the foregoing, IT IS HEREBY ORDERED that the petition for a declaratory ruling IS GRANTED to the extent reflected herein and IS OTHERWISE DENIED.

58. IT IS FURTHER ORDERED that the motion of NATA for expedited action and immediate relief IS DISMISSED as moot.

59. IT IS FURTHER ORDERED that the motions of NARUC and Southern Pacific to correct the transcript of oral argument ARE GRANTED.

60. IT IS FURTHER ORDERED that the Commission retains full jursidiction over the question discussed in paragraphs 52 and 53 above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-103

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TRIBUNE PUBLISHING CO. (ASSIGNOR) and WKY TELEVISION SYSTEM, INC. (ASSIGNEE) For Assignment of License of Commercial Television Station KTNT-TV, Tacoma, Wash.	File No. BALCT-522

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 4, 1974)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; AND HOOKS CONCURRING IN THE RESULT.

1. We have before us an application for assignment of the license of Commercial Television Station KTNT-TV, Channel 11, Tacoma, Washington, from Tribune Publishing Company (hereinafter "Tribune") to WKY Television System, Inc. (hereinafter "WKY").

2. WKY is the broadcasting subsidiary of Oklahoma Publishing Company, which publishes *The Oklahoman*, a morning, daily newspaper, and *The Times*, an evening (except Sunday), daily newspaper in Oklahoma City, Oklahoma. WKY is the licensee of two AM radio stations (WKY, Oklahoma City, Oklahoma, and KGGM, Albuquerque, New Mexico) and five television stations, as follows:

Station	Channel	Location	Affiliation	Market rank [1]	Net weekly circulation
WKY-TV	4	Oklahoma City, Okla.	NBC	51	392,000
KTVT	11	Fort Worth, Tex.	Independent	11	903,300
KHTV	39	Houston, Tex.	Independent	22	682,400
WVTV	18	Milwaukee, Wis.	Independent	25	598,200
WTVT	13	Tampa, Fla.	CBS	29	544,900

[1] The market rankings are according to Net Weekly Circulation, as determined by the American Research Bureau and published in the 1972-73 Television Factbook.

3. Station KTNT-TV is an independent VHF station in the Seattle-Tacoma market, which ranks fifteenth in the nation, with a net, weekly circulation of 737,700. Its acquisition would represent WKY's fifth station in the nation's top fifty markets and its third such VHF station.

4. We stated in our *Report and Order* of February 9, 1968 (12 RR 2d 1501), that an applicant seeking to acquire more than three stations (or more than two VHF stations) in the country's top fifty markets would have to make a "compelling public interest showing" of the bene-

fits to be gained by a grant of the application, which would outweigh the detrimental loss of diversity of ownership in those markets.

5. WKY has submitted such a showing, which makes the following points:

A. *WKY will revitalize a financially ailing station.*—The station has suffered heavy operating losses every year for the last 15 years, with the exception of 1969. These losses have been on the order of hundreds of thousands of dollars per year and they total approximately $9 million. WKY proposes to expend approximately $2 million in constructing a new plant and installing new equipment. The hoped-for result will be better technical service and improved facilities for better programming.

B. *Diversity of media control in the Puget Sound area will be increased.*—The assignor, Tribune, in addition to its ownership of Stations KTNT–AM–FM–TV, Tacoma, also publishes the only daily newspaper in Tacoma and operates a cable television system in Pierce County. The assignee, WKY, has no other media interests in the area: its nearest station is 1,500 miles away in Oklahoma City and the Oklahoma Publishing Company's newspapers have no reportable circulation in the market.

C. *WKY would bring new and responsive programming to the community.*—WKY has experience in operating independent stations in major markets in competition with network affiliates and it would bring this experience to bear in Tacoma. Two proposed new programs would add significantly to the media's treatment of problems in the Puget Sound area: "Probe" would be a forum or panel discussion, designed to treat nearly all of the needs and interests of the community ascertained by WKY in its required surveys, during one hour of prime time each week; "Point and Counterpoint" would present articulate spokesmen with their views on important problems facing the community each weekday morning for one-half hour.

D. *WKY's stations do not dominate their respective markets.*—Only two of WKY's stations have network affiliations and one of these is not in the top fifty markets. The rest are independents. All face competition from network affiliates and other independents. In the Seattle-Tacoma market, KTNT–TV faces competition from three VHF network affiliates, another VHF independent and three educational (one VHF) stations.

