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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 73–899

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ALABASTER CARPHONE CO., HELENA, ALA.	Docket No. 19806 File No. 811–C2–P–72
TELPAGE, INC., TUSCALOOSA, ALA. For Construction Permits for New Facilities in the Domestic Public Land Mobile Radio Service	Docket No. 19807 File No. 1468–C2–P–72

MEMORADUM OPINION AND ORDER

(Adopted September 6, 1973; Released September 12, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. Before the Commission for consideration are the captioned applications to establish new two-way radiotelephone stations to operate on the 152.12–158.58 MHz frequency pair at Alabaster and Tuscaloosa, Alabama in the Domestic Public Land Mobile Radio Service (DPLMRS). Alabaster and Tuscaloosa, Alabama are only about 45 miles apart, and the applications are mutually exclusive, because the grant to both to operate on the same radio channels in the same locality would result in mutually harmful electrical interference. Since both applicants appear to be legally, financially, and otherwise qualified to construct and operate the proposed facilities, the applications must be designated for comparative hearing to determine which applicant is better qualified to operate the proposed facilities in the public interest. *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

2. The application of Alabaster Carphone Co. ("Carphone") was filed on August 12, 1971. It appears from the application that Carphone was at the time of filing the original application a partnership of W. Rene Hill and Wallace Glasscock. Each partner had a 50% financial interest in the partnership; however, by letter dated February 8, 1972, the Carphone application was amended to show Mr. W. E. Glasscock to be the sole owner of Carphone, having purchased the partnership interest formerly held by W. Rene Hill. Mr. Glasscock is also the sole owner of Radio Dispatch Service, which is the licensee of Radio Station KIJ 352 operating in the DPLMRS in the Birmingham, Alabama, area. Prior to February 15, 1971, Mr. Glasscock was also the owner of Radio Dispatch Service which was the licensee of DPLMRS Radio Station KIY 733 in the Huntsville, Alabama, area. However, this station was sold for $13,000 pursuant to FCC consent dated January 1971.

3. The cost estimated by Carphone to establish its proposed facilities, as disclosed by its application, is $4,500. (Carphone Application, filed August 12, 1971, p. 5). A balance sheet submitted as Exhibit 8 to the same application discloses Mr. Glasscock's Current Assets to be $30,448.42 out of Total Assets of $120,848.44. Although Current Liabilities were stated to be $39,208.77, Deferred Liabilities were $10,318.43 with a Net Worth of $71,321.74.

4. Technically, Carphone proposes to operate its base station from a transmitter location in Helena, Shelby County, Alabama at a point 3 miles west of Highway 31 South at Alabaster, with 15F2 and 16F3 emissions and Input/Output powers of 220 and 120 watts. A Motorola Type CC 3040 C transmitter is also proposed, as well as a Decibel Products DB 224 E antenna and a Belden RG–8 transmission line. Carphone's antenna is to be located on top of a watertank mast, with the top of the antenna to be 130.5 feet above ground level. Appropriate frequency measuring equipment will be used to insure frequency stability. Mr. Glasscock will be in control of the proposed station, but installation and maintenance will be performed by Mr. Joe Cameron who holds First Class Radio Operator's License P 1613097.

5. The Carphone application was the subject of an informal protest filed February 18, 1972 by Telpage, Inc., ("Telpage") the other competing applicant in this proceeding. The grounds of the informal protest are two: first, that Carphone did not have a proper certificate of Public Convenience and Necessity from the State of Alabama, as required by Section 21.15(C)(4) of our Rules, and, second, that the change in identity from a partnership to a proprietorship by Carphone amounted to a major amendment of the Carphone application, and thereby constituted grounds for its dismissal. We are of the view that the protest ought to be denied because, first, Carphone does have a proper certificate from the State of Alabama to serve the Alabaster area; and, second, the change in the business organization of Carphone does not constitute a major amendment of its application. The original Carphone application (Item #42, Exhibit 6) stated that the applicant did not intend to interconnect its station with the telephone company landline system "at that time", but if and when it did it would obtain appropriate state approval.

6. It appears that this state approval was sought, and obtained in PSC orders of April 26, 1972 and May 5, 1972. In its April 26, action [1] the Alabama Public Service Commission ("PSC") found that Mr. Glasscock had been issued an Alabama Certificate of Public Convenience and Necessity on March 16, 1964 to operate a "Miscellaneous Common Carrier Service", and that he had requested recertification as required by the Alabama Radio Utility Act, No. 1595, enacted September 28, 1971. The Alabama Commission's opinion further recited that Mr. Glasscock had entered into an interconnection agreement with the South Central Bell Telephone Company, and it found that there would be in the future a public need and necessity for the service offered or proposed by Mr. Glasscock. It further found that the applicant has the "facilities, experience, personnel and financial

[1] *W. E. Glasscock d/b/a Carphone Radio Telephone Dispatch Service* (Informal Docket No. U–2493).

ability to provide the public with the service contemplated", and that the contemplated service to the general public within its service area would be at rates which are "reasonable, uniform, and non-discriminatory" (PSC Op. & Order, p. 2). Mr. Glasscock was issued a certificate, therefore, authorizing him, subject to the licensing requirements of the FCC, to operate as a miscellaneous common carrier in intrastate communications, furnishing both interconnected two-way service and one-way radio service on a secondary basis within 40 miles of its base station in Birmingham, Alabama. The appropriate tariffs and rates on file by Mr. Glasscock with the FCC were considered to be the appropriate tariffs and rates for furnishing Mr. Glasscock's portion of the service being authorized by the Alabama Commission.

7. On May 5, 1972, the Alabama PSC in its Docket No. 16513, held that Carphone did not need a new certificate to serve Alabaster since Mr. Glasscock, its owner, already held a Certificate of Public Convenience and Necessity. The PSC held, however, that the certificated area already defined in the certificate was not to be enlarged. Alabaster is approximately 20 miles south of Birmingham; and Carphone, by letter dated May 6, 1972 to the Commission stated that the contour of its proposed station would be wholly confined within a circle of 40-mile radius of Birmingham. We conclude, based upon the foregoing, that Carphone has the requisite certificate of Public Convenience and Necessity, as required by Alabama law and our Rules (Section 21.15 (c)(4)).

8. The Telpage contention that the change of Carphone's business organization from a two-person partnership in which each partner has a 50% investment, to a proprietorship constitutes a major change in Carphone's application requiring its rejection, must be overruled. First, under Section 21.23(c) of the Rules, the amendment of the Carphone application does not fall within the category of examples described; it does not change a frequency; improve operating characteristics, enlarge service contours or materially alter the nature of its proposed service; nor do we consider it to be otherwise a major amendment of the Carphone application. Mr. Glasscock, prior to dissolution of the partnership, had a 50% ownership interest (or negative control) of Carphone. After the amendment Mr. Glasscock has sole control; but his prior responsibilities for the day-to-day operation of the station remain unaffected. Likewise, the responsibility for maintenance of the transmitter appears unaffected. Considering all the circumstances, we deem the change in ownership in Carphone to be one which does not materially alter the nature of the proposed service within the meaning of Section 21.23(d) of our Rules,[2] and we therefore, do not consider it to be a major change in its application.

9. Telpage is an Alabama Corporation, with its principal office located in Birmingham, Alabama, and was formerly known as Paresco, Inc. The principals of Telpage are Mr. Charles L. Escue, President and Mr. James T. Parsons, Vice President. Both are 49% stockholders, whose wives each own 1% of Telpage stock. Mr. and Mrs. Escue are

[2] Section 21.23(d) states: "Amendments other than major amendments within the meaning of paragraph (c) of this section, will be considered on a case-by-case basis, and if found to materially alter an existing or proposed station, will be deemed to be a major change and will thereafter be listed in a public notice and subject to the provisions of Section 21.27."

the sole stockholders and officers of Birmingham Communications, Inc., of Birmingham, Alabama, which employs approximately 12 persons in the installation and maintenance of communications equipment.

10. Telpage's financial qualifications are demonstrated in a balance sheet dated July 31, 1971 showing Total Current Assets of $3,958.86 and Total Stockholder's Equity of $4,712.76. Construction costs, estimated to be $8,000 for base station construction and $15,000 for 15 mobile units, are to be met under the terms of a standard Motorola lease-purchase agreement requiring 10% down and the balance payable in 60 months. Under terms of the Agreement, Telpage would pay $2,300 down, with the balance spread over 60 months.

11. Telpage proposes to erect its antenna at a point approximately 4 miles southeast of the Tuscaloosa County Court House, at a point 900 feet southwest of 2715 Skyland Boulevard. A Motorola Type CC 3040 C base station transmitter with 15F2/16F3 emission, with transmitter Input/Output powers of 220 and 120 watts, respectively, is proposed; and the mobile units will be FCC Type-Accepted. The Telpage antenna will be mounted on top of a 180-foot tower, and the top of the antenna will be 199 feet above ground. Maintenance of the Telpage transmitter will be provided by Chism Communications Service, Tuscaloosa, Alabama. Mr. Taylor Chism holds FCC Radio Telephone License Number P1–6–11089.

12. Telpage has a certificate issued by the Alabama Public Service Commission (PSC) on May 1, 1972, permitting it to offer to the general public in its service area within a 40-mile radius of Tuscaloosa, Alabama, two-way mobile radio communication service interconnected with the facilities of South Central Bell Telephone Company ("Bell"). The PSC found that the services offered by Telpage are essentially different from the service that Bell is presently authorized to offer in the same area, in that Telpage will provide message relay service and will transmit and relay messages as a secretarial service to its customers. The PSC found that there is presently and there would be in the future, a public need and necessity for the service proposed by Telpage, and that Telpage has the facilities, experience, personnel, and financial ability to provide the service contemplated. The PSC certificate issued to Telpage is subject to the licensing requirements of the FCC, and the requirement that the tariffs and rates filed by Telpage with the FCC are the appropriate tariffs and rates for furnishing Telpage's portion of the service authorized by the PSC.

13. Since it appears that both applicants are legally, financially, and otherwise qualified to construct and operate their proposed stations, IT IS ORDERED, pursuant to Sections 309(d) and (e) of the Communications Act of 1934, as amended (47 U.S.C. §§ 309(d) and (e)), That the captioned applications of ALABASTER CARPHONE COMPANY, and TELPAGE, INC., are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING upon the following issues:

1. To determine the nature and extent of services proposed by each applicant, including the rates, charges, personnel, practices, classifications, regulations, and facilities pertaining thereto.

2. To determine the total area and population to be served by Alabaster Carphone, Inc. within the 37 dbu contour of its proposed station, based upon the

standards set forth in Section 21.504 of the FCC Rules and Regulations; and to determine the need for its proposed service in that area.[3]

3. To determine the total area and population to be served by Telpage, Inc., within the 37 dbu contour of its proposed station, based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations; and to determine the need for the proposed service in that area.[3]

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the above-captioned applicants would better serve the public interest, convenience and necessity.

14. IT IS FURTHER ORDERED, That the hearing shall be held at the Commission offices in Washington, D.C. at a time and place, and before an Administrative Law Judge, to be specified in a subsequent order.

15. IT IS FURTHER ORDERED, That the Burden of proof upon Issue 2 is upon Alabaster Carphone Company; the burden of proof upon Issue 3 is upon Telpage, Inc.; and the burden of proof upon Issues 1 and 4 is upon both applicants.

16. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, is made a party to the proceeding.

17. IT IS FURTHER ORDERED, That applicants and party respondent may avail themselves an opportunity to be heard by filing with the Commission pursuant to Section 1.221(c) of the Commission's Rules within twenty days of the release date hereof, a written notice stating an intention to appear on the date set for the hearing and present evidence on the issues specified in this Memorandum Opinion and Order.

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

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[3] Section 21.504(a) of the Commission's Rules and Regulations describes a field strength contour of 37 decibels above one microvolt per meter as the limit of the reliable service area for base stations engaged in the one-way communications service. Propagation data set forth in Section 21.504(b) are a proper basis for establishing both the location of the service contours and the areas of harmful interference for the facilities involved in this proceeding.

F.C.C. 73-964

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application BELK BROADCASTING CO. OF FLORIDA, INC. For Renewal of License of Radio Station WPDQ, Jacksonville, Fla.	Docket No. 19126 File No. BR-1186

APPEARANCES

James A. McKenna, Jr., *Robert W. Coll* and *Jonathan Schochor* (McKenna, Wilkinson & Kittner) on behalf of Belk Broadcasting Co. of Florida, Inc.; *Martin J. Gaynes* (Cohn and Marks) on behalf of Don W. Burden; and *Thomas B. Fitzpatrick* and *Charles W. Kelley* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

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

COMMISSIONER BURCH (CHAIRMAN) FOR THE COMMISSION; COMMISSIONER ROBERT E. LEE, ABSENT; COMMISSIONERS JOHNSON AND H. REX LEE DISSENTING; COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. In 1970, the Commission designated the WPDQ renewal application for hearing [1] on the following issues:

(1) To determine whether the licensee made misrepresentations to the Commission or was lacking in candor in statements and documents given to the Commission in the course of its inquiry into the operation of Station WPDQ.

(2) To determine whether the licensee willfully or repeatedly failed to observe the provisions of Section 509(a)(3), (4) or (5) of the Communications Act.

(3) To determine whether the licensee at all times has exercised control or supervision over the operation of WPDQ in a manner consistent with the responsibility of a licensee.

(4) To determine whether ownership or control of Station WPDQ was at any time transferred to another party or parties without a finding by the Commission that the public interest, convenience and necessity would be served thereby, in violation of Section 310(b) of the Communications Act.

(5) To determine whether the licensee broadcast announcements which misled the public regarding the value of the prizes to be made available at certain times of the day during the broadcast of the "$60,000 Thank You" and "Green Satellite" contest in 1967.

(6) To determine whether the licensee willfully or repeatedly failed to observe the provisions of Section 73.112(a)(2)(iii) of the Commission's Rules and Regulations in July or August of 1967 in connection with the broadcast of announcements sponsored by Paks Zippy Food Mart or Duval Motors.

(7) To determine whether the licensee willfully or repeatedly violated Section 317(c) of the Communications Act of 1934.

[1] Order, FCC 70-1257, 35 FR 18692, published December 9, 1970. See also FCC 71-180, released March 2, 1971. Reconsideration denied, FCC 71-485 and 71-486, both released May 10, 1971.

(8) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the applicant possesses the requisite qualifications to be and to remain a licensee of the Commission.

(9) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the grant of the captioned application would serve the public interest, convenience and necessity.

2. Hearings were held before Administrative Law Judge Chester F. Naumowicz, Jr. between August 4, 1971, and January 4, 1972. In his Initial Decision, Mimeo No. 84545, FCC 72D–31, issued May 9, 1972, the Judge ultimately resolved all issues in the licensee's favor except Issue No. 2, under which he found that, in two instances, the winners of contests were predetermined. He concluded that this misconduct is not disqualifying, that the licensee possesses the requisite qualifications to remain a licensee of the Commission, and he granted the application. The proceeding is now before the Commission on exceptions to the Initial Decision, filed by the Commission's Broadcast Bureau.[2] Oral argument was heard before the Commission *en banc* on April 30, 1973.

3. This proceeding was initiated following a field inquiry into WPDQ's operation which was conducted as a result of a report which Belk himself filed with the Commission. Briefly, the events which led to the report are as follows. Although WPDQ was rated "number one" in the Jacksonville market, ARB's audience figures for WPDQ were falling in 1967. Henderson Belk, the president and sole stockholder of Belk Broadcasting Co. of Florida, Inc., was convinced by conversations with another broadcaster that its market position and revenues could be improved by conducting promotional contests. Four such contests were conducted in 1967, without accomplishing the anticipated results. At least two of the contests were improperly run. Dino Summerlin, a disc jockey who (in the fall of 1967) was later promoted to program manager, carried out two schemes to rig the outcome of the contests. The "winner" of an automobile, in one instance where the outcome of a contest was predetermined, was unhappy with his share of the proceeds from the sale of the automobile and called the automobile dealership and complained. Belk was advised of the allegations. He retained the services of a lawyer, Frank Godfrey, to investigate the charges and to determine the facts. Godfrey's report to Belk concluded that there had been two instances of contest rigging in 1967, and that Dino Summerlin had been engaged in other misconduct.[3] Belk fired Summerlin and filed a copy of the report with the Commission. The Commission conducted its own investigation of the matter in 1968, and, thereafter, this proceeding was initiated. The findings set forth in the Initial Decision under Issues No. 2 and 7 more fully describe the above misconduct. While serious, these facts do not disqualify Belk as a licensee of the Commission. The crucial evidentiary

[2] Belk Broadcasting Co. of Florida, Inc. filed a statement in support of the Initial Decision on June 26, 1972. The Broadcast Bureau filed exceptions to the Initial Decision and a brief in support thereof on June 27, 1972, to which the licensee filed a reply on August 22, 1972. Don W. Burden filed a statement concerning the Broadcast Bureau's exceptions on August 22, 1972. Also before the Commission are six unopposed petitions to amend the WPDQ renewal application filed by the licensee on various dates between June 13, 1972, and April 6, 1973.

[3] Dino Summerlin had outside interests in promoting dance bands. He induced other DJ's at WPDQ to include spots promoting dances which were not logged until after the billing process had been completed. As a result of these procedures, Summerlin did not pay WPDQ for the advertising and his sponsorship was not identified.

issues are therefore Issues No. 1, 3 and 4,[4] which are potentially disqualifying in nature. The following summary of the Administrative Law Judge's findings and conclusions under these issues will serve as a background for the parties' contentions to the Commission.

4. For a number of years Henderson Belk met Don W. Burden[5] at business and social events, and, as a result of these meetings, they developed a mutual interest in the possibility of increasing WPDQ's revenues by programming promotional contests on Station WPDQ, at which Burden had considerable experience. Finally they discussed the possibility of Burden's advising Belk on how to make the changes in sales techniques and programming which promotional contests would entail, and, in 1967, they reached an understanding that they would proceed with a consultancy arrangement. They were advised by legal counsel to enter into a written agreement embodying the terms of their understandings, and to use letters whenever possible so that a written record would be developed which would rebut any inference that control of WPDQ passed from the licensee to the consultant. An agreement was executed by Belk and Burden on July 7, 1967 and filed with the Commission on July 19, 1967. Under the terms of the agreement, Belk agreed to compensate Burden for his services as a consultant, and Burden agreed to advise Belk on how to conduct promotional contests at WPDQ.

5. Only the general manager was informed of the consultancy agreement. In the following months, many on WPDQ's staff believed that Star Stations personnel were in control of the station. In particular Tom Devaney and Steve Brown created this impression. Tom Devaney came to WPDQ under the following circumstances. In March 1967, Belk advised Burden that he needed a new sales manager and Burden stated that one of his salesmen (Tom Devaney) was capable of such responsibility but Burden had no position to offer him. It was agreed that Belk would offer Devaney the position of sales manager at WPDQ. Devaney consulted with Burden and Burden advised him to accept the offer. Devaney reported to WPDQ in early April, 1967.[6] Devaney was in direct contact with Burden and Star Stations personnel during 1967 regarding various aspects of the contests which were conducted at WPDQ. To the remainder of the staff, it appeared that Devaney had remained associated with Star Stations. However, the Judge rejected proposed findings submitted by the Broadcast Bureau to the effect that Devaney was "Burden's man at WPDQ"; that Devaney's role in WPDQ operations demonstrates that Burden assumed control of Star Stations personnel; and that Belk, in asserting that Devaney did not come to WPDQ as part of the consultancy "package", has misrepresented the facts to the Commission. He found and concluded that Devaney was an employee of Belk, paid by him, and that Devaney looked to Belk—not Burden—for management and supervisory decisions at WPDQ.

[4] The Broadcast Bureau concedes that Issue No. 6 was correctly resolved in Belk's favor. Issues No. 8 and 9 are conclusory issues.

[5] Don W. Burden is the principal stockholder of Star Stations, Inc. whose subsidiaries are the licensees of radio stations WIFE and WIFE–FM at Indianapolis, Indiana; KOIL–AM–FM at Omaha, Nebraska; and KISN at Vancouver, Washington.

[6] During the Commission's field inquiry, Belk was asked whether Devaney came to WPDQ as a part of the consultancy agreement and Belk replied "Yes, sir . . ." The Judge found, however, that Belk had amplified his response to indicate that Devaney's employment was not a condition or part of the consultancy agreement nor any "deal" with Burden.

6. The Judge further found that in March, 1967, Burden sent Steve Brown, vice president of Star Stations, to Jacksonville on his behalf to observe WPDQ's operation and to study the market. Brown made five or seven subsequent visits to WPDQ, each of 2 or 3 days duration. Brown testified that his instructions were to report back to Burden any recommendations he had. Burden testified that his understanding was that Brown would report to him; that he (Burden) would make recommendations to Belk; and that Belk would direct the staff to make any changes at WPDQ which he desired. Members of the WPDQ staff testified that Brown gave the impression on these visits that he had the power to hire and fire; that, in fact, he hired one disc jockey and promoted another to program manager; that Brown called staff meetings and gave orders changing programming; and that they believed the station was being run from Star Stations' headquarters in Omaha. The Judge found, however, that while Brown overstepped his proper role under the consultancy arrangement, and gave the impression that he was a man in authority, the staff's impressions were erroneous; that Belk, in fact, hired and promoted the two men mentioned above; that Belk continued to make the management decisions at WPDQ, as Burden well knew; and that Belk did not delegate management's prerogatives at any time to either Burden or Brown.

