F.C.C. 72-990

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of ROBERT P. ADAMS, ASSIGNOR and PROGRESS RADIO NETWORK, INC., ASSIGNEE For assignment of License and SCA of Station KUTE–FM, Glendale, Calif.	File No. BALH–1578 File No. BASCA–465

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1972; Released November 13, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING. COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. We have before us for consideration: (a) An application for the voluntary assignment of license and SCA of Station KUTE–FM, Glendale, California, from Robert P. Adams to Progress Radio Network, Inc.; (b) a Petition to Deny filed by Mount Wilson FM Broadcasters, Inc., licensee of Station KBCA–FM, Los Angeles, California; (c) responsive pleadings; (d) our pre-hearing letter of August 9, 1972 and; (e) other related matters filed by the parties.

2. The aforementioned application for assignment of license and SCA of Station KUTE–FM was filed with the Commission on September 27, 1971. The stockholders of Progress Radio Network, Inc. are the controlling principals of Tracy Broadcasting Company, licensee of Station KGFJ, Los Angeles, California; WGIV, Inc., licensee of Station WGIV, Charlotte, North Carolina; and M. C. Broadcasting Company, licensee of Station KDON, Salinas, California. On November 3, 1971, Mount Wilson FM Broadcasters, Inc., licensee of Station KBCA–FM, Los Angeles, California, filed a Petition to Deny the subject application.

3. The Petitioner's claim to standing to oppose the assignment is grounded on economic injury. It contends that a grant of the application will result in monopolization of the Black listenership in Los Angeles by converting KUTE's long-time "adult sound" format to a "jazz and rhythm and blues format", "the precise format" of the petitioner's Station (KBCA–FM). The assignee denies the validity of Petitioner's contention, stating that the petitioner has not set forth any facts in support thereof. The assignee does not deny, however, that KBCA–FM is in the same market and thus competing for revenues with KUTE–FM. We therefore find that Mt. Wilson FM Broadcasters Inc. does have standing to file the Petition to Deny. *Broadcast Enterprises, Inc.* FCC 390 F 2d 485, 12 RR 2d 2001 (1968). However, even if we determined that Petitioner did not have standing, this would not

foreclose our consideration of the substantive questions raised by Petitioner. See *e.g.*, *Mel-Eau Broadcasting Corp.*, 10 FCC 2d 537, 11 RR 2d 655 (1967); affirmed *sub nom Broadcast Enterprises, Inc.* v. *FCC*, 390 F. 2d 483 (1968); *Clay Broadcasters, Inc.* 21 RR 2d 442 (1971).

4. The Petitioner charges (1) that the assignee is changing the entertainment format of KUTE–FM from a good listening sound to rhythm and blues without a showing in support thereof; (2) that the assignee, when conducting its ascertainment survey, which was done in the presence of the assignor who was conducting a survey with respect to the station's renewal application, did not inform those interviewed that the format was to be changed; (3) that no Blacks were interviewed when the survey was conducted; (4) that the assignee proposes to relocate the studios of KUTE–FM, already in Los Angeles, to a site which is further from Glendale than the present site; (5) that there would be a *de facto* reallocation of the station to Los Angeles by way of the change in format and relocation of the station's studio; and (6) that the assignee will downgrade the present services of KUTE–FM.

5. In response to these charges the assignee stated that the present format was not unique and there are numerous stations in the Los Angeles metropolitan area presenting the same or similar format; that the assignee, when conducting its survey, is required to ascertain needs and interests rather than entertainment program preferences; that, while no Blacks were interviewed, the community leaders interviewed had special knowledge with respect to the Black community and could speak for the Black community; that the proposed move of studios would not be a much greater distance from Glendale than the present studios; that, even with the change in programming and the proposed move, there would not be a *de facto* reallocation of the station to Los Angeles; and that the assignee will not downgrade the present services of the station but will add public affairs programming and other programming exclusive of entertainment and sports which the present licensee does not provide.

6. After consideration of the application, the Petition to Deny and the responses thereto, we directed a prehearing letter, dated August 9, 1972, which was sent to the above-mentioned parties. In that letter we stated:

> "... the Commission is unable to make the requisite statutory finding that the public interest will be served by a grant of the application. Accordingly, the application must be designated for an evidentiary hearing. Although the hearing order may include other or subsidiary issues, the basic questions to be resolved are (1) whether the assignee's proposed programming is realistically designed to serve the needs and interests of the residents of Glendale where KUTE is the only full-time station and (2) whether the proposed programming and the assignee's stated intention to change the main studio location will result in a *de facto* reallocation of the station from Glendale to Los Angeles of which Glendale is a suburb."

7. On August 18, 1972, assignee filed a response to our letter which presented additional factual material and, in effect, requested that we

reconsider our earlier determination that a hearing would be necessary. Responsive pleadings and letters have been received, the last of which was received on October 18, 1972. Before turning to these recent filings we think it best that we set forth more completely our reasons for determining that a hearing would be necessary, since it is only against this background that these later submissions can be properly evaluated.

8. The original allegations, based primarily on the type of programming format (Jazz and Rhythm and Blues) being proposed for KUTE by the assignee raised the inference that the assignee was planning to convert KUTE, into black oriented station, as a companion to its existing AM station KGFJ in Los Angeles, when Glendale had no such significant black community.[1] The assignee's responses were not supported by a factual showing sufficient to overcome the inference raised by the allegations in the Petition to Deny. In this regard we wish to emphasize that our concern was not with the change of entertainment programming which the assignee proposed but that it appeared that the assignee was proposing to utilize KUTE to program to a specific minority which had no significant representation in Glendale, the city of license. This inference, coupled with the assignees plans to move the main studios to a point 17 miles from Glendale, gave rise to the equally serious question that the ultimate effect of a grant of this application would be to cause a de facto reallocation of KUTE from Glendale to Los Angeles. Since these serious public interest questions remained unresolved a hearing appeared necessary and the applicants were so advised.

9. Assignee's letter of August 18, 1972, contains factual descriptions, contrasting the manner in which its black oriented station, KGFJ, Los Angeles, is operated with the manner in which it proposes to operate KUTE,[2] and affirmative representations that the assignee would not convert KUTE into a black oriented station. In addition, with respect to its original proposal to move the KUTE main studio location 17 miles from Glendale, assignee has stated that, if the studio location were deemed critical to the Commission's decision, it would

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[1] KGFJ is a black oriented station serving the black community in Los Angeles. Glendale, on the other hand has only 84 black residents out of a population of 132,752.

[2] Assignee has described black oriented stations and particularly KGFJ as creating and maintaining a black image through utilization of black on-the-air personnel, with black "accents", "speech patterns", "vocal inflections", and with the music, news, public affairs, public service announcements and editorials all reflecting black interests and designed to meet black needs. In contrast assignee points out with regard to its proposed operation of KUTE:

(a) That four of the five announcers it tentatively hired for KUTE are Caucasian including the proposed operations manager and that it "does not intend to convey black identity [on KUTE] by any form of symbol, accent or speech pattern";

(b) That there will be total separation of KGFJ and KUTE on-the-air personnel;

(c) That the KUTE musical format although described as "jazz and rhythm and blues" will be a distinctly different album sound rather than the "top-40" rhythm and blues singles as carried on KGFJ and that it "will make every effort to insure that the station's music programming will have the broadest possible appeal and that it will not be Black or otherwise ethnically oriented.";

(d) That its news programming and editorials will be geared towards Glendale;

(e) That its weekly half-hour public affairs program "Community Awareness" (to be repeated, for a total of 1 hour per week) will be a forum for Glendale community leaders, for airing Glendale community problems; and

(f) That some or all of its religious programming will originate from Glendale churches and will not be black oriented.

be willing to locate the main studios either in Glendale or no farther away than the present main studio site.[3]

10. In response to assignee's letter, petitioner continues to assert its original contentions and has provided affidavits of a member of the black community in Los Angeles, an advertising agency, and an employee of petitioner's station in further support thereof. After carefully reviewing the application, the Petition to Deny and all responses and related material we conclude, as set forth in the discussions below, that no substantial or material questions of fact remain unresolved and therefore an evidentiary hearing is not required before the requisite public interest finding can be made.

11. As previously noted, our principal concern and that raised by petitioner was whether the assignee, by changing the program format of Station KUTE and moving its main studio location 17 miles from the city of license, was attempting to effect a de facto reallocation of these facilities. The assignee's factual presentation, contrasting the manner in which its black oriented station, KGFJ, is operated with the manner it proposes to operate KUTE; the change in its proposal to move the main studio location; and its affirmative representation that KUTE will be operated with particular regard to the ethnic composition of Glendale, its city of license, have resolved the questions raised in our pre-hearing letter.

12. Petitioner continues to urge that a hearing is necessary. In the face of this new factual showing and the assignee's affirmative representations petitioner is in effect asking us to hold a hearing to determine whether the assignee will do what it has affirmatively represented it would do. In effect we are being asked to determine, in advance, whether the assignee will operate KUTE as it has proposed it would. In view of assignee's explicit representations regarding its proposed operation of KUTE, a hearing on this question is clearly unnecessary. Moreover, such a hearing would deprive the assignee of the opportunity to demonstrate its good faith. *Brandywine-Main Line Radio, Inc.* 4 RR 2d 697, 700, 702 (1965).

13. The other subsidiary allegations of petitioner all bear on the central question of whether KUTE will be operated as a black-oriented facility. Since we have resolved this question based on assignee's express assurances that it will not be so operated, these subsidiary allegations do not raise substantial and material questions of fact. *Broadcast Enterprises Inc.*, U.S. App. D.C. 390 F 2d 485; 12 RR 2d 2001 (1968).

14. We turn next to the remaining questions raised by petitioner with respect to the subject application. Petitioner first argues that the assignee is proposing to change the entertainment format from Adult, middle-of-the-road music to Jazz and Rhythm and Blues without the public interest showing as required by our *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650, 21 RR 2d 1507, 1539 and *Citizens Committee* v. *FCC* U.S. App. D.C. 20 RR 2d 2026 (1970). Petitioners reliance on our *Primer* and the *Citizen's* case is misplaced.

[3] Assignee states that "For engineering reasons only . . . a location in Glendale proper may not be technically feasible."

We have consistently held [4] and the Court in *Citizens* recognized, that the decision as to which entertainment format will be used is primarily in the discretion of the licensee. The *Citizens* case and the portion of our *Primer* relied on by Petitioner refer to those special situations where a licensee or assignee is proposing, through a change in format, to remove from the market a unique program service which would not otherwise be available to a substantial segment of the listening public. Here, as demonstrated by the assignee, nine other stations in the Los Angeles metropolitan area, of which Glendale is a part, have entertainment formats similar to that presently broadcast by KUTE. Therefore, in the context of this case, the proposed format change raises no public interest question.

15. Petitioner also argues that it was improper for the assignee, during the course of its community survey, not to inform those interviewed that the station was being sold and that the entertainment format was to be changed. The purpose of the ascertainment of needs survey is to require a proposed licensee to contact leaders and members of the public in the community to be served in order that he may determine how best the facilities may be utilized for the benefit of that community. While, in circumstances as in the case before us, it would be preferable for the assignee to advise the persons consulted of the proposed changes, our *Primer* has no such requirement nor does the failure to do so affect the validity of the survey or the results obtained therefrom.[5]

16. Finally, petitioner charges that the assignee will downgrade the present service of KUTE. This contention is based on a proposed reduction in news amounting to at most 15 minutes a week and a reduction in hours of operation from 168 to 163 per week. We do not consider these slight reductions materially significant. Moreover, petitioner ignores the fact that the assignee will add 2 hours of "Public Affairs" programming not presently being provided over KUTE.

17. Upon careful review of all of petitioner's charges and the questions raised in our prehearing letter, in the light of assignee's latest submissions, we conclude that there are no remaining substantial and material questions of fact requiring that the application be designated for hearing. Decisional to this conclusion are (a) the affirmations by the assignee to operate and program KUTE to serve the needs and interests of Glendale its city of license, and not to convert it into a black oriented facility directed toward Los Angeles; and (b) the assignee's stated willingness to locate the KUTE main studio in Glendale or at a point no farther than Glendale than the present studio location. Based upon these express assurances, we find that the assignee is fully qualified and conclude that a grant of the application will serve the public interest, convenience and necessity.

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[4] See for example *WCAB, Inc.* 27 FCC 2d 743, 746.

[5] Petitioner also contends that the survey was faulty because no blacks were interviewed. This apparently was based on petitioner's assumption that KUTE was to become a black oriented station. As noted in our discussion *supra*, such will not be the case. In any event, we have examined the survey conducted by the assignee and conclude that it is adequate. Leaders who would be aware of problems existing in Glendale's Black Community (84 out of a total population of 132,752) were contacted.

Accordingly, IT IS ORDERED, That the Petition to Deny, filed by Mount Wilson FM Broadcasters, Inc. licensee of Station KBCA–FM, Los Angeles, California, IS DENIED, and that application for assignment of license of Station KUTE–FM, Glendale, California, from Robert P. Adams to Progress Radio Network, Inc. IS GRANTED subject to the following condition:

> "that the KUTE main studio be located in the city of Glendale if technically feasible or at a location no farther from Glendale than the present KUTE studio location, provided that request for permission to locate the main studio outside of Glendale is supported by an adequate showing that a Glendale location is technically infeasible."

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1009

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 76, SUBPART A OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING PROCEDURES IN THE CABLE TELEVISION SERVICE.

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1972; Released November 13, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS ABSENT; COMMISSIONERS H. REX LEE, REID, AND WILEY CONCURRING IN THE RESULT

1. Section 76.27 of the Rules requires that an objection to an application for certificate of compliance be filed within thirty days of public notice of its filing. Section 76.7 of the Rules allows interested persons to petition for special relief, *e.g.*, ask that the Commission waive a provision of the rules relating to cable television systems or impose additional or different requirements. There is no time limit on the filings of petitions for special relief. To allow a later filed petition for special relief filed pursuant to Section 76.7 of the Rules to have the same effect as a timely filed objection could have the practical effect of eliminating the thirty day filing limit of Section 76.27 of the Rules by encouraging objecting parties not to object pursuant to Section 76.27 of the Rules but instead to delay objection until Commission action seems close and then to object under Section 76.7 of the Rules.

2. It is impossible to prevent this procedure entirely since the Commission can hardly establish formal filing requirements which would shut it off from consideration of serious public interest allegations. On the other hand, it seems reasonable to try to discourage such tactics as much as possible. A similar problem used to occur in connection with petitions for reconsideration filed in connection with broadcast applications which had not been protested before Commission action. This problem was largely solved in the broadcast area by adoption of Section 1.106(c) of the Rules. We believe a similar procedure will be helpful in connection with petitions for special relief directed against applications for certificates of compliance. Consequently, we are adding a new paragraph (i) to Section 76.7 of the Rules to require that a person who files a petition for special relief pursuant to Section 76.7 of the Rules, which if timely filed could have been asserted in an objection under Section 76.27 of the Rules, must show either good cause for not filing under Section 76.27 of the Rules or that consideration of the facts is in the public interest. This action is consistent with

our statement in *Plymouth CATV Services, Inc.*, FCC 72-953, —, FCC 2d —, that we planned such a change.[1]

3. Since this amendment relates to Commission procedure, the prior notice provisions of Section 4 of the Administrative Procedure Act. 5 U.S.C. § 553, do not apply.

Authority for the rule amendment adopted herein is contained in Sections 2, 3, 4 (i) and (j) of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, That effective November 22, 1972, Part 76 of the Commission's Rules and Regulations is AMENDED as set forth in the attached appendix.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

In § 76.7 a new paragraph (i) is added to read as follows:

§ 76.7 Special Relief

* * * * * * *

(i) If the relief requested could have been earlier filed pursuant to § 76.27, the petition will be dismissed unless the petitioner shows that:

(a) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters pursuant to § 76.27.

(b) The facts relied on were unknown to petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity.

(c) Consideration of the facts relied on is required in the public interest.

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[1] The amendment we adopt today does not apply to petitions now on file, but applies only perspectively from the effective date.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 76, SUBPART G, OF THE COMMISSION'S RULES AND REGULATIONS PERTAINING TO THE CABLECASTING OF PROGRAMS FOR WHICH A PER-PROGRAM OR PER-CHANNEL CHARGE IS MADE	Docket No. 19554

ORDER

(Adopted November 9, 1972; Released November 10, 1972)

1. In a petition filed jointly on behalf of the American Broadcasting Company, the Association of Maximum Service Telecasters, the National Association of Theatre Owners, and the National Association of Broadcasters, an extension of the date for filing reply comments in the captioned proceeding from November 15, 1972, to November 29, 1972, is requested.

2. In support of this request, petitioners state that 22 separate comments were filed totalling 651 pages and that more time is needed to adequately respond to the many policy questions raised. Petitioners indicate that counsel for the National Cable Television Association and the Program Suppliers have no objection to a grant of the requested extension.

3. It appears that good cause has been shown for a time extension for the filing of reply comments until November 29, 1972, and the request will accordingly be granted.

Accordingly, IT IS ORDERED, That the "Joint Petition for Extention of Time for Filing Reply Comments" filed November 8, 1972, by the American Broadcasting Company, the Association of Maximum Service Telecasters, the National Association of Theatre Owners, and the National Association of Broadcasters IS GRANTED and the date for filing reply comments in this proceeding IS EXTENDED until November 29, 1972.

This action is taken by the Chief, Cable Television Bureau, pursuant to authority delegated by Section 0.289(c)(4) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,
SOL SCHILDHAUSE,
Chief, Cable Television Bureau.

F.C.C. 72-1005

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CATV OF ROCKFORD, INC., ROCKFORD, ILL. For Certificate of Compliance	CAC-1

MEMORANDUM OPINION AND ORDER

(Adopted November 9, 1972; Released November 15, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS ABSENT; COMMISSIONER H. REX LEE DISSENTING AND ISSUING A STATEMENT; COMMISSIONER REID NOT PARTICIPATING

1. On February 9, 1972, CATV of Rockford, Inc. proposed operator of a cable television system in Rockford, Illinois (located in the 97th television market), submitted an "Application for Certification" pursuant to Section 76.11 of the Commission's Rules, requesting certification for the following television signals: WCEE-TV (CBS) Freeport; WREX-TV (ABC) and WTVO (NBC) Rockford; WGN-TV (Ind.), WFLD-TV (Ind.), WXXW (Educ.), and WTTW (Educ.) Chicago, all Illinois signals.

2. CATV of Rockford's application is opposed by Metro Cable Co., Winnebago Television Corp., licensee of Television Broadcast Station WTVO, Rockford, Illinois, and CATV of Rockford has replied. Comments on the application were filed by Frank M. Parrino, Superintendent of the Educational Service Region, Winnebago County, Illinois and Ed Callahan, Superintendent of the Rockford Area Catholic Board of Education. On July 17, 1972, and on September 5, 1972, CATV of Rockford filed amendments to its application for certification.[1] On July 17, 1972, CATV of Rockford filed a "Petition for Grant of Certification Or Alternatively, Request for Special Relief" relative to its application. This petition is opposed by Metro Cable Co. and Winnebago Television Corp. On July 25, 1972, the Council of Aldermen of the City of Rockford filed a statement in support of the subject application.

3. In its opposition, Metro Cable Co., identifies itself as an operating cable television system in the Metropolitan Rockford area and an applicant for a cable television franchise in Rockford. It argues that CATV of Rockford's application should be denied for the following reasons:

[1] The amendment submitted July 17, 1972 contained an Equal Employment Opportunity Program required by Section 76.13(a)(8). The amendment of September 5, 1972, contained an elaboration of applicant's non-broadcast activity plans.

(A) CATV of Rockford's franchise fails to comply with Commission rules because:

(1) No service of the application on the franchising authority by CATV of Rockford is shown as required by Section 76.13.

(2) CATV of Rockford's franchise provides franchise payments of a minimum of 5% of gross revenues and a maximum of 12% of such revenues, but no statements of justification have been filed as required by 76.31(b), and that advance lump sum payments have been submitted. Additionally, a 5% payment of net operating profits to Public Service Television is required by the franchise.

(3) CATV of Rockford's franchise contains no indication that applicant's legal, character, financial, technical, and other qualifications were considered as required by Section 76.31(a)(1).

(4) There is no significant construction or equitable or reasonable extension requirement included in the franchise as required by Section 76.31(a)(2) of the Rules.

(5) The franchise has a 20 year duration with additional automatic 5 year renewals, a term clearly unreasonable when judged against the Commission's stated 15 year guideline of Section 76.31(a)(3) and paragraph 182, *Cable Television Report and Order*, 36 FCC 2d 143.

(6) No procedures specifying service complaint investigation and resolution is included in the franchise as required by Section 76.31(a)(5).

(7) Several sections of the franchise deal with matters properly the subject of federal regulations: number of channels to be provided, advertising, pay television and signals to be carried.

(B) CATV of Rockford's franchise award was premised upon construction of a leaseback system by Illinois Bell. Yet no construction request pursuant to Section 214 of the Communications Act has been filed by Illinois Bell although initial construction has commenced. Thus either applicant has radically changed the proposal upon which its franchise was awarded or unauthorized leaseback construction has commenced.

(C) There was possible misrepresentation to local authorities in that the President of CATV of Rockford on October 26, 1970, told the Rockford City Council that on that date there were in existence facilities necessary to microwave signals into Rockford, while in reality the licensee of those facilities was WCEE–TV, and under Commission Rules, television inter-city relay stations may not be used to deliver signals to a cable television system. Additionally, Metro charges, a representation was made by a CATV of Rockford official to Rockford Aldermen that the system has been "carefully designed for Rockford residents to have available up to 50 channels forward and 15 return channels," while in its certification request applicant states that the system will have a 27-channel capacity.

(D) There is a cross-ownership between applicant and WCEE–TV, amounting to almost 100% control between these two entities, and that pursuant to Section 76.501 of the Rules, Applicant would have to change ownership within 15 months or less of certification, insufficient time to "get the system in operation in the public interest."

(E) That applicant has commenced construction after the filing of its application in violation of the intent of the Commission's certification procedure. Furthermore, this construction may be used to prejudice the Commission's consideration of the request and to prejudice further consideration of Metro's franchise application by the Rockford City Council. Therefore the Commission should stay further construction by Applicant pending resolution of the instant petition.

4. In its opposition, Winnebago Television Corp., licensee of Television Station WTVO, Rockford, Illinois argues that the franchise issued by the City of Rockford to CATV of Rockford, Inc. fails to comply with or is in direct violation of, almost all of the provisions of section 76.31. In support thereof, Winnebago details the alleged deficiencies in applicant's franchise fee, applicant selection, construction timetables, franchise duration, and investigation and resolution of service complaints described in Metro's opposition at paragraph 3 above.[2] Additionally, Winnebago argues, CATV of Rockford's application does not describe the non-broadcast activities in sufficient detail. Moreover, the Commission should hold in abeyance action on all certification requests until resolution of the program origination jurisdictional question raised in *Midwest Video Corp.* v. *U.S.*, 441 F. 2d 1322 (8th Cir. 1971).[3] Accordingly, Winnebago asks the Commission to dismiss or deny the subject application or in the alternative to explore the issues raised at an evidentiary hearing.

5. By letter dated May 8, 1972, Frank M. Parrino, Superintendent, Education Service Region, Winnebago County, pointed out, "an apparent discrepancy" in CATV of Rockford's application, namely:

> Page 4, paragraph 4f of the Application for Certification provides: "the System will *allocate one channel* for local government and *local educational use* available *without charge during the first five years*." Page 8, Section 13 of the franchise granted by the City of Rockford provides: "the grantee shall furnish upon reasonable request without charge one connection for receiving its services to each public, parochial, and independent school and college level institution and each public library, located in the area of service *and shall make no charge for the monthly service thereafter*."

"Until such time as the Application for Certification of Compliance is amended to conform to the provisions of the franchise," Mr. Parrino requests the Commission to refrain from approving the ap-

[2] Additionally, it argues that the franchise does not provide for rate change public proceedings as required by 76.31(a)(4).

[3] This argument is mooted by the Supreme Court's recent decision upholding the Commission's authority to require cable television program origination. *United States* v. *Midwest Video Corp.*, —— U.S. —— Case No. 71–506, June 7, 1972.

plication. Mr. Parrino's request is supported by Ed Callahan, Superintendent of the Rockford Area Catholic Board of Education, who additionally suggests public hearings to determine, "what can and should be done to provide the maximum benefits to the city of Rockford via ETV/ITV . . ."

6. In its reply to the oppositions filed by Metro and Winnebago, CATV of Rockford submits newspaper clippings purporting to show the extent of public proceedings held by the Rockford City Council before choosing CATV of Rockford over Rockford Community Television, Inc. (the predecessor-in-interest of Metro Cable Co.) as its franchisee. Additionally CATV of Rockford argues that the cross-ownership problem that may arise on August 10, 1973, the Commission-required divestiture date, should not prevent favorable consideration of the instant certification application.