E. *WKY's stations are not geographically concentrated.*—With the proposed acquisition of KTNT–TV, WKY's stations would stretch from Florida to Washington: six television stations in five states.

6. The nearest thing to a "cluster" of stations is WKY's group of three television stations in Oklahoma City, Fort Worth and Houston. Oklahoma City is 375 miles north of Houston and Fort Worth is roughly midway between the two. In 1969 we prevented the extension of this string of stations to Hutchinson, Kansas, *Wichita-Hutchinson Co., Inc.*, 20 F.C.C. 2d 951 (1969), but we do not feel that the acquisition of a station in Tacoma, Washington, raises any question of possible undue concentration of media control.

7. We have identified the important decisional factors in "Top Fifty" cases in the past, for example:

A. *S.H. Patterson*, 12 F.C.C. 2d 50, 12 RR 2d 561 (1968) and *Taft Broadcasting Company*, 17 F.C.C. 2d 876, 16 RR 2d 263 (1969), financial revitalization and capital improvement;

B. *Triangle Publications, Inc.*, 28 F.C.C. 2d 80, 21 RR 2d 189 (1971) and *Time-Life Broadcast, Inc.*, 33 F.C.C. 2d 1099, 23 RR 2d 1085 (1972), increase in diversity of media control in the market;

C. *Cris-Craft Industries, Inc.*, 24 RR 2d 729 (1972) and *Taft Broadcasting Company, supra*, improved programming;

D. *Triangle Publications, Inc., supra*, assignee's general lack of market dominance;

E. *Cris-Craft Industries, Inc., supra*, no concentration of control;

F. *U.S. Communications of Ohio, Inc.*, 36 F.C.C. 2d 653, 25 RR 2d 127 (1972) and *Taft Broadcasting Company, supra*, allowance of as many as six stations in the top fifty markets.

The Top Fifty Policy applies to both VHF and UHF television stations. Thus, while not all of the cases cited dealt with VHF stations, their identification of decisional factors is useful in all Top Fifty cases.

8. We conclude that WKY has made a compelling public interest showing in the light of our precedent in this area and in compliance with our Top Fifty Policy. The applicants are legally, technically, financially and otherwise qualified and a grant of their application would serve the public interest, convenience and necessity. Accordingly, IT IS ORDERED that the above-captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1157

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TWIN STATES BROADCASTING, INC. (ASSIGNOR) and MIDWESTERN BROADCASTING CO., INC. (ASSIGNEE) For Assignment of License of WGLN (FM) (now WXEZ(FM)), Sylvania, Ohio	File No. BALH-1561

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released January 28, 1974)

BY THE COMMISSION: COMMISSIONERS JOHNSON, REID AND HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it for consideration (i) the above-captioned application for assignment of the license of Radio Station WXEZ(FM) (formerly WGLN(FM)), Sylvania, Ohio, to Midwestern Broadcasting Company, Inc., (ii) the Citizens Committee to Keep Progressive Rock's petition for reconsideration (captioned a "Request for Stay, Reconsideration and Permanent Denial") of a grant of that application and related pleadings, (iii) the remand decision of the United States Court of Appeals for the District of Columbia in *Citizens Committee to Keep Progressive Rock* v. *FCC*, Case No. 72-1675, decided May 4, 1973, (iv) the Citizens Committee's motion to withdraw its objections to grant of the assignment application, (v) an agreement between the Citizens Committee and assignee Midwestern, (vi) the Citizens Committee's petition for reconsideration of the Commission's decision disapproving that agreement, and (vii) a supplemental agreement between the Committee and Midwestern.

BACKGROUND

2. Assignee Midwestern proposed to change the WXEZ entertainment format from "progressive rock" to "middle of the road" music. The Citizens Committee objected to the change and, after the Commission affirmed an earlier Broadcast Bureau grant of the application, appealed to the United States Court of Appeals for the District of Columbia. The Court reversed and remanded the case to the Commission for further proceedings. The Court's order was based, in part, on a disputed question of fact as to the availability of an adequate alternative source of progressive rock music to the Toledo, Ohio audience.