7. One additional allegation, that Belk misrepresented facts to the Commission, has been inquired into in this proceeding regarding the preparation of eleven "letters" at a meeting between Belk and Burden in August of 1967. During the month following the execution of the consultancy agreement, there were numerous oral discussions between Belk and Burden regarding sales techniques, contest promotions, and further meetings. It then occurred to them that counsel's advice regarding letter-writing had been overlooked (See Para. 4 above). In an unfortunate attempt to comply with counsel's advice, they composed eleven "letters" which, on their face, appeared to be exchanges of written correspondence between the two men regarding matters which had, in fact, been discussed orally. They exchanged copies of the "letters" at that time and placed them in their respective files. Subsequently, one set of these "letters" was given to legal counsel by Burden's secretary.[7] Counsel was unaware of the method in which the "letters" were prepared, and on May 21, 1968, transmitted them to the Commission during the time when the Commission's staff was considering the implications of the consultancy agreement and the misconduct which the licensee had brought to the Commission's attention.[8] Although the transmittal letter indicated that a carbon copy went to Belk, his recollection with regard to its receipt was imperfect at the time of the hearing.[9] Regarding these "letters," the Judge con-

[7] At that time, Belk and Burden retained the same law firm for communications matters.

[8] In Footnote 18 to the Initial Decision, the presiding Judge found that WPDQ was not under investigation by the Commission at the time the "letters" were transmitted to the Commission, nor did Belk have reason to anticipate one. We do not subscribe to this finding inasmuch as by May 21, 1968, when the transmittal letter was sent, Belk had forwarded his attorney's report on contest rigging and knew that the Commission's staff was inquiring into the operation of WPDQ. The "letters" were thus transmitted in the context of inquiry by the Commission's staff into these matters.

[9] The Judge found that although a copy of counsel's transmittal letter was sent to Belk, he testified that he had no recollection of having received it; and that this testimony, in light of the circumstances and Belk's demeanor, was credible.

cluded that, although the preparation of them does not reflect credit upon Belk and Burden because their purpose could only have been to create the impression that the exchanges of information has taken place in writing instead of orally, nevertheless, in the circumstances in which they were submitted they do not constitute disqualifying misrepresentations to the Commission.

8. Assessing the record as a whole, the Judge concluded that the only misconduct which has been proven on this record is that relating to the rigged contests, for which a denial of the renewal of license would be an inappropriate sanction; that the licensee possesses the qualifications to remain a licensee; and that the public interest will be served by renewal of WPDQ's license. He, therefore, granted the application.

9. The Commission's Broadcast Bureau, in its exceptions and brief and at oral argument, argues that Belk should have taken more effective measures to prevent contest rigging; that Belk had foreknowledge that Summerlin was a "bad apple," who would avail himself of the opportunity to take personal advantage of the large prizes being given away, which in fact occurred; and that Belk was absent from the station and did not make management decisions, creating a void in supervision and management which was quickly filled by Burden's men (Steve Brown and Tom Devaney). The Bureau asserts that Belk thus acquiesced in Burden's assumption of control of WPDQ and that an illegal transfer of control occurred without the Commission's prior consent. The Bureau also contends that Belk made misrepresentations to the Commission: (a) in submitting the "letters" to the Commission and (b) in his contradictory statements regarding whether Devaney was hired as a part of the consultancy arrangement. The Bureau argues that the Judge's resolution of these matters in the licensee's favor is contrary to the record and should be reversed.

10. The licensee admits the two instances of contest rigging and Summerlin's self-dealing in running spots for dance bands for which Summerlin did not pay. The licensee maintains, however, that these matters were first brought to the Commission's attention by the licensee; that no further misconduct has been proved; that Belk made all management decisions during this time; and that, once Belk was apprised that there may have been misconduct at the station, he took prompt, effective measures to determine the facts and prevent any recurrence, including firing the station personnel involved, ceasing the big-prize contests, and terminating the consultancy agreement. The licensee maintains that Belk was not personally involved in any of the misconduct, and that the denial of the renewal application for the misconduct here involved would be an inappropriate sanction and inconsistent with Commission precedent.

11. We are of the opinion that the Judge's appraisal of the circumstances surrounding Devaney's employment at WPDQ agrees with the record evidence, and we affirm the findings to the effect that Belk did not misrepresent the facts and that Devaney was not "Burden's man at WPDQ." There is no substantial evidence that the consultancy agreement was a subterfuge to cover a transfer of control, and the inferences upon which the Bureau relies for the proposition that Belk

acquiesced in an unauthorized assumption of control by overly aggressive personnel from Star Stations do not find sufficient record support to warrant reversal of the Judge's findings.

12. Nor are we convinced that Belk made any other deliberate misrepresentation to the Commission. The record demonstrates that Belk made the management decisions throughout this period. This fact belies the inference that a transfer of control occurred, which is an essential element of the Bureau's position that the "letters" are misrepresentations. It is not logical that Belk would rely upon the "letters" to establish that no unauthorized transfer occurred, when in fact he had retained *de facto* control over the operation throughout the consultancy period. We agree with the presiding Judge's evaluation of the "letters" as an attempt to comply with counsel's advice—not an attempt to mislead the Commission. We, therefore, reject the Bureau's contention that the submission of the "letters" by counsel constituted a deliberate misrepresentation.

13. For the above reasons, we are convinced that the Judge's conclusions that Belk did not misrepresent facts to the Commission or abandon control of WPDQ are reasonable and are supported by the record. Clearly, however, WPDQ's experiment with big-prize promotions was not accompanied by adequate precautionary measures to prevent misconduct, and serious misconduct did in fact occur. Absent the stringent measures taken by the licensee to investigate and terminate the conditions which had prevailed at WPDQ in 1967, the facts here adduced would have had serious implications as to the licensee's qualifications to remain a licensee of the Commission. On this record, however, we believe that the Judge has properly evaluated the facts, and that renewal of the license application is warranted. The findings and conclusions of the Administrative Law Judge, as set forth in the Initial Decision, are adopted except as modified in our rulings on exceptions.

14. Accordingly, IT IS ORDERED That the WPDQ renewal application filed by Belk Broadcasting Co. of Florida, Inc. IS GRANTED.

15. IT IS FURTHER ORDERED That the unopposed petitions to amend the application filed by Belk Broadcasting Co. of Florida, Inc. on June 13, 1972, June 21, 1972, December 22, 1972, January 29, 1973, March 28, 1973, and April 6, 1973 ARE GRANTED and the amendments ARE ACCEPTED.

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

APPENDIX

Rulings on Exceptions of the Chief, Broadcast Bureau, to the Initial Decision

EXCEPTIONS TO FINDINGS

Exception No.	*Ruling*
1–6, 9–11, 14–16, 18–19, 21 and 23–30.	*Denied.* The Administrative Law Judge's findings adequately and accurately reflect the evidence of record.
7–8, 12–13 and 17	*Granted.* The grant of these exceptions does not, however, materially affect the underlying basis for the Judge's conclusions.
20 and 22	*Granted* to the extent indicated in Footnote 8 to this Decision and *otherwise denied.* At the time Belk's counsel forwarded the "letters" to the Commission on Belk's behalf, both the licensee and counsel were aware that the Commission's staff was inquiring into WPDQ's operation. However, for the reasons set forth in the Decision, we are not convinced that any deliberate misrepresentation occurred.

EXCEPTIONS TO CONCLUSIONS

Exception No.	*Ruling*
31	*Granted* to the extent that the first sentence of paragraph 63 of the I.D. is inconsistent with our rulings on Bureau Exceptions No. 20 and 22 to the Findings, and *otherwise denied.*
32–44 and 46–47	*Denied.* The conclusions of the presiding Judge accord with, and accurately reflect, the evidence of record.
45	*Denied.* Section 317 rather than Section 508 of the Communications Act is the applicable provision with regard to the payola/plugola practices inquired into, as is clear from the order of designation.

F.C.C. 72D-31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BELK BROADCASTING CO. OF FLORIDA, INC. For Renewal of License of Radio Station WPDQ, Jacksonville, Fla.	Docket No. 19126 File No. BR-1186

APPEARANCES

Robert W. Coll and *John L. Tierney* (McKenna, Wilkinson and Kittner) on behalf of Belk Broadcasting Co. of Florida, Inc.; *Marcus Cohn, Joel H. Levy* and *Martin J. Gaynes* (Cohn and Marks) on behalf of Star Stations of Indiana, Inc. and Don W. Burden; and *Charles W. Kelley* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

(Issued May 9, 1972; Released May 12, 1972)

PRELIMINARY STATEMENT

1. By Order released December 3, 1970, the above-captioned application was designated for hearing on the following issues:

1. To determine whether the licensee made misrepresentations to the Commission or was lacking in candor in statements and documents given to the Commission in the course of its inquiry into the operation of Station WPDQ.
2. To determine whether the licensee willfully or repeatedly failed to observe the provisions of Section 509(a)(3), (4) or (5) of the Communications Act.
3. To determine whether the licensee at all times has exercised control or supervision over the operation of WPDQ in a manner consistent with the responsibility of a licensee.
4. To determine whether ownership or control of Station WPDQ was at any time transferred to another party or parties without a finding by the Commission that the public interest, convenience or necessity would be served thereby, in violation of Section 311(b) of the Communications Act.[1]
5. To determine whether the licensee broadcast announcements which misled the public regarding the value of prizes to be made available at certain times of the day during the broadcast of the "$60,000 Thank You" and "Green Satellite" contests in 1967.
6. To determine whether the licensee willfully or repeatedly failed to observe the provisions of Section 73.112(a)(2)(iii) of the Commission's Rules and Regulations in July or August of 1967 in connection with the broadcast of announcements sponsored by Paks Zippy Food Mart or Duval Motors.
7. To determine whether the licensee willfully or repeatedly violated Section 317(c) of the Communications Act of 1934, as amended.

[1] The presence of this issue led to Commission instructions that the same Hearing Examiner who heard this case should preside at hearings involving the renewal applications for the Star chain of stations, and that in each case he should "take cognizance" of relevant portions of the record in the other proceeding. In an order released March 2, 1971, the Commission explained that the Examiner was not, in fact, to consider evidence in the Star hearing in resolving this proceeding unless such evidence should be reoffered in this record.

8. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the applicant possesses the requisite qualifications to be and to remain a licensee of the Commission.

9. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the grant of the captioned application would serve the public interest, convenience and necessity.

The issues were defined with greater precision by a Bill of Particulars filed by the Broadcast Bureau on December 3, 1970.

2. The applicant published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Conferences and hearings were conducted on various dates between December 15, 1970 and January 4, 1972. The record was closed by the Examiner's order released January 19, 1972.[2] The filing of proposed and reply findings of fact was concluded by April 28, 1972.

FINDINGS OF FACT[3]

3. Mr. Henderson Belk is President of Belk Broadcasting Co. of Florida, Inc. Since 1968 he has been the sole stockholder. He resides in Charlotte, North Carolina, and relies upon general managers to conduct the day-to-day affairs of Station WPDQ. He devotes a significant amount of his time to the station, and usually participates in decisions relating to such things as format, the hiring or firing of management or on-the-air employees, or the expenditure of large sums of money.

4. Mr. Don W. Burden is the principal of Star Stations, Inc. which, through its subsidiaries, owns radio stations in Indianapolis, Indiana, Omaha, Nebraska, and Vancouver, Washington. The two met in 1964 when Burden was a prospective purchaser for a Charlotte, North Carolina radio station Belk then owned. Thereafter, during 1965 and 1966 there was only casual contact between them.

5. They next met in March of 1967 in San Francisco, California at a meeting of an organization to which both belong. They fell into conversation about broadcasting and their problems as broadcasters. Belk mentioned he had need of a competent sales manager. Burden perceived an opportunity to assist him and at the same time head off a problem of his own. He told Belk that he had a competent and ambitious young salesman, Tom Devaney, working for him at Omaha. Devaney was anxious to advance, but Burden had no position available to which he could promote him. Burden preferred to recommend Devaney to Belk as Sales Manager in Jacksonville than to see Devaney take such a position with one of Burden's competitors in Omaha. Belk offered Devaney the job by telephone, and Devaney, after consulting Burden, accepted.

6. While in San Francisco the two men discussed the possibility that Burden might in some form undertake to act as consultant to Belk on broadcasting affairs. There was no formal or definite agreement on the matter which at that time was no more than a companionable undertaking between two men in the same business who were then in the

[2] A subsequent conference was convened on April 4, 1972, but no additional evidence was received.

[3] The facts from which the issues stem are so interrelated as to render it impractical to recite the facts pertaining to each issue separately. Hence, these Findings have been written in essentially chronological order.

process of formulating a friendship. Nor is there any real evidence that Devaney's employment was related to the consulting arrangement in more than an incidental fashion.[4] Although it is possible that either or both may have contemplated that Burden would ultimately acquire WPDQ, or that some sort of merger might ensue, and such a possibility is not inconsistent with subsequent activities, there is not a shred of direct evidence that they actually discussed the matter, much less agreed upon it.

7. However, Burden did display an immediate, active interest in Belk's broadcast properties. The two met in Charlotte, North Carolina on March 21, 1967, and over the next few days drove to Raleigh, North Carolina; Jacksonville, Florida; Atlanta, Georgia; and back to Charlotte to inspect the stations Belk then owned and the markets in which they were located. Burden's motive for making the tour was to decide whether he wanted to enter a consulting agreement with Belk, although the agreement itself was not discussed at the time. Mr. Burden took care of his own expenses on the trip.

8. At about this same time Burden dispatched the Vice President of Star Stations, Steven Brown, to Jacksonville to inspect WPDQ, and the market. Brown spent some two and a half days in Jacksonville. He understood at the time that Burden's interest stemmed from the possibility of entering into a consulting agreement with Belk.

9. Belk and Burden next met in New York in late March 1967 at which time the tour was discussed. On April 2, 1967 both men were in Chicago for the NAB convention, and on April 14 and 15 they again met in New York. Neither man recalls discussion relating to a consulting contract on either occasion.

10. On Memorial Day Belk was Burden's guest in Indianapolis for the Indianapolis-500 mile auto race. Again neither man remembers any conversation relating to a consulting agreement, although Belk assumes that they discussed his business concerns. In mid-June, 1967, the two met in Los Angeles at the Star Stations sales office. By this time Burden had suggested to Belk that WPDQ commence the sort of on-the-air promotions which characterized the Star Stations operations. Neither man has a clear recollection whether the subject of the consulting agreement arose at this meeting, but it is apparent that the matter must have come up at or about this time.

11. WPDQ was then rated No. 1 in its market. Its objective, at which it was succeeding, was to appeal to the younger segment of the potential audience by catering to their special tastes and interests. This was the same audience segment to which the Star Stations directed their efforts, and Belk recognized that Burden had a great deal of experience and success in this type of operation. Star Stations specialized in on-the-air promotions, and attributed much of their success to such

[4] The Broadcast Bureau contends that Belk acknowledged that Devaney's employment was part of a deal with Burden, but the record does not support this contention. On July 15, 1968, Belk had a recorded interview with Commission investigators. He was asked "in connection with the contract, was it part of the deal that you had with Mr. Burden to employ Mr. Tom Devaney as a Sales Manager at WPDQ?" He replied, "Yes, Sir", but then elaborated his answer to indicate that he had merely asked Burden to recommend someone, and Burden had recommended Devaney. Since the answer, read as a whole, indicates that Devaney's employment was not part of a "deal", it would be misleading to take the words "Yes, Sir" out of context and treat them as Belk's intended response to the question.

activity. WPDQ, on the other hand, had theretofore had relatively little experience with promotions.

12. By early July Burden and Belk had decided that their relationship should be put on a more formal basis. They consulted the Washington communications law firm which at that time was independently representing each of them. They were advised to execute a formal consulting agreement defining the responsibilities which were to be undertaken, and a member of the firm drafted the document.

13. The agreement was entered into on July 7, 1967. It provided that Belk secured Burden's services to "advise and consult" re "sales and promotional activity"; that "the determination to implement any specific recommendation—shall be made by the licensee and control of the station shall remain vested at all times in the licensee"; that Burden's duties might be performed by persons other than himself; that Burden's compensation should be based on a sliding scale tied to WPDQ gross revenues; that Burden should receive a portion of the sales price of the station to a third party if the sales price exceeded a set figure; and that Burden had a right of first refusal on any sale of the station. The contract was filed with the Commission on July 19, 1967 pursuant to Rule 1.613. It remained in effect until it was terminated by mutual consent on January 25, 1968, notice of termination being filed with the Commission on February 28, 1968.

14. The parties' actions indicate they construed the agreement as contemplating the remodelling of WPDQ's operation on the pattern which had proved successful for Star Stations. Primarily this involved a switch from an approach where the station's disc jockeys tried to build up a personal following to one designed to enlist the listener loyalty and interest for the station itself. Individual personalities were to be subordinated to a patterned type of presentation, and give-away promotions were to be emphasized. To accomplish this result Burden dispatched his subordinates, principally Steve Brown, to inspect the station and suggest modifications in the operation.

15. Between late March of 1967 and the termination of the agreement in January, 1968 Brown made 6 or 8 trips of 2 or 3 days duration to Jacksonville. His assignment was to decide what changes needed to be made, and pass them on to Burden. He, in turn, would present them as recommendations to Belk who would transmit them to the WPDQ staff as orders insofar as he accepted them. Since Belk had retained Burden for the very purpose of making such recommendations, it was to be expected that they would be in large measure adopted.

16. In practice things did not work out quite as planned. Although Brown believes he acted merely as a consultant, offering suggestions only when asked, the impression he left with the WPDQ staff was that of a man in authority.

17. In late March 1967, Robert E. Fincher, a/k/a Bob Baker, left his employment as Program Director at Belk's Station WKOX, Raleigh, North Carolina. As more or less pre-arranged with the then WPDQ Program Director, Mike Reineri, he was promptly hired at WPDQ as a disc jockey. Within a few days he had a conversation with Steve Brown who told him that he represented the Star Stations "and that they were coming in on a sales and promotional basis with an agree-

ment with Mr. Burden and Mr. Belk". Hence, Brown said, he was interviewing each WPDQ employee, and that was why he was talking to Baker. Brown also told him that Reineri was leaving, and that Baker among others would be considered for the job of Program Director. A few days later Brown told him that "Don" had approved him and he had the job. Baker assumed this meant that Brown had appointed him Program Director on Burden's authority, although he did not testify that anyone actually told him so. Brown himself testified that he merely recommended Baker to Sid Beighley, the Station Manager, when Beighley solicited his opinion.

18. In any event, Baker regarded himself as a mere figurehead program director lacking actual authority. He believed that his role was to implement Brown's concepts. However, he does not contend that Brown instituted any major changes. He recognized that WPDQ was, and remained, a "Top 40" station. The changes were in little things: openings and closings of news and sports presentations; jingles; musical bridges; etc. In Baker's view the changes would not have been discernible to the ordinary listener, but did result in a change of the sound of the station to the trained ear of a radio professional.

19. Disc jockeys working under Baker's supervision shared his view that Brown was the real power at the station. The principal basis for their opinion was that on two or three occasions when there was a meeting of all the disc jockeys Brown seemed to dominate the affair. However, one of them, Larry W. Pollock, also known as Gary Mack, recalled that Brown had been involved with his hiring at the station. While Pollock was working at a station in Panama City, Florida he received a telephone call from Brown who told him that he and Belk were in Panama City. Brown told him that he needed a night disc jockey. They discussed salary, and Brown told Pollock to contact WPDQ's program director, who had the final say in the matter.

20. In essence, Brown does not dispute the factual assertions of the WPDQ personnel. Although he recalls his innovations as having been advanced in the form of suggestions to the personnel involved or recommendations to Belk, he acknowledges that the changes originated with him. However, he viewed his own actions as constituting the advice of a consultant rather than the orders of a supervisor. The record contains no direct evidence in refutation. While it is obvious that Brown's advice carried great weight with Belk, and that WPDQ employees came to think of him as being high in the chain of command, there is no evidence that Belk ever actually delegated discretionary authority to either Burden or Brown.

21. The ambiguity of Brown's position became clear in the Fall of 1967 when Belk decided that what he needed was a strong station manager. He employed David P. Welborne, a man with several years experience as general manager of radio stations. Welborne was told he would have the broadest possible autonomy, but the Burden consulting agreement was not mentioned to him.

22. Welborne's tenure was neither long nor happy. When he arrived he discovered that his predecessor, Sidney Beighley, was to remain employed by the station in a subordinate capacity. Soon thereafter Beighley and Baker expressed to him their opinions that WPDQ was,

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in effect, being run by Star Stations. He also had what he deemed to be a cordial conversation with Devaney wherein Welborne explained his ideas on station management.

23. Almost immediately Welborne received a call from Belk who told him that Devaney objected to working under him.[5] Belk repeated that Welborne was to have complete autonomy, but asked him to be "nice" to the people from Star Stations. Apparently during this call [6] Welborne resigned because he concluded that his authority would be less than he had been led to believe. Belk immediately travelled to Florida, and persuaded Welborne to stay. He again repeated that Welborne was to run the station to suit himself, and, although he again asked Welborne to be "nice" to the Star Station personnel, he did not give Welborne any order requiring him to accept Star judgments in lieu of his own.[7]

24. Shortly thereafter Welborne met Brown. Someone, the record does not say who, told Welborne that Brown was coming to Jacksonville, and Welborne met him at the airport and took him to dinner. Welborne does not recall that at the time he knew why Brown would be coming to Jacksonville.[8] Over dinner Brown discussed his plans for programming and promotions. Welborne told him that, although he was happy to consider Brown's ideas, he, Welborne had been delegated full authority and would make the final decisions himself. Brown replied that he would "have to take that up with Omaha".

25. At this time it was Welborne's practice to return to his home in Charleston, South Carolina over weekends. While there he received a call from Baker who told him that Brown had posted a memo in the control room ordering changes in the station's music play-list, news format and jingles.[9] Welborne told Baker to remove the memo, rescind the changes, and instruct the disc jockeys not to allow Brown in the control room under penalty of being fired.

26. On October 22, 1967, Welborne addressed a letter to Belk submitting his analyses of the station's problems and his proposed solutions. In essence, the report criticized the Star Stations approach of large expenditures on promotions and staff and recommended cutbacks on these items.