7. In its "Petition for Grant of Certification Or Alternatively, Request for Special Relief" CATV of Rockford seeks grant of its application on the basis of "substantial compliance" with the franchise provisions of Section 76.31 pursuant to paragraph 115 of the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972). Alternatively, it seeks special relief pursuant to Section 76.7 having made a significant financial investment as well as entering into binding contractual agreements prior to March 31, 1972. In support thereof CATV of Rockford reiterates its arguments that the franchising proceedings held by the local City Council were full and open and completely within the parameters of the Commission's requirements. Additionally, it submits exhibits purporting to show that as of September 30, 1971, CATV of Rockford had incurred expenses and binding commitments of $99,366, and that during the six-month period October 1, 1971 to and including March 31, 1972, it incurred an additional $163,333.61. In its opposition Metro reiterates the arguments made in its opposition to CATV of Rockford's application, see paragraph 3 above. Additionally, Metro submits a letter dated May 8, 1972 signed by the Rockford City Clerk, Robert J. Lindley, giving his recollection of the nature and scope of the franchise proceedings and characterized by Metro as proving that there was no public proceeding to approve the applicant's legal, character and financial qualifications or the adequacy and feasibility of its construction plans. Moreover, Metro argues, CATV of Rockford's expenditures are not material because the cross-ownership interest between applicant and WCEE–TV requires divestiture of the cable system prior to August 10, 1973, and that the expenditures were made with full knowledge that divestiture was "an inevitable necessity." Additionally, Metro claims the new franchisee necessitated by divestiture would require a new certificate of compliance thus necessitating repetition of the certificating process, "a clear waste of manpower and time." In its opposition to applicant's petition Winnebago reiterates its argument that applicant's franchise is "fundamentally inconsistent" with the requirements of Section 76.31, citing *Springfield Television, Inc.* v. *City of Springfield, Missouri*, — F. 2d — (8th Cir., 1972), Case No. 71–1590, decided June 12, 1972. Moreover, Winnebago argues, the financial data submitted by applicant suggests that many of these expenditures

may reflect only contingent financial commitments or relate to transactions between applicant and affiliated corporations. Accordingly, Winnebago suggests that applicant should submit a more detailed financial statement showing out-of-pocket expenditures, irrevocable and contingent financial commitments, expenditures incurred prior to franchise receipt and expenditures with affiliated firms. In view of the foregoing, Winnebago states that certification for CATV of Rockford cannot be made until there is substantial conformity with Section 76.31.

8. Initially we note that the signal carriage proposed by CATV of Rockford is permitted by Sections 76.63 and 76.61 of the Rules. Rockford is located in the Rockford-Freeport market, the 97th television market. Pursuant to these Sections, CATV of Rockford may carry WCEE–TV (CBS), WREX–TV (ABC), and WTVO (NBC) because they are assigned to the local market (Rule 76.61(i)); WGN–TV (Ind.) and WFLD–TV (Ind.) because they are closest independent stations (Rule 76.61(b)(2)) and WXXW (Educ.) and WTTW (Educ.) because they are in-state educational signals (Rule 76.61(d)). Accordingly we turn to the arguments raised in the objections discussed above.

9. The arguments raised by Metro Cable Co. in paragraph 3 above are rejected for the following reasons:

(A)(1). Although the affidavit of service accompanying CATV of Rockford's application does not indicate service upon the franchising authority, the application does contain a supporting affidavit of the Mayor of Rockford as well as a supporting resolution by the City Council. Accordingly, it is clear that the franchising authority has notice of the instant application and indeed supports it.[4]

(A)(2)–(A)(7). (a) CATV of Rockford's franchise was issued on May 3, 1966. Accordingly, its consistency with Commission requirements is governed by paragraph 115 of the *Reconsideration*, *supra*. Therein, we modified Rule 76.31 so that franchises granted prior to March 31, 1972 would be processed even though they do not meet all the requirements of our new rules so long as there is substantial compliance. An examination of CATV of Rockford's franchise as well as the Mayor's accompanying affidavit persuades us that a public franchise-award proceeding in which the qualifications of CATV of Rockford were considered was held; that CATV of Rockford must accomplish significant construction after a reasonable time, that equitable distribution of service is required, and that reasonable provision for subscriber complaints and rate changes are made, and while the maximum franchise fee of 12% goes beyond our standards, the franchise shows that this fee is required only when the system reaches 50,000 subscribers. Since the system is not yet operating, and since conformity with our standards is required by March 31, 1977, it does not appear that a significant aberration from our standards will occur in the interim period.

[4] Section 76.7 of the Rules requires that the franchising authority should always be considered an interested party in any filing to the Commission affecting a cable system to which it has issued a franchise. Indeed, the Commission welcomes the participation of the affected franchising authority in any such proceeding.

(b) In paragraph 115 of the *Reconsideration, supra*, we dealt with the question of franchise grandfathering. Ideally, all non-operative franchises should comply with our rule, but we recognized that this could create unreasonable hardships and delays; it could reopen the franchising process in case after case, and thwart the important objective of getting cable under way. We therefore modified the rule to provide for the processing of pre-March 31, 1972 franchises even though they do not meet all the requirements "so long as there is substantial compliance" (par. 115). We also made the further point that if any system, in reliance on the existing franchise, made a significant investment or entered into binding contractual agreements prior to the effective date of the rules but was not operational by that date, it could request that its inconsistent franchise be grandfathered until March 31, 1977, on a showing in a petition for special relief. Equity required this—to change the rules of the game and tell the franchisee again to run the gamut of the franchising process would be patently unfair. And critical to both these holdings was the fact that by March 31, 1977, full compliance with the rules is in any event required.

(c) The term, "substantial compliance", is necessarily imprecise. Its meaning must be established on the basis of experience gained in processing certificate applications and in light of the purposes and policies that the cable program aims to effect. We believe that we have gained enough insight from a review of pending applications to supply guidance as to how the term will be construed. While the decision in each case will, of course, turn on the particular facts, hopefully this further guidance will narrow opposition to more meaningful areas of controversy.

(d) Henceforth, the term "substantial compliance" will be given liberal construction. The principal consideration here is that we are dealing only with those franchises granted before March 31, 1972 but not operational on that date, and which in any event must come into compliance by March 31, 1977. When viewed against the limited nature of the franchises and period involved—and our effort to end the "freeze" on cable development—liberality is clearly called for.

(e) To illustrate—it makes no sense to oppose a certificate application on the ground that the franchise period exceeds our rule or that educational or governmental access channels will be on a free basis beyond the five-year period of our rules; the short answer is that this will and must be revised by March 31, 1977. As to franchise fees, we pointed out (par. 115) the desirability of permitting leeway—systems will be just getting under way over the near term and by the time subscriber penetration is achieved the matter will have been resolved by the 1977 compliance requirement. Therefore, only in the exceptional case—where it would appear that the franchise fee will unduly handicap initial operations—would we be inclined to intervene. The same considerations are applicable to the substantial construction requirement. Clearly alternative construction plans can be tolerated during this limited time period. The same applies to the procedure whereby the franchise was awarded—only in the extreme case would we intervene. If the access provisions are not in full accord, here we note that

we are dealing with a limited initial period and that deviation can be regarded largely in the nature of an experiment—its continuation beyond March 31, 1977 must be justified by a showing (see Par. 81, *Reconsideration, supra*). If there are substantial deficiencies as to procedures concerning subscriber rates or complaints, this would, we believe, be an appropriate area for a grant with conditions—the cable operator and franchising entity can be required to respond within 30 days if the conditions are not accepted. And finally, if the franchise forbids origination-cablecasting (or commercials on such channels) or pay-cable operations or some similar undertaking where we have laid down a federal prescription, the appropriate relief is simply a declaration that these provisions are a nullity. We shall not try to treat further these matters. As stated, the decision must turn on the facts of the case. And we shall by supplying further guidance in future rulings. But what we have said here does give a rough notion of our manner of proceeding in this new area.

(f) In summary, a requirement of strict compliance with our franchise standards at this time could result in unreasonable hardships and delays and could be a disservice to the public whom the standards are designed to protect. Accordingly, a liberal construction of Section 76.31 of the Rules, as explained above, appears appropriate and in all but the most extreme cases, a franchise granted prior to March 31, 1972 need not be renegotiated to conform until March 31, 1977. After that date, strict compliance with our franchise standards will be required.

(B) This argument is improperly raised in the proceedings herein, and is accordingly rejected. We are passing upon the conformity of CATV of Rockford's application with our cable television rules. If Metro has evidence that Illinois Bell Telephone Company is operating in violation of Section 214 of the Communications Act, it should submit the appropriate petition for an Order to Show Cause against the telephone company asking for a Cease and Desist Order.

(C) This allegation is similarly improperly raised in these proceedings. Since the City Council is aware of Metro's charges, having been served with a copy of same, and nevertheless supports CATV of Rockford's application, we believe that the allegations even if established are without decisional significance and are therefore rejected.

(D) Metro's cross-ownership argument is without merit. In the first place even if there is cross-ownership between CATV of Rockford and WCEE–TV, it does not follow that divestiture of the cable system must occur. Divestiture of the television station is also permissible. Moreover, since divestiture in any case is required by August 10, 1973, it would be inequitable to deny Rockford subscribers otherwise legal service in anticipation of that date.

(E) Since we rule that CATV of Rockford's franchise is in substantial compliance with our rules we do not reach the question if the system has made a significant financial investment. Accordingly, CATV of Rockford's construction after the filing of its application is irrelevant herein and Metro's argument based thereon is rejected.

10. The arguments raised by Winnebago Television Corp. concerning failure to comply with our franchise standards are identical with those raised by Metro and are rejected for the reasons stated in para-

graph 9(A) above. Moreover, Winnebago's argument that CATV of Rockford does not spell out its access plan in sufficient detail is mooted by the amendment to the application filed by CATV of Rockford on September 5, 1972, which together with the information contained in the application gives a sufficiently informative account of the access proposal.

11. With reference to the letters by Messrs. Parrino and Callahan mentioned in paragraph 5 above, our rules provide that the government and educational channel be provided free of charge until five years after completion of the system's basic trunk line (Rule 76.251 (a) (10) (i)). The requirement in the franchise that the educational channel be provided free indefinitely is immaterial herein, since in five years the franchise must be renegotiated to conform with our rule.

12. Turning to CATV of Rockford's petition for special relief and the oppositions thereto described in paragraph 7 above, we have already found that the subject franchise is in substantial compliance.[5] The "general recollection" of the City Clerk, Robert J. Lindley does not specifically rebut the sworn affidavit of the Mayor of Rockford that a public franchise proceeding was held in substantial compliance with our rules. And, as noted, since we find the franchise in substantial compliance, we do not reach the question whether a substantial financial investment was made, and CATV of Rockford's "Petition for Grant of Certification Or Alternatively, Request for Special Relief" is dismissed as moot.

13. On May 5, 1972, an Order was issued by the Circuit Court of the 19th Judicial Circuit, McHenry County, Illinois (Order No. 71-2983), ruling that from "that date, no Illinois cable system has authority to operate under State law unless it had already engaged in substantial construction of its system or is in receipt of a valid waiver from the Illinois Commerce Commission." CATV of Rockford has received no such waiver. And whether "substantial construction" as defined by the Illinois local authorities has taken place is a matter to be determined in accordance with local Illinois law. Accordingly (and consistent with the recommendation of the Steering Committee of our Cable Television Federal-State/local Advisory Committee), we will condition the effectiveness of our certification herein on a demonstration by CATV of Rockford of compliance with Order No. 71-2983 of the Circuit Court of the 19th Judicial Circuit, McHenry County, Illinois.

14. In view of the foregoing, we find that a grant of CATV of Rockford's "Application for Certification" filed February 9, 1972 would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certification" filed February 9, 1972 by CATV of Rockford, Inc. IS GRANTED consistent with paragraph 13 above.

IT IS FURTHER ORDERED, That the "Opposition to Grant of Application for Certificate of Compliance, Request for Stay of Con-

[5] In this connection, Winnebago's reliance on the *Springfield Television* case, *supra* at paragraph 8 is inappropriate. In that case, the United States Court of Appeals struck down a franchise because it did not comply with our standards. However that case was decided on June 12, 1972 before our *Reconsideration*, wherein we indicated that substantial compliance for preexisting franchises would be acceptable.

struction and Petition for Special Relief" filed by Metro Cable Co. IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application For Certification" filed by Winnebago Television Corp., licensee of Television Station WTVO, Rockford, Illinois, IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Grant of Certification Or Alternatively, Request for Special Relief" IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER H. REX LEE

In the past few weeks, the Commission has been faced with certificate of compliance applications, filed by proposed operators of cable television systems, that involve franchises awarded prior to the effective date of our new cable rules, i.e., March 31, 1972. Certain provisions of these franchises vary from the standards and requirements imposed by the Commission in regard to the franchise selection process, construction deadlines, franchise duration, the handling of service complaints and rate changes, the reasonableness of franchise fees and the availability of access channels. See Sections 76.31 and 76.251 of the Rules.

In paragraph 115 of our *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972), we specifically considered the question of franchise grandfathering. Although we noted that all franchises must comply with our rules by March 31, 1977, we did recognize that the requirements of the cable regulatory program could create unreasonable hardships and delays, especially in regard to franchises awarded prior to March 31, 1972, which had not yet been implemented. As a result, we modified our rules to provide for the processing of such franchises—even though inconsistent with our announced standards—so long as there is "substantial compliance" with those standards.[1]

We were prompted to alter our rules in this regard by the fact that full compliance with our franchise standards is required, in any event, by March 31, 1977. The decision was an important one, for we now have several hundred pending certificate of compliance applications that are based on franchises which were issued before the effective date of our rules and which are inconsistent with the standards incorporated in the rules. Moreover, many objections have been raised

[1] As the majority points out, paragraph 115 also indicated that a cable system could request, in a petition for special relief, that its inconsistent franchise be grandfathered until March 31, 1977, if it had made a significant financial investment or entered into binding contractual agreements prior to the effective date of our rules. Unfortunately, in transposing the language of paragraph 115 to our rules (Section 76.31), the two tests, *i.e.*, "substantial compliance" and "significant investment," apparently were fused so that the exemption from our requirements would only be available to a cable operator whose system was not operational prior to March 31, 1972, *and* who had made a significant investment prior thereto in reliance on an existing franchise. The obvious inconsistency between paragraph 115 and Section 76.31 should be considered by the Commission immediately. For the purposes of my statement, I will assume that "substantial compliance" is a separate test available to all certificate applicants who received franchises prior to March 31, 1972, whether or not they have filed petitions for special relief.

against the grant of these applications, based on inconsistent franchise provisions, and cable operators, in response, have relied on the "substantial compliance" test articulated in paragraph 115 of the *Reconsideration Order.*

The majority now offers a "clarification" of the "substantial compliance" test in the context of the present case concerning CATV of Rockford, Inc.'s certification application. The "clarification," which apparently is intended as a general guideline for the consideration of similar cases, indicates that: (1) "substantial compliance" is an imprecise term, at best, whose meaning must be established on the basis of experience gained in the certificating process and in light of the purposes and policies of the cable regulatory program; and (2) the term will be given a liberal construction so that objections to certificate applications, based on inconsistent franchise provisions dealing with fees, selection process, franchise duration and access channels, will not be entertained except in "extreme cases." [2] According to the majority, a franchise granted prior to March 31, 1972, need not be renegotiated with the franchising authority to conform with Commission requirements until March 31, 1977. The "clarification" is based on the majority's desire to end the "freeze" on cable development and on the fact that all inconsistent franchises must be in compliance with our rules by 1977.

On the basis of this liberal construction of the "substantial compliance" test, the majority, in the instant case and in others considered simultaneously, approves of franchise provisions which include franchise fees ranging up to 14.4% of gross income or revenues (in addition to large, advance lump-sum payments) and franchise periods of 20 years, which contain only vague and generalized access channel proposals [3] and which provide for something less than full public proceedings for rate changes and for construction timetables at variance from our standards.

I simply cannot agree with the majority's position. The deviations from our franchise standards and requirements permitted here can more properly be viewed as an emasculation of the "substantial compliance" test and the *de facto* substitution of a grandfathering concept. While I am most sympathetic with the majority's desire to stimulate cable operations, I cannot ignore our carefully-conceived plan for the technology's development in the process. The obvious disregard of our own franchise standards may not, in fact, serve the best interests of cable system development—it certainly does not serve to enhance the Commission's reputation in the rule making area. Substantial accommodations have already been made by us in order to fashion a regulatory framework that will provide the non-broadcast

[2] In regard to substantial deficiencies in franchise provisions for subscriber rates or complaints, the majority explains that conditional grants of certificate applications may be appropriate—with responses required from cable operators and franchising authorities within 30 days as to the acceptability of the conditions. With respect to franchise provisions that are inconsistent with federal prescriptions concerning origination-cablecasting or pay-cable operations, the majority would simply declare them to be null and void.

[3] In an Order dealing with the certificate of compliance application of Johnson All Channels, Inc. (CAC–379), the Commission finds that the applicant's description of its access plans "creates a prima facie presumption that it will abide by all our access requirements." However, there is no attempt to show how the presumption arises in light of the applicant's access proposals.

benefits of cable technology—further accommodation through the effective disregard of our franchise standards should not be entertained. Moreover, the long delay of some cable franchises in activating systems [4] argues against our according greater equity to their positions.

A more forthright approach by the Commission would be to amend the grandfathering provisions of the cable rules to exempt all pre-March 31, 1972, franchises from the requirements of Sections 76.31 and 76.251 until 1977. In effect the liberal construction now applied to the "substantial compliance" test accomplishes just that. I am most concerned that our "clarification" now will seriously aggravate the regulatory atmosphere in 1977 when all franchises are expected to conform to our standards. If we are so easily deflected from our regulatory plan now, how likely is it that we will strictly enforce our franchise standards later when systems, certificated today, have been constructed and have operated for years under substantially inconsistent standards? Will we be willing to disrupt established cable service if we encounter recalcitrant system operators and/or franchising authorities?

I would favor an approach whereby the Commission notifies cable operators and franchising authorities that certain provisions of existing franchises are substantially inconsistent with our standards and then seeks advice from the affected parties concerning the available options, including the possibility of corrective amendments. While I am well aware of the delay inherent in this suggestion, I would prefer such a course of action since it represents an attempt to resolve significant franchise matters *before* construction and operation of cable facilities commence. Even the majority recognizes the need to rewrite certain provisions of existing franchises if there are substantial deficiencies concerning subscriber rates and complaints (through the use of conditional grants) or if franchises forbid origination-cablecasting or pay-cable operations which are the subject of federal prescription (through the nullification of franchise provisions). I must confess that the distinction made between these matters and those involving franchise fees, etc., escapes me.[5] It seems to me that our dedication to "dual jurisdiction" or "creative federalism" in the field of cable regulation requires something more. At the very least, it requires adequate and open notice to all affected parties of our franchise standards and requirements and of what deviations from the norm are acceptable under the "substantial compliance" test.

Therefore, I would prefer to define some meaningful boundaries for our "substantial compliance" exemption rather than to enlarge its scope through "clarification" to encompass any and all franchise provisions inconsistent with our standards. Such an attempt by us obviously could increase our present workload and could result in signifi-

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[4] For example, it appears that CATV of Rockford's franchise was issued on May 3, 1966.

[5] In paragraph 177 of the *Cable Television Report and Order*, 34 FCC 2d 143, 24 RR 2d 1501 (1972), the Commission made no distinction between franchise provisions concerning subscriber rates and complaints and those relating to fees, franchise duration, etc., when it considered the need for federal minimum standards. Therefore, I am at a loss to explain why the majority should be more concerned about certain franchise provisions than others.

cant renegotiations of existing franchises; however, it could also ease the administrative crunch that will surely come in 1977. I have dissented to this individual action in order to present my views on the subject of "substantial compliance," which raises novel questions of first impression. I have concurred in subsequent actions by the majority since its view now deserves attention. My concurrence in later actions should not be construed as a withdrawal from the dispute—to the contrary, I shall continue to press my views vigorously and I shall reserve the right to dissent in any case where the factual background provides even stronger support for my position.

F.C.C. 72-965

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Petition by
CALIFORNIA LA RAZA, MEDIA COALITION, OAKLAND, CALIF.
For Denial of License Renewal of Radio Station KOFY, San Mateo, Calif.

NOVEMBER 1, 1972.

Mr. RICHARD A. BESERRA,
Acting Director,
California La Raza Media Coalition
3827 East 14th Street,
Oakland, Calif.

DEAR MR. BESERRA: This is in reference to the California La Raza Media Coalition's (CRMC) petition to deny the license renewal application for Radio Station KOFY, San Mateo, California.

By way of background, we note that by letter of November 30, 1971, we informed you that the CRMC petition to deny had been untimely filed and that it would be considered as an informal objection to the KOFY renewal application pursuant to Section 1.587 of the Commission's Rules. Please be advised that we have reviewed the allegations contained in your petition and, for the reasons set forth below, determined that they are not sufficient to show that a renewal of the KOFY license would be *prima facie* inconsistent with the public interest.

Briefly stated, you allege that KOFY, "as the only 100% Spanish station serving the San Francisco-Oakland Bay Area and the large population of Spanish-speaking people who rely on it for their source of entertainment, news, and information" (Renewal Application, Section IV–A, Question 8), has failed to broadcast enough news and public affairs programming to serve the "La Raza Community" (the Cuban, Puerto Rican, Latin, Spanish American and Mexican American population). To support this allegation you rely on the following information as derived from the KOFY renewal application:

	Composite week	Proposed programing
Public Affairs (percent of total time on air)	1.8	1.7
Local and regional news (percent of total time on air)	.67	0.7
PSA's (number per week)	20	75

In addition, you complain that KOFY "has no fulltime news staff" and that "[i]t plans to continue to have no fulltime news staff."

In its opposition to the petition, filed November 10, 1971, the licensee, Spanish Broadcasting, Inc., responds to your allegations by stating that you have failed to explain why the amounts of public affairs programming, local and regional news, and PSA's, as cited above, are inadequate to serve the needs and interests of Spanish-speaking people in the KOFY service area; that the above-quoted figures for past and proposed public affairs programming are erroneously stated in the renewal application and that the correct figures which should have been given are 2.2% and 2.4%, respectively; that the application indicates (at Exhibit 9) that the Composite Week figure of 29 PSA's is not representative of the station's typical performance "since a normal week contains well over twice that number;" that the proposed increase to 75 PSA's per week constitutes "only a stated minimum;" and that, within the bounds of the discretion accorded the licensee with regard to "operational matters," the station has appropriately "utilize[d] several employees on a part-time basis to handle news."

Thereafter, on March 21, 1972, Spanish Broadcasting, Inc., submitted an amendment to Section IV–A of its renewal application. First, the licensee amends its response to Question 3A which calls for a statement of the amount of time, as a percentage of "Total Time on Air," that the applicant devoted in the composite week to certain types of programming:

Question 3A	Original (percent)	Amendment (percent)
News	6.7	6.7
Public affairs	1.8	2.2
All other programs, exclusive of entertainment and sports	3.7	4.9

In addition, the licensee amends its response to Question 14 to state the minimum amount of time it proposes to devote normally each week to these same types of programming:

Question 14	Original (percent)	Amendment (percent)
News	7.0	7.1
Public affairs	1.7	2.4
All other programs, exclusive of entertainment and sports	3.4	4.7

The licensee states that "[t]he foregoing reflects a recomputation of religious programming in the Composite Week logs and correction of mathematical errors in the calculation of the percentages in other categories." The licensee also notes that "a reanalysis of the news programming of the station" reveals that "approximately 25%" of the news broadcast during the Composite Week consisted of local and regional news. The licensee proposes that the 25% figure will constitute a minimum percentage in the future.

Further, the licensee amends the renewal application to reflect an increase from 75 to 125 in the minimum number of public service an-

nouncements that the station proposes to broadcast during a typical week.

In addition to the above, the licensee, by way of further amendments to the KOFY renewal application, notes that meetings have been held with you and with representatives of the Mexican-American Legal Defense and Educational Fund and the Spanish-Speaking Surnamed Political Association, San Francisco. As a result of these meetings, the licensee has responded as follows:

(1) The station has initiated a series of five minute news and public affairs programs which are conducted by the Program Director of the Mexican-American Legal Defense and Educational Fund, San Francisco;
(2) The station is broadcasting a new weekly public affairs program devoted to such topics as consumer protection, discrimination and reapportionment;
(3) The station's news announcer has been instructed to gather and report additional news concerning the local Spanish-speaking community;
(4) A new reporter has been added to the news staff to gather "news and information from Latin American groups in the Bay Area;" and
(5) The station has cooperated in the establishment of a "bilingual broadcast course" at a local college.

Please be advised that we have carefully evaluated (1) your informal objection to renewal of the KOFY license, (2) the KOFY renewal application, (3) the licensee's opposition, and (4) the subsequent amendments to that application. In doing so, we have sought to determine whether KOFY's programming during the past license period served the needs and interests of the Spanish-speaking population within the station's service area; whether the licensee properly surveyed both the community leaders and members of the general public to ascertain the problems faced by their community; and whether the station has proposed programming which is geared to meet those problems which were ascertained. In making this determination it should be observed that we accord great weight to the good-faith judgment exercised by the licensee, both in evaluating the results of his ascertainment process and in selecting the programs to be presented to meet the problems ascertained.

Accordingly, we conclude that the allegations made in connection with KOFY's past and proposed programming are without merit. The mere citation of what is deemed to be an insufficient showing of news and public affairs programming, without any evidence that such performance has failed or will fail to meet community needs, is insufficient to raise a substantial and material question of fact as to whether a station will serve the public interest in a future license period.

Further, your complaint that the station does not employ a "full-time news staff" also lacks merit. The Commission's concern in this area is only that the station show that it has employed sufficient personnel to assure the presentation of an amount of local, national and international news which is commensurate with needs of the community.