(Sylvania, the city of license, is a suburb of Toledo.) After remand, in an effort to amicably settle the dispute, the Committee and Midwestern negotiated an agreement which was based on the progressive rock service now provided by another Toledo area station, WIOT(FM). The terms of the agreement would have permitted Midwestern to change the WXEZ format to middle of the road music. However, had WIOT subsequently ceased to present an adequate source of progressive rock music at any time prior to expiration of the now current license term (October 1, 1976), Midwestern would have been obligated to conduct a program preference survey of the Toledo area population. If, as a result of that survey, it had found that (a) twenty percent or more of that population expressed a desire for progressive rock which was not otherwise fulfilled by a Toledo area station and (b) a progressive rock format would be economically feasible, Midwestern would then have been required to change the WXEZ format to provide such a progressive rock format.

3. This agreement was filed with the Commission and, in reliance upon its provisions, the Citizens Committee withdrew its objections to the assignment of the WXEZ license to Midwestern. However, we reviewed the agreement and found that it would have operated to preclude Midwestern from exercising its own independent judgment in the selection of the station's programming. Accordingly, we determined that the agreement contravened the public interest. *Twin States Broadcasting, Inc.*, FCC No. 73–850.

4. Thereafter, the parties held further negotiations which led to the supplemental agreement now before us. It is stated that the supplement embodies modifications which cure the defects found in the original agreement, and the Committee requests that we "reconsider and withdraw" our prior decision disapproving the original agreement.

5. As modified, the agreement still requires Midwestern to conduct a program preference survey if WIOT ceases to provide an adequate source of progressive rock music. But now, even if Midwestern should make the two threshold findings of audience preference and economic feasibility, it will not be compelled to alter automatically the WXEZ format. For, the supplement provides that in making any programming decisions pursuant to the agreement, "Midwestern shall . . . exercise licensee discretion in determining whether such changes in its programming practices would be consistent with its obligations as a licensee to further the public interest and to provide programming which meets the tastes, needs and interests of its service area." If in Midwestern's judgment a change to progressive rock "would be inconsistent with overriding public interest factors," no change in the format would be necessary, and Midwestern's only remaining obligation under the agreement would be to state to the Committee the reasons for the decision not to change.

CONCLUSIONS

6. When we reviewed the agreement in its original form we found it to be contrary to the public interest because it inhibited Midwestern's programming discretion. Midwestern would have been required to make a programming format change regardless of whether in the

exercise of independent licensee judgment it would have concluded that such a change would in fact best serve the public interest. It now appears, however, that under the modified agreement Midwestern has relinquished none of its programming responsibilities. In fact, the agreement specifically calls upon Midwestern to exercise fully its discretion before making decisions under the agreement. Midwestern's only obligation would be incurred in the event that it chose not to change to progressive rock: it would be required to provide the Committee with a statement of its reasons for the decision. We find that that obligation does not contravene the public interest. Accordingly, in light of the modifications contained in the supplement, we now conclude that the present agreement warrants our approval.[1]

7. There remains for our consideration the pending application for assignment of the license of WXEZ to Midwestern. The only obstacle to grant of the application has been the objection raised by the Committee to the proposed format change. But, as mentioned above (par. 1), the Committee has by motion of September 10, 1973, withdrawn that objection. In its decision remanding this case to the Commission the Court of Appeals held that "[i]f no objection is raised to a format change the Commission may properly assume that the format is acceptable and, so long as all else is in order, it may grant the application." *Citizens Committee to Keep Progressive Rock*, slip op. at 16. (Footnote omitted.) Since the objection to the format change has been withdrawn, and because Midwestern is technically, financially and otherwise qualified to be a broadcast licensee, we find that grant of the pending assignment application would serve the public interest. Accordingly, we reaffirm the Broadcast Bureau's grant of the Application.

8. Accordingly, IT IS ORDERED, That the agreement between the Citizens Committee to Keep Progressive Rock and Midwestern Broadcasting Co., Inc., as modified by the supplemental agreement of September 10, 1973, IS APPROVED.

9. IT IS ORDERED, That the Committee's petition for reconsideration IS GRANTED to the extent that it requests approval of the agreement as modified by the supplement and DENIED to the extent that it requests reconsideration and withdrawal of our decision disapproving the original agreement.

10. IT IS ORDERED, That the Committee's motion to withdraw its Request for Stay, Reconsideration and Permanent Denial of the above-captioned assignment application IS GRANTED.