27. Welborne's proposed cut-back in the sales staff antagonized Devaney. Devaney appealed to both Burden and Belk, but was told by

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[5] The reason for Devaney's dissatisfaction is apparent from the record. Devaney was Sales Manager and believed in the use of a large sales staff able to give broad coverage to the entire market. Welborne was committed to utilization of a small sales staff concentrating on selective sales. The two were unlikely to find themselves in accord.

[6] The record is not altogether clear on the sequence of events. However, Welborne asserts that his resignation came on the second day of his employment and, since Belk's call had to be preceded by Welborne's initial talk with Devaney and Devaney's call to Belk, it seems unlikely there was sufficient time for two telephone conversations between Belk and Welborne to have occurred.

[7] Welborne does not recall that the reason for Star's involvement in the affairs of WPDQ was explained to him at that time. However, given the context of the conversation, it is inconceivable that he would not have demanded some explanation of why he should be "nice" to Star personnel, and equally inconceivable that Belk would have been less than candid regarding a document then on public file with the FCC. This is not to suggest that Welborne colored his testimony, which the Examiner does not believe, merely that he has had a normal human failure of recollection as to details.

[8] Here, again, it seems probable that Welborne's recollection has failed him. If he did not already know who Brown was and why he would be coming to Jacksonville, there would be no reason for him to extend to Brown the courtesy of picking him up at the airport and taking him to dinner.

[9] The memo stated that the changes were being made "at the specific request of Mr. Belk". In view of Welborne's immediate rescission of the changes without consulting Belk, it seems unlikely that Baker told him this when he called.

Belk to work his problems out with Welborne. When he could not do so he resigned around the end of October. Following his resignation Devaney called Burden looking for a job.[10] Burden told him that his resignation was immature, and invited him to a meeting in Los Angeles with Belk. Following that meeting Devaney withdrew his resignation.

28. Shortly thereafter Welborne resigned. He regards the resignation as an act mutually agreeable to Mr. Belk and himself. On his part he resented the intrusion of the Star Stations personnel into what he regarded as his own prerogatives. On Belk's part, he told Welborne that he was thinking too small in his projections for raising station revenue. Neither Belk nor Welborne regarded Welborne's departure as being directly related to any specific incident.

29. In March, 1968, around a month after the termination of the consulting agreement, Devaney also resigned. He denies that the two events were directly connected. However, it seems apparent that after the Star Stations method was abandoned at WPDQ, neither Belk nor Devaney could have been very happy about a Sales Manager trained and believing in the Star sales techniques. Devaney found employment at Bridal Fair, Inc., a corporation in which Burden has majority ownership.

30. Mr. Burden did not himself directly participate in the operational management of WPDQ. However, during the periods July 13–October 2, 1967 and October 22–December 31, 1967[11] he received copies of the station's bookkeeper's daily report. Moreover, the business affairs of Star Stations and WPDQ became somewhat intertwined.

31. Shortly after the consulting agreement was signed Belk, Beighley and Devaney attended the Star Stations' week-long "sales blitz" in New York City. The technique at this affair was to hold a daily luncheon for advertising people accompanied by a presentation on the individual markets served by Star Stations. While WPDQ was included in these briefings, it was made clear that Belk, not Star, owned the station, and that Star's interest was that of a consultant. However, favors given away at the luncheons were imprinted with the words "Star Stations" plus a listing of the call letters of the chain's stations. The call letters included WPDQ with no indication that it was not a Star station.The favors were obtained in a trade deal with an advertising company. The deal called for the Star Stations and WPDQ to broadcast advertising for one of the company's clients.

32. Burden arranged this deal, acting on behalf of both Star Stations and WPDQ. The matter resulted in some confusion since neither Belk nor Beighley seems to have understood at the time that the commercials they put on for the advertising company's client had been paid through the trade-out, and the account was billed in the regular manner.

33. Also while in New York Burden made an arrangement on behalf of Star Stations with another advertising firm to broadcast commercials for a fraction of the regular price during otherwise unsold time. Belk asked the advertising agency for a similar deal on behalf of WPDQ, and was accepted. The record is not altogether clear, but it

[10] Devaney called Burden fairly often for advice on sales problems he encountered.
[11] Mr. Welborne halted the sending of reports to Burden during his period as General Manager.

appears that although the advertising agency paid for the commercials by checks payable to WPDQ, all the actual paper work of the transaction was handled through Star Stations. While the record is somewhat confused as to the reasons why Star handled the paperwork,[12] it was apparently planned that way since even WPDQ's affidavits of performance were mailed to Star rather than the advertiser's agent.

34. Burden also participated in an affair involving the acquisition of Sheraton scrip [13] obtained on behalf of WPDQ. In August 1967 a Mr. Rosen contacted Burden in an attempt to sell him several hundred motor bikes. Burden didn't want them himself, but he told Rosen that he knew WPDQ was in need of prizes for contests it was conducting. Rosen called Devaney, but, although WPDQ wanted some of the bikes it did not have any of the Sheraton scrip with which Rosen wanted to be paid. Burden then, at Devaney's request, called the Sheraton Corporation and put together a deal whereby he received enough scrip to pay for all of Rosen's bikes. The bikes WPDQ wanted were shipped to it, and it broadcast advertising on behalf of Sheraton. However, the paper work was carried out through Star Stations.

35. Star Stations figured in another WPDQ trade deal. The station needed some 600 radios for use in a promotion. In a conversation with a salesman for an import company which had such radios Devaney was told that in the past an arrangement had been worked out whereby an advertising agency paid for the radios in return for the station which received them broadcasting commercials for the agency's clients. Such a deal was worked out in this instance. However, the contract which the agency drew up provided that it was between the agency and "Star Stations", and that the advertising time might be used interchangeably on WPDQ or any of the Star Stations. Devaney denies that he represented to the agency that he was empowered to negotiate on behalf of Star Stations. However, he acknowledges that in the course of the discussion he mentioned his prior relationship to Star Stations and implied that if he could get a better price on the radios for WPDQ he might serve as a point of contact with Star in the agency's efforts to work a similar deal with Star. In any event when the signed contract was returned to the agency, a disclaimer of any connection with Star was enclosed.

36. Another result of the consulting agreement was the production of certain "letters" between Belk and Burden. As noted at paragraph 12, *supra*, they had discussed the consulting arrangement with Washington communications counsel. That gentleman, plainly cognizant of the risk of precisely the sort of issue here being tried, advised them

[12] Part of the confusion stems from the fact that Belk's original statements to the Commission regarding these transactions conflict on some details with his later statements and his testimony at the hearing. The Examiner does not believe that these conflicts arose out of any intention to deceive. His explanation that his original statements to Commission investigators contained errors of recollection is plausible. He was queried extensively and in great detail regarding events which had transpired some time previously, and did not have with him documents which might have refreshed his recollection. His demeanor at the hearing was entirely favorable. Moreover, it is difficult to assign any motive for deliberate falsification. His participation in the "sales blitz" and his calls upon advertisers in Burden's company which he has at all times acknowledged, constitute an admission that an attempt was being made to sell WPDQ and the Star Stations as a package. Having admitted that central fact, he would stand to gain nothing by quibbling over the details of how that package was wrapped.

[13] Sheraton scrip is paper useable at certain Sheraton Hotels in lieu of cash. It is customarily traded at less than face value.

that their dealings should not only *be* at arms length but should *appear to be* at arms length as well. Hence, he counseled them to reduce the substance of whatever transpired under the consulting agreement to writing.

37. In August of 1967 Belk was Burden's houseguest in Omaha. As an incident of the visit the two men discussed the fact that they had so far ignored counsels advice, and had failed to put the substance of their discussions in writing. They then drew up a series of letters and replies, eleven in all, dated between July 10 and August 2, 1967. The letters, insofar as they could recall accurately represented what each said at or about the date he had said it. Belk's letters were typed on his letterhead.[14] Presumably Burden's letters were typed on his or Star's letterhead.[15]

38. Belk and Burden both contend that the letters were intended to serve as memos to their own files, and were not intended to deceive anyone. The Examiner does not find this version of events to be reasonable. The technique employed would be an unnatural and troublesome method of preparing memos to their own files. Plainly, they were attempting to comply belatedly with their attorney's advice to maintain the appearance as well as the fact of independent dealings with each other. The letters could only have been intended to create that appearance, and, insofar as they were not what they purported to be, they would serve as an aide to deception.[16]

39. By the spring of 1968 Star Stations were being investigated by the Commission. In the course of that investigation Burden's attorney provided the Commission's investigators with copies of the letters from Burden's files. He did not indicate that the letters were anything other than what they purported to be.[17] A copy of counsel's covering letter of transmission to the Commission was sent to Belk.

40. Belk has no recollection of having received a copy of the covering letter. He suggests either that he did not see it or that he did not appreciate its significance at the time.[18] In any event, he freely admitted at the hearing just what the letters were, and the record contains nothing to indicate that he ever affirmatively misrepresented to the Commission the true nature of the letters.

41. As heretofore noted, one of the principal reasons underlying the consulting agreement was Belk's desire to engage in the sort of large prize promotional activities which characterized the operation of the Star Stations. Between July and October, 1967, there were four principal promotions presented by WPDQ: The Big Kahuna; Color Rampage; $60,000 Thank You; and Green Satellite. The first three were suggested by Burden, and the fourth was Belk's own idea modeled on promotions he had heard on other stations.

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[14] He does not recall whether he had blank letterheads with him or if he had to return to Charlotte for the typing.

[15] As noted at paragraph 39, *infra*, the record copies of these letters came from Burden's files. Hence, the Burden letters purport to be copies, and bear no letterhead.

[16] This finding does not, of itself, compel the further finding that either Belk or Burden actually undertook to deceive the Commission. It is merely found that they took action which would make such deception possible in the future.

[17] The record contains no suggestion that counsel knew or had reason to suspect at the time that the letters were not what they seemed.

[18] WPDQ was not then under investigation by the Commission, nor did Belk have reason to anticipate one.

42. The first to be presented was The Big Kahuna. The prizes, totalling some $7,000, were in the form of certificates for food items supplied by Paks-Zippy Food Marts pursuant to a trade-out agreement. The stores at which the certificates could be redeemed were identified on the air as the source of the prizes. A prize was offered every 6 minutes from 6:00 a.m. to 6:00 p.m. An aspect of the promotion was an employee of the station dressed in a colorful costume being driven around the city. The automobile used was provided by the Duval Motor Company, and this fact was mentioned at each announcement. The frequency of the prize giveaways created a practical logging program. Hence, on the advice of counsel, the station did not attempt to enter each announcement on the log. Rather a cover sheet was attached to each log stating that Paks-Zippy Food Mart Stores and Duval Motors had each received mention approximately once every 6 minutes during the hours involved.

43. The contest was conducted by broadcasting the names of persons selected at random from the Jacksonville telephone book. These people then called the station within a specified time to claim their prizes. The selections were made by an office girl who was instructed in her duties by Tom Devaney. There is nothing on the record to suggest any impropriety in connection with the award of prizes in this contest.

44. The next promotion, the Color Rampage, started in August 1967. The prizes included 60 color television sets. Again the procedure called for selection of winners by random reference through the local telephone book. However, in this instance the first hint of irregularity crept in.

45. Baker noted that an unusually high incidence of persons whose names were to be broadcast resided in the vicinity of the home of one of the part-time employees responsible for the random selection of names from the telephone book. From this he inferred that the woman's selections were not truly random but included the names of her friends and neighbors. He reported his suspicions to Devaney who suggested that Beighley should be told. Although the suspicions could not be confirmed, the employee was discharged.[19]

46. Shortly after the close of the Color Rampage the station embarked on the $60,000 Thank You.[20] Here again the list of winners came from the telephone book. The names were selected by Baker and Devaney by random checking. There is some conflict of recollection as to which selected the bulk of the names, but the witnesses agree that the selection was rapid and truly random. The names checked were then transcribed onto master lists.

47. The prizes to be awarded varied greatly in value. Hence, attempts were made to scatter the more desirable prizes among the lesser ones in a somewhat unpredictable manner. The objective was to reduce temptation to station employees to award large prizes improperly by

[19] She was rehired by WPDQ on November 10, 1967, and then worked a total of 46 hours part-time before leaving for good.

[20] The record does not indicate whether the public was affirmatively told that $60,000 worth of prizes would be given away during the contest or whether that fact was merely implied by the name. In any event, somewhat less was actually awarded, although the record does not indicate how much less. WPDQ contends that the $60,000 Thank You and the Green Satellite which followed were actually part of the same contest, and that approximately $60,000 worth of prizes was awarded between the two.

making it difficult to predict when substantial items were to be awarded.[21] Disc jockeys were given the names of winners and the identity of their prizes only at the start of their shifts, and the names of prospective winners of the largest prizes were put in sealed envelopes to be opened only at the time the call was actually made.[22]

48. Nevertheless, one of the large prizes, an automobile, was improperly awarded. One of the disc jockeys, Dino Summerlin, approached Baker, and proposed that an automobile be awarded to a predetermined winner. Baker's participation in the scheme was essential since it was he alone who was in a position to determine which of the names on the list taken from the telephone book would receive large prizes, and the approximate times when such names would be called. Baker agreed, partly for the money he would make and partly because of dissatisfaction with the prominent role being played at WPDQ by the Star Stations' consultants.

49. The plot involved at least one other person.[23] The prospective winner, Michael Youngblood, was approached by Dan Paul, a local businessman, presumably an associate of Summerlin's. Youngblood agreed to become party to the scheme, although his compensation does not seem to have been firmly established. In any event, he was told to expect his name to be broadcast on the morning of September 4, 1967. It was; he called the station within the time limit; and he was awarded a car.

50. Shortly after the award, the car was sold by Paul for the sum of $3,450. Youngblood was given $400 to pay his income tax on the transaction, and was promised he would receive more. The next day he was given $50 which he deemed inadequate. He called Baker at the station to complain. Baker denied knowledge of the arrangement, but said he would look into it. The next day he visited Youngblood and gave him an additional $50, saying it was from Summerlin. Baker also received an unspecified sum for his part in the affair. At this time no one connected with WPDQ other than Baker, Summerlin, and Morgan were aware of what had transpired.

51. The next contest was the "Green Satellite". The rules for this contest were somewhat different. Listeners wishing to participate would affix a green ball to the antennas of their automobiles. A station employee would then drive an automobile about the city. When he encountered a car with a green ball on its antenna he would radio a description of the car back to the station. That description would then be broadcast over WPDQ. If the driver was tuned to the station he would hear the description and pull over. He would then be awarded a prize by the driver of the station's scout car. Here also the value of

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[21] A secondary objective was to insure that large prizes would be awarded during morning and evening "drive time" when potential audiences were at their greatest. The record does not indicate that the listening public was told of this practice, or, conversely, whether they were told that such practice did not exist. (Belk had no knowledge that the public was informed that major prizes were to be awarded during "drive time", but he did not affirmatively state that they were not so told.) In any event the three automobiles which were the largest prizes were awarded during "drive time".

[22] The telephone book which was checked was later left unguarded thereby affording employees an opportunity to discover who future winners might be. However, this information was essentially valueless without the further knowledge as to which would win the large prizes and when their names would be announced.

[23] The disc jockey who was on the air when the "winner's" name was announced, Roger Morgan, was aware of the wrongdoing, but did not participate in the plot or profit from it.

the prizes varied, and here also at least one prize was awarded improperly.

52. One of the regular drivers of WPDQ's give-away car was Henry C. Peiker. He drove 3 or 4 hours at a stretch knowing in advance that he was to award one prize an hour and what those prizes were to be. Instructions as to the list of prizes and the areas of the city where he was to drive were transmitted to him through Summerlin. On one occasion Summerlin told Peiker to drive to a certain place and award a television set to the driver of a car which Summerlin described. Peiker complied because he was intimidated by threats which Summerlin made to him. Summerlin bought Peiker a dinner as his reward. Later during the same contest Summerlin asked Peiker to perform a similar act again, but this time Peiker refused. No one in authority at the station knew of these events at the time.[24]

53. These irregularities came to the attention of the station's management on January 18, 1968. On that day Youngblood, who was dissatisfied with his share of the loot, complained to the manager of the automobile dealership from which his car had come. The manager was shocked when he heard what had happened, and immediately called Beighley who promptly called Belk.

54. Belk decided that a full investigation was warranted. He engaged Frank Godfrey, a Jacksonville trial attorney to conduct the investigation. Godfrey in turn employed a local Police Captain, and an Investigator for the States Attorney's Office to assist him. The investigation, which lasted from January 22 to March 21, 1968, was not limited to the Youngblood incident, but included the entire situation at the station. A polygraph was used.

55. In essence, the investigation turned up the facts heretofore noted. As a result Summerlin was fired on February 23, 1968. Baker had already left for reasons unrelated to this affair. Mr. Godfrey recommended that no action be taken against the others who had participated in or knowledge of events since their actions and silence had arisen from a fear of Summerlin.

56. On April 12, 1972, WPDQ sent a copy of Godfrey's March 21, 1968 report to the Commission. Since that time the station has not engaged in promotions that involve prizes of substantial value.

57. WPDQ required its employees to execute affidavits every six months relating to their outside business interests, and as to whether they had accepted anything of value in return for broadcasting material over the station. All, including Summerlin, had consistently denied impropriety. However, Summerlin was also engaging in payola, and had corrupted other disc jockeys. He had previously owned a local band but had divested that interest at the station's request. However, he acknowledged to the station that he was booking bands and staging dances at the Jacksonville Beach Auditorium.

58. When Baker was hired he noticed that the station carried a number of dance spots. He investigated, and ascertained that Summerlin had purchased very little air time. This aroused his suspicion of payola, but he was unable to obtain definite proof. He took his sus-

[24] Peiker told a fellow employee, Larry Pollock, who also drove the give-away car on occasion, about the improper gift of the television set, but Pollock did not participate in the affair.

picions to Beighley, who told him to handle the matter but not to fire Summerlin. Apparently Beighley communicated the matter to Belk because when Belk hired Welborne he told him to keep an eye on Summerlin because of his outside activities. Baker also spoke to Summerlin about the matter casually, but did not pursue it.

59. In fact, Summerlin was then and thereafter receiving unpaid publicity for his events. Before Baker was hired Summerlin was using William Murvin, a WPDQ disc jockey, to emcee his dances. Murvin was also promoting the affairs over the air, but these spots were not logged and the station received no payment for them. Murvin discontinued the practice after a warning from Reineri, Baker's predecessor as Program Director.

60. Later Summerlin replaced Baker as Program Director. He approached Larry Pollock and asked him to play some dance promotions. However, no "start order" from which the billing was done was issued. Hence, although the announcements were broadcast and logged, they were not billed. He gave Pollock a check and promised more if the system proved effective. Pollock, who feared for his job, accepted the proposition. Subsequently, Pollock had misgivings which he took to his friend, Peiker. They decided to bring the matter to Beighley's attention. He told Pollock to return the $50 to Summerlin, and the investigation of Summerlin for contest rigging which had just begun was broadened to include payola.

CONCLUSIONS

Issue No. 1: Misrepresentation

61. Mr. Belk is accused of two misrepresentations.[25] First in connection with the series of eleven "letters" between himself and Burden, and second in denying that Devaney's employment was part of the consulting agreement.

62. The preparation of the "letters" does not reflect credit on Belk. He could not have failed to realize that anyone reading the letters and thinking them to be genuine would receive a false impression as to the form, if not the substance, of his dealings with Burden. This is not, however, tantamount to a conclusion that he actually undertook to deceive the Commission. The copies of the "letters" which were sent to the Commission were from Burden's files, not Belk's. Belk had no advance knowledge that the letters were being sent to the Commission, and, although he probably received a copy of the transmittal letter to the Commission, it is less than certain that he actually saw the letter or realized its significance.

63. At the time he received the covering letter he had dissolved his relationship with Burden, and he had no reason to anticipate a Commission investigation of WPDQ. Hence, although he certainly had a duty to advise the Commission if he realized it had come into possession of spurious documents purporting to be his correspondence, it is plausible that he did not so realize. The letter appeared to be routine in a

[25] The order of designation does not spell out just what Belk is supposed to have misrepresented, and the Bill of Particulars does not truly clarify the matter. The first time WPDQ, or the Examiner, could be certain as to the scope of this issue was upon reading the Bureau's Proposed Findings.

matter involving Burden and not himself. As such it may well not have been shown to him or he may have failed to give it sufficient attention to appreciate its significance. He so claims, and the Examiner believes he is entitled to the benefit of the doubt.

64. He had no real motive to attempt to carry out the deception.[26] The record indicates that the substance of the "letters" conforms to the actual facts, and, while the form of his contacts with Burden had not followed his attorney's advice, the contacts had not actually been wrong or suspicious. This lack of motive coupled with his favorable demeanor as a witness lead the Examiner to conclude that Belk wasn't consciously aware that the Commission had received the "letters".

65. On the matter of Devaney's employment, there is simply no case against Belk at all. There is no evidence to the effect that Devaney's employment was tied to the consulting agreement unless Belk himself has admitted it, and as found at footnote 4, *supra*, such admission can be found only by reading portions of Belk's testimony out of context. It is concluded that the licensee did not misrepresent or display lack of candor to the Commission.

Issues 2 and 3: Rigged contests and adequacy of supervision

66. The record is clear that Section 509 of the Communications Act was violated during the course of contests broadcast over WPDQ. Baker and Summerlin conspired to fix the award of the automobile to Youngblood. Later Summerlin used Peiker to fraudulently award a television set. While the record indicates that these incidents occurred without the knowledge or consent of either Belk or his managers, such lack of knowledge does not relieve the licensee of responsibility for what occurred, *KLYD*, 14 FCC 2d 292.

67. There remains to be considered the sanction which should appropriately attach. If the licensee was deceived as a result of its own gross negligence it is to be deemed more culpable than if it was deceived despite reasonable precautions. Here the record does not indicate that WPDQ was insensitive to its obligation. Precautions were taken, and attempts were made to impress on the staff that they were to conduct the contests in a straightforward manner.