It does not defy reasonableness to conclude that a station with a small staff (here 9 full-time and 15 part-time employees) could provide adequate news coverage to its service area by assigning "several employees on a part-time basis to handle the news." In this regard, we also note, as mentioned above, that by its March 21 amendment the licensee advises the Commission that another employee has been assigned to cover events of particular interest to the Spanish-speaking community.

In view of the foregoing, therefore, we conclude that you have failed to show that a renewal of the KOFY license would be *prima facie* inconsistent with the public interest. Accordingly, we hereby deny your informal objection to the application for renewal of license of KOFY.

Commissioner Nicholas Johnson dissenting and issuing a statement. Commissioners H. Rex Lee and Benjamin L. Hooks absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Opinion of Commissioner Nicholas Johnson

Station KOFY (AM), San Mateo, California, is alleged to be "the only 100% Spanish station serving the San Francisco-Oakland Bay Area."

A group representing the Spanish-language population in KOFY's listening area—the California La Raza Media Coalition (CRMC)—has petitioned the Commission to deny the station its license renewal.

The Commission brushes the petition aside and renews KOFY's license. I dissent.

CRMC alleged that KOFY's license renewal application stated its programming to be as follows:

	Composite week	Proposed programing
Public affairs (percent of total time on air)	1.8	1.7
Local and regional news (percent of total time on air)	.67	.7
PSA's (number per week)	29	75.0

Understandably outraged, CRMC charged that this was simply not enough programming to serve the needs for news and public affairs of the Cuban, Puerto Rican, Latin, Spanish American and Mexican American population the station is licensed by the FCC to serve "in the public interest."

And what does the station reply? It has the gall to answer that CRMC has failed to show *why* KOFY's programming is inadequate!

For six years I have been struggling with this Commission's adamant refusal to establish *any* minimal programming requirements of its licensees. And now it is engaged in a massive effort to "de-regulate" radio further. As if it were possible!

The argument is sometimes made that in an area with 20 to 50 radio stations there need be no programming requirements, that the market place will insure the availability of a range of entertainment.

There is something to that argument—even though it is *not* clear that profit-maximization will produce a full news and public affairs service for an area.

But a foreign language station has obligations going far beyond those of an English-language station—however minimal the Commission may find the latter to be. There are 364,000 Spanish-speaking people in the San Francisco Bay area (out of over 3 million in the state of California). Such numbers make their "community" the 38th largest city in the United States! Those who are listening to KOFY—as their *only* source of news and public affairs—have the same relationship to that station as do the citizens of a small rural community who have only one station in town—although in this case it's a very large city. Such a station, whether it wants it or not, has an ethical responsibility—and, I believe, a legal responsibility as well—to provide its listeners the full range of information (as well as entertainment) they need to live full and meaningful lives. I just cannot believe that 1.8% public affairs, 0.67% local and regional news, and 29 public service announcements per week can be considered by any reasonable person to be adequate "public interest" programming by this servant of the Spanish-speaking people of Northern California.

The licensee, and the Commission, make much of the station's confusing on-rush of embarrassed amendments, "corrections," and upgrading of the renewal form report of past programming and promises for the future. Not only do I not find this activity persuasive, it is, in my judgment, even more reason to set this renewal for hearing. There are factual disputes (which can only be resolved by hearing). Upgrading is an admission, of sorts, that things could be better. There may have been misrepresentations to the Commission. The Commission's eager acceptance of these changes only renders more obvious, and ludicrous, its consistent favoritism of the licensee in the face of community outrage.

I dissent.

F.C.C. 72R-330

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CENTREVILLE BROADCASTING CO., CENTREVILLE, VA. For Authority to Construct a New Standard Broadcast Station	Docket No. 18888 File No. BP-17564

MEMORANDUM OPINION AND ORDER

(Adopted November 16, 1972; Released November 20, 1972)

BY THE REVIEW BOARD:

1. This proceeding involves the application of Centreville Broadcasting Company (CBC) for a construction permit to build a standard broadcast station in Centreville, Virginia. By Order, FCC 70-656, 23 FCC 2d 845, released June 30, 1970, the Commission designated the application for hearing on, *inter alia*, a limited financial qualifications issue. By Memorandum Opinion and Order, FCC 71R-62, 21 RR 2d 216, released February 23, 1971, the Review Board denied, *inter alia*, a request of O.K. Broadcasting Corporation (WEEL) to expand the financial issues specified against Centreville; rather, it deleted the financial issue which the Commission had previously specified.[1] Now before the Review Board is a further motion to enlarge the issues, filed August 25, 1972, by WEEL, seeking the addition of a new financial issue [2] and a Rule 1.65 issue against the applicant.[3]

Financial Qualifications Issue

2. Petitioner's request for a financial qualifications issue is based upon the complaint filed against counsel for and majority shareholders of CBC.[4] WEEL urges that the pendency of the suit reflects either the inability of the defendants to pay for engineering services, which

[1] The Review Board stated: We take this somewhat unusual course because of the unique factual situation raised here and because the existing issue has no viability of its own in light of the overlooked pre-designation amendment and the subsequent post-designation revision of the applicant's financial plan.

[2] The issue, as requested by the applicant, reads as follows: (1) To determine (a) what expenses have been and will be incurred by Centreville Broadcasting Company in preparing and prosecuting its application and in constructing its proposed facility; (b) whether the amount of funds required to construct and operate the proposed station for one year without revenue will be available to it and; (c) whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.

[3] Also before the Review Board are: (a) Broadcast Bureau's opposition, filed September 7, 1972; (b) opposition, filed September 20, 1972, by CBC; (c) reply, filed October 2, 1972, by WEEL; (d) supplement to (b), filed October 27, 1972, by CBC; and (e) reply to supplement, filed November 3, 1972, by WEEL.

[4] The complaint, filed on August 14, 1971, by an engineering firm utilized by the applicant alleged that: Defendants are indebted unto plaintiff in the full sum of $3,422.95, the balance due and owing by virtue of engineering services rendered to the defendants by the plaintiff at the instance and request of the defendants.

would reflect on the applicant's financial qualifications, or their unwillingness to pay, which could reflect on the accuracy of the applicant's engineering exhibits. However, in a supplement to its opposition, filed October 27, 1972, CBC stated that the complaint was settled and dismissed with prejudice on October 16, 1972. In the Board's view, the settlement and dismissal of the complaint have effectively mooted the requested financial issue. Moreover, even if the suit had not been settled, the petitioner has failed to comply with the specificity requirement of Rule 1.229(c) by setting forth sufficient factual allegations in support of its claim that the applicant is financially unqualified. See *Jay Sadow*, 27 FCC 2d 248, 20 RR 2d 1171 (1971); *Howard L. Burris*, 29 FCC 2d 462, 21 RR 2d 1093 (1971). Furthermore, the Board concurs in the position taken by the Bureau and the applicant to the effect that CBC's financial proposal leaves a sufficient cushion to cover the amount in controversy in the lawsuit.[5] We conclude, therefore, that no substantial question as to CBC's financial qualifications has been raised, and that no issue is warranted.[6]

Rule 1.65 Issue

3. WEEL's request for the addition of a Rule 1.65 issue is predicated on the failure of CBC to bring the pending civil suit to the attention of the Commission. The petitioner cites *Royal Broadcasting Co., Inc.*, 4 FCC 2d 857, 8 RR 2d 639 (1966) to support its assertion that even though the application form (Form 301) does not specifically ask whether there are any civil suits pending against an applicant or a principal of an applicant, it is established policy that an applicant report any substantial change which may be of decesional significance in a Commission proceeding involving the pending application. In opposition, CBC asserts that the lawsuit is not of decisional significance. The applicant cites several cases to illustrate the type of complaint which must be reported to the Commission and attempts to distinguish them from the present controversy. The Broadcast Bureau also opposes the requested issue. The Bureau believes the pending suit is not a substantial change in CBC's application. According to the Bureau, disclosure would have been required by Section 1.65 if the suit had involved a potentially disqualifying factor, if the amount in controversy had been substantially larger or if judgment had in fact been entered. In reply, petitioner cites *Folkways Broadcasting Company*, 21 RR 2d 211 (1971), in support of its contention that a lawsuit which could affect the applicant's financial qualifications may be of decisional significance and argues that this is precisely the situation here. Petitioner urges that the cases relied upon by CBC in its opposition establish that the filing of a complaint (not the rendition of judgment thereon) is sufficient to require notification to the Commission pursuant to Section 1.65.

[5] See Memorandum Opinion and Order, 21 RR 2d 216, 231 (1971), where the Board held that CBC's application showed an available cushion of some $4,425, in addition to $10,000 allocated for other miscellaneous costs with which to meet unexpected expenses.

[6] Petitioner's claim that a financial issue is warranted because CBC's financial showing is out of date lacks the specificity required to warrant the addition of an issue; if there has been any substantial change in CBC's financial condition, such change would have to be reported by the applicant in any event.

4. The Review Board does not share petitioner's view that a Rule 1.65 issue is required in this proceeding. As previously indicated, the lawsuit could have no effect on the financial qualifications of CBC. Nor do we perceive any other significance the suit might have on the qualifications of CBC, or its prospective service to the public.[7] We do not agree with the petitioner that the filing of a complaint in and of itself is sufficient to require notification to the Commission pursuant to Section 1.65. In *Folkways Broadcasting Co., Inc.*, 21 RR 2d 211, 215 (1971), the Review Board held that "although it is well established that an applicant need not report *every* civil suit filed against it or its principals, an applicant must report those suits which may be of decisional significance." As indicated above, the Board is of the opinion that the suit involved in this proceeding does not represent matters relating to the applicant's basic qualifications nor to his performance as a licensee. Therefore, a Rule 1.65 issue will not be specified by the Board.

5. Accordingly, IT IS ORDERED, That the further motion to enlarge issues, filed August 25, 1972, by O.K. Broadcasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[7] Petitioner's contention that the lawsuit suggests that CBC's engineering showing is defective is sheer speculation and must be rejected.

F.C.C. 72R-327

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CORVALLIS BROADCASTING CORP., CORVALLIS, OREG.	Docket No. 19439 File No. BP-18942
	Docket No. 19440 File No. BPH-7392
TED A. JACKSON, CORVALLIS, OREG.	Docket No. 19441 File No. BP-18966
	Docket No. 19442 File No. BPH-7390
WESTERN RADIO CORP., CORVALLIS, OREG.	Docket No. 19443 File No. BP-18967
	Docket No. 19444 File No. BPH-7391

MEMORANDUM OPINION AND ORDER

(Adopted November 10, 1972; Released November 14, 1972)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. Before the Review Board for consideration is a letter, dated October 25, 1972, from Corvallis Broadcasting Corporation (Corvallis), requesting withdrawal of a previously-filed petition for enlargement of issues against the competing applications of Ted A. Jackson (Jackson) and Western Radio Corporation (Western).[1]

2. The reason advanced for the requested withdrawal is the applicants' recent submission of a joint petition for approval of agreements, which are now pending before the Administrative Law Judge. The agreements, among other things, provide for the dismissal of the Jackson and Western applications and the prosecution of the Corvallis application by a new corporate entity, Radio Corvallis, Inc., which will be comprised of Jackson and principals of Western. The Review Board agrees with Corvallis that dismissal of the Western application would obviate the requests for the *Suburban*, programming and financial issues directed to Western. In the same vein, dismissal of the Jackson application would moot Corvallis' request for *Suburban*, "principal city", and financial issues against Jackson. Accordingly, the Board will grant the letter request and dismiss the petition to enlarge with respect to the above matters.[2] See *Lebanon Valley Radio*, 9 FCC 2d

[1] The pleadings before the Review Board are: (a) petition for enlargement of issues, filed March 13, 1972, by Corvallis; (b) motion for leave to file supplement and supplement, filed April 4, 1972, by Corvallis; (c) statement partially opposing and partially supporting (a), filed April 12, 1972, by the Broadcast Bureau; (d) opposition, filed April 18, 1972, by Jackson; and (e) reply to (c) and (d), filed May 15, 1972, by Corvallis.

[2] Of course, our action herein is without prejudice to the refiling of these requests should the Presiding Judge disapprove the applicants' agreements.

762, 11 RR 2d 64 (1967); *KWHK Broadcasting Company, Inc. (KWHK)*, FCC 67R–18, released January 12, 1967. In view of Ted Jackson's interest in the merged applicant, however, the Review Board believes that the orderly administration of Commission business would be better served by the Board's present consideration of the real party in interest issue, which Corvallis also requested against Jackson.

3. The Corvallis request for a real party in interest issued against Jackson is based on the alleged business, financial and personal involvement of his father, Phil D. Jackson, and his brother, J. D. Jackson, in the application. Specifically, Corvallis alleges that Phil Jackson, who has a 50% interest in an AM Station at Grants Pass, Oregon, and is an applicant for a second station at Eureka, California, assisted his son in preparing the subject application, that Phil Jackson's application for a Eureka, California radio station was used as a guide for the Corvallis application, that Phil Jackson has given Ted Jackson the securities upon which his son relies to establish his financial qualifications, that J. D. Jackson is acting as guarantor of a proposed bank loan to Ted Jackson, that Phil Jackson assisted his son in the survey of community needs and interests, and that Phil Jackson has accompanied his son to meetings of the KFLY Interim Broadcasters Committee (which is operating Stations KFLY–AM and FM on an interim basis) and advised his son with regard to business coming before such meetings. Petitioner further alleges that Ted Jackson is very young (25 years old), has no past business experience, and, until recently, has lived in his father's home and has relied on his father for day-to-day financial support. Corvallis contends that these allegations raised a substantial question as to whether Phil Jackson and J. D. Jackson are real parties in interest to the Jackson application and warrant addition of the requested issue. In the alternative, Corvallis requests that the broadcast interests of Phil Jackson "be imputed" to Ted Jackson due to the ties between them.

4. As stated in *Sumiton Broadcasting Co., Inc.*, 15 FCC 2d 400, 14 RR 2d 1000 (1968), "the test for determining whether a third person is a real party in interest is whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station." The Board agrees with both Jackson and the Broadcast Bureau that the Corvallis allegations do not meet this test. The Corvallis allegations, stripped of their speculations and innuendos, come down to no more than a claim that the familial relationship, plus the senior Jackson's insubstantial assistance in the preparation of the application, are sufficient to make him a real party in interest. Ample Commission precedent demonstrates that neither a family relationship nor such assistance, standing alone, is sufficient to support the addition of a real party in interest issue. See *Michael S. Rice*, 9 FCC 2d 217, 10 RR 2d 965 (1967); *Jones T. Sudbury*, 5 FCC 2d 397, 8 RR 2d 867 (1966); *Voice of Middlebury*, —— FCC 2d ——, 8 RR 2d 109 (1966); and *J. T. Parker, Jr.*, 7 FCC 2d 192, 9 RR 2d 705 (1967). The facts that Phil Jackson assisted his son by providing office space and a form, that the son lived in his father's house until recently and that the father has given his son various securities are clearly within the parameters of a normal father-son relationship. The

Board is also convinced that the Corvallis allegations relating to Phil Jackson's nominal assistance in preparing his son's application and in conducting the *Suburban* survey, and the father's presence at the meetings of the Interim Broadcasters, fall far short of demonstrating that Phil Jackson is a real party in interest in this proceeding. Finally, in reference to the assets received from his father, Ted Jackson states that he owns these stocks outright and his father has "absolutely no control or interest in them." Furthermore, an affidavit from J. D. Jackson submitted with the opposition avers that he has no interest in or connection with the loan other than as guarantor. In conclusion, it appears that the Corvallis' allegations as to Phil Jackson's conduct indicate, at most, a natural, fatherly concern for the success of his son's initial business endeavor and not, as Corvallis would lead us to believe, an effort to use his son as a "front man" in order to gain a comparative advantage in this proceeding. *Cf. Medford Broadcasters, Inc.*, 34 FCC 2d 989, 24 RR 2d 359 (1972). Therefore, the requested issue will be denied.

5. Accordingly, IT IS ORDERED, That the petition for enlargement of issues, filed March 13, 1972, by Corvallis Broadcasting Corporation, IS DENIED insofar as it requests a real party in interest issue and IS DISMISSED in all other respects; and

6. IT IS FURTHER ORDERED, That the motion for leave to file supplement, filed April 4, 1972, by Corvallis Broadcasting Corporation, IS GRANTED and the supplement filed therewith IS ACCEPTED; and

7. IT IS FURTHER ORDERED, That the informal request for withdrawal of the petition for enlargement of issues, filed October 25, 1972, by Corvallis Broadcasting Corporation, IS GRANTED to the extent indicated herein, and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-324

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PETITIONS FILED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ET AL.	Docket No. 19143

MEMORANDUM OPINION AND ORDER

(Adopted November 10, 1972; Released November 14, 1972)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. On November 19, 1970, the American Telephone and Telegraph Company (AT&T) requested permission from the Commission to increase its long distance telephone rates in the 48 contiguous states in order to raise its rate of return from 7.5% to 9.5%. On December 10, 1970, the Equal Employment Opportunity Commission (EEOC) filed a petition to intervene, opposing AT&T's request on grounds that the company discriminates in employment against women, blacks, Spanish-surnamed Americans, and other minorities. The Commission found no "logical or functional relationship" between rate levels and the company's employment policies; therefore, it denied EEOC's request to intervene in the rate increase matter.[1] However, the Commission did believe that EEOC had raised substantial questions as to AT&T's employment practices with respect to women and minority groups, and, by Memorandum Opinion and Order, released April 27, 1971,[2] designated the matter for hearing to explore the alleged discriminatory practices as possible violations of the Commission's policy against discrimination in employment by communications common carriers[3] and possible violations of the Civil Rights Act of 1964.[4] The issues specified by the Commission were:

(a) Whether the existing employment practices of AT&T tend to impede equal employment opportunities in AT&T and its operating companies contrary to the purposes and requirements of the Commission's Rules and the Civil Rights Act of 1964.

(b) Whether AT&T has failed to inaugurate and maintain specific programs, pursuant to Commission Rules and Regulations, insuring against discriminatory practices in the re-

[1] Based on other grounds, the Commission did order a hearing on the lawfulness of AT&T's proposed increase in rates. See *American Telephone and Telegraph Company*, 27 FCC 2d 151 (1971).

[2] 27 FCC 2d 309, 20 RR 2d 1181.

[3] See *In the Matter of Rule Making to Require Communications Common Carriers To Show Nondiscrimination in Their Employment Practices*, 24 FCC 2d 725, 19 RR 2d 1862 (1970).

[4] New York Telephone Company and New Jersey Bell Telephone Company were made parties to the proceeding by Commission Order, FCC 71-327, released April 14, 1972.

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cruiting, selection, hiring, placement and promotion of its employees?

(c) Whether AT&T has engaged in pervasive, system-wide discrimination against women, Negroes, Spanish-surnamed Americans, and other minorities in its employment policies?

(d) Whether, and in what manner, any of the employment practices of AT&T, if found to be discriminatory, affect the revenues or expenses of AT&T, or otherwise affect the rates charged by that company for its interstate and foreign communication services, and if so, in what ways this is reflected in the present rate structure?

(e) To determine, in light of the evidence adduced pursuant to the foregoing issues, what order, or requirements, if any, should be adopted by the Commission?

2. On May 8, 1972, the first day of field hearings in New York City, the Administrative Law Judge responded to fears expressed by employee-witnesses that the companies named in this proceeding would take retaliatory actions against them if they testified. The Judge stated that he "will direct that both the Bell System and New York Telephone, that if any person who testifies in this proceeding is subsequently discharged because of—during the pendency of this proceeding that the parties and myself are to be immediately notified for whatever reason the discharge occurred." Preceding his directive, the Judge stated that he was "simply acting on the basis that the information has been expressed, and I think it affects the outcome of the proceeding, and I want to remove that fear, whether it's true or not, ..." Following the hearings, the Presiding Judge issued a written Memorandum Opinion and Order (FCC 72M–657, released May 18, 1972), in which he confirmed and explained his oral order, and ordered New York Telephone Company (NYT), New Jersey Telephone Company (NJT), and/or AT&T to ". . . notify all parties herein, if any employee who testified in this proceeding (or whose name had been presented to the companies as a prospective witness) is proposed to be discharged or disciplined, for whatever reason, prior to taking such action; and provided further, that if the disciplinary action included discharge from employment or suspension of pay, the prior notice shall be not less than fifteen days."[5] Now before the Review Board are: an appeal by respondent NYT from presiding Judge's Order regarding employee-witnesses in this proceeding, filed May 25, 1972; and appeals by AT&T and New Jersey Bell Telephone Company, filed May 25, 1972 and May 26, 1972, respectively, adopting and incorporating by reference NYT's appeal.[6]

3. In their appeals, respondents argue, in essence, that the Judge lacked the authority to issue his Order. Respondents characterize the

[5] The Judge also ordered, "that in view of the important question of law and policy presented and confirming oral approval given on the record, parties hereto may file appeals to this order under Section 1.301(b) of the Rules . . .".

[6] Also before the Review Board are the following related pleadings: (a) request for permission to exceed length of pleading limitation, filed June 14, 1972, by the Common Carrier Bureau; (b) Common Carrier Bureau's opposition, filed June 16, 1972; (c) opposition, filed June 16, 1972, by Equal Employment Opportunity Commission; and (d) reply, filed June 23, 1972, by NYT.

Order as an "injunction", which, they maintain, traditionally has fallen within the general equitable powers exercised solely by local, state, and federal courts. According to respondents, Congress has made it clear in legislation granting administrative agencies their powers that such agencies cannot issue injunctions, and that injunctive relief when required must be obtained from the courts. For example, respondents continue, the EEOC was not empowered by Congress to issue preliminary injunctions against employers threatening employees with retaliation for challenging the employers' employment practices; however, in Title VII of the Civil Rights Act of 1964 (Section 706(f)(2)), Congress authorized the EEOC to seek temporary equitable relief in the courts. To further emphasize their point, respondents note that Congress, realizing that employers could take retaliatory actions against employees in labor relation disputes, provided the National Labor Relations Board with the power to petition the courts for injunctive relief and did not vest the NLRB itself with the power to issue preliminary injunctions (citing 29 U.S.C. Section 160(j), National Labor Relations Act, Section 10(j)). Furthermore, respondents argue, the Judge's Order is contrary to the legislative scheme for dealing with the problem of retaliation; the scheme Congress developed in legislation like the Civil Rights Act and the NLRB is intended to protect and accommodate the interests of both the employee and the employer. Respondents insist that the Judge's Order requiring them to retain employee-witnesses for fifteen days on the payroll after their services are deemed undesirable by respondents imposes an undue burden on them contrary to Congress' statutory scheme and could also possibly endanger the public. In this regard, respondents maintain that the Commission's anti-discrimination rules (see note 3, *supra*) are intended to "complement, rather than conflict with any action by other agencies especially created to enforce the policy of equality in employment." In "complementing" the EEOC's efforts, respondents argue, the Commission cannot confer upon itself powers which are in the exclusive domain of the courts. Finally, respondents take the position that the Judge's reliance on Section 1.243(f) of the Commission's Rules as authority for his Order is improper. That section authorizes the Presiding Judge to "regulate the course of the hearing, maintain decorum, and exclude from the hearing any person engaging in contemptuous conduct or otherwise disrupting the proceeding."[7] Respondents argue that Section 1.243(f) is a procedural rule exclusively and has been used by Administrative Law Judges only

[7] Respondents also cite Section 556(c) of the Administrative Procedure Act, which delineates the following powers of Administrative Law Judges:
(1) Administer oaths and affirmations;
(2) Issue subpoenas authorized by law;
(3) Rule on offers of proof and receive relevant evidence;
(4) Take depositions or have depositions taken when the ends of justice would be served;
(5) Regulate the course of the hearing;
(6) Hold conferences for the settlement or simplification of the issues by consent of the parties;
(7) Dispose of procedural requests or similar matters;
(8) Make or recommend decisions in accordance with Section 557 of this rule; and
(9) Take other action authorized by agency rule consistent with this subchapter.

to maintain the "decorum" of Commission proceedings.[8] Moreover, respondents maintain, the subject matter of the instant Order falls outside the scope of the Commission's expertise and, in the past, the Commission has refused to rule upon such matters.[9] Respondents therefore request that the Judge's Order be reversed.