11. IT IS FURTHER ORDERED, That grant of the above-captioned application for assignment of license for WXEZ(FM) (formerly WGLN(FM)), Sylvania, Ohio, IS HEREBY REAFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] We are not persuaded, however, that our earlier decision disapproving the original agreement should be withdrawn, as is requested by the Committee. Our decision now to approve the agreement is prompted solely by the modifications set forth in the supplement, and not by any reconsideration of the original agreement. In fact, although the Committee has labeled its pleading a "Petition for Reconsideration," we have not really been asked to reconsider the original agreement, but rather to pass upon a new agreement.

F.C.C. 74-83

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of UNITED TELEVISION CO., INC., (WFAN-TV), WASHINGTON, D.C. For Renewal of License	Docket No. 18559 File No. BRCT-585
UNITED TELEVISION CO., INC. (WFAN-TV), WASHINGTON, D.C. For Construction Permit	Docket No. 18561 File No. BPCT-3917
UNITED BROADCASTING CO., INC. (WOOK), WASHINGTON, D.C. For Renewal of License	Docket No. 18562 File No. BR-1104
WASHINGTON COMMUNITY BROADCASTING CO., WASHINGTON, D.C. For Construction Permit for New Standard Broadcast Station	Docket No. 18563 File No. BP-17416

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 4, 1974)

BY THE COMMISSION:

1. By our Memorandum Opinion and Order, 42 FCC 2d 390, released August 8, 1973, United Television Company, Inc., was directed to resume operation of television station WFAN-TV, Washington, D.C., by no later than 12:01 a.m., December 1, 1973. On November 30, 1973, United filed a request for evidentiary hearing, stating that it was not possible to resume operation of WFAN-TV as directed and requesting an opportunity to submit evidence in a hearing explaining why it could not comply with our order.

2. On December 6, 1973, The Broadcast Bureau filed a motion to terminate the authorization of WFAN-TV. Asserting that the license for WFAN-TV has been forfeited by United's failure to resume operation of the station, the Bureau concludes that the authorization for WFAN-TV should be cancelled, that the call letters should be deleted, and that an opportunity should be provided for the filing of new proposals for the facility. In an opposition filed December 19, 1973, United claims that the Bureau has totally ignored its procedural rights under Section 312 of the Communications Act. United contends that, while authorizations have been terminated where the licensees abandoned their facilities, it has not abandoned WFAN-TV. In fact, according to United, it has shown consummate interest in its license, and it has expended substantial sums of money to preserve it. United thus concludes that the Bureau's motion is without merit and that it

should be rejected. The Bureau, in a reply filed December 28, 1973, urges that there is no dispute that WFAN–TV is silent, that United's factual contentions in support of its request to remain silent have already been found insufficient, and that there is therefore nothing to be considered in a Section 312 evidentiary hearing.

3. In our view, the case before us raises a very serious question as to whether or not United's refusal to resume operation of its station constitutes a permanent discontinuance of operation requiring the cancellation of the license under Section 73.667 of our Rules. While United urges that there are equitable considerations justifying its refusal to resume operation, there is a substantial issue as to whether or not such matters would, in any event, be a sufficient basis to allow a licensee to discontinue operation for an indefinite period of time.[1] Since there is no dispute as to the underlying factual circumstances, we believe that the appropriate procedure is to hold an oral argument before the Commission, *en banc*, on the issues set forth above.[2]

4. Accordingly, IT IS ORDERED:

(a) That the request for evidentiary hearing filed by United on November 30, 1973, IS DENIED;

(b) That the motion to terminate the authorization of WFAN–TV filed by the Bureau on December 6, 1973, IS DENIED;

(c) That United IS DIRECTED TO SHOW CAUSE at an oral argument before the Commission, *en banc*, at 9:30 a.m. on March 29, 1974, why its license for television station WFAN–TV, Washington, D.C., should not:

(i) BE CANCELLED under the terms of Section 73.667 of our Rules, relating to a permanent discontinuance; or

(ii) BE REVOKED, pursuant to Section 312(a)(3) of the Communications Act of 1934, as amended, for failure to operate substantially as set forth in the license;

(d) That the parties wishing to participate in the oral argument SHALL FILE a written notice of intention to appear and participate within five (5) days after the release of this order; and

(e) That the Secretary of the Commission SHALL SEND a copy of this order by Certified Mail-Return Receipt Requested to United Television Company, Inc., licensee of station WFAN–TV, Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[1] Licenses are granted to operate the authorized facilities. Under the Communications Act, we have a responsibility to ensure that available broadcast channels are used to serve the public interest, and any prolonged period of silence is inconsistent with the efficient utilization of broadcast facilities. See *Palladium Times, Inc., (WOPT, WOPT–FM)*, 43 FCC 546, 6 RR 846 (1950).