68. When an employee was suspected of impropriety in the conduct of the Color Rampage she was discharged. Thereafter procedures were tightened. Attempts were made to forestall cheating by placing the selection of winners in the hands of management level employees, and denying the lower staff of sufficient advance knowledge of the identity of the winners to give them time to arrange collusion. The system could reasonably have been expected to work, and, in fact, failed only because the Program Director allowed himself to be corrupted. Similarly, the Green Satellite went awry only because Summerlin, who had been trusted with a position of responsibility, proved unworthy of that trust.

69. Hence, while it may be concluded that Belk should have been more aware of the frailties of human nature, it is not to be concluded that he was indifferent to his responsibilities. He and his managers tried to protect against fraud. Their efforts were genuine and well

[26] While lack of motive to deceive does not make an actual deception less culpable, it is a weighty factor in determining whether deception was intended.

intended. They were not so lax as to brand Belk as unqualified to be a licensee.

70. While the Commission has in the past denied license renewal where the licensee himself was party to the fraudulent contest, *WSRA*, 9 FCC 2d 644, it has been less strict in cases where the fraud was by employees and unknown to the licensee. In such cases it has relied upon the sanction of forfeiture. In instances where the licensee should have been aware of the character flaw in the employee the forfeiture has been substantial, *Eastern Broadcasting Corp.*, 8 FCC 2d 611, 10 FCC 2d 37. In other instances the forfeiture has been of a lesser amount, *KLYD*, *supra*. Here, forfeiture is not available, but in the Examiner's view the harsher action of denying renewal is not warranted. As heretofore concluded, the licensee was victimized despite not unreasonable precautions. When it discovered the dangers and difficulties involved it abandoned the broadcast of large prize, promotional contests. Finally, when it realized what had happened it freely and voluntarily informed the Commission. Such are the actions of a responsible licensee unlikely to knowingly engage in actions inimical to the public interest. It is not concluded that renewal should be denied on the basis of the contests.

Issue No. 4: Transfer of control

71. The Commission defines "control" as "the power to dominate the management of corporate affairs", *WHDH, Inc.*, 16 RR 2d 185. Thus, the question to be resolved is whether that power ever passed from Belk's hands into those of others. In the Examiner's view the record in this proceeding reflects precisely the opposite.

72. It is apparent that with Belk's growing acquaintance with Burden came a growing admiration for the way Burden's stations were run. He decided that if he could emulate Burden's methods of operation his own operation would be more satisfactory. He undertook to accomplish that result in the most straightforward manner possible. He had a lawyer draw up a consulting agreement.[27]

73. It should be noted that people retain a consultant in any field only because the consultant's advice in his area of expertese is valued. Hence, one who employs a consultant normally accords considerable weight to his advice. This is precisely what Belk did. He expected Burden and his people to show him how to reform WPDQ in the Star image, and this was the advice he received and followed.

74. Nevertheless, the dominance of corporate affairs was always Belk's. His mistake lay in failing to realize that by relying heavily on the advice of the Star people without explaining their function to his own employees, he inevitably destroyed the self confidence and morale of his own staff. It is hardly surprising that WPDQ employees, seeing that Star's advice was almost always followed and their own unsolicited, concluded that Star was running the station.

75. However, examination of the incidents on which such conclusions rested demonstrates that such judgments were not truly reasonable. Devaney undoubtedly attained a prominent position at the station, and

[27] Such agreements are not violative of Section 310 of the Communications Act, even when they are a prelude to an open transfer of control, unless their actual effect is to pass the power of decision from the licensee to the consultant, *Town and Country Radio, Inc.*, 15 RR 1035.

he undoubtedly continued to look to Burden for counsel with his problems. However, it does not follow that Devaney was Burden's man at WPDQ. The Star Stations' system was to be put in at WPDQ, and Devaney was the man familiar with that system. Thus, although he looked to Belk for orders, he looked to Burden for advice. This is *precisely* what the consulting agreement contemplated. To read something more insidious into it requires pure speculation.

76. Similarly, Baker regarded Brown as the man who appointed him Program Director. Yet he acknowledges that no one told him so. He merely assumed that Brown was acting on Burden's authority, not Belk's. Such unfounded assumptions do not rise to the level of proof. Pollock regarded Brown as the man who hired him, disregarding that when Brown first called him he said that he *and Belk* had just heard Pollock on the air, and further disregarding that it was WPDQ's Program Director who actually hired him. Plainly, his assumption that Brown had real authority was based upon his subsequent exposure to the attitudes of his fellow employees rather than on reasonable inferences to be drawn from the facts within his own knowledge.

77. Certain witness believed that Brown's authority was demonstrated by his posting in the control room of a memo ordering changes in several aspects of the station's operation. Those holding this view disregarded the fact that the memo itself specified that the changes were being made at Belk's direction. That so essential a part of the document was overlooked suggests that the witness were not truly objective in evaluating the evidence.

78. Finally, there is the matter of Welborne. While his experience emphasizes the prominent role played by the Star consultants at WPDQ, his appointment even more strongly emphasizes that it was Belk, not Burden, who had the ultimate control of the station. Whatever else may be said of Welborne, he was not Burden's man. His concept of how a station should be run differs so radically from Star's that it is inconceivable that his appointment was approved by Burden. His tenure was short and unhappy due to Belk's inability to decide whether to give Welborne his head or to follow the advice of the Star consultants. Nevertheless, the record is plain that insofar as Welborne and the Star-oriented people clashed they looked to Belk for decision, and it is his power of decision rather than what he ultimately decided which illustrates his retention of control.

79. Nor does the cooperation between Star and WPDQ on the various trade-out arrangements compel a more adverse conclusion. Plainly, Belk and Burden were cooperating, and at times that cooperation exceeded the bounds of discretion. Burden was making available to WPDQ the fruits of some of his negotiations. Certain people with whom they dealt were left with the impression that the relationship was closer than it was. Nevertheless, close examination of the incidents discloses no actual impropriety. WPDQ delivered value in air time for the goods it received. Although WPDQ was treated as part of a package with Star stations, they were not treated as interchangeable units, and WPDQ was not dealt with as just another Star station.

80. It is also significant that the record does not suggest that Burden or Star ever put any money into or took any money out of WPDQ. When control is transferred, financial accommodations are almost in-

variably involved. Indeed, there is no substantial evidence indicating that control ever slipped from Belk's grasp. He hired consultants, he took their advice, and he severed the relationship when that advice did not work out as he hoped. It is concluded that no unauthorized transfer of control of WPDQ occurred.

Issue No. 5: Misleading announcements

81. To establish that the public was misled as to when prizes were to be awarded, two facts must be proven: that major prizes were awarded only or primarily during drive time; and that the public was directly or inferentially misinformed as to this fact. The record supports the conclusion that a majority of the major contest prizes were awarded during "drive time" when the station's potential audience was at its largest. However, it is not established just what the text or substance of the promotional announcements were or whether or not the audience was actually told about time limitations on the award of major prizes.[28] Hence, no conclusion as to whether or not the public was misled is possible.[29]

Issue No. 6: Logging

82. Rule 73.112(a)(2)(iii) provides that "The following entries shall be made in the program log: for commercial matter . . . an entry showing that the appropriate announcements (sponsorship, furnishing material or services, etc.) have been made as required by Section 317 of the Communications Act and Section 73.119 [of the Rules].[30] A checkmark . . . will suffice but shall be made in such a way as to indicate the matter to which it relates." As found at paragraph 42 Paks-Nippy Food Marts and the Duval Motor Company furnished goods or services in connection with the "Big Kahuna" contest. This fact was broadcast, and, because the promotional announcements were so frequent as to overcrowd the log form, they were put on cover sheets attached to the logs.

83. Thus, the Rule was complied with unless it is to be concluded that the failure to log the announcements on the log form proper constitutes a violation. No such conclusion is warranted. The Rule in question specifies that "entries shall be made in the program log", but neither it nor any other rule specifies the precise form the log must take. While the Rules do specify what information the log must contain, they do not require that the log be a single sheet of paper. Plainly, the device of attaching a cover sheet may be appropriate when the information to be entered is too voluminous to be entered on the ordinary form. Such a device complies with both the letter and the spirit of the Rule, and it is concluded that WPDQ did not violate Rule 73.112 in the instances specified in the Order of Designation.

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[28] The burden of proceeding with the introduction of evidence was not on the licensee. Hence, it cannot be held accountable for the silence of the record. A contrary holding would amount to a *de facto* shifting of the burden contrary to the expressed intention of the Commission.

[29] In view of the silence of the record, it is not necessary to consider whether, assuming *arguendo* that the public was not informed, it was thereby misled. The question, and others similar to it, present numerous possibilities regarding which reasonable men might differ.

[30] In pertinent part Rule 73.119 requires broadcast identification of a sponsor who shall have contributed to the station something of value in return for the announcement.

Issue No. 7: Payola

84. Section 317 of the Communications Act requires that broadcast material which has been paid for be identified as such on the air at the time it is broadcast. Section 317(c), specified in the Order of Designation, requires the licensee to "exercise reasonable diligence" to obtain from employees such information as may be necessary to comply with subsection (a) of the statute. WPDQ has satisfied the pertinent provisions of the Act. It has required appropriate affidavits from its employees, and it has conducted investigations when it had reason to believe that "payola" might be going on. Such is reasonable diligence within the meaning of the statute.[31]

Summary

85. All of the issues have been resolved favorably to Belk except that relating to the rigged contests. However, the circumstances surrounding that phase of the station's operation have been concluded to be such that a denial of renewal would be entirely disproportionate to the magnitude of the offense. It is concluded that the licensee possesses the requisite qualifications to be and to remain a licensee of the Commission, and that the public interest would be served by a grant of the subject application.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion pursuant to Rule 1.276, the subject application IS GRANTED.

CHESTER F. NAUMOWICZ, JR.,
Hearing Examiner,
Federal Communications Commission.

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[31] The Order of Designation specifies only a possible violation of Section 317(c) (reasonable diligence re employees). Hence, it would be superfluous to formulate conclusions as to whether there was any violation of Section 317(a) (the actual broadcast of commercial material unidentified as such).

F.C.C. 73R-331

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of BISBEE BROADCASTERS, INC., BISBEE, ARIZ.	Docket No. 19754 File No. BPH-7873
WILLIAM F. WRYE & ROSE D. WRYE, D.B.A. WRYE ASSOCIATES, BISBEE, ARIZ. For Construction Permits	Docket No. 19755 File No. BPH-7944

MEMORANDUM OPINION AND ORDER

(Adopted September 17, 1973; Released September 19, 1973)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Bisbee Broadcasters, Inc. (BBI) and Wrye Associates (Wrye) for authorization to construct a new FM broadcast station to operate on 92.1 MHz in Bisbee, Arizona. Now before the Review Board is a petition to enlarge issues, filed July 12, 1973, by Wrye, requesting the addition of various issues against BBI.[1]

2. Wrye requests, first, that issues should be added against BBI for lack of candor and "to show cause why its application should not be rejected because of faulty engineering" because, petitioner alleges, its owner and general manager, Howard Waterhouse, falsely stated[2] that there were no other radio stations or transmitter antenna sites in the vicinity of its proposed tower location. In fact, Wrye alleges, there are "approximately seven" other towers within 300 feet of BBI's proposed site, which raises the possibility of interference with other services and degradation of BBI's own signal. Wrye alleges that BBI used six-year-old engineering data in its application, and that "a simple thirty minute drive" would have disclosed the existence of these other towers. Wrye also requests that a Rule 1.65 issue and a second candor issue be added since Waterhouse stated in the application that BBI is applying for an FM permit largely because it has not been allowed to raise the power of standard broadcast Station KSUN, licensed to BBI, to 1000 watts.[3] According to Wrye, KSUN is in fact broadcasting at 1000 watts during the day. Wrye asks acceptance of its petition despite its untimeliness, arguing that prompt filing was impossible because of business commitments and because the Commis-

[1] Also before the Board are the following related pleadings: (a) opposition, filed July 18, 1973, by BBI; (b) supplement to petition, filed July 19, 1973, by Wrye; (c) opposition, filed July 23, 1973, by the Broadcast Bureau; (d) reply to BBI's opposition, filed July 24, 1973, by Wrye; (e) letter, filed August 7, 1973, by BBI; (f) comments on letter of August 7, 1973, filed August 16, 1973, by the Broadcast Bureau; and (g) reply to comments, filed August 23, 1973, by BBI.

[2] Wrye cites BBI's application, Form 301, Section V-B, paragraphs 10 and 16(a), and Section V-G, paragraph 6.

[3] Wrye cites nothing specific in BBI's application. References to KSUN's operating power appear therein at: Form 301, Section II, p. 5; Exhibit 1A, p. 1; Exhibit 1C, p. 1; Exhibit E-1, pp. 1-2; amendment of September 5, 1972, pp. 10, 12.

sion failed, despite repeated requests, to send pertinent correspondence to Wrye's proper address.

3. In opposition, BBI argues that Wrye has not shown good cause for the untimeliness of its petition; has failed to provide a supporting affidavit and to make a showing of competence with respect to engineering matters, as required by Section 1.229(c) of the Commission's Rules; and has failed to serve the petition by air mail as required by Section 1.47(f) of the Rules. In a supplement to its petition, Wrye submits an affidavit of William F. Wrye, its owner and general manager, verifying the petition and stating that he visited the BBI proposed site on two occasions and observed the towers mentioned in the petition.

4. In opposition, the Broadcast Bureau declares that Wrye's petition, despite its procedural deficiencies, raises a serious question as to whether BBI falsely answered questions on its application form regarding the presence of other towers or antennae in the vicinity of its proposed tower site, which, absent a satisfactory explanation, would warrant exploration at hearing. However, the Bureau urges the Board not to add an engineering issue to determine the effects of the towers' proximity, since, in its view, Wrye's allegations lack specificity and are unsupported by a showing of engineering competence. The Bureau also opposes the addition of issues relating to KSUN's operating power; it argues that BBI did not misrepresent the facts in this regard since "any reference to 250 watts in the FM application apparently refers to the nighttime power of the AM station."

5. Replying to BBI, Wrye asserts that the competence of William Wrye in engineering matters is set forth in Exhibit E–1 of Wrye's application, and requests official notice of these qualifications, including his "experience . . . as Chief Radio Measurements Engineer for the U.S. Air Force Atlantic Missile Range." With respect to Rule 1.47, Wrye contends that service of its initial petition was effected by air mail, but inadvertently not noted, and amends its certificate of service to reflect this.

6. In a letter dated August 7, 1973, BBI calls the Board's attention to an amendment to its application, tendered August 6, 1973, along with a petition for leave to amend. This amendment, according to BBI, contains the "required information" and explains that its absence from the subject FM application was the inadvertent result of copying information from an application submitted by a previous owner of BBI. Commenting upon this, the Broadcast Bureau points out that BBI apparently submitted the engineering information from the old application subsequent to the time of the erection of the other towers. Although it has no objection to the correction of BBI's application in this regard, the Bureau states that "numerous problems" are raised by BBI's letter. Specifically, the Bureau notes that BBI's explanation is actually contained in the petition for leave to amend, not in the amendment, and that the explanation is not supported by affidavit. Finally, the Bureau notes that the Commission has indicated its disapproval of the use of letters rather than pleadings in disputed matters. In reply to the above, BBI apologizes for its use of the letter form and states that it did not submit an affidavit with its amendment or "explanation" because it was referring to informa-

tion already on file with the Commission. That is, BBI contends, its application apprised the Commission that its engineering derived from a previous application.

7. The Review Board is of the opinion that the procedural infirmities in Wrye's petition are not dispositive. Although good cause has not been shown for the lateness of the petition, certain questions raised therein are serious enough to warrant a decision on the merits. See *The Edgefield-Saluda Radio Co.* (*WJES*), 5 FCC 2d 143, 8 RR 2d 611 (1966). Wrye's other procedural failures have either been corrected or are *de minimis*. BBI's letter of August 7 is subject to more serious objections. The Board has made plain its intention not to accept supplemental pleadings unless clearly justified. *In re Filing of Supplemental Pleadings Before the Review Board*, 40 FCC 2d 1026 (1973). Therefore, we will not consider BBI's letter in deciding the questions before us. However, since the amendment to BBI's application has been accepted by the Administrative Law Judge without objection from Wrye, it would serve no purpose to exclude the material contained therein, and in BBI's petition for leave to amend, from our deliberation. In the amendment, BBI concedes the presence of eleven other towers (including public safety, and utility operations) in the vicinity of its antenna site. We will therefore add an issue to determine the adverse effects, if any, which may result from the proximity of applicant's proposed tower and antenna system to other towers and antenna systems. We will not, however, add a lack of candor issue. While the information before us clearly indicates poor judgment and carelessness on Waterhouse's part in submitting information contained in a previous application without ascertaining its current accuracy, it does not demonstrate any intention or motive to conceal the existence of the towers from the Commission. *Cf. Media, Inc.*, 27 FCC 2d 228, 20 RR 2d 1153 (1971). We also decline to add issues relating to KSUN's operating power. Although Waterhouse's statements in this regard are confusing, he does seem to have been particularly concerned with KSUN's night-time power, which was and still is 250 watts. There is no indication that he intended to misrepresent either the authorized power of the AM station or his motives for wishing to acquire an FM construction permit, or that he failed to report significant information as required by Rule 1.65.

8. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed July 12, 1973, by Wrye Associates, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

9. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

To determine, with respect to the application of Bisbee Broadcasters, Inc., whether the proximity of applicant's proposed tower and antenna system to other towers and antenna systems will result in adverse effects either affecting applicant's qualifications or warranting the imposition of a condition on any grant to Bisbee Broadcasters, Inc.

10. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof under the issue specified SHALL BE upon Bisbee Broadcasters, Inc.

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

F.C.C. 73–984

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF LARRY EDWARDS AND RAY L. DANNER, D.B.A. DAE BROADCASTING CO., LICENSEE OF RADIO STATION WDVH, GAINESVILLE, FLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

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

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has under consideration (1) its Memorandum Opinion and Order dated March 13, 1973, addressed to Larry Edwards and Ray L. Danner, d/b/a DAE Broadcasting Company, licensee of Radio Station WDVH, Gainesville, Florida, assessing a forfeiture of $2,000 for the broadcast of information concerning a lottery, and (2) licensee's Application for Mitigation of Order of Forfeiture, dated April 4, 1973.

2. In the Application for Mitigation of Order of Forfeiture, licensee reviews the undisputed facts and Commission actions to date, and cites the Commission action of February 21, 1973 (FCC 73–218) whereby the licensee of Williamsburg Broadcasting Company, Inc., was notified of apparent liability for forfeiture of $1,000. Licensee argues that it has "suffered a severe injustice by having been assessed a forfeiture which is twice the amount of the forfeiture assessed against another licensee for precisely the same violation," and that the violations in the Williamsburg case were more flagrant, since the broadcasts were far more frequent than the announcements broadcast on WDVH. Licensee contends that by "meting out justice in an unequal and arbitrary fashion in the manner in which it has done in this instance, the Commission has apparently overstepped the bounds of its regulatory authority." Licensee requests that the forfeiture be reduced to $1,000.

3. The Commission in determining the amount of a forfeiture considers many factors, including the seriousness of the violations, the circumstances under which they were committed, their duration, and the financial condition of the licensee. *Laury Associates, Inc.*, 27 FCC 2d 870 (1970). Considering the licensee's request and all the circumstances in this case, we are not persuaded to mitigate the forfeiture.

4. In view of the foregoing, IT IS ORDERED, That the Application for Mitigation of Order of Forfeiture IS DENIED.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Larry Edwards and Ray L. Danner, d/b/a DAE Broadcasting Company, licensee of Radio Station WDVH, Gainesville, Florida.

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

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
UNITED CHURCH OF CHRIST, NEW YORK, N.Y.
Concerning Fairness Complaint Re Station KRRV, Sherman, Tex.

SEPTEMBER 7, 1973.

OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST,
289 Park Avenue South, New York, N.Y.

GENTLEMEN: This is in response to your fairness complaint of June 28, 1973, against Radio Station KRRV, Sherman, Texas. You contend that the licensee has not afforded reasonable opportunity for the discussion of contrasting viewpoints on a controversial issue of public importance which you claim was raised by the April 10, 1973 broadcast of the following announcement:

(Sound: Voice of Adolph Hitler addressing crowd. Sound full, then under announcer and out.)

Male Voice: That is the voice of Adolph Hitler. When Hitler became Chancellor of Germany, he also became the boss of every German radio station, because every station was owned and operated by the government. Surprisingly, that's still true in Germany and in most other countries in the world—but not in America. In America, when you hear the phrase, "And now the news," on your radio or TV, you know you're hearing independently gathered news presented by independently owned radio and TV stations. You won't just be hearing what the government might like you to hear. Now we think that's a pretty important reason for preserving our free broadcasting system in this country. Let's keep broadcasting free in America!"

You assert that the controversial issue of public importance raised by the announcement is "the advisability of regulation of broadcast advertising." You add that you have "not heard the consumer viewpoint on the issue expressed." In support of your complaint, you incorporate by reference the arguments made by you and the Consumer Federation of America in your May 10, 1973 Request for Declaratory Ruling and June 8, 1973 Memorandum in Reply to Response to Request for Declaratory ruling.[1]

In its letter to you, dated May 15, 1973, KRRV denied your request, "since the matter was a station promo and did not raise a controversial issue."

A licensee who presents one side of a controversial issue of public importance must afford reasonable opportunity for the presentation of contrasting viewpoints. This requirement, embodied in the fairness doctrine, places the responsibility upon 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

[1] In a companion decision, rendered this date, the Bureau denied the request for a declaratory ruling by Consumer Federation of America, Straus Communications, Inc., and Office of Communication, United Church of Christ. —— FCC 2d —— (September 7, 1973).

Commission will review complaints only to determine whether the licensee can be said to have acted reasonably and in good faith.