4. In opposing respondents' appeals, the Common Carrier Bureau [10] states that the issue "is not whether the Judge has the power to issue orders of an injunctive nature, but whether the particular exercise of that power in issuing this interlocutory order is authorized." The Bureau believes that the Order was within the Judge's powers. In the Bureau's opinion, the Judge's Order is not an "injunction" because it does not require the respondents to perform some act, such as reinstating any employee-witness, nor does the Order serve as a temporary injunction intended to maintain the status quo until a full hearing on the matter can be held to take some final action. The Bureau submits that the Judge can issue orders injunctive in nature,[11] and, in support, cites the Administrative Procedure Act (5 U.S.C. Section 551(b)) which states that an " 'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." The Bureau, however, believes that the Judge's Order is more properly characterized as a demand for information and/or as a protective order. Moreover, the Bureau continues, under the Commission's Rules and Regulations, the Judge has authority to order the production of relevant evidence during the proceedings. In the Bureau's opinion, the Judge's Order will insure the reporting of retaliatory acts which are encompassed within the issues designated for hearing in this proceeding,[12] and, should the respondents retaliate, this would reflect upon their good faith compliance with Title VII of the Civil Rights Act. See paragraph 1, *supra*. According to the Bureau, Rule 1.243(f) has not been used by Presiding Judges solely to preserve the decorum of the hearing; rather the rule has been used to order the taking of depositions [13] and to compel foreign nationals who are principals of an applicant to the proceeding to appear.[14] The Bureau further argues that the Supreme Court, in *United States* v. *Morton Salt*, 338 U.S. 632 (1950), held that presiding Judges in federal administrative agencies have the power to "investigate [respondents' conduct]

[8] According to respondents, Administrative Law Judges have, pursuant to the power conferred by Section 1.243(f), postponed hearing dates (*WMOZ, Inc.*, 5 RR 2d 732 (1965)); granted continuances (*Selma Television, Inc.*, 3 FCC 2d 63, 7 RR 2d 546 (1965)); determined the order of evidence (*Charles W. Jobbins*, 5 FCC 2d 167, 8 RR 2d 874 (1969)); closed the record (*Sports Network, Inc.* v. *American Telephone & Telegraph Co.*, 7 FCC 2d 42, 9 RR 2d 630 (1967)); and directed production of a document (*Milton Broadcasting Co.*, 16 FCC 2d 820, 15 RR 2d 909 (1969)).

[9] Citing *Radio 1½, Inc.*, 33 FCC 2d 402, 23 RR 2d 743 (1972); *A. A. Schmidt and James Broadcasting Co., Inc.*, 14 RR 2d 1156 (1967).

[10] The Common Carrier Bureau's unopposed request for permission to exceed the length of the pleading limitation in Rule 1.301(b)(5) will be granted.

[11] In this regard, the Bureau submits that Section 1.301(b) of the Rules characterizes interlocutory rulings of the Judge as "orders". Section 1.301(b) specifies:

> Except as provided in paragraph (a) of this section, appeals from interlocutory rulings of the presiding officer shall be allowed only if allowed by the presiding officer . . . The request shall be filed within 5 days after the *order* is released . . . [Bureau's emphasis.]

[12] See paragraph 1, *supra*.

[13] Citing *Harriman Broadcasting Co.*, 8 FCC 2d 274, 10 RR 2d 1 (1967).

[14] Citing *American Broadcasting Corp., Inc.*, 23 FCC 2d 142, 19 RR 2d 47 (1970), review denied, FCC 70–784, released July 22, 1970.

upon mere suspicion when the hearing process is threatened by contemptuous conduct," or "even just because he wants assurance that it [the proceeding] not" be threatened. Intimidation of witnesses, the Bureau asserts, is not only recognized as a form of contempt but also as an interference with the dignity of the court and obstruction of justice. Further authority to support the Judge's Order is derived from Section 219(b) of the Communications Act, the Bureau maintains.[15] In this case, the Bureau asserts, the Commission has indicated that it has an independent responsibility to effectuate the strong national policy against discrimination in employment, citing *In the Matter of Rule Making to Require Communications Common Carriers to Show Nondiscrimination in Their Employment Practices, supra.* The Rule Making statement makes it clear that the Commission can and must look into such matters, the Bureau concludes.

5. In its opposition, EEOC, like the Common Carrier Bureau, argues that the Judge has the authority to issue his Order under Commission Rule 1.243(f). As respondents note, presiding Judges have employed Rule 1.243(f) to postpone hearing dates, determine the order of evidence, and direct production of documents; therefore, EEOC maintains, the Rule certainly can be employed by the Judge to protect "the most vital process of [the] hearing—the gathering of evidence through the testimony of witnesses." EEOC notes that Commission Rule 1.313 [16] gives the Judge authority to issue a protective order to protect witnesses in discovery proceedings before hearing "from annoyance, expense, or embarrassment." If the Judge can protect witnesses before a hearing, EEOC insists, he can do so during the hearing. The Order further provides a monitoring mechanism of the respondents should they take retaliatory action against the employee-witnesses, thereby providing evidence relevant to the issues in the proceeding, EEOC continues. EEOC argues that if, as respondents suggest, Congress has indicated in Title VII and the NLRA that the issuance of protective orders are vested solely in the courts and if the FCC does not have enabling legislation in order to secure a protective order from the courts, then the Commission would have no means to protect the testimonial process during the hearings; therefore, it must be implied, EEOC argues, that Rule 1.243(f) includes the power to protect witnesses. Section 706(f)(2) of the Civil Rights Act of 1964 does not provide an adequate alternative to the Judge's Order because it provides judicial remedy for actual violations of anti-discrimination laws, EEOC maintains. Furthermore, EEOC argues, employing Section 706(f) would require the hearing be adjourned, a petition filed with EEOC and EEOC filing for judicial relief. This would not only delay the instant proceeding, but would remove the conduct of the proceeding from the hands of the Administrative Law Judge and vest it in the EEOC and the courts. The Order does not endanger the public safety nor the

[15] Section 219(b) of the Act authorizes the Commission to: by general or special orders require any such carriers . . . to file periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act . . .

[16] Section 1.313 is entitled "Protective Orders" and reads in part: The use of the procedures set forth in Section 1.311–1.325 is subject to control by the presiding officer, who may issue any order consistent with the provisions of those actions which is appropriate and just for the purpose of protecting parties and deponents as of providing for the proper conduct of the proceeding.

companies' security, EEOC asserts. Under the Order, the respondents are free to discharge any employee-witness; however, they must give all parties to the proceeding notice of the discharge and must continue to pay the employee during the fifteen days. EEOC concludes that the respondents' assertions that they have no intention of retaliating against the employee-witnesses is "irrelevant." The Judge's Order was intended to allay the fears of the employee-witnesses that the companies would take retaliatory action against them for testifying, EEOC maintains, and was not a determination that respondents had or would take retaliatory actions.

6. In reply, respondents object to the absence in the Order of a reimbursement provision to cover the situation where the company discharges an employee, pays him for the fifteen days, and after investigation of the discharge, the company is found to be justified in its actions. Without a reimbursement provision, respondents argue, the order consitutes a "taking of respondents' property". Respondents note that Section 706(f)(2) of Title VII provides that preliminary relief "shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure." That Rule provides that the party seeking injunctive relief must post security to compensate the party who may be found to have been wrongfully enjoined or restrained. Without appropriate provision for reimbursement, respondents argue, the Order is "wholly unjustifiable". In response to the Bureau's and EEOC's arguments that the Order is necessary to "protect the integrity" of the hearing by providing protection for the witnesses, respondents assert that the employees are provided with the following means of protection: (a) the EEOC has the power to seek emergency relief in the court, under the Civil Rights Act; (b) a federal criminal statute (18 U.S.C. Section 1505) proscribes a penalty of up to five years imprisonment and a fine of up to $5,000 or both for any person who "injures any . . . witness in his person or property . . . on account of his testifying" before any federal agency; and (c) EEOC or the Common Carrier Bureau could utilize the FCC's subpoena power to compel a witness to testify. The respondents disagree with EEOC that, since no provision has been made by Congress for the FCC to seek relief in the courts, it has inherent power to grant the desired relief on its own. Respondents believe it would be easier to imply that the FCC has authority to seek relief in the courts, citing *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 605–608 (1969), where the Court found such implied authority.

7. The Review Board cannot agree with respondents that the Administrative Law Judge abused his discretion or acted without authority in ordering the telephone companies to give all parties to the proceeding notice of any disciplinary action taken against any employee-witness in this proceeding, and, should the disciplinary action be discharge or suspension of pay, a fifteen day advance notice. By its terms, Section 1.243(f) of the Commission's Rules confers upon the presiding officer the authority "to regulate the course of the hearing", and it is well established that this authority is plenary and "invests the presiding officer with great latitude". *Selma Television, Inc.*, 3 FCC 2d at 64, 7 RR 2d at 548. See also *Tinker, Inc.*, 4 FCC 2d 372, 7 RR 2d 677 (1966);

Chronicle Broadcasting Co., 20 FCC 2d 728, 17 RR 2d 1094 (1969).[17] As both the Bureau and EEOC point out, encompassed within the Judge's authority to conduct the hearing is the preservation of evidence. *Cf. Bunker Ramo Corp* v. *Western Union Telegraph Co.*, 31 FCC 2d 449, 22 RR 2d 843 (1971). In issuing the Order under consideration, the Judge explained that it was intended to allay the fears the witness-employees had expressed during the hearing that the companies would retaliate against them for testifying.[18] In our view, the Judge made clear in his Order that he was not determining whether the respondents had, in fact, or actually would take retaliatory action against the employee-witnesses.[19] The Order was intended as a procedural device to provide some protection for the witnesses, thereby insuring that a full and complete airing of the issues can take place at the hearing. In this regard, we note that the Commission, in *Tinker, Inc., supra*, encouraged presiding officers to be innovative in conducting hearings to assure a meaningful and efficient hearing record. The Commission stated, "It is commendable for [an Administrative Law Judge] to exercise firm control of the course and conduct of a proceeding and to adopt such innovations in procedure as are consistent with the statutes, the Rules of the Commission, the rights of the parties, and adapted to achieve expedition of proceedings, *the full disclosure of facts* and the attainment of justice." 4 FCC 2d at 374, 7 RR 2d at 680. (Emphasis supplied.) We believe the Judge's Order is in keeping with the spirit of *Tinker* and is consistent with the general tenor of Section 1.243(f); therefore, it will not be disturbed.[20] See *Charles W. Jobbins, supra; Selma Television, Inc., supra;* and *WMOZ Inc., supra.*

8. Accordingly, IT IS ORDERED, That the request of the Chief, Common Carrier Bureau, for permission to exceed length of pleading limitation, filed June 14, 1972, IS GRANTED, and the opposition pleading IS ACCEPTED; and

9. IT IS FURTHER ORDERED, That the appeal by Respondent New York Telephone Company from Presiding Judge's Order regarding employee-witnesses in the proceeding, filed May 25, 1972; the appeal by Respondent American Telephone and Telegraph Company from Presiding Judge's Order regarding employees who have appeared as witnesses in the proceeding, filed May 25, 1972; and the appeal by Respondent New Jersey Bell Telephone Company from the Presiding Judge's Order regarding employees who appeared as witnesses in this proceeding, filed May 26, 1972, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[17] "[Administrative Law Judges] are delegated broad responsibility for the management of the hearings assigned to them. It is their obligation to see that these proceedings move forward in an orderly fashion with due regard for equity and fairness to all participating parties." 20 FCC 2d at 728, 17 RR 2d at 1095.

[18] The Judge explained in his Order that some employees had testified at the beginning of the hearings that they were unwilling to testify out of fear of retaliation by their employers—the telephone companies.

[19] The fact that the Judge did not find that the respondents had, in fact, retaliated against any employee-witnesses—a point respondents make several times in their pleadings—is really immaterial in light of the true nature of the Order which is to protect the witnesses and insure a free flow of evidence at the hearing.

[20] We do not agree with respondents that a lack of a reimbursement provision renders the Judge's Order unjustified. At this time, it is purely conjectural that respondents would have to discharge an employee with pay. However, should this problem arise, the parties could seek further clarification from the Presiding Judge.

F.C.C. 72–992

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE PROCESSING PROCEDURES FOR APPLICATIONS FOR DOMESTIC SATELLITE SYSTEM FACILITIES IN DOCKET NO. 16495

NOVEMBER 9, 1972.

THE COMMISSION BY COMMISSIONERS BURCH (CHAIRMAN), ROBERT E. LEE, JOHNSON, H. REX LEE, WILEY AND HOOKS WITH COMMISSIONER REID CONCURRING, ISSUED THE FOLLOWING PUBLIC NOTICE: PROCESSING PROCEDURES FOR APPLICATIONS FOR DOMESTIC SATELLITE SYSTEM FACILITIES IN DOCKET NO. 16495.

In response to paragraph 45(b) of the *Second Report and Order* (*Second Report*) issued in Docket No. 16495 (35 FCC 2d 844, 860) and the *Memorandum Opinion and Order* issued on September 14, 1972 (FCC 72–807) the Commission has received statements by the applicants for domestic satellite systems as to their present intentions with respect to pursuing pending applications.

Requests for immediate processing, prior to a resolution of issues raised by pending petitions for reconsideration of the *Second Report* and related pleadings of the parties, have been received from Western Union Telegraph Company (Western Union); Hughes Aircraft Company and GTE Satellite Corporation (Hughes/GTE); American Satellite Corporation (American Satellite), a newly formed corporation owned by Fairchild Industries, Inc. and Western Union International, Inc.; and RCA Global Communications, Inc. and RCA Alaska Communications, Inc. (the RCA applicants). Requests for deferral, pending a resolution of issues raised by pending pleadings or for other reasons, have been received from American Telephone and Telegraph Company (AT&T); Communications Satellite Corporation (Comsat); MCI Lockheed Satellite Corporation (MCIL); and Western Tele-Communications, Inc. (WTCI).

Immediate Processing of System Applicants

Processing of those system applicants requesting immediate processing has been commenced. Such processing will proceed on an individual basis, apart from the proceedings in Docket No. 16495, at a pace geared to the speed at which each applicant makes any additional showings or amendments (consistent with the *Second Report*) that may be required by the Commission or desired by the applicants, and may take account of the preference of the particular applicant as to the order in which various components of its proposed system are

processed.[1] Basic findings, required by statute or as a result of the conditions of policy adopted in the *Second Report*, will be made in conjunction with Commission action on the first applications of each applicant that are considered, whether such applications constitute the entire system proposal of that applicant or only a portion thereof. Any grant will, of course, be fully subject to the outcome of Docket No. 16495 (see *Memorandum Opinion and Order* in Docket No. 16495 issued on September 14, 1972, FCC 72–807). However, it is not contemplated that parties to Docket No. 16495 will participate in the processing of applications for individual systems, except upon express invitation of the Commission and to the extent indicated in any such invitation.

Deferred Processing of System Applicants

Processing of those system applicants that have requested deferral will be held in abeyance pending a request by any such applicant for processing. Such request may be made at any time, according to the desires of the particular applicant in the light of evolving circumstances, and may encompass any modifications or amendments to the pending system applications that are consistent with the *Second Report* or any Commission action taken upon reconsideration. Upon receipt of any such request for processing, processing of the relevant applications will be commenced as promptly as possible, provided that the request is not contingent upon future events and the particular proposal involved is not determined by the Commission to be contrary to the policies adopted in the *Second Report* or any Commission action taken upon reconsideration.

Earth Stations Only

Applications for earth stations only, to be operated with space segment facilities owned by another entity subject to the Commission's jurisdiction, will be processed upon request filed after a construction permit for the relevant space segment has been issued. This procedure does not pertain to AT&T and GTE, whose applications for earth stations and other associated terrestrial facilities were filed as an integral part of the proposed system of the space segment applicant. As noted in paragraph 16 of the *Memorandum Opinion and Order* issued in Docket No. 16495 on September 14, 1972 (FCC 72–807), the Commission has received some informal expression of interest in the possibility of domestic earth stations to be operated on a temporary, experimental basis with the Canadian Telsat system. The statement of intent filed by American Satellite also contemplates this mode of operation for its proposed Phase I. In the event that the Canadian statute governing the Telsat system is amended to permit such use, applications for earth stations to operate in this manner may be submitted for the Commission's consideration. The Commission will resolve any broad policy issues associated with such proposals in conjunction with

[1] Applications for terrestrial interconnection facilities for earth stations will not be processed, in any event, until after the relevant earth station sites have been cleared from an interference standpoint.

its action on the first application of this type that is ripe for Commission consideration.

Orbital Arc Locations, Frequency Usage and Polarization

The *Second Report* adopted paragraph 152a of the staff recommendation attached to the Memorandum Opinion and Order issued on March 17, 1972 in Docket No. 16495 which provided as follows (35 FCC 2d at 859; 34 FCC 2d 1, 72–73):

> The assignment of orbital arc locations will be made by subsequent order of the Commission. We will assign orbital locations for satellites authorized to serve Alaska and Hawaii in that portion of the orbital arc that is five degrees or more west of the orbital locations that have been selected by Canada and is capable of illuminating those States as well as CONUS. Other authorized satellites will be assigned orbital locations in that portion of the orbital arc that is five degrees or more east of the Canadian locations and is capable of illuminating CONUS. The orbital locations for satellites authorized to utilize 4 and 6 GHz frequencies, in whole or in part, will be separated by no more than 3° (or allow for intervening assignments separated by 3°) unless good cause is shown for a wider separation. In assigning orbital arc locations, the Commission would endeavor to make maximum allowance for the authorization of future satellites utilizing 4 and 6 GHz frequencies. The assignment of any orbital location for use by a particular satellite shall not grant the licensee any right to the use of that orbital location for another satellite.[91] Nor shall the initial assignments preclude the Commission from changing orbital location assignments during the life of the initially authorized satellites, as required by the public interest, convenience or necessity.[92]

The assignment of orbital arc locations, including specification of frequency usage and polarization, will be made by the Commission after it has been finally determined, *inter alia*, upon consideration of the petitions for reconsideration, what domestic system or systems will be initially designated to provide service to Alaska and Hawaii.

Section 214 Authorization

In the 1970 *Report and Order* in Docket No. 16495 inviting the submission of concrete applications to assist the Commission in formulating policy in the domestic satellite field, the Commission stated that potential common carrier applicants should request certification pursuant to Section 214 of the Communications Act, as well as make

[91] In determining whether a space segment licensee will be permitted to use the same orbital location for another satellite (such as an existing ground spare) to replace a satellite that has failed short of its design life, the Commission will be guided by the circumstances then prevailing (including the length of time, if any, the failed satellite was operational, the current state of the technology, and the then existing demands on that portion of the orbital arc available for assignment).

[92] In the event that changes in orbital location assignments are found necessary, the Commission will endeavor to make such reassignments in a manner which will be least prejudicial to the affected licensees, all relevant factors considered.

application for construction permits under Title III (22 FCC 2d 86, 99 at paragraph 32). The pending system applications submitted in response to that invitation are very voluminous and only a limited number of copies were filed pursuant to paragraph 38 of the 1970 Report (22 FCC 2d at 103). Before processing of such applications is completed and any Section 214 authorization is issued, the Commission must be furnished with sufficient copies of the application for certification pursuant to Section 214 to enable it to comply with the service requirements of Section 214(b).

Common carrier applicants for domestic satellite facilities that have already requested processing, or that in the future request processing, should submit (or resubmit) applications for Section 214 certification, separately from the applications for construction permits, in the form and with the number of copies specified by Sections 63.52 and 63.53 of the Commission's Rules and Regulations. Such separate application need not be accompanied by additional copies of the applications for construction permits, but should include a descriptive summary of the proposed system and the facilities for which application has been made, as well as the information specified in Section 63.01 of the rules to the extent practicable. In the event that it appears to any applicant that some of the information specified by Section 63.01 is not relevant to applications for facilities of this nature or should be submitted at some later stage (e.g., Section 63.01(h)), a statement to that effect with supporting reasons will be sufficient for initial processing. Further, for good cause shown, construction permits may be issued prior to Section 214 authorization, subject to the usual conditions. All necessary Section 214 authorization will be required prior to the grant of authority to commence operations.

Filing Fees

Pursuant to paragraph 38 of the 1970 Report in Docket No. 16495, and Section 1.1113 (footnote 7) of the Commission's Rules and Regulations, the filing fees specified in the schedule for satellite communications services do not apply to initial applications for domestic systems to be considered in conjunction with that of Western Union in Docket No. 16495. However, the grant fees are applicable to any grant, and all subsequent applications are subject to the filing as well as the grant fees.

In light of the Commission's conclusions in paragraphs 16 and 17 of the *Second Report*, which have not been challenged in the petitions for reconsideration, the applications accepted for filing for consideration in conjunction with that of Western Union in Docket No. 16495 will now be processed on an individual basis. In order to avoid, insofar as practicable, placing those pending applicants who have already filed amendments in a disparate position as compared to those who have deferred filing amendments, we will treat the question of filing fees as follows.

The applicable grant fees will be charged for the authorization of any and all domestic satellite facilities. There will be no filing fee for amendments to facilities that were timely filed and accepted for

consideration in Docket No. 16495. This exception includes amendments filed by new corporations or other entities that are successors in interest to the position of pending applicants before the Commission. However, where any amendment proposes new facilities, e.g., an additional earth station or space station, the filing fees will apply. Further, where any amendment constitutes in essence a proposal for a new system, with basically different facilities from those proposed in the pending applications, the filing fees will apply. New applications, submitted by new or pending applicants, will be subject to the filing fees.

Further Processing Procedures

The foregoing comprises the public notice concerning processing procedures contemplated by footnote 11 to paragraph 45(b) of the *Second Report*. As recognized in paragraph 15 of the *Second Report*, the "initial implementation of domestic satellites does not confront us with a normal or routine situation" and some "departure from conventional standards may be required if the public is to realize the potential benefits of this high capacity technology" (35 FCC 2d at 849–850). Rather than attempting to delineate in advance the kind of showings that may be required on such questions as financial qualification or the absence of potential burden or detriment to customers for essential communications services now provided by common carrier applicants, we think it preferable to consider the case of each applicant individually on the basis of its particular circumstances. In the course of processing, each applicant will be advised of any further information that may be required and of any additional procedures that appear appropriate in its instance. Should any question of general applicability arise in course of processing, which appears to warrant clarification for the benefit of pending and/or future applicants, the Commission may issue a further public notice concerning processing procedures or take such other appropriate measures as in its judgment would best serve the public interest.

Action by the Commission November 8, 1972. Commissioners Burch (Chairman), Robert E. Lee, Johnson, H. Rex Lee, Wiley and Hooks, with Commissioner Reid concurring.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
GARY LANE, CERRITOS, CALIF.
Concerning Fairness Doctrine Re National
Broadcasting Co.

NOVEMBER 10, 1972.

GARY LANE, Esq.,
17518 Kensington Circle,
Cerritos, Calif.

DEAR MR. LANE: This is in response to your complaint concerning commentary presented during the "David Brinkley's Journal" segment of the NBC NIGHTLY NEWS.

On July 21, 1972, NBC broadcast the following remarks of commentator David Brinkley regarding the retirement of Mr. Otto Otepka from the Subversive Activities Control Board (SACB).

What follows is another moral saga of the bureaucratic life in Washington. Nine years ago, a man named Otto Otepka was a minor security official in the Department of State when a Senate sub-committee was investigating the loyalty of State Department employees. Otepka said the committee was not getting the whole truth, as he saw it, so he slipped the committee some State Department classified papers. But he was caught at it, and there was a loud, raucous controversy. It is interesting to note now, by the way, that the same people who were outraged when Daniel Ellsberg put out classified papers thought it was fine when Otepka put out classified papers. Anyway, the State Department fired him. He appealed the firing and it dragged through hearings and appeals for five years, while in the meantime he remained on the payroll, doing nothing, at full salary—$17,000. However, three years ago President Nixon came into office and ended this by giving Otepka a better job at $36,000 a year—a member of the Subversive Activities Control Board. That is an agency which does nothing whatsoever, has no reason to exist, and it holds on in spite of attempts to abolish it. Its members are supposed to be confirmed by the Senate, but for three years the Senate just never got around to voting on Otepka one way or another, and so he stayed on there, doing nothing. Now after three years of no work at $36,000 a year, coming after five years of no work at $17,000 a year, he is retiring at the age of 57. His pension is computed on his three highest earning years, or $36,000. So he will retire on a pension of $24,000 a year for life, or $7,000 more than he ever made when he was working. It's the end of another continuing series on the bureaucratic life in Washington.

In a letter to NBC, you questioned the accuracy of Mr. Brinkley's account of the facts surrounding Mr. Otepka's role in the Senate subcommittee investigation, his leaving the State Department, and his appointment to and retirement from the SACB. You also objected to Mr. Brinkley's characterization of the Board's duties and record of performance. Noting that a bill to continue the SACB appropriation was before Congress and being of the opinion that Mr. Brinkley's remarks might have a detrimental effect on its passage, you requested that NBC air a "correction" of the commentary.

Your letter was referred by NBC to Mr. Brinkley who stated that your differences concerning the course and significance of Mr. Otepka's public life were those of personal opinion and that therefore no correction would be forthcoming. You then filed complaint with this Commission on August 18, 1972 requesting a review of the matter under the fairness doctrine.

In response to the Commission's inquiry, NBC states that, in its judgment, the commentary in question did not involve discussion of a current controversial issue of public importance and therefore that there was no violation of the fairness doctrine. NBC states that the Otepka affair occurred nine years ago and can no longer be considered an issue of controversy or public importance. NBC also states that the occasion for the commentary was Mr. Otepka's recent retirement from the SACB which in itself presented no controversial issue of public importance but rather only an event worthy of ordinary news coverage. Finally NBC notes your concern regarding the SACB appropriation bill pending in Congress but states that Mr. Brinkley's comments were directed to Mr. Otepka's career and retirement and referred to the SACB only in passing. NBC is therefore of the judgment that the remarks did not constitute a discussion of the Board or of the bill concerning its appropriation and did not raise or comment on any controversial issue of public importance pertaining thereto.

Your reply to NBC's response states your disagreement with its conclusion that no controversial issue of public importance had been presented by Mr. Brinkley's commentary. In particular, you state that in light of the SACB appropriation bill then before Congress, the work and continued existence of the Board is "a matter of major and current controversy" and insist that "The work of the SACB most certainly was a subject of the discussion."