[2] In the light of the fact that United is now seeking an opportunity to explain why it has not resumed operation of this station, we are persuaded that it would not be appropriate to grant the Bureau's motion for immediate termination of this authorization. However, as noted above, we are convinced that the absence of any substantial and material question of fact bearing on the determination to be made here renders United's request for a full evidentiary hearing equally inappropriate. The procedure adopted is, we believe, fully adequate under Section 312 of the Communications Act and under the Administrative Procedure Act.

F.C.C. 74-84

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF LICENSE OF UNITED TELEVISION CO. OF NEW HAMPSHIRE FOR TELEVISION STATION WMUR, MANCHESTER, N.H.	Docket No. 19336
In Re Applications of UNITED TELEVISION CO. OF EASTERN MARYLAND, INC. FOR TELEVISION STATION WMET, BALTIMORE, MD. For Renewal of License	Docket No. 19337 File No. BRCT-635
KECC TELEVISION CORP. FOR LICENSE TO COVER CONSTRUCTION PERMIT (BPCT-3079) AS MODIFIED, AUTHORIZING A NEW TELEVISION STATION (KECC-TV) AT EL CENTRO, CALIF.	Docket No. 19338 File No. BLCT-2099

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 4, 1974)

BY THE COMMISSION:

1. By our Order, 42 FCC 2d 397, released August 8, 1973, United Television Company of Eastern Maryland, Inc. was directed to resume operation of television station WMET, Baltimore, Maryland, by no later than 12:01 a.m., December 1, 1973. On November 30, 1973, United filed a request for evidentiary hearing, stating that it was not possible to resume operation of WMET as directed and requesting an opportunity to submit evidence in a hearing explaining why it could not comply with our Order.

2. On December 6, 1973, the Broadcast Bureau filed a motion to terminate the authorization of WMET. Asserting that the license for WMET has been forfeited by United's failure to resume operation of the station, the Bureau concludes that the authorization for WMET should be cancelled, that the call letters should be deleted, and that an opportunity should be provided for the filing of new proposals for the facility. In an opposition filed December 19, 1973, United claims that the Bureau has totally ignored its procedural rights under Section 312 of the Communications Act. United contends that, while authorizations have been terminated where the licensees abandoned their facilities, it has not abandoned WMET. In fact, according to United, it has shown consummate interest in its license, and it has expended substantial sums of money to preserve it. United thus concludes that the Bureau's motion is without merit and that it should be rejected. The Bureau, in a reply filed December 28, 1973, urges

that there is no dispute that WMET is silent, that United's factual contentions in support of its request to remain silent have already been found insufficient, and that there is therefore nothing to be considered in a Section 312 evidentiary hearing.

3. In our view, the case before us raises a very serious question as to whether or not United's refusal to resume operation of its station constitutes a permanent discontinuance of operation requiring the cancellation of the license under Section 73.667 of our Rules. While United urges that there are equitable considerations justifying its refusal to resume operation, there is a substantial issue as to whether or not such matters would, in any event, be a sufficient basis to allow a licensee to discontinue operation for an indefinite period of time.[1] Since there is no dispute as to the underlying factual circumstances, we believe that the appropriate procedure is to hold an oral argument before the Commission *en banc*, on the issues set forth above.[2]

4. Accordingly, IT IS ORDERED:

(a) That the request for evidentiary hearing filed by United on November 30, 1973, IS DENIED;

(b) That the motion to terminate the authorization of WMET filed by the Bureau on December 6, 1973, IS DENIED;

(c) That United IS DIRECTED TO SHOW CAUSE at an oral argument before the Commission, *en banc*, at 9:30 a.m. on March 29, 1974, why its license for television station WMET, Baltimore, Maryland, should not:

(i) BE CANCELLED under the terms of Section 73.667 of our Rules, relating to a permanent discontinuance; or

(ii) BE REVOKED, pursuant to Section 312(a)(3) of the Communications Act of 1934, as amended, for failure to operate substantially as set forth in the license;

(d) That the parties wishing to participate in the oral argument SHALL FILE a written notice of intention to appear and participate within five (5) days after the release of this order; and

(e) That the Secretary of the Commission SHALL SEND a copy of this order by Certified Mail-Return Receipt Requested to United Television Company of Eastern Maryland, Inc., licensee of station WMET, Baltimore, Maryland.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

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[1] Licenses are granted to operate the authorized facilities. Under the Communications Act, we have a responsibility to ensure that available broadcast channels are used to serve the public interest, and any prolonged period of silence is inconsistent with the efficient utilization of broadcast facilities. See *Palladium Times, Inc.*, (*WOPT, WOPT-FM*), 43 FCC 546, 6 RR 846 (1950).