You contend that the "Adolph Hitler" spot broadcast on KRRV raised a controversial issue of public importance: namely, "the advisability of regulation of broadcast advertising." For support of that contention you rely solely on arguments presented in your May 10 and June 8 pleadings. However, those pleadings referred to two entire series of spot announcements distributed by the National Association of Broadcasters, while here we are asked to consider only a single announcement from the series. Although the spot directly argues against governmental ownership of the broadcasting system in America, there is no mention of broadcast advertising or even of government regulation of broadcasting. The pervasive theme of the spot is the advisability of avoiding government *ownership* of the American broadcasting system. While the "Advisability of regulation of broadcast advertising" may constitute a controversial issue of public importance, you have failed to specifically indicate how the announcement in question here presented one side of that particular controversy. See *Healey* v. *FCC*, 460 F. 2d 917, at 921 (C.A.D.C., 1972); *Allen C. Phelps*, 21 FCC 2d 12, 13 (1969). Accordingly, upon consideration of all of the information and arguments before us concerning this one particular announcement, we cannot find that the licensee was unreasonable in concluding that a controversial issue of public importance regarding the advisability of regulation of broadcast advertising was not raised by the broadcast.

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
DR. HAKKI S. TAMIMIE, GALESBURG, ILL.
Concerning Fairness Doctrine Re Iowa
Educational Broadcasting Network,
Des Moines, Iowa

AUGUST 29, 1973.

DR. HAKKI S. TAMIMIE,
1639 Bluebird Drive,
Galesburg, Ill.

DEAR DR. TAMIMIE: This is in reference to your letters dated July 11 and July 31, 1973 in which you allege that the Iowa Educational Broadcasting Network, Des Moines, Iowa failed to fulfill its fairness doctrine obligations when it presented pro-Israeli views on the "KUP Show" and did not provide a pro-Arab spokesman a reasonable opportunity to express an opposing view.

In your correspondence you state that the Iowa Educational Broadcasting Network broadcast a program on June 10, 1973 at 9:00 p.m. entitled the "KUP Show" which featured Mr. Abba Eban; that the controversial issue of public importance that was discussed was the Middle East situation; that Mr. Eban presented the Israeli viewpoint and attacked "some of the Arabian countries with whom we still have some diplomatic and economical affiliation which is highly important to our national interest"; that the network and producer of the "KUP Show" have ignored your complaint; and that you are available to present the Arab viewpoint.

The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford a reasonable opportunity for the presentation of contrasting views in its overall programming, which may include news programs, interviews, discussion, debates, speeches and the like. The fairness doctrine does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and 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. It is the responsibility of the broadcast 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 will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

The Commission expects an individual who lodges a fairness doctrine complaint to submit specific information including: (1) the specific issue or issues of a controversial nature of public importance presented by the station; (2) the basis for the claim that the issue or issues were controversial issues of public importance, either nationally or in the station's local area at the time of the broadcast; (3) the basis for the claim that the station or network broadcast only one side of the issue or issues in its overall programming (complainant should include accurate summary of the view or views broadcast and presented by the station); and (4) whether the station or network has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue or issues. See *Allen C. Phelps*, 21 FCC 2d 12, 13 (1969).

In your complaints to the Commission you state that the issue is the "Middle East:" however, you failed to specify the particular aspect of the general topic which was discussed. Further, as noted above, one of the essential elements the Commission requires from a complainant for establishing a *prima facie* fairness doctrine case is information which substantiates the claim that the station or network broadcast only one side of the issue *in its overall programming*. You have not presented this information to the Commission. Accordingly, until the Commission receives that necessary information, no further action on your complaint 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.

F.C.C. 73-918

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Petition by
PENNY MANES, CINCINNATI, OHIO
For Reconsideration of Denial of Fairness Complaint

SEPTEMBER 6, 1973.

MS. PENNY MANES,
498 Kulla Viken Lane,
Cincinnati, Ohio

DEAR MS. MANES: This is in response to your December 1, 1972 petition for reconsideration of the Commission's denial, on November 1, 1972 (38 FCC 2d 308), of your fairness doctrine complaint of October 3, 1972, against WCPO–TV, Cincinnati, Ohio.[1]

In your complaint of October 3, 1972, you alleged that WCPO–TV was violating its fairness doctrine obligations to afford reasonable opportunity for the discussion of a controversial issue of public importance: namely, the 1972 Congressional race for the 2nd district of Ohio in which you were the Democratic party's nominee. In its decision of November 1, 1972, the Commission held that WCPO–TV had not acted unreasonably in covering that campaign or in bad faith with respect to its fairness doctrine obligations arising out of the campaign. The Commission noted its long-standing policy of not attempting to substitute its judgment on news values for that of the licensee.

PETITION FOR RECONSIDERATION

In support of your petition you argue that the Commission:

(a) "relied upon evidence which was intentionally withheld from petitioner by both the licensee and the Commission." You state that WCPO–TV filed several documents sometime prior to the issuance of the Commission decision of November 1, 1972, without your knowledge or the opportunity to comment thereon.

(b) "erroneously found that a television licensee may regard a major party candidate for federal office as being inherently unnewsworthy and therefore instruct its news personnel not to cover such candidate's campaign."

(c) "erroneously concluded that it was unable to find that the licensee has acted unreasonably or in bad faith with respect to its fairness doctrine obligations." You allege that WCPO–TV's scanty coverage of your campaign, right up to election day, is evidence of its bad faith in earlier suggestions to the Commission that, as election day neared

[1] Also before the Commission is WCPO–TV's January 9, 1973 Opposition to Petition for Reconsideration and your January 30, 1973 Reply to Opposition to Petition for Reconsideration.

and audience interest increased, campaign coverage would also increase. Furthermore, you allege that on August 6, 1972, the station carried a statement regarding highway congestion in Cincinnati by your opponent. Rep. Donald Clancy, without offering you such an opportunity.

(d) "failed to resolve the factual disputes as to whether WCPO–TV had a blanket policy not to cover Petitioner except where she responded to her opponent."

(e) "wrongfully failed to accommodate its decision with the recently enacted provision of Section 312(a)(7) of the Act." You contend that the recent amendment of Section 312(a) imposes an obligation on broadcasters to provide legally qualified candidates for federal office with reasonable access to a station's facilities, and that WCPO–TV failed to do this.

REPLY OF WCPO–TV

In oppositon to the petition, WCPO–TV:

(a) denies any impropriety with regard to documents which you allege were intentionally withheld from you. WCPO–TV claims that the evidence in question was information concerning the scope of WCPO–TV's campaign coverage and "backup material" furnished upon request of the Commission's staff and "handled on a (sic) informal basis." Moreover, WCPO–TV states that a Commission staff member revealed the contents of the evidence in question by phone conversation with you or your representative on or about November 1, and alleges that you failed to supply licensee a copy of your own reply letter of October 18, 1972.

(b) reaffirms its right to determine what is news, and views the contention that WCPO–TV had a blanket policy of not covering you except in response to your opponent as "wholly invalid." WCPO–TV disputes your calculation of 19 minutes of campaign coverage from October 18 through election day, November 7, 1972, and contends that some of the thirty-five news releases of your campaign which you claim were ignored were actually utilized in the two-minute analysis on the six p.m., November 2, 1972 news show. WCPO–TV also rejects your characterization as an "editorial" of its news stories of November 3 regarding the November 1, 1972, decision, and states that it "gratuitously" extended you the privilege of responding to the news story in like time segments. Further, license reaffirms its position that no extrinsic evidence has been presented to support your allegation that the station has suppressed, or that any of its staff has been ordered to suppress, any news pertaining to you.

(c) asserts that you are confused about the date of Rep. Clancy's comments regarding highway congestion in Cincinnati, but that in any event the remarks made during a September 6, 1972 news program were exempt from Section 315 obligations. Also, WCPO–TV claims that this matter is not properly before the Commission (under Section 1.106 of the Commission's rules) because there is "no showing as to why these matters could not have been produced before this petition."

(d) disagrees "completely with [your] tortured version of the meaning and applicability of Section 312(a)(7) to this case," and reasserts that it has met all of its obligations under the fairness doctrine.

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

In response to WCPO–TV's opposition to your petition for reconsideration of the Commission's November 1, 1972 decision, you submit that:

(a) by giving current news coverage to your campaign only once during the 60 days preceding the election, WCPO–TV demonstrated its "flagrant and consistent refusal in its news coverage to afford the public a reasonable opportunity to be informed about the existence of petitioner's campaign . . ."

(b) Congress, by amending Sections 312(a) and 315 of the Communications Act in the Federal Election Campaign Act of 1971, "holds broadcasters accountable for failure to provide 'reasonable access.'" You add, "It defines an affirmative obligation on the broadcaster under Section 315 to provide a 'candidate for Federal elective office' with reasonable news coverage in the period preceding the election." By "its failure to adequately cover your campaign," you allege that WCPO–TV "committed a disservice to the public interest of sufficient magnitude to require a finding of violation of its Section 315 obligation . . ." You claim that only two minutes of news coverage in the 19-plus minutes of airtime were afforded you during the campaign's last 60 days, and that almost half of the total amount of airtime was a 14-minute interview, three weeks before the election, at a time when, you claim, the Assistant News Director of WCPO–TV said "the period of greatest audience interest . . . is still ahead."

(c) even though your opponent ran a very low-profile campaign, WCPO–TV was not excused or justified in an "almost total blackout of news coverage which WCPO place on (your) campaign."

(d) "ordinary diligence" was exercised in attempting to ascertain facts not available until after the Commission's ruling of November 1, 1972, and that, regardless, the Commission should still consider any and all new facts because the public interest requires their consideration.

DISCUSSION

We deal first with two preliminary matters. You allege that denial of your complaint by the Commission was in reliance upon evidence that was "intentionally withheld from petitioner by WCPO–TV and the Commission's staff." However, it does not appear that any information received from the licensee was withheld from you by the Commission or intentionally withheld from you by WCPO–TV. Shortly before the Commission reached its decision of November 1, 1972, the Commission staff requested that the licensee provide certain additional information in order to clarify matters raised in the WCPO–TV reply letter of October 3, 1972. Following the receipt thereof, on or about October 31, 1972 a Commission staff member telephoned your campaign office to relay the information. Although the information from the licensee was received by the Commission prior to the November 1 decision, it was not stamped as "received" until November 6, 1972 because of the extraordinarily heavy workload in the week preceding the November 1972 general elections. The information in question consisted of affidavits which purported to refute

your claim that WCPO–TV employees had been "instructed not to cover you," and also of information concerning the scope of WCPO–TV's election-year coverage of all the political campaigns in its viewing area.[2] In view of WCPO–TV's knowledge that the Commission's staff was informing you of the additional information in question, the licensee cannot be said to have intentionally withheld information from you. Indeed, the licensee's explication of this sequence of communications in its January 9, 1973 pleading was not subsequently challenged by you. Furthermore, you have presented no refutation of the substance of the information thus conveyed which would warrant the Commission's reconsideration of this matter.

Secondly, your allegation that, on August 6, 1972, WCPO–TV broadcast a statement on highway congestion by your opponent without offering you such an opportunity comes late for consideration as a part of this petition for reconsideration since this was not brought to the Commission's attention prior to issuance of its November 1 decision, and you have not shown why this matter could not have been presented previously to the Commission. See Section 1.106(c) of the Commission's Rules and Regulations. In any event, it appears that the statement was part of a *bona fide* news story, exempt from the equal opportunities requirement, and you have not shown that it represented one side of a controversial issue of public importance for which WCPO–TV had failed to afford reasonable opportunities for the discussion of opposing viewpoints.

You contend that the Commission's decision "found that a television licensee may regard a major party candidate for federal office as being inherently unnewsworthy . . .," and that the public was not afforded a reasonable opportunity to be informed about your campaign. To the contrary, the Commission found that WCPO–TV had not been unreasonable in fulfilling its obligation to present conflicting viewpoints on the federal campaign in which you were a candidate. As noted in the November 1 decision, the Commission will not attempt to substitute its judgment of news values for those made by the licensee, but rather will review complaints such as yours to determine whether the licensee's judgments were unreasonable or in bad faith. While you may have regarded WCPO–TV's news coverage of your campaign as less than you desired, and while other local stations may have provided more coverage than did WCPO–TV, nevertheless, the undisputed evidence is that the licensee reported the announcement of your candidacy on January 3, 1972; broadcast film of your appearance at the August 4, 1972 "lettuce inspection"; broadcast the October 15, 1972 14-minute special interview with you; broadcast sound-on-film coverage of your appearance before the Cincinnati City Council on both the 6 & 10 p.m. newscasts on October 18, 1972 (a total of 4 minutes and 48 seconds); and broadcast a two-minute report on your campaign as one segment in the November 2, 1972 6 p.m. newscast. Under these circumstances, WCPO–TV could not reasonably be said to have regarded your campaign as "inherently unnewsworthy." In view of the sworn affidavits by the WCPO–TV employees you named, the Com-

[2] It appears that you failed as well to serve licensee with a copy of your own October 18, 1972 pleading. WCPO–TV states that it had to obtain a copy of your response from the Commission on or about October 30, 1972.

mission is also unable to find that you have submitted the requisite extrinsic evidence to support your allegation that the licensee suppressed or distorted, or that any of its staff was ordered to suppress or distort, any news pertaining to you, or that WCPO–TV had a blanket policy not to cover your campaign. See *Mrs. J. R. Paul*, 26 FCC 2d 591 (1969).

It is well established that broadcasters must give adequate coverage to public issues such as a Congressional campaign. *United Broadcasting Co.*, 10 FCC 515 (1945); *CBS* v. *DNC*, 412 U.S. —— (May 29, 1973). The gravamen of your complaint here is that WCPO–TV was unreasonable in exercising its journalistic discretion as to the amount of coverage to give to your campaign. Yet, you do not dispute that at least 19 minutes [3] of free coverage was provided to you during the last 60 days of your campaign; nor do you contest WCPO–TV's statements that you "got more time than did Representative Clancy" and that "it is clear that (you) got the better treatment in any comparison." WCPO–TV estimated that it faced the 1972 campaign season with approximately 150 important political races in its metropolitan area and some fifty other important contests in the licensee's Area of Dominant Influence. There is no evidence that other Congressional campaigns in the licensee's service area received significantly more coverage than your race. While no licensee should permit the activity or inactivity of one or more of the candidates in a campaign to determine the amount of campaign coverage which it provides to the public, we are unable upon the evidence presently before us to find that WCPO–TV was unreasonable in exercising its journalistic discretion in this matter. The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved.

You also contend that WCPO–TV acted in bad faith by suggesting to the Commission that, as election day drew nearer, the campaign would receive more news coverage. However, you do not dispute the fact that WCPO–TV, in accordance with a statement made to the Commission in a reply letter of October 3, 1972, presented at least 16 minutes of additional coverage of your campaign between October 3, 1972 (the date of your original complaint) and election day.

Finally, we come to your contention that the Commission "failed to accommodate its decision with the recently-enacted provision of Section 312(a)(7) of the Communications Act," with which you assert WCPO–TV has not complied. While you accurately note that Section 312(a)(7) does not pertain to the fairness doctrine, you argue that it is "clearly relevant" in determining whether a licensee has met his Section 315 obligations. Congress amended Section 312(a) in 1971 to provide for revocation of a station's license:

> (7) for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy, Pub. Law No. 92–225 (1972).

We do not agree with your interpretation of the phrase "allow reasonable access to." Section 312(a)(7) relates to "use" of a licensee's

[3] You state that WCPO–TV claims at least 24 minutes. *Reply to Opposition to Petition for Reconsideration*, p. 6, January 30, 1973.

facilities by the candidate, not to a licensee's coverage of a candidate's campaign in news or public affairs programming. Question and Answer 5 of the Commission's Public Notice of March 16, 1972, *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 37 Fed. Reg. 5796, 5805, covers this point:

> 5. Q. Does the "reasonable access" provision of Section 312(a)(7) require commercial stations to give free time to legally qualified candidates for Federal elective office?
>
> A. No, but the licensee cannot refuse to give free time and also [refuse] to permit the purchase of reasonable amounts of time. *If the purchase of reasonable amounts of time is not permitted*, then the station is required to give reasonable amounts of free time." (emphasis supplied)

Since you make no allegation, nor is there any evidence presently before us showing that WCPO–TV has ever refused to permit you to purchase reasonable amounts of time, no violation of Section 312(a)(7) can be said to have occurred.

In view of the foregoing, your petition for reconsideration is denied.

Commissioner Robert E. Lee absent.

By Direction of the Commission,
Vincent J. Mullins, *Acting Secretary.*

F.C.C. 73-944

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS, TUPELO, MISS.	Docket No. 19720 RM-1915

REPORT AND ORDER

(Adopted September 11, 1973; Released September 14, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it the Notice of Proposed Rule Making in this proceeding, adopted April 11, 1973 [FCC 73-391; 38 Fed. Reg. 9835], comments filed by the proponent, Town 'N Country ("TNC") and an informal response from the mayor of Baldwyn, Mississippi.

2. The proposal put forward in the Notice was to assign Channel 240A to Tupelo, Mississippi, as a second FM assignment. Tupelo, a community of 20,471 persons, already has an operating Class C FM station on its only current FM channel. Before we could proceed to make the requested assignment, it would be necessary to favorably resolve the several issues presented by this case. Beyond the always-present question of the justification for the assignment itself, we need to consider the matters of intermixture and preclusion. In some instances, we decide against making an assignment without regard to such other factors, but the reasoning applicable to such cases does not apply here. TNC has provided sufficient support to warrant making the assignment were it not for these other matters. Since there is no dispute on this score, we need not pursue the aspect of the filings concerned with making a prima facie case for assigning a second channel. Instead we will turn to the other questions to see if they dictate a different resolution of the case.

3. The first point to consider is that of intermixture. As TNC has observed, in some instances we have added a Class A channel to the existing Class B or C assignment (or assignments) in a community. If a Class B or Class C channel, as the case may be, is not available and additional FM service is needed, quite obviously this is the only means to bring it. If no other problems are presented and a party is willing to proceed using a Class A channel, we have given our approval. Before we can conclude that no other problems are presented, we need to examine other aspects of the situation. Since Class A channels are normally intended for use in smaller communities, we need to consider the impact on channel availability for such smaller communities. This channel could instead be used at Baldwyn or Booneville, Mississippi, but the latter already has a channel for which an

application has been filed. Baldwyn does not, and TNC acknowledges that no channel other than 240A could be made available to Baldwyn. Thus, we face a question of preclusion.

4. How important is the preclusionary effect on Baldwyn? To answer this point we need to consider relative need and likelihood of interest in using the channel at Baldwyn. If the Tupelo need is demonstrably greater or no interest in Baldwyn were apparent, it would be possible to accommodate the TNC request. If not, its proposal must be denied. The material on these points is not extensive. Baldwyn's mayor simply states that there is interest in use of the channel and that we should not deprive this community of 2,366 persons of its only chance for local broadcast service. TNC points to Baldwyn's small size, contrasting it with Tupelo's; TNC also emphasizes Tupelo's growth and economic development.

5. Our guidelines for the making of assignments indicate that one or two FM channels might be assigned to communities having a population under 50,000. Tupelo's population is toward the lower end of the range, and for most communities of like size in Mississippi, we have provided only a single FM assignment. In addition, we note that Tupelo has a VHF television station, three AM stations in operation (two full-time, one Class III and one Class IV), an AM station under construction and a 100 kilowatt operation on its current FM assignment.[1] This is not the picture of great deprivation calling for immediate remedy regardless of the consequences.

6. Baldwyn lacks any means of local expression, save for its weekly newspaper. As a small community, it is a suitable location for a Class A assignment. The mayor assures us that interested parties will step forward shortly. If they did, our current inclination would be to act favorably on their request. However, these interested parties have yet to speak. For this reason, we do not think it appropriate to assign the channel to Baldwyn now. If a rule making proposal were to be filed, the matter could then be pursued. In the meantime, we shall not make an assignment to any community. TNC is invited to renew its request should a Baldwyn proposal not be forthcoming within six months. In this way we can protect Baldwyn's needs in a reasonable manner without precluding a future assignment to Tupelo should Baldwyn parties not proceed in due course.

7. Accordingly, IT IS ORDERED, That the subject proposal IS DENIED and that this proceeding IS TERMINATED.

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

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[1] It also has a daily newspaper and a large CATV system. Baldwyn has a CATV system, too, but only a weekly newspaper.

F.C.C. 73-946

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS, ELKHORN CITY, HINDMAN, JENKINS, AND NEON, KY.	Docket No. 19740 RM-1914 RM-2091

REPORT AND ORDER

(Adopted September 11, 1973; Released September 14, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it the Notice of Proposed Rule Making in this proceeding (FCC 73-495), adopted May 9, 1973, and responsive comments filed by Knott County Broadcasting Corporation ("Knott") and by Allen Epling.

2. Knott and Epling had each filed a petition for rule making seeking a first FM assignment in Hindman and Elkhorn City, Kentucky, respectively. Each proposed the assignment of Channel 296A and the substitution of Channel 232A for the unoccupied Channel 296A assignment at Neon, Kentucky. Because the communities are closer to one another than our spacing requirements would allow, it would not have been possible to accommodate both requests. Commission study indicated that it would be possible to avoid this conflict and to assign Class A channels to Hindman and to Elkhorn City without depriving any other community of a current assignment. Under this approach, set forth in the Notice, Elkhorn City could have Channel 276A and Hindman could have Channel 296A, provided Channel 232A [1] were substituted for Channel 276A at Jenkins, Kentucky, and Channel 261A were substituted for Channel 296A at Neon, Kentucky. None of these proposed changes would affect any existing operation. The only comments filed were those of the petitioners, and each supported the Notice as it related to its own proposal.