The general question raised by your complaint and by NBC's response is whether the Brinkley commentary presented the discussion of one side of a controversial issue of public importance and thereby obligated NBC under the fairness doctrine to afford an opportunity for the broadcast of contrasting views. As has been frequently observed, "(to) invoke the fairness doctrine . . . there must exist a controversial issue of public importance on which the licensee has refused to allow a reasonable balanced point of view." *Green* v. *FCC*, 447 F. 2d 323, 327 (D.C. Cir. 1971); *quoted with approval in Healey* v. *FCC*, —— U.S. App. D.C. —— (March 3, 1972). The Commission has long held in this regard that it is both the responsibility and within the discretion of the broadcast licensee or network to determine whether a controversial issue of public importance has been presented in its programming and that the burden is on the complainant to establish that the licensee's or network's judgment in such matters was unreasonable or in bad faith. See *In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598 (1964); *Report on Editorializing*, 13 FCC 1246 (1949).

With these principles in mind, the specific issue on the facts presented here is whether Mr. Brinkley's remarks were so related to a question of the SACB's performance and continued existence and to the SACB

appropriation bill before Congress as to evidence a discussion of a controversial issue of public importance, and the reasonableness of NBC's judgment that they were not. The commentary in question was primarily concerned with the personal career and retirement of Mr. Otepka. Since the events related to Mr. Otepka's role in the Senate subcommittee investigation occurred nine years ago, it is not believed that the licensee was unreasonable in concluding that such events are not now the subject of any public controversy and that Mr. Brinkley's references thereto did not constitute the discussion of any controversial issue of public importance. Similarly, no evidence has been submitted from which it could be inferred that the occasion of Mr. Otepka's retirement presented any matter of controversy or public importance. Rather, Mr. Otepka's retirement appears to be simply a matter worthy of ordinary news coverage. As the Court of Appeals has stated:

> Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues. *Healey* v. *FCC, supra,* at —— U.S. App. D.C., at ——.

The remaining contention of your complaint is that in view of the pending SACB appropriation bill, Mr. Brinkley's reference to the Board as "an agency which does nothing whatsoever, has no reason to exist, and . . . holds on in spite of attempts to abolish it" presented one side of a controversial issue of public importance and thereby comes within the purview of the fairness doctrine. However, it must first be observed that aside from this one specific reference to the SACB in passing, the Brinkley commentary was focused on the personal history and retirement of Mr. Otepka as what the commentator termed "another moral saga of bureaucratic life in Washington" and not on the Board itself or its record. Secondly, Mr. Brinkley did not comment upon nor even mention the SACB appropriation bill in his remarks. Thus, although the commentary touched upon the work and continuation of the SACB, it did so only incidentally during a discourse on Mr. Otepka's career and retirement. Thus, it is not believed that Mr. Brinkley's remarks were addressed more than incidentally to the SACB.

As the Commission has stated:

> Clearly the licensee must be given considerable leeway for exercising reasonable judgment as to what statements or shades of opinion do require offsetting presentation. If every statement, or inference from statements or presentations, could be made the subject of a separate fairness requirement, the doctrine would be unworkable. More important, . . . such a policy of requiring fairness on each statement or inference from statements would involve this agency much too deeply in broadcast journalism. We would become an integral part of broadcast journalism, passing on thousands of complaints that some statement, or inference to be drawn from a statement, on a newscast or other news show had not been offset by a countering presentation. A policy of requiring fairness, statement by statement or inference by inference, with constant Governmental intervention to try to implement the policy, would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, wide-open". *National Broadcasting Co.*, 25 FCC 2d 735, 736–37 (1970).

For the foregoing reasons, the Commission is unable to conclude that NBC's judgment in this matter was unreasonable or made in bad faith, and therefore it appears that no further Commission action is warranted.

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.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
HORACE P. ROWLEY III, NEW YORK, N.Y.
Concerning Fairness Doctrine
Re Station WOR–TV

NOVEMBER 13, 1972.

HORACE P. ROWLEY III, Esq.,
416 East 81st Street,
Apartment 3–C,
New York, N.Y.

DEAR MR. ROWLEY: This is in reply to your fairness doctrine complaint against WOR–TV in New York City.

In your complaint you alleged that a series of programs entitled "It's Your City; It's Our Job" were broadcast on WOR–TV on which Victor H. Gotbaum, Executive Director, District Council 37, State, County and Municipal Employees Union acted as host; that each program was 30 minutes long and was broadcast on eight different Sunday evenings in prime time; that the controversial issue of public importance involved is ". . . what is and what ought to be the relationship between the people of metropolitan New York and unions of public employees;" [1]; that this program series implicitly presented the Union side of strike issues in a favorable light; and that the licensee has not fulfilled its fairness doctrine obligations in regard to this issue.

You further alleged that the trend in metropolitan New York is toward more strikes by unions of public employees; that in response to this trend the legislature in New York passed the so-called "Taylor Law" which prohibits public employees from striking; that in late 1970 the City and Mr. Gotbaum's Union agreed on an employee pension plan; that the Union planned a strike to coerce the Legislature into approving the plan; that on June 7, 1971 Mr. Gotbaum and Mr. Barry L. Feinstein (President of Local G 237) directed their men to lock open 27 of the 29 draw bridges across the East River between Manhattan and Long Island, abandon city trucks in the center of major highways, flush millions of gallons of raw, untreated sewage in the rivers, cut off the water supply, shut down the incinerators and stop serving school lunches; and that an effect of the strike was to make the issue of

[1] The complaint lists the following as the "ultimate issues" in this case:
(1) Whether or not the 1972 Legislature ought to approve the city-union pension agreement and the other 10 pension bills;
(2) Whether the Legislature ought to approve the 15 bills to change the penalties for violating the anti-strike provisions;
(3) Whether a New York County Grand Jury ought to indict Mr. Gotbaum and Mr. Feinstein and other union members for their criminal action during the strike, and a petit jury ought to convict them;
(4) Whether the City ought to enforce its claim for fines against the union and its members under the Taylor Law;
(5) Whether the Legislature and the City Council ought to limit the size and power of these unions.

the relationship between the people of New York and the public a controversial issue of public importance.

In support of your contention that this is a controversial issue of public importance you quoted various articles which you alleged demonstrated that this issue was controversial and of public importance in New York City. You stated that Mr. James Reston in the June 9th edition of the *New York Times* wrote:

> Like the mightiest of nations, New York rests on power that is highly vulnerable to guerrilla warfare. Its energy is not going to be stopped this time by a few angry bridge mechanics and sanitation workers and their frightened union bosses, but their assertion of arbitrary power to force the city and the state to meet their demands at the expense of the people raises questions about the rights and duties of public service employees that have to be faced.
>
> * * * * * * *
>
> This is the real issue in the present New York City strikes. If bridge workers and sanitation workers can use force to compel the state and city to meet their demands, why not policemen, firemen, teachers, electrical supervisors and all other public service employees?

You further alleged that the *Times* in an editorial on the same date stated:

> The abrupt abandonment last night of the recklessly irresponsible strike by unionized municipal employees does much more than end what had become an undisguised war against the eight million residents of New York City whose health and welfare the strikers were supposed to protect. The back-to-work order by strike leaders has made it clear that governmental firmness can triumph over unconscionable abuses of union control over vital public services. This outcome could mark the turning point in city-union relationships that have gotten grievously out of balance, primarily because the community's desire to build up strong, responsible unions in the civil service enabled labor to acquire power faster than social responsibility;

You state that Mr. Gotbaum stated on June 9th in a report to Union members:

> Now they know who we are. They know that we man sewage treatment plants, the water supply pumps, the huge city incinerators and the heavy duty vehicles, as well as the hospitals, the schools, the parks, the health services, the libraries, the social service centers, the museums, the offices, and so many other services without which New York City would die.
>
> Now they know who we are. The suburban commuters who are delighted to pay a fraction of the taxes that the city dweller pays; the Commerce and Industry Association, frothing at the mouth over D.C. 37 setting decent standards for pensions that business might have to follow; the upstate Republicans, smug over their distance from New York's burning problems, and enjoying the opportunity to light yet another match; the millionaire Governor, with his savage slashes at the poor and working poor of our city, including the one-man campaign to bottle up the D.C. 37 pension bills.
>
> *New York Times*, June 10, 1971.

In your complaint you also listed other articles which you alleged demonstrated the controversial and important nature of this issue.[2]

[2] You listed the following articles which appeared in the *New York Times:* Gotbaum: "The Philosophy of a Unionist" (June 8, 1971); Spero and Capozzola: "The Right to Strike" (December 22, 1971); Schwartz: "Labor Disputes in the Public Sector" (January 13, 1972); Editorial: "The Vulnerability of Systems" (March 1972). You also listed an article in the May 29, 1972 issue of "New York Magazine" by Richard Reeves entitled, "Solidarity Forever—The Unions Must Be Curbed" and you stated that on June 16, 1971 Mr. William Buckley and Mr. Gotbaum debated the issues involved on the program, "Firing Line."

You further alleged that the program presented only one side of the issue of what the relationship should be between the people of New York and the public unions; that the explicit and implicit positions broadcast were that Victor Gotbaum and the union were good and that the people ought to support them or at least not oppose them; and that the program was one-sided because it presented only the "It's Our Job" side and neglected the "It's Your City" aspect of the program.[3] You also alleged that the licensee acted in bad faith because it failed to make a reasonable judgment about the application of the fairness doctrine to the program.

In response to a station inquiry by the Commission the licensee stated that while certain aspects of the union's activities or operations, such as the strike in 1971, might raise controversial issues of public importance, the issue as stated by the complainant was too broad and was not a controversial issue of public importance; that the presentation of an informative program does not necessarily lead to the conclusion that people ought to support one side as opposed to the other; that the program did not raise the issue considered controversial by Mr. Rowley because there is no nexus between the presentation of a program which includes a person or an association presenting information and the past history of such person or association.

The licensee further states that you have not shown where the program series brought into issue any of the issues considered controversial by you; that apart from the implications which you claim arise from the programs in general, these issues never arose in the program series; that the mere presentation of people or organizations who may have been involved in prior controversial issues does not raise new issues; and that in any event WOR–TV has dealt with all aspects of the strike issue.

In response to the licensee's letter to the Commission you stated that labor management relations differ in public sectors from the private sectors; that unions must use political power to achieve their goals in the public sector; and that public opinion influences the legislature's decisions in regard to treatment of unions of public employees (and that the broadcasts of "It's Your City, It's Our Job" were designed to influence the public to look favorably on the Union and its position on issues). You also stated that the 20 thirty-minute programs broadcast by the union outweigh the possible presentation of contrasting issues broadcast on the programs listed by the licensee.

DISCUSSION

Under the fairness doctrine, if a licensee presents one side of a controversial issue of public importance, it must afford a reasonable opportunity for the presentation of contrasting views. The licensee has

[3] In your complaint you state: The product was one sided. Gotbaum was the host even though he was not a public employee. The camera focused on him and the union. They discussed the union's relationship with the city and the people. They showed the organization and power of the union, and the members access to vulnerable public systems. The programs implied that the members and Gotbaum were the "good guys" and the City and the Legislature were the "bad guys." It implied that the members deserved a big union and a big pension, but not prosecutions and fines. During the series no one from the other side was present and contrasting views were not discussed.

an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming. Robust, wide-open debate is encouraged to ensure that the public is adequately informed on issues of public importance and it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission cannot encroach upon the discretion of a licensee in the absence of an apparent abuse of this discretion. *Democratic National Committee et al. v. F.C.C.*, —— U.S. App. D.C. ——, —— F. 2d ——, (decided February 2, 1972; Case Nos. 71–1637 and 71–1723).

Before the Commission can determine whether a licensee has complied with the fairness doctrine, a complainant must present reasonable grounds to support a conclusion that a licensee in its overall programming has failed to comply with the fairness doctrine with regard to specific issues. *Allen C. Phelps*, 21 F.C.C. 21 719 (1970). Other than your allegation that the 20 thirty-minute programs broadcast by the union outweigh the possible spectrum of contrasting issues broadcast by the licensee, your complaint does not demonstrate how the licensee failed in its overall programming to comply with the fairness doctrine on specific issues.

In this regard (although the licensee stated that it had determined that the alleged issue of the relationship between the people of New York City and unions of public employees was not a controversial issue of public importance), we note that the licensee has extensively presented contrasting views on the various issues specifically listed in your complaint.[4]

Furthermore, it is not clear the program series discussed the issues which you find controversial. We note that a program list attached to the licensee's response does not indicate that the program series was explicitly concerned with any of the alleged controversial issues.[5]

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[4] In its response the licensee lists the following: On June 7 the station presented film in which Mayor Lindsay called the strike intolerable and in which Mr. Kheel said that the unions were attacking the wrong people. On the same day there were statements by the news announcers that Governor Rockefeller said he was ready to call the National Guard and a member of the State Legislature said the pension bill referred to by you was dead. There was additional coverage on the news broadcasts on the days following. In addition, on the regularly scheduled one-hour interview program entitled "Straight Talk" Mr. Gotbaum appeared on January 18, 1972, together with Dr. Emanuel Savas, First Deputy City Administrator of New York and Mr. Joel Hartnett, Chairman of the Board of Trustees, the City Club of New York, at which time there was extensive debate relative to the productivity of city employees and the position of Mr. Gotbaum's union in regard to strikes. This program was repeated during prime time on January 23, 1972. In addition, on June 4, Mr. Metzger, President, League of Voluntary Hospitals and Homes in New York, was questioned on the WOR–TV regularly scheduled program entitled "New York Report" in which he discussed negotiations with the unions and the jurisdictional dispute between Local 1199 and District Council 37. He also discussed collective bargaining in the hospital business. On June 11, 1972, Leon J. Davis, the President of Local 1199, Drug and Hospital Union, appeared on the same program and was questioned about collective bargaining. In addition, on the 27th, 28th, and 29th of January, 1972, Mr. John Murray, Vice President Public Affairs, WOR–TV, presented an editorial relating to the "ominous escalation of conflict over salary and benefits for city employees," and supported a proposal that all new city employees except teachers live in the city after their appointment.

[5] Program descriptions of "It's Your City: It's Our Job": *Ambulance Driver and Technician*, October 3, 1971, February 13, 1972; *Park Slope Youth Center*, October 10, 1971, February 27, 1972, December 19, 1971; *Prospect Park Zoo*, October 17, 1971, November 28, 1971, March 12, 1972; *Sewer Workers*, October 24, 1971; *Operation Price Watch*, October 31, 1971; *D.C. 37 School*, November 7, 1971, March 19, 1972; *Lunch Room Workers*, November 14, 1971, March 5, 1972; *Hunt's Point Market*, November 21, 1971, March 26, 1972; *Library Workers*, December 5, 1971, April 2, 1972; *Clericals*, December 12, 1971; *City Puppeteers*, December 26, 1971.

The presentation of a person or an association who was formerly involved in a controversial issue of public importance does not necessarily mean that their presentation of information regarding their present activities raises a controversial issue of public importance; and the appearance of a person or group in a noncontroversial context does not necessarily raise the entire history of that person or group.[6] While it is possible that controversial issues of public importance could be raised implicitly, there is no showing that they were raised in this case. Therefore, on the basis of the information before the Commission and in light of the extensive programming presented by the licensee in regard to strikes of public employees, it does not appear that the action of the licensee was unreasonable. Your complaint is accordingly denied.

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.

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[6] The licensee argued that the fairness doctrine was not intended to mean, for example, that the presentation of Mayor Lindsay discussing trees in Central Park would raise all the controversial issues, present and past, concerning his administration.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
DR. IRVIN J. REINER, HOUSTON, TEX.
Concerning Fairness Doctrine Re National
Broadcasting Co.

NOVEMBER 9, 1972.

DR. IRVIN J. REINER,
8845 Long Point Road,
Houston, Tex.

DEAR DR. REINER: This refers to your complaint alleging that the National Broadcasting Company's "Today Show" presented one-sided coverage of the controversial issue of national health insurance.

You contend that on four programs featuring Dr. Herbert Dennenberg, Insurance Commissioner of Pennsylvania (May 19); Dr. Marshall Goldberg (June 8); Senator Edward Kennedy (June 19); Dr. Russell Roth, President-elect of the American Medical Association, and Elliot Richardson, Secretary of the Department of Health, Education, and Welfare (June 30), views were presented which advocated national health insurance and which were derogatory of private health insurance systems and private doctors and hospitals.

NBC responded to your allegations by explaining the content matter of the programs in question and by providing the Commission with transcripts of them. NBC stated that Senator Kennedy spoke in favor of national health insurance in reference to his book *In Critical Condition* (a summary of the hearings of the Senate Subcommittee on Health) and in reference to his proposed National Health Security Act, but that nothing disparaging was said about private doctors or hospitals; that his views on national health insurance were opposed on a separate program of approximately the same length (June 30) by Elliot Richardson, Dr. Russell Roth, and Charles Sigfried, vice-chairman of the Metropolitan Life Insurance Company, and that none of these men said anything disparaging about private doctors, hospitals or health insurance companies; that the Dennenberg (May 19) and Goldberg (June 8) programs did not present a discussion of national health insurance, but were primarily discussions of Dr. Dennenberg's book *A Purchaser's Guide to Life Insurance* and Dr. Goldberg's book *The Karamanov Equations*, and related topics. In both programs, states NBC, only incidental remarks pertained to the issue of health care. NBC has also provided the Commission with an extensive list of doctors and others associated with the medical profession who, it states, have appeared on the "Today Show" in the recent past and spoke favorably about the medical profession and health care.

The fairness doctrine provides that if a licensee presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views in its

overall programming. No particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. The Commission has stated that the "critical issue is whether the sum total of the licensee's efforts, taking into account his plans when the issue is a continuing one, can be said to constitute a reasonable opportunity to inform the public on the contrasting viewpoints—one that is fair in the circumstances." *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283, 295 (1970). The Commission will not substitute its judgment for that of the licensee and will limit its role to determining whether the licensee acted reasonably and in good faith under the circumstances.

From the information submitted by NBC, which indicates that it has broadcast programs that have permitted persons to present views favorable to the medical profession and the present system of health insurance, it does not appear that the network in its overall programming has failed to provide the public with reasonable opportunity to be informed of the contrasting views associated with these issues.

Enclosed for your further information is a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance." It is hoped that the above will explain the Commission's policies in the general area of your complaint.

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. 72-1000

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JACK O. GROSS, TRADING AS GROSS BROADCASTING CO. (KJOG-TV), SAN DIEGO, CALIF. For Extension of Construction Permit	Docket No. 18377 File No. BMPCT-6661

ORDER

(Adopted November 8, 1972; Released November 14, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, REID AND HOOKS DISSENTING.

1. The Commission has before it for consideration Applications for Review of Review Board Supplemental Decision FCC 22R-126, 34 FCC 2d 780, released May 3, 1972, filed June 2, 1972, by Jack O. Gross, tr/as Gross Broadcasting Company, permittee of proposed UHF television station KJOG-TV, Channel 51, San Diego, California, and by United States International University (USIU); a Supplement to Applications for Review filed jointly on June 27, 1972, by Gross and USIU; the opposition of the Chief, Broadcast Bureau, filed July 3, 1972; and Gross' and USIU's reply, filed July 11, 1972.

2. Accordingly, IT IS ORDERED, That the applications for review, filed June 2, 1972, by Jack O. Gross tr/as Gross Broadcasting Company and by United States International University ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1015

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
ITT WORLD COMMUNICATIONS INC.
Revisions to Tariff F.C.C. No. 43 to provide for leased extension channels between ITT's international leased channel gateway at Miami, Fla., and its New York, N.Y. and San Francisco, Calif., gateways.

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 16, 1972)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. The Commission has before it (a) proposed revisions [1] to its Tariff F.C.C. No. 43 originally filed by ITT World Communications Inc. (ITT) on September 25, 1972, presently scheduled to become effective November 16, 1972,[2] which would allow customers using leased channel service between the Bahamas and Miami to extend such service to the San Francisco and New York gateways; (b) a Petition to Reject or Suspend filed on October 12, 1972, by TRT Telecommunications Corp. (TRT); (c) an opposition to the Petition to Reject or Suspend filed by ITT on October 20, 1972; (d) a Petition to Reject or Suspend filed by The Western Union Telegraph Co. (WU) on October 20, 1972; [3] and (e) a reply to the WU Petition to Reject or Suspend filed by ITT on October 26, 1972.

2. Pursuant to a currently effective Special Temporary Authority (STA) authorizing it to acquire the subject extension lines,[4] ITT

[1] Specifically, the 322nd Revised Page 1, 56th Revised Page 1A, and 3rd Revised Page 49A.

[2] The revisions were originally scheduled to become effective October 26, 1972, but were extended several times. During this period ITT dropped the provisions relating to an extension channel to Washington, D.C., limited the proposed service to customers using leased channel service between the Miami gateway and the Bahamas, and withdrew its proposed half and quarter-speed leased channel extension rates.

[3] The WU petition was received after the period for filing comments had passed. However, in the interest of complete treatment of the issues involved in this matter, we will grant WU a waiver of Section 1.773(b) of the Rules and consider its petition.

[4] On March 20, 1972, ITT filed with the Commission an application (T-C-2227-1) for authority under Section 214 of the Act to acquire on an indefeasible right of user (IRU) basis, one voice-grade circuit in the Florida-Freeport, Bahama Islands Tropospheric Scatter Radio System (TSRS) to provide leased channel service. While this application was pending, ITT, on March 27, 1972, filed an application for STA to cover the same facilities. The STA was granted on March 31, 1972, to extend until September 28, 1972. In a letter dated September 7, 1972, ITT amended its March 20, 1972 application to request additional authority to lease one circuit between its operating office in Miami and its operating office in San Francisco and one circuit between Miami and its New York office; to be used in connection with the leased channel service to be provided through the circuit in the Florida-Bahamas TSRS. By letter dated September 15, 1972, ITT sought (a) extension of the March 31, 1972 STA, and (b) authority to lease the previously requested extension channels. The modified STA was granted on October 2, 1972, extending the earlier STA until March 28, 1973, and authorizing ITT to acquire the subject extension lines.

seeks, in the proposed tariff revisions, to extend Bahamas-Miami private line overseas channels between Miami and San Francisco and between Miami and New York. Currently, ITT is authorized to provide leased channel service between the Bahamas and Miami, and between the Bahamas and New York, ITT is proposing monthly alternate voice/data (AVD) extension channel rates of $1,180.25 and $2,300.75 between Miami and New York and Miami and San Francisco, respectively, and full speed (50 baud) telegraph channel rates between such cities at $730.58 and $1,190.73, respectively. At present, ITT has on file monthly AVD charges of $2,500 for the Bahamas-Miami link and $3,680.25 [5] for the Bahamas-New York through route. Therefore, under its proposed revisions, the charge for an AVD leased channel between the Bahamas and New York would remain as under ITT's presently effective tariff, and the charge for an AVD channel from the Bahamas to San Francisco would be $4,800.75, consisting of the Bahamas-Miami portion ($2,500.00) plus $2,300.75 for the Miami-San Francisco extension.

3. Objections to the proposed AVD extension rates were filed by TRT and WU.[6] TRT does not primarily object to the extension of the voice-grade circuit as such, but rather to the charges and service to be offered for the various uses of the channel. TRT notes that the proposed ITT rates would allow ITT "systematically to underprice" TRT with respect to potential customers. TRT's reasoning is that although ITT claims it will charge the same rates as those now offered by domestic carriers for a voice-grade circuit, it is actually offering a lower rate. TRT alleges that ITT proposes to offer full-duplex service while domestic carriers offer only half-duplex service at the rates proposed by ITT. TRT is concerned because, unlike ITT, TRT is not authorized to provide leased channel service through the New York or San Francisco gateways, so that if TRT has a potential customer in these cities, that customer must obtain his own circuit, full-duplex or half-duplex, between New York and TRT's office in Miami from a domestic carrier, and must pay the published tariff rates established by that carrier. ITT, on the other hand, can go directly to a domestic carrier and itself lease a full-duplex circuit between New York and its Miami office, and employ it to provide the customer's leased channel because ITT is authorized to use New York, Miami and San Francisco as gateway cities. It appears that ITT can negotiate special carrier-to-carrier rates for the circuits between these points lower than the domestic tariff rate. The crux of TRT's concern lies in its belief that it is prejudiced by the fact that a user may lease a full-duplex voice extension channel from ITT at the same charge as would be made by a domestic carrier for a domestic half-duplex voice channel where the customer desires to use TRT between Miami and the Bahamas. For a duplex channel, the domestic carrier would charge 10 per cent more to TRT's customer.

4. WU supports TRT's position and adds a further contention that the tariff revisions should be rejected for failure to supply cost or market data required by Section 61.38 of the Commission's Rules and

[5] The quoted charges include a monthly service terminal charge of $12.50.
[6] We do not discuss herein objections to matter which has been withdrawn.

Regulations to support the lawfulness of what WU characterizes as a reduction in the rate currently in effect for leased channel services between New York (or San Francisco) and the Bahamas. WU also contends that ITT's claim that it is following the existing domestic charges does not justify its request for a waiver of the Rules.

5. The three principal international record carriers, RCA Global Communications, Inc., ITT, and Western Union International, Inc., have been publishing rates and regulations for extension channels connecting the three gateways of New York, San Francisco and Washington, D.C. in connection with leased channel service for ten years. Thus, the present ITT proposal represents a development in a continuing practice, common to the industry, and one which, unless there is some affirmative reason to decide otherwise in this particular case, should be acceptable under present practices.