[2] In the light of the fact that United is now seeking an opportunity to explain why it has not resumed operation of this station, we are persuaded that it would not be appropriate to grant the Bureau's motion for immediate termination of this authorization. However, as noted above, we are convinced that the absence of any substantial and material question of fact bearing on the determination to be made here renders United's request for a full evidentiary hearing equally inappropriate. The procedure adopted is, we believe, fully adequate under Section 312 of the Communications Act and under the Administrative Procedure Act.

F.C.C. 74-94

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of	
WKBC CABLEVISION, INC., NORTH WILKESBORO, N.C.	CAC-1363 NC058
WKBC CABLEVISION, INC., WILKESBORO, N.C.	CAC-1626
For Certificates of Compliance	NC076

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 6, 1974)

BY THE COMMISSION:

1. WKBC Cablevision, Inc., has filed applications for certificates of compliance to begin cable television service at North Wilkesboro and Wilkesboro, North Carolina, communities located in the smaller television market of Hickory, North Carolina. WKBC proposes to carry the following television broadcast signals:

WXII (NBC, Channel 12), Winston-Salem, North Carolina
WGHP-TV (ABC, Channel 8), High Point, North Carolina
WSOC-TV (NBC, Channel 9), Charlotte, North Carolina
WBTV (CBS, Channel 3), Charlotte, North Carolina
WCCB-TV (ABC, Channel 18), Charlotte, North Carolina
WUNE-TV (Educ., Channel 17), Linville, North Carolina
WHKY-TV (Ind., Channel 14), Hickory, North Carolina
WTVI (Educ., Channel 42), Charlotte, North Carolina
WCYB-TV (NBC, Channel 5), Bristol, Virginia

Additionally, WKBC has filed for special relief to carry the following television broadcast signals:

WFBC-TV (NBC, Channel 4), Greenville, South Carolina
WRET-TV (Ind., Channel 36), Charlotte, North Carolina
WFMY-TV (CBS, Channel 2), Greensboro, North Carolina

The application for North Wilkesboro is opposed by Multimedia, Inc., licensee of Station WXII, Winston-Salem, North Carolina. WKBC's petition for special relief is also opposed by Multimedia, and by Jefferson-Pilot Broadcasting Company, licensee of Station WBTV, Charlotte, North Carolina, and WKBC has replied. Turner Broadcasting of North Carolina, Inc., licensee of Station WRET-TV, Charlotte, North Carolina, has intervened on behalf of WKBC's petition for special relief.

2. Multimedia opposes the carriage of out-of-market Station WCCB-TV because it is a network affiliate not significantly viewed in the subject communities and accordingly not permitted by Sec-

tion 76.59 of the Commission's Rules. In support of its request to carry WCCB–TV, WKBC states that (a) WCCB–TV places a predicted Grade B contour over North Wilkesboro and Wilkesboro; (b) Stations WBTV and WSOC–TV, located in the same market as WCCB–TV, are significantly viewed in Wilkes County where North Wilkesboro and Wilkesboro are situated and will be carried on WKBC's systems; and (c) WHKY–TV, the only station within those specified zone WKBC's systems will operate, has not objected to carriage of WCCB–TV.

3. Multimedia and Jefferson-Pilot oppose WKBC's petition for special relief on the ground that carriage of the signals for which special authorization is sought is inconsistent with the provisions of Section 76.59 of the Rules and WKBC has not made a substantial showing to warrant a grant of its request. Moreover, Jefferson-Pilot argues that the franchises for North Wilkesboro and Wilkesboro contain franchise fees of 4 percent of gross annual subscriber revenues, and WKBC and the respective franchising authorities have not made the special showings contemplated by Section 76.31(b) of the Rules.