3. This case does not involve conflicts of any sort to be resolved and so does not require extended discussion. Although they have become involved in this proceeding, the communities of Neon and Jenkins would suffer no injury, as each would continue to have a single Class A assignment available for use. Even as to other communities not directly involved, our study of the pattern of assignments suggests that the proposed alteration of the FM Table would not work to deprive such communities of otherwise possible assignments. Since this is the case and since we do not have to choose between conflicting proposals, the question is simply one of the need for the requested assignments.

[1] Antenna site at Jenkins, Kentucky, must be located at least 2 miles west of the community.

4. At some length the petitioners have set forth the facts which lead them to believe that a first FM assignment is required in order to meet important local needs. Although neither community is particularly large, each functions as a trade center for a significant number of persons. Thus, even though Hindman has only 808 residents, it is the seat of Knott County and currently supports a daytime-only AM station, licensed to Knott. In fact, Hindman is the only incorporated community in the county, and the proposed assignment would bring the county's first full-time radio service. Elkhorn City is somewhat larger (population 1,081), but it has no local station at all. Since both areas are to some degree isolated and lack nearby full-time radio service, the proposed assignments could bring important area benefits in addition to providing first FM assignments in the communities. In our view, this situation provides ample reason for making the proposed assignments.

5. Accordingly, IT IS ORDERED, That effective October 26, 1973, the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) IS AMENDED to read as follows for the communities indicated:

City:	*Channel No.*
Elkhorn City, Ky	276A
Hindman, Ky	296A
Jenkins, Ky	232A
Neon, Ky	261A

6. Authority for the actions taken herein is contained in Sections 4(i), 303 and 307(b) of the Communications Act of 1934, as amended.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATION COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

104-010—73——4

F.C.C. 73-952

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS, RIPLEY, MISS.; BERRYVILLE, ARK.; CARO, MICH.; MITCHELL, S.D.; BOLIVAR, TENN.; HONEA PATH, S.C.; PAWHUSKA, OKLA.; OAK CREEK, COLO.; SPRINGHILL, LA.; QUITMAN, MISS.; AND HUNTINGBURG, IND.	Docket No. 19763 RM-2066, RM-2103, RM-2110, RM-2112, RM-2123, RM-2138, RM-2141, RM-2171, RM-2173, RM-2174, and RM-2178

REPORT AND ORDER

(Adopted September 11, 1973; Released September 17, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has under consideration its Notice of Proposed Rule Making (FCC 73-607, 38 Fed. Reg. 15971) which was adopted June 6, 1973, and which requested interested parties to submit comments concerning the proposed changes in the FM Table of Assignments, Section 73.202(b) of the Rules, on or before July 20, 1973, and to file reply comments on or before July 31, 1973. An Order extending the time for the filing of comments to August 3, 1973 and of reply comments to August 14, 1973, was granted in the case of Ripley, Mississippi. A similar Order which extended the time for filing reply comments up to and including August 8, 1973, was issued with regard to Huntingburg, Indiana. All comments and reply comments that were filed in response to the Notice were considered in making the subsequent determinations.

2. *Caro, Michigan* (RM-2110); *Bolivar, Tennessee* (RM-2123); *Pawhuska, Oklahoma* (RM-2141); *Oak Creek, Colorado* (RM-2171); *Springhill, Louisiana* (RM-2173); *Quitman, Mississippi* (RM-2174). Petitioners have requested that the Commission assign first FM channels (Class A) to these six communities. No additional changes in the FM Table of Assignments are required. The specific channel that has been proposed for each locality and the identity of the petitioner are as follows:

Channel 285A to Caro, Michigan (Tuscola Broadcasting Company)

Channel 244A to Bolivar, Tennessee (Bolivar Broadcasting Service, Inc.)

Channel 272A to Pawhuska, Oklahoma (Cherokee Broadcasting Company)

Channel 280A to Oak Creek, Colorado (Elliott Bayly)

Channel 224A to Springhill, Louisiana (Springhill Broadcasting Company)
Channel 252A to Quitman, Mississippi (Radio Station WBFN)

The populations of these communities range in size from 492 in Oak Creek, Colorado, to 6,674 in Bolivar, Tennessee.[1] With the exception of Oak Creek, which has no broadcast station, each town has only a local AM station which does not transmit at night. The assignment of a Class A FM channel would enable these communities to receive their first local nighttime service. Economic and demographic data further justifying the need of these communities for a first FM assignment was contained in the Notice of Proposed Rule Making and need not be repeated in this decision.

3. These changes in the FM Table of Assignments comply with the Commission's minimum mileage separation rule provided that the transmitter site in Caro, Michigan, is situated four miles east of that city and the transmitter location in Bolivar, Tennessee is 5.5 miles east of that city. Therefore, since there has been no opposition to these proposals and since the petitioners have all expressed their intent to apply for these channels, we are of the view that the requested assignments are in the public interest.

4. *Honea Path, South Carolina* (RM–2138). On February 12, 1973, Andco Broadcasting Company (Andco), the licensee of standard broadcast Station WHPB in Belton, South Carolina, petitioned the Commission to assign Channel 276A to Honea Path as its first FM assignment. Honea Path (population 3,707) is located in the northwest corner of the state in Anderson County (population 105,474) with approximately 3% of the city extending into Abbeyville County (population 21,112). While this community does receive broadcast service from stations in the South Carolina towns of Anderson, Belton and Greenville, it has no locally operated broadcast stations. Andco has expressed in its supporting statements the intent to file for Channel 276A in Honea Path, provided the channel is assigned there, and to operate the station independently of its AM operation in Belton.

5. The need of Honea Path for a first FM assignment is clearly stated in the Notice of Proposed Rule Making and requires no further elaboration here. It is sufficient to note that the shift of Honea Path from a rural agricultural community to a more industrialized locality has been a consequential factor in our decision to assign Channel 276A to that city. However, in order that the minimum mileage separation rule not be violated, the eventual occupant of Channel 276A must build his transmitter 5 miles south of Honea Path. Subject to this stipulation we believe that the assignment of Channel 276A to Honea Path is warranted.

6. *Berryville, Arkansas* (RM–2103). KTHS, Inc. petitioned the Commission on December 4, 1972, to substitute Channel 296A for Channel 237A at Berryville. Berryville (population 2,271) is located in Carroll County (population 12,301) approximately sixty miles south of Springfield, Missouri. It has one Class A FM channel (237A) which is unoccupied and a daytime-only AM station licensed to petitioner.

[1] All population figures are from the 1970 U.S. Census.

7. On August 4, 1972, KTHS, Inc. had applied for authority to operate on Channel 237A at Berryville, but its application was rejected due to the failure of its proposed transmitter site to be the required mileage separation distance of 65 miles from Station KTTS–FM in Springfield, Missouri. A subsequent search by the petitioner for a location this distance from Station KTTS–FM failed to discover a site which was for sale or, alternatively, a site which was economically feasible to develop. The petitoner adds that any of these locations were well outside Berryville's city limits and would have resulted in a signal of dubious quality to this community. In light of these circumstances, the petitioner's request to substitute Channel 296A for Channel 237A at Berryville appears to be in the public interest. The petitioner's engineering statement indicates that Channel 296A is available for use in Berryville without violating our minimum mileage separation requirement. Since petitioner has manifested his intent to apply for Channel 296A if it is assigned and since this change will allow the residents of Berryville to receive a local nighttime service, the substitution of Channel 296A for Channel 237A at Berryville is warranted.

8. *Mitchell, South Dakota* (RM–2112). Radio Station KYNT(AM) in Yankton, South Dakota, filed a petition on January 2, 1973, proposing the substitution of Channel 269A for Channel 265A at Mitchell, South Dakota. Mitchell, with a population of 13,425 persons, is located in Davison County (population 17,319), about 69 miles west of Sioux Falls. The community has a Class IV AM broadcast station, and the only FM channel assigned to it, Channel 265A, is unoccupied.

9. Petitioner had previously applied on August 8, 1972, for authorization to operate on Channel 262 in Yankton, but was rejected because its proposed transmitter site would have been short-spaced to the reference point of Channel 265A at Mitchell. Since this latter channel is unoccupied, petitioner's request to substitute Channel 269A would result in the elimination of the short spacing problem, thereby allowing the utilization of Channel 262 at Yankton. Channel 269A can be placed in Mitchell without affecting any other FM assignments. For these reasons petitioner's proposal merits adoption.

10. *Ripley, Mississippi* (RM–2066). On September 28, 1972, Kerry Hill filed a petition to assign Channel 288A to Ripley, Mississippi. Ripley, with a population of 3,482 persons, is located in the north central portion of the state in Tippah County (population 15,852). It has no FM assignments and the only local broadcast service which it receives is provided by Station WCSA, a daytime-only AM station. As the Notice of Proposed Rule Making indicates, the assignment of FM Channel 288A to Ripley would be instrumental in presenting to the public developmental problems which currently affect the community. Petitioner has expressed his intent to apply for this channel if it is assigned. Numerous letters in support of this petition were received from interested persons in the Ripley area.

11. Comments were filed by petitioner, Kerry Hill, and J. W. Furr. Hill supports the proposed assignment of Channel 288A to Ripley. Furr contends that the assignment of Channel 288A to Ripley would be in conflict with his application for the same channel at Aberdeen, Mississippi, which was filed with the Commission on December 26,

1972. Furr states that petitioner's engineering report indicates that a station operating on Channel 288A at Ripley would have to be located in a five-square-mile area approximately six miles east of the city, in order to comply with the Commission's mileage separation requirements and still provide the required city-grade signal over the entire community of Ripley. Furr mentions that in computing the required 65-mile separation from Aberdeen, petitioner mistakenly used the geographical center of Aberdeen as the reference point. He points out that Section 73.208(b) of the Rules requires that the coordinates of Furr's proposed transmitter site be used. When this is done, there are no permissible transmitter sites available which prevents petitioner from having Channel 288A assigned to Ripley. Furr indicates in a counterproposal that Channel 272A could be assigned to Ripley in lieu of Channel 288A.

12. Petitioner in his reply comments notes that his engineering statement was submitted prior to any application for Channel 288A at Aberdeen, and, therefore, could not be expected to consider Furr's proposed antenna site. He does not agree, though, that the grant of Furr's application would preclude the use of Channel 288A in Ripley. Petitioner requests that Furr's counterproposal assigning Channel 272A to Ripley be adopted.

13. The assignment of Channel 272A to Ripley would not violate the Commission's mileage separation rule nor result in any additional changes in the FM Table of Assignments provided that the transmitter site is six miles east of the city. In accord with previous decisions, specific notice of the counterproposal to assign Channel 272A to Ripley is not required before it can be adopted. See, e.g., *Owensboro on the Air, Inc.* v. *U.S.* 262 F. 2d 702 (D.C. Cir. 1958). Therefore, since the counterproposal would allow this community to have its first FM service, we believe that the assignment of Channel 272A to Ripley, Mississippi, is warranted.

14. *Huntingburg, Indiana* (RM–2178). On April 10, 1973, Paul Knies petitioned to have Channel 265A assigned to Huntingburg, Indiana. This city has a population of 4,794 persons and is located in Dubois County (population 30,934), 67 miles west of Louisville, Kentucky. Petitioner's proposal is in conformity with the Commission's minimum mileage separation rule and does not require any changes in the FM Table of Assignments, provided the transmitter site is three miles north of Huntingburg. Presently, Huntingburg has no local broadcast facilities and petitioner notes that the county has only one daytime AM station and its affiliated FM station. Petitioner has expressed his intent to apply for Channel 265A if it is assigned to Huntingburg.

15. Comments and reply comments were filed by petitioner Paul Knies and Jasper on the Air, Inc., the licensee of WITZ and WITZ–FM in Jasper, Indiana. Jasper on the Air notes that since the communities of Huntingburg and Jasper are in the same county and only five miles apart, on March 28, 1972, it was granted authorization for dual city identification pursuant to Section 73.1201(b) of the Rules. Jasper on the Air further states that while Jasper is the principal city

in terms of its public service obligations, WITZ and WITZ–FM have provided ample local service to Huntingburg. This claim of sufficient service, however, does not follow automatically just because Jasper on the Air has been granted dual city identification. The numerous letters from interested parties in the Huntingburg area present strong evidence that the needs of this community are not being adequately served and that it could use its own local broadcast station. The Mayor, the Chamber of Commerce and the editor of the weekly newspaper, have all stressed the fact that a local radio station, whose primary concern is Huntingburg, would be of substantial benefit. Further, petitioner believes that ample service is not being provided to Huntingburg because WITZ–FM, which is the only nighttime voice in the county, operates only 16 hours a day with up to 14 hours per day of its programming duplicated from daytime-only AM Station WITZ.

16. Jasper on the Air also challenges a claim in support of petitioner's request which was advanced by Thomas Brumett, the Superintendent of North Spencer County School Corp. and which stated that a station operating at Huntingburg on Channel 265A could furnish 1 mV/m service to eight communities in adjacent Spencer County. Mr. Brumett's contention was without the benefit of engineering advice and Jasper on the Air is correct in noting that a 1 mV/m contour would not extend to half of these communities. However, the principal reason for assigning Channel 265A to Huntingburg is not to serve the eight communities in Spencer County, but to provide Huntingburg with local FM service. Jasper on the Air's last objection involves a counterproposal, advanced in its reply comments, which would assign Channel 265A to communities other than Huntingburg. In our Notice of Proposed Rule Making we stated that counterproposals advanced in the proceeding itself would be considered if they were included in the comments, so that parties may treat them in their reply comments. Since Jasper on the Air made its counterproposal in its reply comments, we shall not consider it.

17. Petitioner's proposal has the distinct advantage of not only providing Huntingburg with its first local FM channel assignment, but also of creating a competitive broadcast voice in Dubois County. Based on the evidence submitted by petitioner we believe that Huntingburg can maintain an FM station. As petitioner indicates, the estimated retail sales in 1970 for the county were $69,681,000. He also states that there are twenty industrial establishments in the city, along with over 100 places of business. In view of the need for local FM service and the lack of any substantial objection to this proposal, we conclude that it is in the public interest to assign Channel 265A to Huntingburg.

18. Authority for the adoption of the amendments contained herein appears in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

19. In view of the foregoing, IT IS ORDERED, That effective October 26, 1973, Section 73.202(b) of the Commission's Rules, the FM Table of Assignments, IS AMENDED to read as follows for the communities indicated:

City:	*Channel No.*
Berryville, Ark	296A
Oak Creek, Colo	280A
Huntingburg, Ind	265A
Springhill, La	224A
Caro, Mich	285A
Quitman, Miss	252A
Ripley, Miss	272A
Pawhuska, Okla	272A
Honea Path, S.C	276A
Mitchell, S. Dak	269A
Bolivar, Tenn	244A

20. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

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

F.C.C. 73–875

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE NOTICE OF APPARENT LIABILITY FOR FORFEITURE TO HUGHES TOOL CO., LICENSEE OF STATION KLAS–TV, LAS VEGAS, NEV.

AUGUST 21, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

HUGHES TOOL CO.,
Licensee of Station KLAS–TV,
Box 15047,
Las Vegas, Nev.

GENTLEMEN: This letter constitutes a Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

On September 18, 1972, the Commission received a complaint against Station KLAS–TV filed by Mr. James P. Rosner on behalf of Mr. Walter S. Baring and "The Volunteers for Congressman Baring." Mr. Baring was a legally qualified candidate in the September 5, 1972 Nevada primary elections seeking the Democratic nomination for the state's at-large Congressional seat. "The Volunteers for Congressman Baring" was legally constituted as Mr. Baring's campaign committee and authorized to purchase political advertising on behalf of his candidacy. Complainant Rosner represented the committee in its efforts to secure such advertising. In his letter of complaint, Mr. Rosner submitted a copy of a telegram, dated August 29, 1972, 4:28 p.m., which he sent to KLAS–TV on behalf of "The Volunteers for Congressman Baring" requesting "Equal opportunities as defined by the Federal Communications Commission under Section 315 of the Communications Act of 1934, in reference to James Bilbray [one of the two legally qualified candidates opposing Mr. Baring in the September 5, 1972 Democratic primary]." The telegram advised that "This request will be repeated daily, from this date forward through election day [September 5, 1972], in order to insure 'The Volunteers for Congressman Baring' continual equal opportunities to purchase paid political advertising on KLAS–TV." Complainant also submitted a copy of your station's reply telegram, sent August 30, 1972, stating that Mr. Rosner was already in receipt of a list of availabilities for the dates requested and advising that "There are no availabilities for you or James Bilbray between the hours of 6:00 to 10:00 p.m. on Saturday, 9/2/72 because of football, as previously stated and there are no availabilities from 7:30 p.m. on Sunday 9/3/72 through 3:30 p.m. on Monday 9/4/72 for you or James Bilbray, due to Jerry Lewis Telethon, as previously [stated]." Complainant submitted a copy of a final telegram sent to

KLAS–TV on September 1, 1972 which requested time "'Comparable' to that which you have broadcast for James Bilbray." The telegram further stated:

> . . . A total of 16 thirty-second announcements have been sold to James Bilbray to run in prime time (defined as between the hours of 7:30–11 p.m.) between Tuesday, August 22, 1972, and Monday, September 4, 1972. As of 5:00 p.m. today, September 1, 1972, James Bilbray has broadcast 12 thirty-second announcements in prime time between 7:30–11 p.m. Assuming the announcements in prime time purchased by the Volunteers for Congressman Baring and confirmed by KLAS–TV are broadcast according to contract, those announcements made available in prime time between the hours of 7:30–11 p.m. for Congressman Baring total only nine. Therefore, under the equal opportunity provisions of Section 315 of the Communications Act of 1934, KLAS–TV, as of 5:00 p.m. this date, must make available to the Volunteers for Congressman Baring three additional prime time thirty-second announcements to be broadcast between 7:30–11 p.m. before election day. Furthermore, James Bilbray has purchased four additional prime time announcements 7:30–11 p.m. between Friday, September 1, 1972 and election day. This equal opportunity request will be repeated on each of the succeeding days between now and election day and must be granted.

Complainant stated that this telegram was not answered, "nor was equal opportunity granted." He requested that the Commission "investigate this incident to determine if KLAS–TV is in violation of Section 315 of the Communications Act of 1934," and that "appropriate action be taken."

In a response of December 5, 1972 to the Commission's inquiry, you state that on August 3, 1972, the "Bilbray for Congress Committee" requested and purchased a schedule of spot announcements which were broadcast on behalf of Mr. Bilbray's candidacy from August 8, 1972 through September 4, 1972. You state that on August 3 and 4, your station's general sales manager telephoned complainant's office to advise him of the above purchase by the Bilbray committee and to urge a similar purchase of spot announcements in order to assure Mr. Baring's campaign adequate coverage in the Las Vegas area; that such calls were repeated on August 17 and 18 to again urge complainant to purchase spots and "to do so quickly, as availability of time was running scarce"; and that on August 16, the General Manager of KLAS–TV also attempted to contact complainant by phone, but his call was not returned. You state that on or about August 24, complainant contacted KLAS–TV requesting 30-second spot availabilities and was supplied with such the following day, and that on Monday, August 28, complainant met with the General Manager "to purchase a spot schedule, which was immediately produced but did not appeal to Mr. Rosner, even though it was equivalent to the schedule running on behalf of Congressman's Baring's opponent." You state that several local sponsors were then pre-empted to provide complainant with an acceptable schedule. You indicate that Mr. Baring's announcements were broadcast from August 31 through September 4 and direct attention to the following comparison between those announcements and the schedule running for Mr. Bilbray during the same calendar period:

HUGHES TOOL COMPANY

	Baring	Bilbray
Class "AA" spots (7:30–11 PM)	8 30-sec. spots	3 30-sec. spots.
Class "A" spots (5–7:30 PM; 11 PM)	12 30-sec. spots	8 30-sec. spots.
Class "B" spots (9 AM–5 PM; 11–11:30 PM)	17 30-sec. spots	8 30-sec.; 1 60-sec.
Class "C" spots (7:30–9 AM; 11:30 PM–CC)	4 30-sec. spots	3 30-sec.; 3 60-sec.

You further state that "Mr. Rosner still insisted on more spots and in particular, inside the football game on September 2, 1972. . . . a time period in which Mr. Bilbray had no spots running and KLAS–TV was already in an oversold position," and that as a result of the failure to reach an accord on complainant's last request the exchange of telegrams cited by complainant took place and led to the instant complaint. On the basis of the foregoing, you state that "we acted in eminent good faith to give access and equal opportunity to Congressman Baring's campaign, and we reject Mr. Rosner's accusations that we violated section 315 of the Communications Act of 1934."

In his reply to your response, dated December 12, 1972, complainant objected to the designation of the calendar period of August 31 through September 4 as the basis for comparison of the opportunities afforded the two candidates. Referring to the first of his daily telegram requests for "equal opportunities," dated August 29, 1972, complainant directs attention to "the fact that KLAS–TV has ignored . . . the seven-day retroactive provision applicable to a request for equal opportunity," and states that "It is in that regard, and with specific reference to comparable time availabilities that my complaint was made."

Upon the facts here presented, it would appear that your failure to fully honor complainant's requests for "equal opportunities" on Mr. Baring's behalf constituted a willful or repeated violation of Section 315(a) of the Communications Act of 1934, as amended.[1] Crucial to this conclusion is our finding that complainant's interpretation of the applicability of the Commission's 7-day rule (Section 73.657(e)) [2] is correct. The 7-day rule provides a licensee affording time to one candidate with a standard rule of thumb for his scheduling expectations vis-a-vis the resulting "equal opportunities" rights of other opposing candidates. The licensee must be prepared, upon request, to afford the other candidate or candidates opportunities for the use of his station's facilities equal to the uses allowed the opponent during the 7-day period preceding the date of such request. Similarly, where a licensee allows a candidate to use his station's facilities in a fixed and continuing pattern (as, for example, through the sale

[1] Section 315 of the Communications Act, in relevant part, provides:
(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . .
The Commission notes that you do not dispute that the announcements broadcast on behalf of Mr. Bilbray's candidacy were "uses" within the meaning of Section 315(a).