6. However, addressing the specific question of extension channels to Miami, ITT is not proposing to do anything that is essentially different from what it now does. ITT currently has on file a rate for leased channel service between the Bahamas and New York and is now proposing to provide the same service, at the same rate, with the additional option of allowing customers the flexibility to terminate all or part of their traffic in Miami or New York or San Francisco. Since ITT's current Bahamas-New York service is routed through Miami, the proposal is merely to establish a rate which will result in an identical cost to the customer whether he chooses a through route from the Bahamas to New York, or chooses one with a connection in Miami. With respect to the Bahamas-San Francisco route, the proposal may be said to be for new service, but one which is hardly a significant departure from existing practice. Since TRT does not attack the New York-Bahamas through rate, acceptance of the TRT argument on the extension channel rate could result in an anomaly in that different rates would apply for the same service between the same points.[7] We note as well that WU has offered to attempt to establish through service with TRT from New York [8] which would be competitive with ITT's rates. For these reasons, and in light of the above-mentioned changes made by ITT to the original proposed revisions we see no merit to rejecting, suspending, or setting for hearing the ITT proposals.[9]

7. We do, however, have one problem with the proposed revisions to the ITT tariff. That is, since the tariff revisions have been filed pursuant to a special temporary authority which, by its terms, expires on

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[7] Although it might be argued that the ITT through rate between New York and Miami is inferentially called into question by the TRT position, we do not think the present pleadings are an appropriate vehicle for an examination of the international carriers' rate patterns involving landline costs and charges. It should also be noted that TRT has presently pending an application which would make New York a TRT gateway. A grant of such application would place TRT in the same position as ITT with respect to New York and so mitigate any prejudice to TRT.

[8] Petition of WU, filed October 3, 1972, to Deny TRT's application to use New York as a leased channel gateway (T–C–2498), at pp. 4, 5.

[9] In its amended 214 application, ITT has submitted cost data for the proposed extensions here involved. ITT states that its cost to lease a voice-grade circuit from Miami to New York is $609.00 per month, and its cost for a channel to San Francisco is $1,232 per month. The monthly rates which ITT proposes to charge for a voice-grade channel are $1,180.25 for the New York extension and $2,300.75 for the San Francisco extension (both rates include the monthly terminal charge of $12.50). Even assuming an overhead factor of 40%, added to the charges for the leases, the rates as shown in the tariff are clearly compensatory.

March 28, 1973, the tariff revisions should likewise indicate that they expire on March 28, 1973. The present proposed revisions do not contain any expiration date. However, we shall not take any formal action at this time; provided that ITT amends, within one week, its tariff to include the above-mentioned expiration date of March 28, 1973 (for which special permission is hereby granted to file this change on not less than one day's notice). Failure to comply with this condition will, of course, result in appropriate action on our part.

Accordingly, IT IS ORDERED, That the above-mentioned Petitions to Reject or Suspend filed in this matter by The Western Union Telegraph Company and TRT Telecommunications Corp. are hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1008

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re JOHNSON ALL CHANNELS, INC., FRANKLIN, IND. For Certificate of Compliance	CAC-379 (IN060)

MEMORANDUM OPINION AND ORDER

(Adopted November 9, 1972; Released November 15, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS ABSENT; COMMISSIONERS H. REX LEE, REID AND WILEY CONCURRING IN THE RESULT.

1. Johnson All Channels, Inc., has applied for a certificate of compliance to begin cable television service at Franklin, Indiana, in a major television market (Indianapolis-Bloomington, Indiana #15). This application is opposed by Sarkes Tarzian, Inc., licensee of Television Station WTTV, Bloomington, Indiana, and Indiana Broadcasting Corporation, licensee of Television Station WISH-TV, Indianapolis, Indiana.

2. Johnson intends to commence service with the following television signals:

WTTV (Ind.), Bloomington, Ind.
WISH-TV (CBS), Indianapolis, Ind.
WLWI (ABC), Indianapolis, Ind.
WTIU (Educ.), Bloomington, Ind.
WURD (Ind.), Indianapolis, Ind.
WFYI (Educ.), Indianapolis, Ind.
WFBM-TV (NBC), Indianapolis, Ind.
WGN-TV (Ind.), Chicago, Ill.
WXIX-TV (Ind.), Cincinnati, Ohio-Newport, Ky.

Carriage of these signals would be consistent with the provisions of our rules.

3. Sarkes Tarzian objects to certification on the grounds that the franchise awarded Johnson All Channels, Inc., does not comply with the franchise standards of Section 76.31 of the Rules in the following particulars: that (1) the franchise document submitted by Johnson contains no recitations or provisions which indicate that any of its qualifications or the adequacy and feasibility of its construction arrangements have been considered at all by the City of Franklin much less considered in a full public proceeding affording due process; (2) the franchise contains no significant construction requirements; (3) the franchise period of 20 years exceeds the Commission's 15 year standard, yet no justification is made by Johnson; (4) the franchise contains no conditions requiring that rate changes be made after an appropriate public proceeding affording due process; and (5) there

is no provision in the franchise for the investigation and resolution of subscriber complaints.

4. In its opposition, Indiana Broadcasting presents the same objections to Johnson's franchise detailed in paragraph 3 above, pointing out that the franchise fee may be in excess of the Commission's requirements since Johnson must pay an annual fee of up to 5% on receipts from hook-ups that exceed 3,000, but Johnson has submitted no justifying statement as required by Section 76.31(b). Moreover, Indiana Broadcasting argues, Johnson's access plan is not spelled out in sufficient detail. Finally, Johnson has given no indication that it will comply with the Commission's new syndicated programming exclusivity rules.

5. We deal with these contentions as follows: In paragraph 115 of our *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, we stated that we are modifying our franchise standards so that franchises granted prior to March 31, 1972, may be processed even though they do not meet all the requirements of our new rules so long as there is substantial compliance. An examination of Johnson's franchise shows that the franchise was granted prior to March 31, 1972; that there are provisions for expeditious construction; that subscriber rates may not increase without franchise authority authorization, and that there is a provision for prompt satisfaction of subscriber complaints. In its application, Johnson avers that grant of the franchise was preceded by a public hearing in which its legal, financial and character qualifications were considered. Accordingly, while the franchise provisions are not in full compliance with our standards, there is substantial compliance sufficient to permit grant of the application until March 31, 1977. In view of the relatively short duration of our grant, the excessive franchise period and maximum franchise fee of 5% (which will not apply until after 3,000 hook-ups have been achieved) does not justify denial of this application, see, *CATV of Rockford*, —— FCC 2d —— (1972). Moreover, Johnson's description of its access plans in its application creates a prima facie presumption that it will abide by all our access requirements. And the oppositions have submitted no evidence to rebut that presumption. Finally, there is no requirement that an applicant give assurances that it will comply with any particular rule, and we see no reason to delay action here to seek assurance.

In view of the foregoing, we find that a grant of the "Application for Certificate of Compliance" filed May 10, 1972, by Johnson All Channels, Inc., would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the captioned application for certificate of compliance filed by Johnson All Channels, Inc., IS GRANTED.

IT IS FURTHER ORDERED, That the "Opposition by Sarkes Tarzian, Inc. to Application for Certificate of Compliance," filed June 16, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the "Objection of Indiana Broadcasting Corporation Pursuant to Section 76.7" filed June 16, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 72-1020

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of
MID-MICHIGAN BROADCASTING CORP., CLARE, MICH.
Requests: 990 kHz, 250 W, DA, Day (Facilities of WCRM(AM), Clare, Mich.)
MID-MICHIGAN BROADCASTING CORP., CLARE, MICH.
Requests: 95.3 MHz, #237; 3 kW; 160 ft. (Facilities of WCRM-FM, Clare, Mich.)
For Construction Permits

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 17, 1972)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. The Commission has before it the above-captioned and described applications for authority to operate stations WCRM(AM) and WCRM-FM, Clare, Michigan. Accompanying the applications is a petition for waiver of various procedural rules of the Commission to permit the acceptance of the applications and expeditious processing. The petition also requests that it be granted a temporary authorization to operate the station pursuant to section 309(f) of the Communications Act of 1934, as amended, pending action on the applications for regular authority to operate the stations.

2. Applications of Bi-County Broadcasting Corporation, licensee of stations WCRM(AM) and WCRM-FM, for renewal of the licenses of those stations were designated for hearing by order of the Commission on April 19, 1972 (released April 25, 1972, Docket No. 19492). The hearing proceeding has been held in abeyance in order to permit Bi-County to find a buyer for the physical facilities of the Clare stations. Meantime, the stations ceased operation on June 27, 1972.

3. Bi-County has reached an understanding with the Mid-Michigan Broadcasting Corporation (Mid-Michigan) whereby Mid-Michigan will acquire the technical equipment of the stations for a total of $35,000 and will acquire the real property (land and building) for $18,940. The agreement under which Mid-Michigan will acquire the station is subject to the express contingency that the Commission grant a temporary authorization to operate the stations.

4. Section 309(f) of the Communications Act of 1934, as amended, provides that, notwithstanding the requirement in section 309(b) of the act that an application shall not be granted by the Commission earlier than thirty days following the issuance of a public notice

by the Commission of the acceptance for filing of such application, the Commission may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operation in the public interest, grant a temporary authorization.

5. In ordering a hearing on the WCRM renewals, the Commission specified an issue to determine whether the applicant had complied with various sections of the Commission's rules including a determination as to whether station logs were deliberately falsified by James A. Sanzone, the station manager. Among the bases upon which that issue rested, were allegations in the bill of particulars which the Commission's order directed the Chief of the Broadcast Bureau to serve on the applicant. The bill of particulars alleged, in part:

"Sanzone instructed those working at the station not to sign logs because they did not have valid licenses. They were instructed to read the meters and type the readings into the logs. Sanzone would sign the logs at a later time."

Among those receiving instructions from Sanzone were three of the four principals of Mid-Michigan.

6. In view of the foregoing, it appears that those three Mid-Michigan principals who were working at the station, may have been involved to a certain extent in the alleged falsification of logs by James Sanzone. Under these circumstances the Commission is unable at this time to make the necessary finding regarding the basic qualifications of three of Mid-Michigan's four principals to be principals of a broadcast licensee.[1] Therefore, the Commission is unable to find that a grant of the Mid-Michigan application is otherwise authorized by law within the meaning of section 309(f) of the statute. It follows that the Commission is unable to grant a temporary authorization to operate stations WCRM(AM) and WCRM–FM. Since the agreement under which Mid-Michigan proposes to acquire the Clare stations' facilities is expressly conditioned on the Commission's granting temporary operating authority, the Commission need not, at this time, reach the question of whether Mid-Michigan's request for waiver of various procedural rules should be granted. Therefore, Mid-Michigan's petition will be denied.[2] This action is without prejudice to Mid-Michigan retendering its applications if and when the Clare broadcast facilities may become available.[3]

7. Accordingly, IT IS ORDERED, That the petition for waiver of various sections of the rules and the request for temporary operating authority of stations WCRM(AM) and WCRM–FM filed by the Mid-Michigan Broadcasting Corporation ARE HEREBY DENIED.

8. IT IS FURTHER ORDERED, That the applications of the Mid-Michigan Broadcasting Corporation ARE RETURNED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] If the above allegations were proven, there would be a serious question about the qualifications of the persons involved to the principals of a broadcast licensee.

[2] *Voice of Reason, Inc.*, 20 FCC 2d 291 (1969), 21 FCC 2d 487 (1970).

[3] Although WCRM(AM) and WCRM–FM have ceased operation, the applications for the renewal of those applications are still pending, and, therefore, the authorizations for those stations are still outstanding. See section 307(d) of the Communications Act. Accordingly, one bar to the acceptance of the applications at this time is section 1.516(c) of the Commission's rules which precludes the filing of an application of a frequency assigned to an existing station.

F.C.C. 72–898

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of NATIONAL BROADCASTING COMPANY, INC., ASSIGNOR and OHIO COMMUNICATIONS, INC., ASSIGNEE For Assignment of License of Station WKYC–AM and FM, Cleveland, Ohio	BAL–7553, BALH–1656

OCTOBER 5, 1972.

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE 1954 INTERNAL REVENUE CODE (26 U.S.C. 1071)

On October 5, 1972, the Federal Communications Commission granted its consent to the assignment of the license of Stations WKYC–AM and WKYC–FM, Cleveland, Ohio, from the National Broadcasting Company, Inc. (NBC) to Ohio Communications, Inc. (BAL–7553, BALH–1656).

It is hereby certified that the above assignment of the licenses was necessary or appropriate to effectuate compliance with rules and policies in regard to ownership and control of broadcast facilities, and, more particularly to effectuate compliance with the one-to-a-market interim policy of the Commission as subsequently incorporated in the Commission rules (effective May 15, 1970).

This Certificate is issued pursuant to the provisions of Section 1071 of the 1954 Internal Revenue Code.

In witness whereof I have hereunto set by hand and seal this 5th day of October, 1972.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Appearing eager to effectuate the policies underlying our multiple ownership rules, the Commission today approves the National Broadcasting Company's assignment of stations WKYC–AM and FM to Ohio Communications, Inc. While I certainly approve of our one-to-a-market rule, and would normally endorse any voluntary action by the networks to rid themselves of offending broadcast interests, I believe that, by giving today's assignment its blessing, the majority has helped a bad situation deteriorate.

109–017—72——5

Ohio Communications, Inc., is a brand new corporation—designed for the sole purpose of operating stations WKYC–AM and FM. The President, who is also the corporation's major stockholder, has substantial financial interests in several of Ohio's professional sports teams. For this reason, and also because the assignee proposes to broadcast less news, public affairs, and other non-entertainment programming than did NBC, the Cleveland Local of the American Federation of Television and Radio Artists (AFTRA) opposes this assignment.

The majority has no problems with the assignee's intention to broadcast less news, public affairs, and non-entertainment programming. Indeed, the majority has the gall to assert that the assignee's proposals are "fully consistent with Commission policies"—policies which are not here, and have never been, enunciated.

Entering this void which the majority has stubbornly refused to fill, former Commissioner Kenneth Cox and I proposed, in 1968, a subsistence level of news, public affairs, and non-entertainment programming below which no station's audience should have to suffer. See *Oklahoma Renewal Study*, 14 FCC 2d 1 (1968). That minimum standard—and, indeed, it is a very minimum standard—would have provided that licensees must broadcast at least 5% news, 1% public affairs, and 5% other non-entertainment programming. The majority rejected our suggestion in 1968 and, with a consistency which is seldom seen around here, has rejected it again today. For, not only has Ohio Communications reduced to a ridiculously meager level the amount of news and public affairs it intends to broadcast, but it also proposes to allocate only 3.5% of its stations' time to other non-entertainment programming. Without even a moment's hesitation, the majority stamps this arrangement with approval.

Nor is the majority troubled by the assignee's proposal to broadcast most of what paltry public affairs it does contemplate on Sundays—when it will do the least damage to the assignee's commercial interests and when it will, no doubt, attract the smallest audience. In classic fashion, the majority begs the crucial "public interest" question by satisfying itself that programming "decisions are left to the discretion of the licensee and not altered by the Commission unless not in the public interest."

But perhaps more baffling is the majority's haughty indifference to the danger 1) that the assignee's programming decisions may well be subject to outside influence, and 2) that the assignee's sports interests might carry anti-competitive implications.

First, the assignee's loan agreements provide for certain fixed payments to reduce the borrowings; those agreements also provide that if assignee's net earnings exceed a certain amount, then 50% of said earnings will be paid to the banks to satisfy the loans. The obvious danger in such an arrangement is the possibility that the banks, desirous of having their loans repaid expeditiously from net earnings, might encourage the assignee to devote its broadcast time to what the banks believe are the most lucrative forms of programming. There is also the substantial risk that the content of whatever meager news and public affairs programs *are* presented may be influenced by the financial interests of the banks.

In *The Yankee Network, Inc.*, 13 FCC 2d 1014 (1949), the Commission refused to tolerate such a risk of outside programming influence, stating that an assignee's freedom to operate its station in the public interest "carries with it the duty of independent decision." *Id.* at 1020. The majority, however, maintains that under the instant assignee's financial agreement, the banks will not exercise influence over programming because said banks would lose interest if the loans were repaid in advance of the fixed payment schedule. That, of course, is a highly dubious assumption in that a more rapid repayment of the loans (at a fixed rate of interest), in the context of an economy with rising interest rates, could well prove more advantageous to the banks.

Second, the assignee's principal stockholder and president also controls the local professional sports teams and plans to air their games over his stations. Though the majority at least recognizes the possibility that such an arrangement could have anti-competitive effects, the majority is, nevertheless, content with the fact that "assignee has indicated that steps will be taken to prevent such an occurrence." Nowhere, however, are these "steps" outlined.

The Justice Department has recently sued the networks, arguing that their ownership of the production centers from which they purchase programming violates the antitrust laws. Just as the networks' ownership patterns may foreclose other broadcasters from obtaining programs from such production centers, so the assignee's ownership of the local sports teams might foreclose other broadcasters from having a fair opportunity to air those teams' games.

In the face of such blatant antitrust ramifications, the majority should surely demand more from the assignee than its vague assurances that it will not engage in anti-competitive conduct.

The assignment of stations WKYC–AM and FM to Ohio Communications is thus rampant with problems, problems which may well return to haunt this Commission if, indeed, this Commission is truly concerned about the public interest. It simply makes no sense to sanction this transfer on the sole ground that NBC is doing some good by divesting itself of some of its broadcast interests. For that good has been more than offset by the problems inherent in Ohio Communication's insidious financial arrangements and programming proposals. Any one of these defects should give the Commission pause. That even this combination of defects fails to move the Commission, however, is perhaps a classic illustration of the anything-for-business stance that has come to characterize this "regulatory" agency.

I think NBC should be encouraged to find another buyer, one that would better serve the Cleveland public. I dissent.

F.C.C. 72-1022

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WILLIAM P. JOHNSON AND HOLLIS B. JOHNSON, DOING BUSINESS AS RADIO CARROLLTON, CARROLLTON, GA. Requests: 1330 kHz, 500 W, Day For Construction Permit	Docket No. 19636 File No. BP-17970
FAULKNER RADIO, INC. (WLBB), CARROLLTON, GA. Has: 1100 kHz, 1 kW, Day For Renewal of License	Docket No. 19637 File No. BR-1431

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 21, 1972)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. The Commission has before it for consideration (i) the application of Radio Carrollton for a construction permit; (ii) the application of Faulkner Radio, Inc. for renewal of license; (iii) a petition to deny the application of Radio Carrollton filed by Faulkner Radio, Inc.; and (iv) pleadings in opposition, reply, and supplement thereto.

2. This case arose as a result of a petition to deny the application of Radio Carrollton filed on June 18, 1968, by Faulkner Radio, Inc., licensee of station WLBB, Carrollton, Georgia, requesting that the application be denied or alternatively designated for hearing on the issues requested. Faulkner questioned the character and financial qualifications, and the community survey submitted by the applicant. Radio Carrollton answered with its explanation of the character allegations, as well as additional financial data and community survey information. It also submitted an affidavit of Hollis B. Johnson, a partner of Radio Carrollton, which averred that Robert M. Thornburn, Vice President of Faulkner Radio, Inc., admitted to him in a telephone conversation that Faulkner filed the petition only to delay the grant of the construction permit. Mr. Thornburn deposed in his response that the statements attributed to him were untrue which indicated that Faulkner's petition was interposed for the purpose of delay. Subsequently, numerous supplemental petitions, answers, and replies were filed raising additional questions as to the applicant's character qualifications. The petitioner also questioned the applicant's compliance with 1.65 of the Commission's rules [1] and site availability.[2]

[1] Section 1.65 requires an applicant to provide complete and accurate information for all the matters disclosed in a pending application, and it further requires the applicant to inform the Commission within 30 days whenever there has been a substantial change as to any other matter which may be of decisional significance.

[2] Faulkner has also raised numerous other questions during the pendency of the application; however, they will not be discussed below since they are inconsequential and lacking in merit.

3. The factual disputes mentioned above inextricably connect the applications of Radio Carrollton for a construction permit and Faulkner Radio, Inc., for a license renewal. The Commission will, therefore, consolidate these two applications for hearing, pursuant to section 1.227(a)(1) of the Commission's rules, to permit an orderly resolution of the questions presented. There is no engineering conflict between the two applications.

Character Qualification and Rule 1.65

4. The initial petition to deny filed by Faulkner on June 18, 1968, requested an evidentiary hearing inquiring into the character qualifications of Hollis B. Johnson, a partner in Radio Carrollton and the law firm of Johnson & Johnson. Faulkner based its request upon an affidavit sworn to by Loyd Madden alleging that Johnson fraudulently acquired a parcel of the applicant's property in the course of their attorney-client relationship. Near the end of this relationship, Madden swears, Johnson coerced him into signing a bank deed [3] with no one else present. Subsequently, the deed was completed, witnessed by William Johnson and Linda Jeters, and recorded. Several months after the alleged transaction, Madden filed a petition in bankruptcy. The trustee in bankruptcy instituted a suit against Hollis B. Johnson to recover the property for the benefit of creditors. The case resulted in a court settlement which gave Hollis B. Johnson $800 in exchange for the deed.

5. Radio Carrollton responded to this charge with an affidavit of Hollis B. Johnson and William P. Johnson. The Johnsons deposed that they represented Madden for several years, but never demanded payment for the fees because of Madden's weak financial status. After a falling out with Madden, however, they decided to collect the fees due and owing. To this end, they contend, the deed was accepted as security. The applicant also controverted Madden's claim he was coerced into signing the deed out of a fear that the Johnsons would employ some less desirable method for collection. Madden claimed the Johnsons had previously frozen his accounts in order to collect their fees. An affidavit of E. H. Hearn, President of the West Georgia National Bank, recites that the Johnsons had never frozen Madden's account for a personal indebtedness due Johnson & Johnson law firm. Finally, the applicant submitted numerous affidavits of Carrollton citizens attesting to the high public character of Hollis B. Johnson.

6. Faulkner's response affirmed its original charge and challenged several statements made in the applicant's reply. This challenge, briefly stated, claims that the final billing by the Johnsons showed Madden received $924.40 worth of services, paid $100 on the account, and carried a balance of $824.40. The deeded property, however, was sold for $2,648. In light of these facts, Faulkner asks, how could the

[3] Madden referred to the deed as a "security deed." Likewise, the applicants stated generally that the property was deeded to them as security for the fees due and owing, and, in the event Madden could not pay, the land would be payment. Under Georgia law, a "security deed" is an absolute deed *intended as security*. In such a conveyance, legal title passes to the vendee until the debt secured by the conveyance is fully paid. At the same time, the vendor retains an equitable estate in the premises conveyed. *Merchants' and Mechanics' Bank* v. *Board*, 134 S.E. 187 (Ga., 1926).

applicant's opposition to the petition to deny claim the property was "only partial recompense," and the firm never received any fees from Madden? Those contradictions, concludes the petitioner, cast doubt upon the Johnsons' credibility.

7. A Supplement to the Petition to Deny filed on January 3, 1969, informed the Commission that, among other things, Madden had filed a complaint with the Grievance Committee of the Carroll County, Georgia, Bar Association based on the allegations made above. We subsequently were informed that the Committee investigated the allegations made, and concluded that no disciplinary action was warranted.[4]

8. Upon consideration of all the facts before us, we are not persuaded that additional Commission inquiry into this matter is necessary. Faulkner has attempted to show that the applicant, and specifically Hollis B. Johnson, violated Georgia State law and the Code of Ethics of the Georgia Bar. It has traditionally been our policy to decline to interfere in matters of alleged violation of such laws and ethics where local tribunals have apparently deemed the allegations nonmeritorious. Cf. *Home Service Broadcasting Corporation*, 23 FCC 2d 914, 19 RR 2d 315 (1970); *Home Service Broadcasting Corporation*, 21 FCC 2d 168, 18 RR 2d 63 (1970); *North American Broadcasting Co., Inc.*, 15 FCC 2d 979, 15 RR 2d 311 (1969). The actions raised by Faulkner were alleged in the complaint filed by the trustee in bankruptcy for Loyd Madden in the U.S. District Court for the Northern District of Georgia, and in the complaint presented to the Grievance Committee of the Carroll County, Georgia Bar Association. Neither tribunal made a finding that Hollis B. Johnson nor William P. Johnson acted illegally or with any impropriety. Accordingly, we decline further inquiry into the matter.

Misrepresentation; 1.65

9. In the course of the pleadings, Faulkner raised several questions as to Radio Carrollton's lack of candor and misrepresentation, and failure to comply with rule 1.65. It avers there are several specific instances in the pleading where the affidavits filed by the applicant conflict with theirs in material respects. These recurring inconsistencies, claim Faulkner, create a pattern that shows the applicant has not been truthful with the Commission. The alleged points of conflict are as follows:

(a) During the controversy involving the alleged improper activities of the applicant partners in the course of their law practice described above in paragraphs 3 through 8, Loyd Madden filed a complaint with the Grievance Committee of the Carroll County Bar Association concerning the alleged misconduct. After waiting 30 days, the elapsed time wherein it assumed Radio Carrollton must inform the Commission of this filing, Faulkner informed the Commission that the complaint had been filed, claimed the applicant knew of the complaint, and requested the Commission include a 1.65 issue

[4] Letter from William J. Wiggins, Chairman of Grievance Committee, received August 9, 1972.

against the applicant. It supported its allegations with affidavits sworn to by William J. Wiggins, Chairman of the Grievance Committee, and Dewey Smith, a newly appointed member of the committee, stating that the Johnsons knew of the complaint's pendency for more than 30 days. In response, Hollis B. Johnson swore he could not recall when the committee informed him that a grievance had been filed against him. Subsequently, Faulkner argued that this evasiveness is but a single example of the overall pattern of the applicant's untruthfulness.