4. In response, WKBC argues that carriage of the signals for which it has requested special relief is desirable because of the variety of information, entertainment, and sports programming which would be made available to the cable systems' viewers, and adds that carriage of these signals has been requested by a franchising official and members of the public and that the signals are in fact watched by community viewers, although they are not "significantly viewed" in Wilkes County. Furthermore, WHKY–TV, within whose specified zone the communities are located, has submitted its written consent to carriage of the requested additional signals.[1] With respect to the franchise fees, affidavits have been filed by the mayors of North Wilkesboro and Wilkesboro, stating that the relatively small amounts of revenue which will be received from the cable systems are reasonable in light of the towns' regulatory programs, consisting of the intention "to maintain a continuing involvement with cable television, which will require staff, administrative, and town government time and efforts." An affidavit has also been submitted by Roland B. Potter, president of WKBC, stating that the projected franchise fee to each town during the first year of operation is $1,764 to North Wilkesboro, and $1,036 to Wilkesboro, and that these franchise fees will not interfere with FCC regulatory matters applicable to cable systems.

5. The objections to WKBC's applications and petition for special relief regarding carriage of WCCB–TV, WFBC–TV, WRET–TV, and WFMY–TV must be granted. In the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 187 (1972), we stated that:

> * * * [W]e have no intention of re-evaluating on request of cable systems in individual proceedings the general questions settled in our carriage and exclusivity rules. Rather, we strongly believe that cable systems must generally

[1] In its motion to intervene, WRET–TV presents the additional argument that it should be carried on WKBC's cable systems in order to prevent WBTV, which may demand carriage on the systems, from obtaining an unfair competitive advantage. WRET–TV, a UHF station, and WBTV, a VHF station, both compete in the Charlotte, North Carolina, television market.

operate under these rules and that, only after meaningful experience, will we be in a position for a general reassessment.

and:

We are leaving unusual situations to petition for special relief, but there must be substantial showing to warrant deviation from the "go, no-go" concept of the rules.

The arguments made by WKBC and WRET-TV do not amount to such a "substantial showing" and we accordingly require compliance with our Rules.

6. With regard to the appropriateness of the franchise fees, the mayors of North Wilkesboro and Wilkesboro have not submitted sufficient data for us to determine what their respective cable television regulatory programs actually will be. Information such as the number of people who will be assigned regulatory duties, the type of duties which will be performed and the projected cost of performing those duties is necessary in order to determine the appropriateness of a franchise fee in excess of 3 percent. Similarly, the showing made by the president of WKBC is not sufficient. In order for us to determine whether a franchise fee in excess of 3 percent will interfere with the effectuation of federal regulatory goals we must be given information such as the projected revenues and costs of the systems' operations which can be compared with the projected franchise fees. *See A.N. Cable TV Co.*, FCC 73-830, 42 FCC 2d 291 (1973), and *Lake County Cable TV, Inc.*, FCC 73-927, 42 FCC 2d 952 (1973). And all of the projections must cover a substantial part of the franchise period, not only the first year of operations.

7. Although not raised in the objections, we believe it appropriate to note, *sua sponte*, an additional variation from our Rules in the applications of WKBC. WKBC states that it will operate within the towns of North Wilkesboro and Wilkesboro and in the areas immediately adjacent thereto. WKBC submits that franchises are not required to operate cable systems in the adjacent areas in Wilkes County which are not incorporated. Section 76.5(a) states that:

In general, each separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete, unincorporated areas) served by cable television facilities constitutes a separate cable television system, even if there is a single headend and identical ownership of facilities extending into several communities.

Section 76.11(a) states that every "cable television system" must obtain a certificate of compliance before operations are commenced. Section 76.31(a) requires a franchise or other appropriate authorization in order for a proposed cable television system to obtain a certificate of compliance. In view of the foregoing, WKBC must submit a separate application and franchise for the unincorporated areas in Wilkes County. If no franchise can be submitted, special relief must be requested. *See* paragraph 116, *Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972), *Mahoning Valley Cablevision, Inc.*, FCC 73-243, 39 FCC 2d 939 (1973), and *Armstrong Utilities, Inc.*, FCC 73-242, 40 FCC 2d 891 (1973).

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the objections filed by Multimedia, Inc., licensee of Station WXII, Winston-Salem, North Carolina, and Jefferson-Pilot Broadcasting Company, licensee of Station WBTV, Charlotte, North Carolina, ARE GRANTED to the extent indicated above and in all other respects ARE DENIED.

IT IS FURTHER ORDERED, That the applications (CAC–1363 and CAC–1626) and petition for special relief filed by WKBC Cablevision, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*