[2] Section 73.657 of the Commission's Rules and Regulations provides in relevant part:
(e) A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use, giving rise to the right to equal opportunities, occurred. . .

of a number of spot announcements to be broadcast over a specified period of time), a Section 315 request from an opposing candidate in reference thereto gives the licensee notice that equal opportunities are requested as to all uses in the 7-day period prior to the request and all subsequent uses pursuant to the pre-established schedule. See *Emerson Stone*, 40 FCC 385 (1964). Since the first of complainant's daily Section 315 requests on Mr. Baring's behalf was transmitted to your station on August 29, these principles hold that such request covered all uses by Mr. Bilbray in the prior 7-day period (August 22 through 28) and also put you upon notice that equal opportunities were sought in reference to the opponent's future uses which were scheduled through the election eve of September 4.[3] Thus, the relevant calendar period for a comparison of the opportunities afforded the two candidates is not, as you submit, August 31 through September 4 (such period corresponding only to the schedule of announcements broadcast for Mr. Baring's candidacy), but rather August 22 through September 4. Copies of the candidates' respective announcement schedules which you have submitted indicate the following comparison between the spot announcements broadcast for Mr. Bilbray's candidacy during the period of August 22 through September 4 and those afforded Mr. Baring's campaign in time periods of comparable desirability:

	Bilbray	Baring
Class "AA" spots (7:30–11 PM)	10 30-sec.	8 30-sec.
Class "A" spots (5–7:30 PM; 11 PM)	17 30-sec. (6 at 11 PM)	12 30-sec. (1 at 11 PM).
Class "B" spots (9 AM–5 PM; 11–11:30 PM)	22 30-sec.; 1 60-sec.	17 30-sec.
Class "C" spots (7:30–9 AM; 11:30 PM–CC)	17 30-sec.; 11 60-sec.	4 30-sec.

It therefore appears that, as complainant requested, Mr. Baring's campaign was entitled to two additional "Class 'AA' " 30-second spot announcements and five additional "Class 'A' " 11:00 p.m. 30-second spot announcements and that your refusal to afford such additional announcements constituted a willful or repeated violation of Section 315(a) of the Communications Act.[4]

The Commission has considered your response in this matter but is of the view that it is not satisfactory. Although the Commission has stated that "a candidate cannot use Section 315 of the Act to delay his request for time and expect the 'equal opportunities' provision of that Section to give him the right to saturate pre-election broadcast time," *Honorable Allen Oakley Hunter*, 40 FCC 246, 247 (1952), we do not find such circumstances presented where, as here, the request is communicated to the licensee almost a full week before the elec-

[3] Although complainant's first telegram advised that the request would be repeated daily from August 29 through September 5 "in order to insure . . . continual equal opportunities," the Commission has always considered as valid and appropriate an equal opportunities request made prior to Section 315 broadcasts if it is based on specific future uses which were known or announced to be pre-scheduled. See *Socialist Workers Party*, 15 FCC 2d 96 (1968).

[4] Although in his telegram of September 1 complainant claimed that his August 29 request for equal opportunities entitled Mr. Baring to seven additional spot announcements "in prime time (defined as between the hours of 7:30–11:00 p.m.)", complainant's "prime time" definition clearly encompassed the "Class 'A' " 11:00 p.m. time slot, as well as the "Class 'AA' " 7:30–11:00 p.m. time period. It appears that complainant made no requests for additional "Class 'B' " or "Class 'C' " announcements in his communications with you.

tion. Had complainant waited until the last day or two before the election to make his request for "equal opportunities," a different conclusion might be warranted. We note your statement that you believed you were acting reasonably and in good faith in attempting to advise complainant of the Bilbray committee's purchase of spot announcements and in urging him early in the campaign to purchase a similar schedule on behalf of Mr. Baring's candidacy. However, as the Commission has stated in a somewhat different but analogous context:

> When the licensee and the candidates agree to the broadcast of a program featuring a joint appearance of all candidates, such a broadcast would appear to comply fully with the licensee's obligations under Section 315 to afford "equal opportunities."
>
> A different situation is presented where a candidate has not accepted the licensee's earlier offer to appear on a joint program with his opponents and, subsequently, seeks opportunities equal to those afforded to and accepted by his opponents. *However well intentioned the licensee's earlier offer may have been* as to the joint program, *it is clear that such offer cannot operate to modify the licensee's obligations under the Act.* Where the licensee permits one candidate to use his facilities, Section 315 then—*simply by virtue of that use*—requires the licensee to "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." *Senate Committee on Commerce*, 40 FCC 357, 358–59 (1962) (Emphasis added).

Thus, where a licensee affords time to one candidate, other opposing candidates may assert their resulting rights to "equal opportunities" according to their own judgment, subject only to the 7-day rule and the above-noted limitation on eleventh-hour demands. This is not a case where a clear offer of equal time was made to, and rejected by, the candidate. There was therefore no reason for the station to assume that there had been any waiver of the candidate's rights or that Section 315 was not fully applicable. Finally, your submission that KLAS–TV was in an oversold position in many of the relevant time periods and therefore could not afford the total number of spot announcements requested by complainant without further altering its sustaining and/or program schedules cannot justify your failure to comply with your obligations under Section 315. As the Commission stated in explaining the policy underlying the 7-day rule:

> We are fully cognizant of the fact that licensees must be able to plan their program schedules sufficiently in advance to give reasonable assurance that the planned programs will be broadcast substantially as scheduled. Of course, from time to time, unforeseen events occur or circumstances change, necessitating a modification of such program plans and these contingencies should be, and are, taken into consideration when the schedule is planned. *Requests for broadcast time pursuant to Section 315 are one form of such unforeseen events for which leeway must be built into the schedule. Senate Committee on Commerce, supra*, at 359, Emphasis added); See also *E. A. Stephens*, 11 FCC 61 (1945).

In this regard, we note that complainant specifically requested only seven additional 30-second spot announcements in prime time although Mr. Baring was entitled to additional "Class 'B'" and "Class 'C'" 30- and 60-second spot announcements as well. Under these circumstances, there appears to be no valid justification for your refusal to honor his request for those comparatively few additional announcements.

It should be observed that the 7-day rule, which, in this case, determined the number of announcements to which Mr. Baring was rightfully entitled under Section 315, has been in effect since August 10,

1959. See 24 Fed. Reg. 6345 (1959). The Commission has repeatedly stated that it expects licensees to become familiar with the Commission's Rules and Regulations and to adhere thereto in the operation of their stations, and has also advised licensees that sanctions will be imposed where necessary to ensure such recognition and compliance. See *Crowell-Collier Broadcasting Corp.*, FCC 61–989, 21 RR 921 (1961). Accordingly, for failing to comply with your obligations under Section 315(a), you are subject to forfeiture pursuant to Section 503 (b) (1) (B) of the Communications Act of 1934, as amended. In view of the serious nature of this violation, the Commission has determined that you have incurred an apparent liability in the amount of one thousand dollars ($1,000) for willfully or repeatedly failing to observe the obligations imposed by Section 315(a).

Under Section 1.621 of the Commission's Rules, you may take any of the following actions in regard to this forfeiture proceeding:

1. You may admit liability by paying the forfeiture within thirty days of receipt of this Notice. In this case you should mail to the Commission a check or similar instrument for $1,000, made payable to the Federal Communications Commission.

2. Within thirty days of receipt of this Notice you may file a statement, in duplicate, as to why you should not be held liable or why the forfeiture should be reduced. The statement may include any justification or any information that you desire to bring to the attention of the Commission. After consideration of your reply the Commission will determine whether any forfeiture should be imposed, and, if so, whether the forfeiture should be imposed in full or reduced to some lesser amount. An order stating the result will be issued.

3. You may take no action. In this case the Commission will issue an order of forfeiture after expiration of the thirty-day period ordering that you pay the forfeiture in full.

Commissioner Reid concurring in the result, Commissioners Wiley and Hooks absent.

By Direction of the Commission,
Vincent J. Mullins, *Acting Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE RENEWALS OF BROADCAST LICENSES FOR INDIANA, KENTUCKY, AND TENNESSEE, 1973

SEPTEMBER 4, 1973.

The Commission by Commissioners Burch (Chairman), Robert E. Lee, H. Rex Lee, Reid, Wiley and Hooks with Commissioner Johnson dissenting and issuing a statement approved staff action reviewing Broadcast Licenses for Indiana, Kentucky, and Tennessee for 1973.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON ON INDIANA, KENTUCKY, AND TENNESSEE RENEWALS

On July 26, 1973, the Commission noted actions to be taken by the staff under delegated authority in connection with disposition of August 1, 1973 broadcast renewal applications for Indiana, Kentucky, and Tennessee. Commissioner Johnson dissented and has now issued the attached statement.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

INDIANA, KENTUCKY, AND TENNESSEE RENEWALS 1973

Today, the Commission notes the staff report on the disposition of 681 Indiana, Kentucky, and Tennessee broadcast licenses due for renewal August 1, 1973. Of these applications, 374 are granted by the staff and here approved by the Commission. The licenses of the remaining stations will be renewed at staff level after their submission of further information. The majority thus approves the behavior of yet another batch of stations, some good and some bad, without its ever enunciating any criteria by which to judge whether the licensees' performance serves the public interest. Once again, I dissent.

Two AM stations [1] and six TV stations [2] propose less than 5% news. One TV station [3] and twenty-one AM stations [4] propose less than 1% public affairs, including one station, WCDS, Glasgow, Ky., which proposed no public affairs programming at all. Twenty-three AM sta-

[1] WKXV, Knoxville, Tenn.; KWAM, Memphis, Tenn.

[2] WDBR–TV, Louisville, Ky.; WDXR–TV, Paducah, Ky.; WHMB–TV, Indianapolis, Ind.; WKPT–TV, Kingsport, Tenn.; WRIP–TV, Chattanooga, Tenn.; WXIX–TV, Newport, Ky.

[3] WDXR–TV, Paducah, Ky.

[4] WAWK, Kendalville, Ind.; WCDT, Winchester, Tenn.; WEMB, Erwin, Tenn.; WENR, Englewood, Tenn.; WETB, Johnson City, Tenn.; WGOH, Grayson, Ky.; WHIT, Danville, Ky.; WIVK, Knoxville, Tenn.; WJCD, Seymour, Ind.; WKXO, Caro, Mich.; WMJL, Marion, Ky.; WMOC, Chattanooga, Tenn.; WMTL, Leitchfield, Ky.; WNES, Central City, Ky.; WNKY, Neon, Ky.; WNTT, Tazewell, Tenn.; WSLV, Ardmore, Tenn.; WSTL, Eminence, Ky.; WVAK, Paoli, Ind.; WWXL, Manchester, Ky.

tions [5] proposed less than 5% public affairs and non-entertainment programming.

We have been considering changes in standards for license renewals for years. In the interim, we continue to note with approval staff decisions to renew countless licenses of stations falling below even this 5–1–5 standard. I believe we should do much more. See *Broadcasting in America*, 42 FCC 2d 1 (1973). In no event, however, can I conclude that our current procedures serve the public interest; therefore, I cannot join in the Commission's action.

[5] WAWK, Kendalville, Ind.; WBGN, Bowling Green, Ky.; WDXB, Chattanooga, Tenn.; WGNS, Murfreesboro, Tenn.; WGOW, Chattanooga, Tenn.; WHAL, Shelbyville, Tenn.; WHEL, New Albany, Ind.; WHUT, Anderson Ind.; WIKY, Evansville, Ind.; WIVK, Knoxville, Tenn.; WJSO, Jonesboro, Tenn.; WJZM, Clarksville, Tenn.; WKDA, Nashville, Tenn.; WKGN, Knoxville, Tenn.; WKXO, Berea, Ky.; WKYE, Bristol, Tenn.; WLYV, Ft. Wayne, Ind.; WMAK, Nashville, Tenn.; WMOC, Chattanooga, Tenn.; WSAC, Fort Knox, Ky.; WSIX, Nashville, Tenn.; WXLW, Indianapolis, Ind.; WXVW, Jeffersonville, Ind.

F.C.C. 73-974

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INTERNATIONAL RECORD CARRIERS' SCOPE OF OPERATIONS IN THE CONTINENTAL UNITED STATES, INCLUDING POSSIBLE REVISIONS TO THE FORMULA PRESCRIBED UNDER SECTION 222 OF THE COMMUNICATIONS ACT	Docket No. 19660 RM-960

MEMORANDUM OPINION AND ORDER

(Adopted September 19, 1973; Released September 20, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it (a) Petition for Reconsideration and Clarification and (b) Request for Extension of Time, both filed September 10, 1973 by Western Union International, Inc. (WUI), and (c) Motion to Dismiss and (d) Opposition to Request for Extension of Time, both filed September 12, 1973 by The Western Union Telegraph Company (WU).

2. WUI's petition and request for extension of time are directed at the Commission's Memorandum Opinion and Order (Order) released August 31, 1973 (FCC 73-887) which scheduled oral argument before the Commission *en banc* for September 25, 1973 on the following question:

> **Under what circumstances, if any, may the Commission grant the request of Western Union, in whole or in part, for an interim increase in landline charges for outbound and inbound international messages?**

In addition, written briefs on this question were directed to be filed by specifically named parties to the argument, including WUI, on or before September 17, 1973.

3. Basically, in its petition WUI contends that oral argument on the above question would be "an empty, burdensome and useless exercise" because the Communications Act and the Administrative Procedures Act "absolutely forbid" the Commission from taking action on WU's request for an interim increase in landline charges for outbound and inbound international messages pending completion of a definitive proceeding on its underlying request for a permanent increase. WUI insists that the "mere exchange of pleadings and oral argument do not constitute the full evidentiary hearing" mandated by Section 556 (d) of Administrative Procedure Act before the Commission may act on WU's request under Sections 201(a) and 222(e)(3) of the Communications Act. Accordingly, WUI requests that the Commission reconsider its Order and cancel the oral argument.

4. Alternatively, WUI requests that the Commission clarify its Order by explicitly stating that the scheduled oral argument shall not be

construed as constituting a full evidentiary hearing and reject any argumentation either in written briefs or orally which extends beyond the narrow legal issue in question, such as pleas of poverty by WU and facts, costs and theories relating to message handling practices. WUI also requested that, pending this clarification, the briefing and oral argument dates be postponed.[1]

5. In the event the Commission denies the Petition for Reconsideration and Clarification, WUI requests that the time for filing briefs be extended from September 17 to October 23, 1973 and that oral argument be rescheduled from September 25 to October 30, 1973. WUI notes that it has been authorized to state that the other interested parties (except WU) to this proceeding concur in the request for extension of time. In support, WUI alludes to a number of proceedings and conferences both here and abroad on matters before the Commission which it says will occupy the time and attention of its legal counsel for the next several weeks and thereby seriously restrict its capacity to prepare and file a brief by September 17 and present an oral argument by September 25, 1973. It also urges that the argument be deferred to permit Commissioner Robert E. Lee, who is attending an international conference in Spain until October 26, to be present, in view of his previous experience in matters relating to the domestic handling of international messages. Finally, WUI maintains that the Commission's Order of August 31 can only become effective, under the provisions of Section 408 of the Communications Act, "not less than thirty days after service of the Order," so that the September 17 briefing date and the September 25 oral argument date cannot be imposed by the August 31 Order.

WESTERN UNION OPPOSITION

6. WU contends that WUI's petition and motion are delaying tactics without merit which should be summarily dismissed or ignored. It maintains that the Commission's Order of August 31 is an interlocutory action against which petitions for reconsideration are prohibited by the Commission's Rules and Regulations, Section 1.106(a). With respect to the request for additional time, WU points out that the delay attending grant of such request could result in a loss of revenues to it; that the questions to be briefed and argued have already been researched and briefed by WUI and the other international record carriers in connection with their oppositions to WU's Amended Complaint and Petition and Motion for Interim Relief; that WUI itself argues in its petition that it has already made a filing with the Commission demonstrating that an evidentiary hearing is necessary, so that little further need be done by WUI in the way of preparation; and that Section 408 is not intended to apply to procedural orders such as this.

WUI REPLY

7. In reply, WUI asserts that WU ignores the substantive aspects of its petition, i.e., that the Commission is prohibited by law from grant-

[1] Acting under delegated authority, the Chief, Common Carrier Bureau, by Order of September 14, 1973 extended the time for filing briefs herein from September 17 to September 19.

ing the relief sought by WU, and that clarification of the Order is required to assure that the *en banc* proceeding will not be construed as constituting a full evidentiary hearing. WUI further argues that petitions for reconsideration of interlocutory orders may be considered in exceptional circumstances. It believes that such circumstances arise through the Commission scheduling argument, without opportunity for WUI to first comment on a matter "clearly" prohibited by law. In any event, WUI believes its procedural rights would be jeopardized if its request for clarification of the Order is denied. Insofar as its petition for postponement is concerned WUI argues that the allegations of WU's financial hardship should not be permitted to prompt precipitous action by the Commission, and that a grant of WU's request should not be made without careful examination of all the underlying issues. It also repeats the other arguments made in its request, and urges that a month of delay is not a significant one to WU.

DISCUSSION

8. As we indicated in our Order of August 31, we carefully reviewed the points and authorities advanced by the parties on the question of whether the Commission is empowered to grant an interim increase in landline charges in view of the hearing requirements of Section 222(e)(3) of the Communications Act. Such review convinced us that the question was sufficiently important to warrant a full briefing and *en banc* oral argument. Nothing in WUI's petition has persuaded us to the contrary. We cannot accept, without a full airing of this question, WUI's contention that interim action of the nature requested in this proceeding is flatly prohibited by statute. Indeed, WUI, in its request for additional time, asserts that "great care and careful preparation will be required" to comply with our Order.

9. As regards WUI's request for clarification, no specific contention is made that the question specified in our August 31 Order is unclear. Obviously the scheduled oral argument will not be an evidentiary hearing; the purpose of the argument is to determine the nature of any hearing, evidentiary or otherwise, that may be required by law. Although WUI indicates that some uncertainty may exist in its mind, or in the minds of other parties, the question at issue is clear on its face, and we see no need to provide further guidelines to the parties in the preparation of their briefs. Should a party to the oral argument digress from the question at issue, we shall take such action as appears appropriate.[2]

10. Finally, it is the settled policy of the Commission that petitions for reconsideration of an interlocutory ruling or order will not be entertained (Commission's Rules and Regulations, Sections 1.102(b), 1.106(a) and 1.291(c)(3)). While it is true that extraordinary or unusual circumstances may cause the Commission to waive the requirements of its rules, no such circumstances appear in this case. WUI misconstrues the intent of the oral argument and its contention that it should have been consulted prior to such scheduling is without merit.

[2] As regards the effectiveness of our Order to require the filing of briefs and oral argument as scheduled, such order is procedural in character and not subject to the 30-day requirement of Section 408 of the Communications Act.

11. By reason of the foregoing, we shall dismiss WUI's Petition for Reconsideration and Clarification. Additionally, WUI has not made a persuasive showing that it requires the considerable extension of time it requests for the filing of a brief and preparation for oral argument.[3] However, in the interest of insuring that we have given ample opportunity for preparation, we shall grant, to the extent hereinafter specified, a short extension of time to all parties in this proceeding, of the currently scheduled dates specified in our Order of August 31.

Accordingly, IT IS ORDERED, that the Petition of Western Union International, Inc. IS HEREBY DISMISSED;

IT IS FURTHER ORDERED, that the motion of Western Union International, Inc. for an extension of time is granted, to the extent that briefs by all parties shall be filed on or before September 25, 1973 and that oral argument is hereby scheduled to be heard before the Commission *en banc* at its offices in Washington, D.C. on October 1, 1973 at 2:00 PM; and

IT IS FURTHER ORDERED, that, in all other respects, our Order of August 31, 1973 SHALL REMAIN UNCHANGED.

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

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[3] We note that, although other international record carriers apparently authorized WUI to state that they joined in its request, the major argument made by WUI was its own staffing problem.

F.C.C. 73–936

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REQUIRING TELEPHONE COMPANIES TO SEND ADEQUATE, UNDERSTANDABLE, INTERSTATE LONG DISTANCE TELEPHONE RATE INFORMATION TO THEIR CUSTOMERS	RM–1865

ORDER

(Adopted September 11, 1973; Released September 18, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. On October 14, 1971, the above captioned Petition for Rule Making was filed by the Institute for Public Interest Representation on behalf of seven Georgetown University law students. Petitioners proposed basically that we adopt rules requiring telephone companies subject to our jurisdiction to distribute complete interstate long distance rate information to all customers every six months. The stated need for such a rule was to provide the public with sufficient rate information as to the various classes of calls and rate periods to enable a meaningful choice as to the most economical time and method of calling. Petitioners alleged that the only readily available rate information was inadequate, citing the limited information available in various directories.

2. Opposition to the petition was received only from GTE Service Corporation which alleged that the General System operating companies do provide adequate rate information and in a variety of methods. Petitioners filed a Reply to GTE's Opposition, claiming that the very information provided by GTE illustrates the incompleteness of the rate information available to the average telephone subscriber, such as the failure to provide information on additional minute rates, or on operator-assisted rates. Petitioners noted that they did not intend by their proposed rule to establish only one means of providing rate information, but to establish a minimum standard.

3. Subsequent to these pleadings, our staff initiated discussions between petitioners' attorneys, the American Telephone and Telegraph Company (AT&T)* and representatives of the United States Independent Telephone Association (USITA) to determine whether the telephone companies could voluntarily provide sufficient toll information to meet the reasonable requirements of customers. As a result of these discussions, AT&T has produced an Interstate Long Distance

*AT&T did not respond to the petition, but is the filing carrier for interstate long distance telephone service, *see* AT&T Tariff FCC No. 263, Long Distance Telecommunications Service.