(b) Faulkner filed an affidavit of O. S. Whitman, owner of property proposed for the transmitter site, which disclosed for the first time that the option had expired, that he had no present intention of selling the land to the applicant, and that he had communicated this to the applicant. More than 30 days had elapsed from the time Whitman swore he told the Johnsons of the filing of this affidavit. The partners individually replied they were never definitely told the land was no longer available. Although Radio Carrollton subsequently amended its application to specify a new site, the petitioner argues that this does not obviate the 1.65 issue, or the misrepresentation issue since the direct conflict between the affidavits persists.

(c) Finally, Faulkner claims that the applicant has attempted to mislead the Commission as to the facts surrounding the second antenna site. It argues that the site was unavailable because a proposed highway's right-of-way passed over part of the site, and Georgia law prohibits a public official (William J. Johnson was counsel for Carroll County) from contracting with the state for less than adequate consideration. As a result, they argue the lease for the site was invalid *ab initio*. These allegations were supported by an affidavit of the Secretary of the State Highway System Committee, House of Representatives, State of Georgia, and an opinion of Georgia counsel. In response, the applicant moved the site to avoid the proposed right-of-way, and informed the Commission that a grand jury had investigated the lease and found no impropriety. Ultimately, however, the applicant specified an entirely new site. Again, Faulkner complained that the representations made by Radio Carrollton as to the lease are another example of the applicant's misrepresentations and asks that this matter also be placed in issue.

10. All told, Faulkner argues a question as to Radio Carrollton's fitness to be a Commission licensee must be placed in issue as a result of the several enumerated instances of alleged misrepresentations and lack of candor. A misrepresentation issue is not mooted merely because an intervening event, namely the finding by the Grievance Committee that no action is warranted against the Johnsons or the specifying of a new antenna site, removes the substantive issue from Commission consideration. There remains the question whether the applicant misrepresented itself to the Commission. Cf. *Midwestern Broadcasting Co., Inc.*, 19 FCC 2d 691, 17 RR 2d 342 (1969), *FCC* v. *WOWO, Inc.*, 329 U.S. 223, 67 S. Ct. 213 (1946). Accordingly, we will consider the petitioner's allegations of misrepresentation to determine whether the appropriate issues should be included.

11. The petitioner avers the applicant's failure to inform the Commission that a complaint had been filed with the County Bar Grievance Committee raises a 1.65 issue; and the applicant's subsequent evasive response to its pleading informing the Commission that a complaint had been filed requires the inclusion of a misrepresentation issue. It reasons that the applicant was obligated to inform the Commission of this filing because Radio Carrollton had included in its pleading a statement by William J. Wiggins that there had never been any grievances filed against the partners of the application, and because the outcome could be of decisional significance. We do not agree. An applicant is required, as a general matter, to keep the Commission informed of changes in the information requested in the application. This requirement has been modified to the extent that the filing of any lawsuit alleging misconduct must be considered a substantial and significant matter, and must be reported.[5] The filing of a complaint with a grievance committee is not sufficiently analogous, however, to require the reporting of the event. A bar grievance proceeding is, by its very nature, quasi-judicial and normally conducted in a confidential manner.[6] Accordingly, we are not convinced that Radio Carrollton was obligated to report the grievance complaint filed against the Johnsons within 30 days after the filing. If, on the other hand, a grievance committee were to find the applicant violated the Canons of Professional Responsibility, then it should be obvious that the information would be "any other matter which may be of decisional significance" within the purview of rule 1.65. Moreover, we do not regard the alleged discrepancy between the affidavits submitted by the parties of such a nature as to raise a misrepresentation issue.

12. We are not, furthermore, convinced that a misrepresentation issue is warranted based on alleged misleading statements given by Radio Carrollton concerning the second antenna site. The applicant's representations concerning the site location and lease validity have been satisfactorily explained. By Faulkner's own admission, the state did not firmly establish the proposed highway's right-of-way until after the applicant specified a new site.[7] We also note that during the intervening period, the applicant amended the site location to avoid interference with the then referenced right-of-way. Moreover, Radio Carrollton reports in its "Opposition to Further Supplement to Petition to Deny" filed December 13, 1971, the Grand Jury of Carroll County investigated the lease and found no impropriety. The enforceability of this lease is a question of local law. Accordingly, we will not inquire further into the representations made as to the lease since a local grand jury apparently deemed the allegations nonmeritorious. *Home Service Broadcasting Corporation, supra.*

13. Finally, Faulkner alleges that Radio Carrollton's first proposed transmitter site, by virtue of an affidavit of the landowner, was not

[5] *Lorain Community Broadcasting Co.*, 18 FCC 2d 686, 16 RR 2d 946 (1969).

[6] In his sworn statement sent to the Commission to confirm the filing of a grievance complaint against the Johnsons, William J. Wiggins also stated that the statements transmitted "are confidential and shall not be published."

[7] In its "Further Supplement to Petition to Deny" filed November 19, 1971, Faulkner included an article from the *Carroll County Georgian* of November 11, 1971, announcing that the bids for the proposed by-pass will be let in 30 days. Radio Carrollton specified a new site in its amendment filed October 13, 1971.

available, and that the applicant knew this for more than 30 days without notifying the Commission, thus raising a 1.65 issue. It also requests a misrepresentation issue because it avers the affidavits relied upon by the applicant and petitioner conflict in material respects. The applicant denied knowing the site was no longer available and apparently infers, therefore, it could not be expected to report this substantial change. Based on the pleadings, we cannot make a final determination. Accordingly, issues will be included to determine the facts and circumstances concerning the availability of O. S. Whitman's site, to determine whether Radio Carrollton failed to keep its application current and correct, to determine whether the applicant represented itself with candor to the Commission, and to determine, in the event the issues are resolved against the applicant, the effect upon Radio Carrollton's basic qualifications to receive a grant of their proposal.

Abuse of Commission Processes

14. In its opposition to Faulkner's petition to deny, filed July 25, 1968, Hollis B. Johnson deposed that Robert M. Thornburn, Vice President of Faulkner Radio, Inc., contacted him by telephone and discussed the Radio Carrollton application. He swears Thornburn told him that he "[found] it necessary to object to the application" for purposes of delaying the grant of the construction permit because they were experiencing "money problems." The character issue was made only because he (Thornburn) was "grasping at straws." In light of the conversation, concludes Radio Carrollton, this matter should be considered at the time of Faulkner's renewal, and in evaluating the petition to deny. Thornburn deposed in rebuttal that a conversation did take place in the manner and at the time claimed by the applicant. He swears, however, that Johnson misrepresents the substance of the conversation. "Mr. Johnson's affidavit attributes statements to me which I did not make and misconstrues those statements which I did make to him." Since the sworn statements are clearly in conflict and no other information is available, a substantial question of fact exists which must be explored in hearing. Therefore, we will include appropriate issues as to the applicants.

Suburban and Financial Issues

15. Throughout the pendency of the Radio Carrollton application, the petitioner has raised numerous questions concerning the applicant's community survey. Radio Carrollton each time has amended its survey in response to these questions. Therefore, it would be fruitless for the Commission to examine all the specific questions raised. Moreover, the specific Commission requirements have been modified over the past five years. Our examination of the applicant's community survey, when measured against the *Primer*[8] reveals that several deficiencies persist, and we will include a Suburban[9] issue. Specifically, we note that the

[8] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 36 FR 4092, 27 FCC 2d 650 (1970).
[9] *Suburban Broadcasters*, 20 RR 951 (1961).

demographic data does not sufficiently detail the economic, educational, and governmental activities, and any other factors which tend to make Carrollton distinctive. Without this information, we cannot make a determination that the applicant has consulted with leaders from all segments and factions of the community. Finally, the applicant has not indicated the anticipated time segments for the proposed programs.

16. We have also found several deficiencies in Radio Carrollton's financial proposal. The applicant estimates its first-year construction and operating expenses to be $76,519, as follows: down payment and first two (2) months' payments on the equipment lease, $5,009; principal and interest payments on loans, $21,750; land, $9,000; miscellaneous expenses and equipment not covered by lease, $4,722; and working capital, $36,038. To meet these expenses, the applicant relies upon three (3) bank letters for a total of $75,000, and any additional cash which may be needed.[10] The bank letters are now more than a year old, however, and hence unacceptable. The balance sheets for the partners are also more than a year old, and must be updated. Accordingly, we will specify a financial issue in order to examine this further in hearing.

17. Except as indicated by the issues specified below, the construction permit applicant is qualified to construct and operate as proposed, and the renewal applicant is qualified to continue operation. In view of the foregoing, however, the Commission is unable to make the statutory finding that a grant of the subject applications would serve the public interest, convenience and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to section 309 (e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the efforts made by Radio Carrollton 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.

2. To determine with respect to the application of Radio Carrollton:

(a) Whether the commitments by the Commercial Bank, West Georgia National Bank, and Peoples Bank are still available to the applicant;

(b) Whether the partners possess adequate current assets to finance the proposed station; and

(c) Whether, in light of the evidence adduced pursuant to (a) and (b), above, the applicant is financially qualified.

3. To determine whether Radio Carrollton has complied with the provisions of section 1.65 of the Commission's rules by keeping the Commission advised of substantial and significant changes as required

[10] The partnership agreement, in article 10, provides that in the event additional capital is needed the partners will contribute equally.

by section 1.65, and, if not, the effect of such non-compliance on its basic qualifications to be a Commission licensee.

4. To determine whether Radio Carrollton misrepresented itself to the Commission pertaining to the availability of the land owned by O. S. Whitman as an antenna site, and, if so, what effect such conduct has on the basic qualifications of Radio Carrollton to be a Commission licensee.

5. To determine whether Faulkner Radio, Inc., filed its petition to deny for the purpose of delaying the processing of Radio Carrollton's application, and, if so, what effect such conduct has on the basic qualifications of Faulkner Radio, Inc., to be a Commission licensee.

6. To determine whether Faulkner Radio, Inc., or Radio Carrollton misrepresented itself to the Commission in its affidavit submitted concerning the conversation between Robert M. Thornburn and Hollis B. Johnson, and, if so, what effect such conduct has on the basic qualifications of either applicant to be a Commission licensee.

7. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the Radio Carrollton application and/or renewal of the Faulkner license would serve the public interest, convenience, and necessity.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to section 1.221(c) of the Commission rules, in person or by attorney, shall, within 20 days of the mailing of this Order file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended and section 1.594 of the Commission rules give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1006

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re: TELECABLE OF SPARTANBURG, INC., SPARTANBURG, S.C. For Certificate of Compliance	CAC-96

MEMORANDUM OPINION AND ORDER

(Adopted November 9, 1972; Released November 16, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS ABSENT; COMMISSIONERS H. REX LEE AND REID CONCURRING IN THE RESULT.

1. On March 31, 1972, TeleCable of Spartanburg, Inc., filed an application (CAC-96) for Certificate of Compliance for a new cable television system at Spartanburg, South Carolina to operate with 20 channel capacity, and offer approximately 43,000 persons the following television signals: WANC-TV (NBC), WLOS-TV (ABC), Asheville, North Carolina; WFBC-TV (NBC), WSPA-TV (CBS), WNTV (Educ.), and WGGS-TV (c.p.), Greenville, South Carolina; WBTV (CBS) and WRET-TV (Ind.), Charlotte, North Carolina; WAIM-TV (CBS, ABC), Anderson, South Carolina; and WTCG-TV (Ind.), WHAE-TV (Ind.), and WATL-TV (c.p.), Atlanta, Georgia. Public notice of this application was given April 12, 1972. On May 12, 1972, Multimedia, Inc., licensee of Station WFBC-TV, Greenville, South Carolina, filed an "Opposition to Application for Certificate of Compliance"; Spartan Radiocasting Company, licensee of Station WSPA-TV, Spartanburg, South Carolina, filed an "Objection Pursuant to Section 76.17"; and Wometco Skyway Broadcasting Company, Inc., licensee of Station WLOS-TV, Asheville, North Carolina, filed a "Petition in Opposition to Application for Issuance of Certificate of Compliance," all directed against a grant of CAC-96. On June 12, 1972, TeleCable filed a "Reply to Petitions in Opposition and Amendment to Application for Certificate" in which, *inter alia*, it indicated that it would delete its proposal to carry WHAE-TV and WGGS-TV should the Commission not—on reconsideration of the *Cable Television Report and Order*—decide to afford religious stations special status comparable to that afforded educational and foreign language stations. On July 3, 1972, Spartan filed a "Reply of WSPA-TV"; and Multimedia filed a "Response of Multimedia, Inc. to Reply of TeleCable of Spartanburg, Inc." On August 8, 1972, TeleCable filed an "Amendment to Application and Petition for Special Relief" in which it deleted its proposal to carry WHAE-TV and WATL-TV. The City of Spartanburg, South Carolina, on August 22, 1972, filed "Comments in Support of Amendment to Application and

Petition for Special Relief" in which it supports TeleCable's amended proposal as well as supplying further information. And on October 2, 1972, Multimedia filed a "Statement of Multimedia, Inc." in which it advises that it has "no present objection to TeleCable's amended application."

2. In its Petition of May 12, Wometco argues: (a) that TeleCable proposes distant signals in excess of those allowed by Section 76.61 of the Commission's Rules, and (b) that the application is deficient in that it contains no showing that (1) TeleCable's franchise was issued pursuant to a proceeding wherein its legal, character, financial, technical qualifications were considered, (2) that the franchise period is of reasonable duration, (3) that the rates to be charged have been approved by the franchising authority, and (4) that the franchise fee shall be reasonable. In its August 22, 1972, pleading, the City of Spartanburg argues that the qualifications of the successful franchise applicant were considered in full public proceedings, that a twenty year franchise period is necessary to attract necessary capital, that rate changes will be made only after a public proceeding affording due process, that service complaints will be promptly investigated, that the franchisee must maintain a local business office and that the city found that the franchise fee imposed, averaging six and one-half percent, is reasonable. We rule on Wometco's objections as follows: (a) TeleCable cured this problem in its amendment of August 8, and (b) in Par. 115, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 366, we provided that inconsistent franchises issued prior to March 31, 1972 (TeleCable's franchise was issued April 5, 1971), can be processed providing there is substantial compliance, *see CATV of Rockford*, —— FCC 2d —— (1972). Moreover, we provided for issuance of special relief in instances where—in reliance upon an existing franchise—a system has made a significant financial investment or entered into binding contractual agreements. The City of Spartanburg in its comments indicates that it believes TeleCable has expended over one million dollars to fulfill its obligations under its existing franchise. Because of this expenditure and because TeleCable's franchise contains no extreme deviation from the general thrust of our Rules, issuance of the requested certificate is warranted until March 31, 1977. By then, of course, we will expect TeleCable and the City to have renegotiated the franchise in acceptable form.

3. Since Multimedia has withdrawn its objections, the remaining questions are posed by Spartan's Reply which argues: (a) that TeleCable's franchise is not consistent; (b) that TeleCable did not give details concerning compliance with the access channel requirements; and (c) failed to make an unequivocal commitment to comply with the syndicated program exclusivity and network nonduplication rules. We rule on these objections as follows: (a) the franchise qualifies under Par. 115, *Reconsideration*, as explained in par. 2(b), above; (b) TeleCable supplied further information on its access channel plans in its August 8 amendment; and (c) in its June 12 Reply, TeleCable "assures the Commission that it intends to strictly adhere to the letter and spirit of all of the Commission's rules."

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That this "Petition in Opposition to Application for Issuance of Certificate of Compliance" filed May 12, 1972, by Wometco Skyway Broadcasting Company, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Objection Pursuant to Section 76.17" filed May 12, 1972, by Spartan Radiocasting Company, IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certificate of Compliance" filed May 12, 1972, by Multimedia, Inc., IS DISMISSED.

IT IS FURTHER ORDERED, That TeleCable of Spartanburg, Inc.'s application (CAC–96) IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-929

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Request by
TELEDYNE PACKARD BELL, WEST LOS ANGELES, CALIF.
For Waiver of the comparable tuning rules (47 CFR 15.68)

OCTOBER 6, 1972.

MR. GAIL STAKER,
Director of Engineering,
Teledyne Packard Bell,
12333 West Olympic Boulevard,
West Los Angeles, Calif. 90064

DEAR MR. STAKER: This concerns a petition for waiver of the comparable tuning rules (47 CFR 15.68) filed by Teledyne Packard Bell on September 20, 1972.

On June 5, 1972, pursuant to an earlier petition for waiver, Packard Bell was authorized to use continuous tuners in two new receiver models through September 30, 1972, and to count these models toward compliance with the 40% of models compliance figure effective July 1, 1972. Packard Bell had planned to utilize a six-position, motor-driven UHF detent mechanism in these models, which would have permitted remote control UHF tuning. However, the manufacturer of this tuner decided to go out of business and was unwilling to fill orders for the tuner, and Packard Bell found it necessary to remodel its receivers to accommodate different tuners. Though interim use of continuous UHF tuners was authorized, Packard Bell was not permitted to combine such tuners with VHF tuners which could be operated by remote control.

Packard Bell currently produces four receiver models. One of the models which was covered by the earlier waiver has been converted to accommodate a 70-position UHF detent tuner produced by Sarkes Tarzian, Inc. The remote control feature has been eliminated. However, this tuner does not meet the ±3 MHz tuning accuracy standard prescribed by the rules. The second model has been redesigned to accommodate a remotable UHF varactor tuner. However, the varactor tuner will not be available in production quantities until March of 1973. When the UHF varactor tuner becomes available, Packard Bell plans to combine it with a remoted VHF tuner. Packard Bell asks that the tuning accuracy standard be waived for the one model and that use of a continuous tuner through February 1973 be permitted in the second. It has also renewed its request for authority to combine a continuous UHF tuner with a remoted VHF tuner during that period.

The problem of tuning accuracy in the 70-position Tarzian tuner is one which has been called to our attention repeatedly by television

receiver manufacturers who opted for use of that tuner. For reasons stated in our August 30, 1972 letter to RCA Corporation (a copy of which is attached), Packard Bell is authorized to utilize that 70-position tuner in one model through December 31, 1972, subject to the following conditions:

Receivers utilizing tuners produced prior to July 1, 1972 shall meet a tuning accuracy standard of ±6 MHz maximum deviation from correct frequency, as measured by procedures set out in Bulletin OCE 30.

Receivers utilizing tuners produced between July 1 and September 10, 1972 shall meet a tuning accuracy standard of ±5 MHz, as measured by OCE 30 procedures.

Receivers utilizing tuners produced on or after September 11, 1972 shall meet a tuning accuracy standard of ±3 MHz as measured by OCE 30 procedures.

All receivers produced on or after January 1, 1973 shall meet a tuning accuracy standard of ±3 MHz, regardless of the date on which the tuner utilized was produced.

The second part of the waiver request presents different considerations. The ability to offer the remote control feature is an important part of Packard Bell's marketing strategy. To comply with the comparable tuning rules, it redesigned two of its four models to accommodate a six-position tuner adaptable to remote control operation. The tuner manufacturer declined to fill orders for the tuners. Packard Bell has proceeded expeditiously to obtain a substitute tuner for one receiver model which can be remoted and to redesign that model a second time to accommodate that tuner. A waiver is needed because production quantities of the tuner will not be delivered until March 1973 and because both models under consideration are "new models" and must therefore be equipped for comparable tuning. The percentage of models requirement would be satisfied if only one of the two models were so equipped. Packard Bell's plans call for 50% of its models to have comparable tuning by March 1, 1973. As of July 1, 1973, it expects to produce five models, four of which will have comparable tuning. The fifth model may by dropped from the line, in which event the company will have met the goal of 100% compliance a year before it is required by the rules.

The facts presented warrant waiver of the "new model" requirement to permit use of a UHF continuous tuner in one receiver model through February 1973 and to permit Packard Bell to combine a UHF continuous tuner with a remotable VHF tuner during that period. The new model requirement was adopted because it was considered foolhardy for a receiver manufacturer to go through the costly and time-consuming redesign process and not emerge with a receiver which complied with the regulations. It was not meant to apply to a situation in which a manufacturer attempted to design a comparable receiver but was frustrated by the tuner manufacturer's failure to deliver tuners for which the receiver was designed. Having proceeded diligently and in good faith and having failed for reasons beyond its control, the company should not be disadvantaged simply because the receiver utilizes a new solid state chassis introduced after January 1, 1972.

Commissioner Johnson concurring in result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-1010

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
TEXARKANA TV CABLE COMPANY, INC., TEXARKANA, TEX.	CAC–624 TX227
TEXARKANA TV CABLE COMPANY, INC., TEXARKANA, ARK.	CAC–626 AR072
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted November 9, 1972; Released November 15, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS ABSENT; COMMISSIONERS H. REX LEE AND REID CONCURRING IN THE RESULT.

1. On May 30, 1972, Texarkana TV Cable Company, Inc. filed: (a) An "Application for Certificate of Compliance in Accordance with Section 76.13(c) of the Commission's Rules" (CAC–624) in which it seeks approval of a new cable television system at Texarkana, Texas; and (b) An "Application for Certificate of Compliance in Accordance with Section 76.13(c) of the Commission's Rules" (CAC–626) in which it seeks approval of a new cable television system at Texarkana, Arkansas.[1] Public notice of these applications was given June 28, 1972. On July 28, 1972, KSLA–TV, Inc. licensee of Station KSLA–TV, Shreveport, Louisiana, filed: (c) an "Opposition to Application for Certificate of Compliance" directed against a grant of (a) above; and (d) An "Opposition to Application for Certificate of Compliance" directed against a grant of (b) above, at the same time.

2. The only objection to either proposal is that in each case Texarkana TV has agreed to a franchise which requires that it pay an annual fee of 5% of its gross subscription receipts plus an additional annual sum of $1,000. KSLA–TV, Inc., argues that this agreement violates the fee limitation contained in Section 76.31 of the Commission's Rules, and moreover that a franchise providing for a fee in excess of that allowed by Section 76.31 of the Rules cannot be in substantial compliance within the meaning of Par. 115, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 336. We find this argument not persuasive: Par. 115 itself recognizes that,

[1] Texarkana TV filed an application (CAC–625) for a new cable television system at Wake Village, Texas, to operate from the same head end as CAC–624 and CAC–626. This application was not opposed, and was granted by the Chief, Cable Television Bureau, acting pursuant to delegated authority, on October 6, 1972.

109–017—72——6

> "For instance, the delay attendant to renegotiation of a franchise requiring a 6% franchise fee would do more of a disservice to the public we are trying to protect than would the fee itself, which will have, in any case, to be modified within 5 years".

Consequently, we hold that Texarkana TV's franchises are in substantial compliance and may be approved until March 31, 1977, *see*, *CATV of Rockford*, —— FCC 2d —— (1972).

In view of the foregoing, the Commission finds that grant of each of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Application for Certificate of Compliance" filed July 28, 1972, by KSLA–TV, Inc., directed against CAC–624 IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certificate of Compliance" filed July 28, 1972, by KSLA–TV, Inc., directed against CAC–626 IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–624; CAC–626) for Certificates of Compliance ARE GRANTED and appropriate Certificates of Compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1011

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re TULSA CABLE TELEVISION, TULSA, OKLA. For Certificate of Compliance	CAC-8 OK061

MEMORANDUM OPINION AND ORDER

(Adopted November 9, 1972; Released November 15, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS ABSENT; COMMISSIONERS H. REX LEE AND REID CONCURRING IN THE RESULT.

1. On March 6, 1972, Tulsa Cable Television filed an application (CAC-8) for certificate of compliance for a new cable television system at Tulsa, Oklahoma. The proposed system was to operate with 27 channel capacity to offer approximately 328,000 persons the following television signals. KTEW (NBC), Tulsa, Oklahoma; KOTV (CBS), Tulsa, Oklahoma; KTUL-TV (ABC), Tulsa, Oklahoma; KOED-TV (Educ.), Tulsa, Oklahoma; KTVT (Ind.), Ft. Worth, Texas; and KBMA-TV (Ind.), Kansas City, Missouri.[1] Public notice of this application was given April 12, 1972. On May 12, 1972, Leake TV, Inc., licensee of Station KTUL-TV, Tulsa, Oklahoma, filed an "Objection to Certification," and Corinthian Television Corporation, licensee of Television Broadcast Station KOTV, Tulsa, Oklahoma, filed an "Objection of Corinthian Television Corporation Pursuant to Section 76.17" both directed against a grant of CAC-8. And on August 16, 1972, Tulsa Cable filed both an "Amendment" and a "Reply of Tulsa Cable Television to Objections to Certification."

2. In its "Objection to Certification," Leake alleges: (a) that Tulsa Cable is planning to carry more than two distant signals on a regular basis; (b) that this is being accomplished by proposing carriage of KBMA-TV—which does not operate full time at present—in lieu of an available station (such as KDTV, Dallas) which would not leave time open for substitutions; (c) that Tulsa Cable's franchise does not comply with the requirements of Section 76.31 of the Commission's Rules since: (1) it is to continue in effect until revoked; (2) the franchise fee ranges from 4% to 6% (with additional costs for furnishing free service) and yet there is no showing either that (i) Tulsa Cable can pay it and maintain other services, or (ii) that any city regulatory program justifies the fee; and (d) that Tulsa Cable may have overcommitted its channel capacity. In its Objection, Corinthian argues (to the extent its arguments do not duplicate Leake's): (e) that (similar

[1] When KBMA-TV was not on the air, Tulsa Cable planned to carry programs from KDTV (Ind.), Dallas, Texas, or KPLR-TV (Ind.), St. Louis, Missouri.

to (a) and (b) above), Tulsa Cable should not be allowed to present other signals when KBMA–TV is not broadcasting; (f) that Tulsa Cable has not alleged that its franchise was adopted after a full public proceeding affording due process; (g) that the franchise does not provide for a public proceeding before rates can be changed; (h) that the franchise makes no significant provision for investigation and resolution of complaints; (i) that the franchise makes no provision for changes made necessary by changes in this Commission's requirements; (j) that there is no construction timetable and possibility of abuse exists in determining where significant construction will take place; (k) that there is no detailed showing of how the Commission's access standards will be satisfied; and (l) that Tulsa Cable has not indicated that it intends to comply with the Commission's new syndicated exclusivity rules.

3. We rule on the objections as follows: (a) (b) (e) these issues have been mooted by Tulsa Cable's amendment of August 16 wherein it deleted its request for certification of KBMA–TV, and instead requested certification of KDTV; (c) (1) Tulsa Cable states that it will accept a certificate of compliance containing a 15 year term, renewable only upon recertification by the franchising authority. We find this offer to be acceptable, and therefore proceed on the understanding that Tulsa Cable will voluntarily seek franchise renewal by June 25, 1986, *LVO Cable of Shreveport-Bossier City*, FCC 72–954, —— FCC 2d ——. (2) the discrepancy in the franchise fee is not so great as to bar the franchise (granted June 25, 1971) from being approved as in "substantial compliance" within the meaning of Par. 115, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 366; (d) this argument is entirely hypothetical since it assumes without apparent basis that Tulsa Cable will first direct its channel capacity to uses other than those required by our rules. As a practical matter, we do not believe it likely that Tulsa Cable will so quickly run through its 27 channels of capacity. And even assuming *arguendo* that it did, there is no reason to think it could not expand its channel capacity as contemplated by our rules; (f) both Tulsa Cable and Robert J. LaFortune, Mayor of Tulsa, have supplied information to establish that the franchise was issued only after an exhaustive public proceeding; (g) the franchise mechanism for rate changes is that the cable operator may file a proposal which the city may disapprove after a public hearing if it wishes. This appears adequate protection for the public under the circumstances; (h) Tulsa Cable states that it has established and will maintain an office in Tulsa so that maintenance service will be promptly available to its subscribers. Further, the franchise (in its "Standards of Good Engineering Practice") requires Tulsa Cable to investigate and dispose of all customer complaints; (i) Tulsa Cable states that—if the Commission modifies Section 76.31 of the Rules in a manner inconsistent with its permit—it will "apply to the franchising authority so as to secure within one year of adoption of the modification or upon renewal of its permit, whichever occurs first, a modification of its permit consistent with the Section 76.31 modification." As in (c) (1), above, we find this offer to be acceptable and proceed upon the basis of this express representation; (j) Tulsa Cable

is required by its franchise to commence construction within 30 days of receipt of all necessary authorizations, and to complete construction to all developed areas within 18 months thereafter. While this timetable does not formally correspond to the literal requirements of Section 76.34(a)(2) of the Rules (which requires a "significant" amount of construction within one year of certification), it assures completion of construction in less time than required by the Commission's rules. In these circumstances, we can see no reason to object to the technical variation in terms when the net effect is completely consistent with our policies; (k) the specific objection—that there is no specially designated channel for local government uses—has been resolved by the August 16 amendment which provides for such a channel. And the more general objection—that more specific plans should be provided for access channels—seems premature at best; and (l) the Commission's rules do not require the requested assurance and no good reason is given to show that it should be sought. In summary, our review of Tulsa Cable's proposal persuades us that it is in substantial compliance with our rules and policies sufficient to warrant a grant until March 31, 1977, *see*, *CATV of Rockford*, —— FCC 2d —— (1972).

In view of the foregoing, the Commission finds that a grant of the subject application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection to Certification" filed May 12, 1972, by Leake TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Objection of Corinthian Television Corporation Pursuant to Section 76.17" filed May 12, 1972, IS DENIED.

IT IS FURTHER ORDERED, That Tulsa Cable Television's application (CAC–8) IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-994

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WLCY-TV, INC. (WLCT-TV) LARGO, FLA. For Construction Permit	Docket No. 19627 File No. BPCT-4484

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1972; Released November 17, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it (a) the application (BPCT-4484) of WLCY-TV, Inc. (WLCY), licensee of television broadcast station WLCY-TV, channel 10, Largo, Florida, filed on December 15, 1971; (b) a petition to deny filed on January 24, 1972, by Hubbard Broadcasting, Inc. (Hubbard), licensee of television broadcast station WTOG, channel 44, St. Petersburg, Florida; (c) a petition to deny filed by the Sarasota-Bradenton Florida Television Company, Inc. (Sarasota), licensee of television broadcast station WXLT-TV, channel 40, Sarasota, Florida; (d) WLCY's opposition filed April 7, 1972; (e) a reply filed on May 17, 1972, by Hubbard Broadcasting, Inc.; (f) a reply filed May 17, 1972, by Sarasota-Bradenton Florida Television Company, Inc.; and related pleadings.[1]

2. Station WLCY-TV is currently authorized to operate with a nondirectionalized antenna with a horizontal visual effective radiated power of 316 kW from an antenna height of 500 feet above average terrain at a transmitter site located approximately 2.6 miles north of Tarpon Springs, Florida. WLCY originally proposed to merely increase its antenna height from 500 feet to 1,493 feet above average terrain; but, on April 7, 1972, WLCY reacted to the petitions by amending its application to move its tower 50 feet and specifying a directionalized antenna system, which reduced its signal strength toward both Sarasota and St. Petersburg.

3. Both Hubbard and Sarasota compete for audience and revenues with station WLCY-TV, and, under these circumstances, have standing as parties in interest within the meaning of section 309(e) of the Communications Act of 1934. *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). Hubbard alleges that a grant of the WLCY application will result in adverse UHF impact; that the proposed tower would constitute a hazard to both air

[1] On June 9, 1972, WLCY filed a motion for leave to file rejoinder and a rejoinder to replies to opposition to petition to deny. On June 22, 1972, Hubbard filed an opposition to WLCY's motion, and alternatively filed a motion for leave to file reply to rejoinder and a reply to the rejoinder. On July 5, 1972, WLCY filed an addendum to its rejoinder.

navigation and to persons in the area; that the property owned by WLCY would not be sufficient for the proposed tower; that the applicant has not been candid with the Commission with respect to its activities before the FAA; that the applicant's performance with respect to past programming promises raises an issue; and that the applicant's previous wage and hour violation raises an issue. In addition to the UHF impact issue, Sarasota raises questions of possible anti-competitive practices by station WLCY–TV. WLCY argues that in view of the amendment to directionalize the proposed antenna system to suppress radiation towards Sarasota and St. Petersburg, the UHF impact issue is now moot. Moreover, WLCY argues that the current FAA determination of no hazard has already answered the question of whether the proposed tower would constitute an air hazard. With regard to the remaining requested issues, WLCY offers a general denial.

4. In order to view this decision in the proper perspective, a brief summary of the history of the allocation and authorization of channel 10 to Largo is of value. Following a rule-making proceeding, the Commission, in 1957, allocated channel 10 to Tampa-St. Petersburg, Florida. *Tampa Drop-In Case*, FCC 57–568, 14 RR 1663. At that time, the Commission contemplated channel 10's transmitter would be located northwest of Tampa-St. Petersburg, at a site which would meet all of the Commission's mileage separation requirements. Following the allocation, WLCY (then named WTSP–TV, Inc.) and five other applicants, filed competing applications for channel 10. All six applications specified transmitter sites located approximately 25 miles northwest of Tampa, which would meet all mileage separation and city coverage requirements. In 1958, due to aeronautical considerations, it became apparent that a tower with sufficient height to place a principal city signal (77 db) over either Tampa or St. Petersburg, could not be constructed at the proposed sites. WLCY and four of the five applicants therefore petitioned the Commission to waive the mileage separation requirements to permit channel 10's transmitter to be located south of Tampa, and approximately 35 miles short of the required 220-mile separation to channel 10, Miami. The Commission refused to waive the mileage requirements. *Florida Goldcoast Broadcasters, Inc.*, FCC 58–1012, 17 RR 871. The applicants thereafter were permitted to amend their applications to specify Largo, Florida, as their station location in order to meet the principal city coverage requirements of the rules. After a comparative hearing, the Commission, in November 1964, issued a construction permit to WTSP–TV, Inc. *Florida Goldcoast Broadcasters, Inc.*, FCC 64–1009, 4 RR 2d 1. In February 1965, the Commission denied reconsideration of the grant of the construction permit. *Florida Goldcoast Broadcasters, Inc.*, FCC 65–28, 4 RR 2d 81; affirmed *Florida Goldcoast Broadcasters, Inc. v. Federal Communications Commission*, 112 U.S. App. D.C. 250, 352 F 2d 726, 6 RR 2d 2001. In January 1966, WLCY filed an application (BPCT–3700) for a construction permit to relocate its transmitter 37.5 miles southeast of its present location and increase its antenna height to 1,463 feet above average terrain. Since the proposed transmitter site would have been 38 miles short-spaced to the Miami co-channel station, a waiver of

section 73.610(b) of the rules was requested. The Commission designated the application for hearing to determine whether a waiver of the minimum mileage spacing requirements would be warranted and to determine whether the proposal would create any UHF impact. In addition, an issue was specified to include a determination as to whether WLCY could obtain FAA clearance for additional height at the existing site. With respect to this issue, both the Hearing Examiner and the Review Board found that the FAA would not approve increased height at the existing site. The Commission ultimately denied WLCY's application and found that a grant would have a substantial adverse impact upon UHF development, and that the applicant had not justified waiver of the spacing requirements. *WLCY–TV, Inc.*, 16 FCC 2d 506 (1969). On September 29, 1970, the Commission denied WLCY's petition for review of the Review Board's decision, and denied a motion to reopen the record on the UHF impact issue. *WLCY–TV, Inc.*, 25 FCC 2d 832. WLCY then petitioned for reconsideration of the Commission's denial of its motion to reopen the record on the UHF impact issue, and the Commission denied that petition. 28 FCC 2d 353, 21 RR 2d 572 (1971). Thereupon, this application was filed.

5. In support of its request for inclusion of a UHF impact issue, Hubbard has submitted an engineering report showing that 170,286 persons residing in Polk County, Florida, presently receive Grade A service from station WTOG, and do not presently receive any service from station WLCY–TV. The report further states that WLCY's proposed directionalized operation, would for the first time, provide Grade A service to 59,205 persons and Grade B service to 138,048 persons residing in Polk County. With respect to increased impact upon station WXLT, Sarasota claims that WLCY's proposed Grade B contour would, for the first time, encompass 10% of the area and 21.1% of the population of Sarasota County, Florida, and that WLCY's proposal would intensify its signal to 72,334 persons residing in Manatee County, Florida. Sarasota further argues that the extension, for the first time, of WLCY–TV's Grade B service to 49,000 persons residing in Sarasota and Manatee Counties, will have a substantial adverse impact upon its operation.

6. WLCY argues that any increase in its viewers in Polk County would probably come from persons watching ABC's Orlando affiliate, WFTV, channel 9, and further, that WTOG's Grade A signal in Polk County would continue to give it a competitive advantage over WLCY–TV's proposed Grade B signal. WLCY contends that there would be no significant change in the present overlap situation between stations WLCY–TV and WXLT–TV, and assuming WTOG's projections are accurate, the maximum adverse impact on station WTOG would not exceed 2% of the station's audience, and would not exceed 4% of WXLT's present viewing audience. WLCY further argues that this minimal impact should be permissible under the Commission's "small wind of competition" doctrine,[2] and that under

[2] *VHF channel assignment at Mount Vernon, Illinois*, 17 RR 2d 1620, aff'd. *sub nom Plains Television Corporation v. FCC*, 440 F 2d 276 (D.C. Cir. 1971).

the circumstances, no useful purpose would be served by further evidentiary inquiry into the matter.

7. The Commission's longstanding UHF impact policy arose out of a realization that the development of a viable system of UHF broadcasting would not occur without providing protection against VHF stations. *Triangle Publications, Inc. v. FCC*, 291 F 2d 342 (1961). *WLVA, Inc. v. Federal Communications Commission*, 23 RR 2d 2081. The Commission's desire to foster the development of UHF broadcasting is well known and there has been no basic change in this policy. After a careful review of all the allegations, the Commission finds that the petitioners have raised a substantial question of fact regarding UHF impact. WLCY's reliance upon *Soillcom, Inc.*, 31 FCC 2d 656, 22 RR 2d 1012 (1971), and *Selma Television, Inc.*, 29 FCC 2d 522, 21 RR 2d 1151 (1971), for rejection of a UHF impact issue is misplaced. In *Soillcom* the Commission was concerned with an unaffiliated VHF's moving closer to its community of license. In doing so, it reduced overlap with five UHF stations while slightly increasing the overlap with two established network affiliated UHF stations. Moreover, the overlap would only occur at the periphery of their predicted coverage areas. The Commission also rejected a UHF impact argument with respect to an unaffiliated UHF in Paducah, Kentucky, on the grounds that since there would be no overlap between the Grade B contours, the argument as to injury was speculative. In the *Selma* case, *supra*, the determination not to specify a UHF impact issue was based upon the fact that the proposal involved a slight increase in effective radiated power from 2.51 kW to 25.1 kW, and a small increase of 3% to 4% in population in the overlap area. The Commission stated that petitioners had failed to show how the minor increases in population in the gain area would have a significant economic impact on UHF stations in Montgomery, Alabama.

8. In the case at hand, it is clear that the proposed modification contemplates a substantial increase in coverage area with a concomitant increase in population. Moreover, this increase occurs within those areas of dominant influence of the two petitioning UHF stations.[3] With respect to station WXLT, an ABC affiliate, it is noted that the station is not presently receiving any network compensation because it has not yet reached a sufficient circulation rate. The extension of WLCY's signal into Sarasota and Manatee Counties will undoubtedly have an impact upon this aspect of WXLT's operation. Using the applicant's figures, we find that under the existing facilities, WLCY's Grade B contour encompasses 72,334 persons (74.5%) in Manatee County, and under the proposed facilities, 94,974 persons (98.8%) would be included within the Grade B contour. WLCY's present Grade B contour does not penetrate Sarasota County. Under the proposed operation, 25,461 persons (21.1%) would be within the WLCY Grade B contour. Since WLCY's proposed Grade B contour would, for the first time, encompass 49,000 persons residing in WXLT's area of dominant influence, we cannot conclude that the

[3] ARB County Report for Florida—1971 Share of hours study shows Polk County to be in WTOG's area of dominant influence and Sarasota County to be in WXLT's area of dominant influence.

resulting impact would be minimal. Using WLCY's figures, WTOG presently serves 100% of Polk County and WLCY serves only 56,218 persons, or 23% of the population. The proposed operation would increase WLCY's coverage to 197,253 persons, or 86.8% of the population. WLCY urges that most of the gains in this area will be at the expense of the Orlando VHF. Nevertheless, to the extent that WTOG and WLCY compete in Polk County, the increased competition is substantial. As indicated above, this case is clearly distinguishable upon the facts from the *Selma* and *Soillcom* cases, *supra.* As recently as March 1971, in *WLCY–TV, Inc., Docket No. 17051*, 28 FCC 2d 353, the Commission stated its policy with respect to UHF development had not changed, and that until "UHF becomes substantially equal and fully competitive, the question of 'UHF impact' must continue to be of substantial concern". We find that the petitioners have raised a substantial question of fact with respect to UHF impact, and an appropriate issue will be specified.

9. Hubbard argues that there are substantial and material questions of fact as to whether WLCY's proposed tower would constitute a hazard to air navigation. Hubbard has submitted an affidavit of an aviation consultant, describing the proposed tower as a hazard to visual flight air navigation and states that the proposed lighting of the tower would not alleviate the air hazard. Hubbard asserts that the FAA grossly underestimated the number of flights within the area of the tower. An affidavit of three pilots who fly VFR in the vicinity, further states that in the event of a tower increase, U.S. Highway 19 would no longer be available to pilots to use as a navigational guide. Hubbard contends that the Federal Aviation Administration's determination of no hazard [4] should not preclude the Commission from making its own determination with regard to whether or not the proposed tower would constitute an air hazard. WLCY argues that it is not necessary for the Commission to decide whether it has the statutory authority or administrative expertise to review a no hazard determination by the FAA because Hubbard has not made factual allegations not previously considered by the FAA. Citing *Antenna Farms*, 8 FCC 2d 559, 10 RR 2d 1514 (1967), WLCY argues that the Commission has never asserted either the authority or the intention to review and reverse a final determination of no hazard by the FAA.

10. Section 309(a) of the Communications Act of 1934, as amended requires the Commission, before granting an application, to make a finding that the public interest, convenience and necessity will be served. In exercising this responsibility, the Commission must consider all relevant matters, including the height and location of proposed antenna structures, and will designate applications for hearing, if it is deemed necessary, to determine the possible existence of hazards to air navigation. This jurisdiction over antenna structures has been consistently recognized by Congress, the Courts and the FAA. Because of this statutory obligation, the Commission can not delegate to the FAA the authority to make the final determination as to whether or not an application should be denied because it will result in the creation

[4] The determination was issued by the FAA's Southern Region Office on September 2, 1971, and was affirmed by the FAA's Air Traffic Service on December 3, 1971.

of a hazard to air navigation, nor can the Commission grant the application simply because the FAA has made a no hazard determination. However, the Commission relies heavily on the FAA's expertise, and will not designate an air hazard issue in the face of a no hazard determination by the FAA, unless of course, the facts presented to the Commission raise a substantial and material question of fact under section 309(e) of the Communications Act of 1934, as amended. After considering all of the pertinent facts in this case *de novo*, the Commission finds that the petitioners have not alleged sufficient facts to require the Commission to reject the FAA's findings, and will, therefore, not specify an air hazard issue.

11. In support of its request for the inclusion of a "candor" issue, Hubbard states that WLCY, on November 27, 1970, requested the FAA to study the feasibility of an increase in height to its present tower, and in support of a petition for reconsideration,[5] submitted a letter dated September 30, 1970, from James G. Rodgers, Director, Southern Region Federal Aviation Administration, stating that his office felt that aviation would best be served if WLCY's present tower were relocated. Hubbard argues that between November 27, 1970, and March 26, 1971, when the Commission denied WLCY's last petition for reconsideration, WLCY failed to inform the FAA that the Rodgers letter was being presented before the Commission with its application (BPCT-3700), and failed to inform the Commission of its pending request before the FAA. Hubbard alleges that the pursuance of these inconsistent courses of action and the failure to disclose, warrants the inclusion of a "candor" issue. WLCY argues that it was caught between two federal agencies, and that it should not be penalized for pursuing an alternative plan of action prior to the complete exhaustion of a prior course. The Commission finds that, although under the circumstances, it would have been advisable for WLCY to inform the Commission and the FAA of its dual actions, this failure to disclose does not constitute sufficient reasons to warrant the inclusion of a "candor" issue.

12. Hubbard has requested the inclusion of a "promise v. performance" issue, specifying programming, studios, personnel plans, remote broadcasts, program advisory committee and implementation of contacts as areas of discrepancies. WLCY's opposition states that the issue is not germane to its application, and, citing *Moline Television Corp.*, 31 FCC 2d 263, 22 RR 2d 745 (1971); argues that the issue is of little significance in view of the period of time and the changes in events which have occurred. In view of the passage of fifteen years since WLCY filed its initial program proposals, the Commission finds that no useful purpose would be served by comparing those proposals to the station's present programming. While basic qualifications issues, including "promise v. performance", are always germane to any application filed with the Commission, it appears that an examination of these 1957 program proposals would not yield a significant measure of revelant information. In the event Hubbard desires to pursue its allegations regarding WLCY's programming proposals contained in

[5] Denied, 28 FCC 2d 353, 21 RR 2d 572 (1971).

their 1969 renewal application, it will have ample opportunity to do so when WLCY's license comes up for renewal in February 1973.

13. Hubbard further argues that the property owned by WLCY is not large enough to accommodate the necessary guy wires for the proposed tower. It appears that this issue is now moot since WLCY has entered into an agreement to purchase three parcels of land adjacent to its present site for the purpose of assuring adequate space. With respect to Hubbard's concern that the proposed tower might constitute a danger to the lives and property of persons living near the structure, WLCY has submitted information demonstrating that the new tower will be safe and that all precautions will be taken to assure against any accidents. Since Hubbard has not offered any factual basis for inquiring into the safety of the structure, an issue will not be specified.

14. Hubbard further argues that WLCY's failure to disclose a January 22, 1969, consent decree regarding a wage and hour violation in its 1966 application to change antenna site (BPCT–3700) and in its 1969 renewal application (BRCT–616) constituted violations of section 1.65 of the Commission's rules, and requests the Commission to specify an appropriate issue. WLCY admits that it failed to report the consent decree in either of the above applications, and although we do not condone these failures, since the consent decree has long since been fully complied with, and is not the type of judgment which seriously reflects upon the corporation's qualification to be a licensee, we believe that no useful purpose would be served by specifying an issue on the matter.

15. In order to obtain the full schedule of ABC network programming, Sarasota, in September 1971, agreed to pay WLCY $2,000 per month for the right to establish bridging equipment in WLCY's control room, and for the right to rebroadcast WLCY's off-the-air signal should the bridging equipment fail to operate. This agreement was limited to the carriage of ABC network programming, and did not grant WXLT permission to rebroadcast any of WLCY's non-network programming. Sarasota alleges that WLCY rejected all of its requests for permission to rebroadcast off-the-air syndicated programs. Sarasota further alleges that on several occasions WLCY invoked exclusivity clauses to prevent WXLT from carrying the same program, and on at least one occasion stated that it would refuse to purchase a particular program if it were sold to WXLT. Sarasota requests the inclusion of an issue to determine whether WLCY has used its economic position improperly to deny WXLT access to programming.

16. WLCY argues that the difficulties experienced by WXLT in obtaining rights to syndicated programming resulted from a mistaken belief of various syndicators that the common service area between WXLT and WLCY would preclude delivery of programming to both stations. WLCY claims that it has never exerted any pressure upon film syndicators to withhold programming from WXLT, and argues that its refusal to permit WXLT to rebroadcast certain programming is permissible since its agreement with WXLT did not confer a blanket privilege to pick up all non-network programming.

WLCY submits that it has now reduced its fee to WXLT from $2,000 per month to $500 per month, that it has agreed to waive all market exclusivity clauses, and that it stands ready to renegotiate its network pickup agreement with WXLT. WLCY states that it is fully aware of the Commission's longstanding policy that rebroadcast rights should not be unreasonably withheld and contends that it has no intention of violating this policy in the future. The Commission must, however, concern itself with WLCY's past relationship with station WXLT. The fact that WLCY has now agreed to make some programming available to WXLT does not remove questions regarding its past actions. Sarasota's allegations that WLCY has engaged in anti-competitive practices by improperly using its economic position to deny WXLT access to syndicated programming, raise substantial and material questions of fact which can only be resolved in a hearing. For this reason, an appropriate issue will be specified.

17. We have carefully considered all of the matters raised in the various pleadings and, except as indicated by the issues specified below, we find that the applicant is qualified to operate as proposed. The Commission finds, however, that substantial and material questions of fact have been raised, and is, therefore, unable to make the statutory finding that a grant of the application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for an evidentiary hearing on the issues set forth below.

18. Accordingly, IT IS ORDERED, That pursuant to section 309 (e) of the Communications Act of 1934, as amended, the above-captioned application IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine whether a grant of the application would impair the ability of existing and prospective UHF television stations to effectively compete in the Sarasota, St. Petersburg and Tampa areas.
2. To determine whether WLCY–TV, Inc., has engaged in anti-competitive practices in its relationship with WXLT, and, if so, whether WLCY–TV, Inc., is qualified to remain a licensee of the Commission.
3. To determine, in light of evidence adduced pursuant to foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

19. IT IS FURTHER ORDERED, That, to the extent indicated above, the petitions to deny filed by Hubbard Broadcasting, Inc., and Sarasota-Bradenton Florida Television Company, Inc., ARE GRANTED, and in all other respects ARE DENIED.

20. IT IS FURTHER ORDERED, That Hubbard Broadcasting, Inc., and Sarasota-Bradenton Florida Television Company, Inc., ARE MADE PARTIES to this proceeding.

21. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence with respect to issues 1 and 2 IS HEREBY PLACED on the petitioners, and the burden of proof with respect to all issues IS HEREBY PLACED upon the applicant.

22. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicant and the petitioners herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall within twenty (20) days of the mailing of this Order file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594 of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*