Calling Guide in a folded one sheet form suitable for mailing. This guide contains an explanation of rate classes, a complete rate chart for interstate long distance calls, a mileage table which keys the rate chart to distance between principal cities, and a schedule of the rate periods. On June 1, 1973, AT&T transmitted to its operating companies a copy of the guide with a request that within 90 days, all customers be advised of its availability and informed as to how a copy may be obtained. AT&T has agreed to compile certain statistical data such as the number of notices sent out to subscribers, the number of requests for the guide, the number of guides distributed, and plans for advising new customers of the availability of the guide. AT&T will report to us by the end of November 1973. In addition, AT&T has agreed to provide independent telephone companies with the guide for their own reproduction and distribution.

3. In our view, the aforesaid effords of AT&T should make available to the public greater detail concerning long distance rates which will be useful to persons who need information upon which to make rational choices as to calling times and methods of calling. We will therefore dismiss the petition, without prejudice to resubmission if it should appear in the future that the above-described Calling Guide notification or distribution program does not adequately serve the public need.

4. Accordingly, IT IS ORDERED, That the Petition for Rulemaking, RM–1865, is DISMISSED, WITHOUT PREJUDICE.

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

F.C.C. 73R-329

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JEFFERSON-PILOT BROADCASTING CO. (WBTV), CHARLOTTE, N.C. For Construction Permit	Docket No. 18880 File No. BPCT-4168

APPEARANCES

R. Russell Eagan and *Theodore A. Shmanda*, on behalf of Jefferson-Pilot Broadcasting Company (WBTV); *Howard F. Roycroft* and *Richard S. Rodin*, on behalf of WFMY-TV Corporation (WFMY-TV); *Thomas M. P. Christensen* and *Raymond J. Shelesky*, on behalf of Southern Broadcasting Company (WGHP-TV); and *Jay L. Witkin*, *Charles W. Kelley* and *Joseph Chachkin*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted September 14, 1973; Released September 19, 1973)

BY THE REVIEW BOARD: BERKEMEYER AND NELSON. BOARD MEMBER PINCOCK DISSENTING WITH STATEMENT

1. This proceeding involves the application of Jefferson-Pilot Broadcasting Company, licensee of television Station WBTV, Channel 3, Charlotte, North Carolina (WBTV), for authority to increase its antenna height and change its transmitter site. By Memorandum Opinion and Order, FCC 70-636, 23 FCC 2d 931, released June 24, 1970, the Commission designated the application for hearing under areas and populations and UHF impact issues. The Commission named as parties objectors WFMY-TV Corporation (at the time of designation Greensboro News Company), licensee of WFMY-TV, Channel 2, Greensboro, North Carolina; Southern Broadcasting Company, Inc., licensee of WGHP-TV, Channel 8, High Point, North Carolina; WEAL, Inc. (Piedmont Triad TV, Inc., at the time of designation), permittee of WUBC, Channel 48, Greensboro, North Carolina (hereinafter WUBC); and Charlotte Telecasters, Inc., licensee of WCTU-TV (now WRET-TV), Channel 36, Charlotte, North Carolina. No appearances were filed for WRET or WUBC and those UHF stations did not subsequently participate in this proceeding.[1] The Commission placed the burden of proceeding under the UHF impact issue on the objectors and the burden of proof on the applicant.

[1] On July 13, 1970, WUBC advised the Commission that it did not intend to participate due to "substantial and continuing" financial losses, and on September 22, 1970, the Commission granted an involuntary transfer of control of the station to William Zuckerman, trustee in bankruptcy (BTC-6375). The applicant points out that on June 15, 1971, after the record was closed, but prior to issuance of the Initial Decision, at WUBC's request, its license was cancelled and its call letters deleted.

2. In an Initial Decision, FCC 71D–44, released July 30, 1971, Administrative Law Judge James F. Tierney recommended a denial of WBTV's application. The Judge resolved the areas and populations issued and the UHF impact issue insofar as it dealt with existing and prospective UHF stations in the Charlotte area in favor of the applicant. However, he ultimately held that grant of WBTV's application would not serve the public interest, convenience and necessity on the basis of his conclusion that a grant of the application would have a substantial adverse effect on Station WUBC, and would "impair, if not totally frustrate," the development of allocated UHF channels in Winston Salem-Greensboro-High Point areas.

3. The proceeding is now before the Board on exceptions filed by WBTV. We have reviewed the Initial Decision in light of these exceptions, the arguments of the parties,[2] and our examination of the record. We find the Administrative Law Judge's findings of fact to be substantially accurate and complete and his conclusions persuasive. Furthermore, except for WBTV's argument that the demise of WUBC indicates that there is no longer a potential for UHF development in the Winston Salem-Greensboro-High Point market, we believe that the Presiding Judge has dealt adequately with the arguments raised in the exceptions, and no useful purpose would be served by further discussion here.[3] Therefore, except as modified in this Decision and in the rulings on exceptions contained in the attached Appendix, and upon a finding that the public interest would be served thereby, Judge Tierney's Initial Decision is adopted.

4. WBTV argues on appeal that the Administrative Law Judge did not consider the fact that, after the close of the record, WUBC's call letters were deleted and its license was cancelled. These facts, appellant urges, confirm that WUBC "has been dead" for some time and that, because of the competitive situation in the Greensboro-High Point-Winston Salem market, there is no potential for a UHF station in that market regardless of whether WBTV's application is granted. While the Presiding Judge did not in his Initial Decision specifically consider the demise of WUBC, his denial was predicated on the adverse impact WBTV would have on the development of allocated UHF channels in the market, as well as the adverse impact on WUBC; and the Board does not believe that the facts relied on by the applicant to establish that there is no potential for a UHF station in the market, including the failure of WUBC, are sufficient to warrant such a conclusion. On the contrary, the only record evidence regarding the specific reasons for the failure of WUBC do not reflect that it was the result of the competitive situation in the market, but rather due, at least in part, to poor management and equipment and underfinancing. Thus, under the circumstances here, the fact that a UHF station operates in the market for several years evidences a potential for

[2] Oral argument was held before a panel of the Review Board on July 26, 1973.

[3] We note, however, that while we agree with the Judge's determination that the impact of WBTV's proposal on the Charlotte market is not, of itself, substantial enough to require denial, we believe that it nevertheless should have been weighed in making the ultimate determination herein, and when considered together with the impact of the Winston Salem-Greensboro-High Point market, the Charlotte impact serves to reinforce the conclusion that WBTV's proposal would not serve the public interest.

UHF, rather than the opposite.[4] We conclude that the failure of WUBC does not necessitate reversing the Administrative Law Judge.

5. Accordingly, IT IS ORDERED, That the application of Jefferson-Pilot Broadcasting Company, licensee of television Station WBTV (WBTV), Channel 3, Charlotte, North Carolina, for authority to increase antenna height and change its transmitter site IS DENIED.

JOSEPH N. NELSON,
Member, Review Board,
Federal Communications Commission.

APPENDIX

RULINGS ON THE EXCEPTIONS OF JEFFERSON-PILOT BROADCASTING CO.

Exception No.	*Ruling*
1	*Denied* to the extent that the exception is based on an inaccurate and incomplete quotation of words in the penultimate sentence of paragraph 2, Findings of Fact, Initial Decision. *Granted* to the extent that in the first sentence of paragraph 2 of the Preliminary Statement, Initial Decision, "WVBC" is corrected to read "WUBC", and "WCTU–TV" is changed to "WRET–TV" to reflect the change in call letters authorized July 13, 1970.
2,3,4.18	*Granted* in substance and to the extent that the reasons for the requested antenna height increase and transmitter relocation, which exceptor submitted solely for background purposes (Tr. 503–504), are within the scope of a UHF impact issue; however, the Board does not consider that the reasons advanced by exceptor indicate economic hardship or any other basis significant in making the ultimate public interest determination. *Cf. WLVA, Incorporated*, 35 FCC 2d 182, 24 RR 2d 423 (1972); and *Daily Telegraph Printing Co.*, 20 FCC 2d 976, 18 RR 2d 95 (1969).
5,6	*Granted*. These changes are allowed in order to have a complete record, although they are clearly not determinative.
7	*Denied*. These findings by the Presiding Judge provide a reasonable brief summary of much contradictory testimony in the record, and are also a fair and terse reflection of the conflicting record evidence.
8,9,10,11,12,13,14	*Granted* in substance as relevant to a determination of possible adverse impact. However, the Board agrees with the Presiding Judge that in view of the conflicting nature of this opinion evidence, much of which is inadequately substantiated, the respective positions expressed in this record "tend to neutralize each other," and it must be remembered that as specified in paragraph 17 of the Order of Designation (FCC 70–636, 23 FCC 2d 931, released June 24, 1970), appellant bore the burden of proof under the impact issue. See also the ruling on Exception 7, *supra*.
15	*Granted* in substance, although the critical question must always be whether or not the impact is sufficiently adverse in nature.
16	*Granted*, although it is to be noted that the Presiding Judge specifically stated that such information would be disregarded as without decisional effect. See Initial Decision, p. 3, note 1.

[4] It is also noteworthy that in WLCY–TV, Inc., 28 FCC 2d 353, 21 RR 2d 572 (1971), the Commission, in a somewhat different factual context, rejected an argument that the demise of an existing UHF station necessitated reversal of an earlier conclusion of substantial adverse UHF impact.

Exception No.	*Ruling*
17	*Denied.* The record supports the Judge's statement in the first sentence of Appendix VI. The proposed WBTV operation would affect existing or proposed UHF stations in the communities cited. Initial Decision, Ultimate Findings and Conclusions, para. 20; Board Decision.
19	*Granted.*
20	*Denied.* The quotation correctly cites the Commission's general policy of UHF protection where a substantial adverse impact has been demonstrated. Nothing more was intended by its inclusion. The requested additional language is not applicable to the specifics of the present proceeding and is therefore denied as being without decisional significance.
21	*Denied.* The substance of this exception is, in fact, contained in the Initial Decision, although under a discussion of the areas and populations issue. See, for example Ultimate Findings and Conclusions of the Initial Decision, paras. 4–5. Moreover, since substantial adverse impact has been found, the service benefits do not outweigh such impact.
22	*Denied.* The Judge's determinations in this regard are correct. See also the ruling on Exceptions 2, 3, 4, 10 and 19, *supra.*
23,24	*Denied.* The conclusions excepted to adequately reflect the Administrative Law Judge's evaluation of the evidence. See note 3 of this Decision.
25, 26	*Denied.* The Administrative Law Judge correctly evaluated all the record evidence concerning the Greensboro-Winston Salem-High Point area, a much different matter from Charlotte, and WBTV's proposed penetration into the former market would, in fact, pose a very real threat to potential UHF growth and development.
27, 29, 30, 32	*Denied.* The conclusions excepted to are either in the record or reasonable inferences based on the Judge's findings of fact. See, for example, WFMY–TV's Exhibit No. 1 and the testimony of Mr. William Lowell Putnam (Tr. 396–432). See also the ruling on Exceptions 8, 9, 10, 11, 12, 13 and 14, *supra.* On a more general level, the conclusions excepted to by WBTV are fairly and reasonably based upon much testimony that is, by its very nature, speculative and, to some extent, contradictory. The nature of the UHF impact issues is such that certainty cannot be guaranteed and some reliance on inference is inevitable. In this regard, the Judge has relied upon legitimate record testimony and a minimum of guesswork and the Board finds no substantial basis for disagreement with said conclusions. *Cf. Midwest Television, Inc.*, 13 FCC 2d 478, 498, 13 RR 2d 698, 721 (1968).
28	*Denied.* The Judge specifically states that the bases of his conclusions in this paragraph stem from information supplied by the applicant. See Appendix VIII of the Initial Decision.
31	*Granted,* although it must be emphasized that past, specific county shifts are not necessarily reflective of possible future shifts resulting from a grant of WBTV's proposal.
33, 34	*Denied* for the reasons stated in the Decision, the Initial Decision, and the rulings on Exceptions.

DISSENTING STATEMENT OF BOARD MEMBER DEE W. PINCOCK

The majority bases its determination on little more than a surmise that the existence of UHF allocations presupposes a realistic potential for UHF development in Greensboro. Underlying this assumption are two necessary hypotheses, neither of which is supported by the record evidence. There is no record support for finding either that the Greensboro market is economically capable of supporting a UHF facility, or that, but for its poor management and equipment and underfinancing, WUBC would have survived in the market. Thus, the majority has chosen to sacrifice definite and immediate public interest benefits which must flow from additional service to a substantial number of people on the hypothetical assumption that at some time in the indefinite future a qualified applicant may seek one of the allocated UHF channels in Greensboro. In effect, the majority has transformed the mere allocation of a channel to a particular community into an irrebutable presumption of UHF potential. Although the determination in this proceeding is unfortunate, I believe that it has much greater implications than the denial of one application. Rather, I believe that this Decision will serve as a signal to broadcasters that any application for improved VHF facilities which might impinge upon the theoretical service area of a UHF station which might be authorized at some undetermined time in the future, is a futile exercise.

F.C.C. 71D-44

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JEFFERSON STANDARD BROADCASTING Co. (WBTV), CHARLOTTE, N.C. For Construction Permit	Docket No. 18880 File No. BPCT-4168

APPEARANCES

R. Russell Eagan, Esq., and *Theodore A. Shmanda, Esq.*, (Kirkland, Ellis, Hodson, Chaffetz, Masters & Rowe) on behalf of Jefferson Standard Broadcasting Company (WBTV); *Howard F. Roycroft, Esq.*, and *Richard S. Rodin, Esq.*, (Hogan & Hartson) on behalf of WFMY-TV Corporation (WFMY-TV); *Thomas M. P. Christensen, Esq.*, and *Raymond J. Shelesky, Esq.*, (Welch & Morgan) on behalf of Southern Broadcasting Company (WGHP-TV); and *Jay L. Witkin, Esq.*, *Charles W. Kelley, Esq.*, and *Joseph Chachkin, Esq.*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER JAMES F. TIERNEY

(Issued July 26, 1971; Released July 30, 1971)

PRELIMINARY STATEMENT

1. This proceeding is concerned with the application of Jefferson Standard Broadcasting Company, licensee of television station WBTV, Channel 3, Charlotte, North Carolina (hereinafter WBTV), for authority to increase antenna height and change its transmitter site.[1] By Memorandum Opinion and Order, FCC 70-636, 23 FCC 2d 931 (1970), the Commission designated the application for hearing on the following issues:

1. To determine the areas and populations which may be expected to gain or lose television service or signal strength by the proposed operation of Television Broadcast Station WBTV, and the other television broadcast services available to such area.

2. To determine whether a grant of the application would impair the ability of authorized or prospective UHF television broadcast stations in both the Winston Salem-Greensboro-High Point and Charlotte areas to compete effectively, or would jeopardize, in whole or in part, the continuation of existing UHF television service.

[1] WBTV has agreed to accept a grant subject to the condition that it divest itself, prior to commencing operation, of any interest it may then hold in CATV systems located within the WBTV Grade B gain area. WBTV's present interests are a 50% stock interest in the Greensboro, North Carolina, CATV system, owned and operated by Jefferson-Carolina Corporation; and a 40% stock interest in the Rockingham, North Carolina, CATV system, owned and operated by Cablevision of Rockingham-Hamlet, Inc. (WBTV Ex. 3, pp. 33-34).

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

2. Besides the customary presence of the Broadcast Bureau and applicant, named as parties were: Greensboro News Company, licensee of WFMY–TV, Channel 2, Greensboro, North Carolina,[2] Southern Broadcasting Company, Inc., licensee of WGHP–TV, Channel 8, High Point, North Carolina; Piedmont Triad TV, Inc., permittee of WVBC, Channel 48, Greensboro, North Carolina; and Charlotte Telecasters, Inc., licensee of WCTU–TV, Channel 36, Charlotte, North Carolina.[3] The Commission placed on them the burden of proceeding with the introduction of evidence with respect to Issue 2, and on the applicant the burden of proceeding with the introduction of evidence with respect to Issue 1 as well as the burden of proof on all issues.

3. Prehearing conferences were held on August 4, 1970 and January 29, 1971. Hearings were held on March 1, 2, 3, 4 and 5, 1971, and on March 19, 1971. The record was closed on the latter date. The nature of the case under the issues being such, comprehensive, if not extensive, proposed findings and conclusions were filed by the respective parties; some parties in great detail. Without detracting from the general excellence of all submissions, because of their clarity, precision and admirable fidelity to the evidence of record, the findings of the Broadcast Bureau have received particular attention and, save for language preferences, editing, emphasis and, at times, differences in application and interpretation, have to a large degree been adopted. The following witnesses testified at the hearing:

Witnesses for Respondents:

James H. Hoke, vice president and director of engineering, Southern Broadcasting Company

Lawrence M. Turet, broadcasting consultant

W. Robert McKinsey, broadcast management

Joseph P. Dowling, vice president for research for Storer Television Sales

William A. Sietz, president and general manager of WFMY Television Corporation

William L. Putnam, president of Springfield Television Broadcasting Corporation

Witnesses for Applicant:

Howard T. Head, consulting radio engineer

Melvin A. Goldberg, president of Melvin A. Goldberg, Incorporated, Communications, broadcast consultant

Thomas B. Cookerly, vice president and managing director of WBTV and Jefferson Productions.

4. For the reasons stated hereafter, this, as an Initial Decision shall *deny* the application of Jefferson Standard Broadcasting Company (WBTV).

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[2] Greensboro News Company has since changed its name to WFMY Television Corporation.

[3] All of the named parties had filed petitions opposing a grant of Jefferson's application. Piedmont Triad TV, Inc., now known as WEAL, Inc., and Charlotte Telecasters, Inc., did not, however, participate as parties in this proceeding. Thus, the only active parties respondent in the proceeding were the two VHF licensees (WFMY–TV and WGHP–TV).

FINDINGS OF FACT [4]

1. Confronted with the propositions underlying the issues, at times, it becomes necessary to lay out at some length the metes and bounds of the detailed technical, demographic, economic and other factual conditions, disclosed by the record. It being a frequent, if not common, characteristic of adjudicative administrative proceedings, to compile and assay the litany of such conditions, one needs to alert the reader, if only by way of apology, to the ordeal laying ahead. Where possible, without offending cohesion, the bulk of the many findings, particularly those in tabular form, will be set out in Appendices for convenience, where, in any event, they shall be deemed an integral part of and incorporated in the factual findings.

2. In the final analysis, where, as here, UHF impact is in issue in a case involving a proposed transmitter move, a choice must be made between the Commission's policy of "encouraging television broadcast stations to operate with maximum facilities in order to make the most efficient use of channel assignments" and the policy of "fostering the development of UHF broadcasting" (*Cosmos Broadcasting Corporation* 21 FCC 2d, 729, 733 (Review Board 1970); See also *Eighth* Report and Order, FCC 71–92, Docket No. 14229, February 1, 1971). Of increasing frequency these two policies seem, as here, set on collision course. Hence, without elucidation of the facts on a record the Commission has not been at the threshold to make the necessary statutory determination that a grant of the instant application would be in the public interest.

3. In particular, this proceeding is concerned with the application for a change in the facilities of television station WBTV, Channel 3, Charlotte, North Carolina, licensed to Jefferson Standard Broadcasting Company, WBTV, a CBS affiliate, which presently operates with an effective radiated power of 100 kilowatts at a site on Spencer Mountain, 15 miles west of Charlotte with an antenna height of 1,086 feet above average terrain. It is proposed to move the transmitter site some 22 miles in a northerly direction to a point 5.4 miles north of Denver, North Carolina and 28 miles north of Charlotte, North Carolina, and to increase the antenna height to 1,800 feet above average terrain.

4. Charlotte, North Carolina, is located 10 miles from the southern border of the state about 85 miles north of Columbia, South Carolina, and 82 miles southwest of Greensboro, North Carolina. Charlotte with its population of 241,178 [5] is the largest city in North Carolina and is the county seat of Mecklenburg County which has a population of 354,656.[5] The Charlotte Standard Metropolitan Statistical Area (SMSA) consists of both Mecklenburg and Union Counties and has a total population of 409,370.[5] Charlotte is the central city of the Charlotte Urbanized Area which has a population of 279,530.[6] In

[4] The Bureau, by its filing of June 25, 1971, requests that Official Notice be taken of the Commission's action in Docket No. 19046 (Report and Order, FCC 71–636, released June 21, 1971) wherein the Commission concluded that UHF assignments to Gastonia and Monroe, North Carolina should not be made. Such Official Notice is taken and while steps to eliminate any reference to those communities have also been taken in this Initial Decision, to the extent such references might remain which have been overlooked, in any event, should be disregarded as without decisional effect.

[5] Advance Final 1970 U.S. Census figures.

[6] Preliminary 1970 U.S. Census figures.

addition to WBTV, the community has the following television stations:[7]

Call	Channel	ERP (kW)[8]	HAAT (ft)[9]	Affiliation
WSOC-TV	9	316	1,180	NBC.
WCCB-TV	18	5,000	1,295	ABC.
WRET-TV	36	1,330	1,350	IND.
WTVI	42	214	450	Educational.

[8] Effective radiated power.
[9] Antenna height above average terrain.

5. The increase in antenna height will enlarge the reach of coverage with respect to the transmitter site, and moving the site northward will increase the present coverage to the northwest, north, northeast and east and decrease it to the south and southwest of the center of Charlotte as shown in the following table: (WBTV Ex. 1, p. 15).

Direction	Reach (in miles) of contours from Charlotte			
	Present WBTV		Proposed WBTV	
	Grade A	Grade B	Grade A	Grade B
North	41	74	74	110
Northeast	29	62	53	88
East	23	56	32	69
Southeast	23	58	22	59
South	30	66	21	57
Southwest	41	75	29	67
West	53	85	47	88
Northwest	53	85	70	107

Grade A gain area

6. The northward expansion of WBTV's Grade A contour by some 30 miles will overreach North Wilkesboro (pop. 3,357) by 9 miles and fall just beyond Elkins (pop. 2,899) at the southwestern corner of Surry County. In the northeast, the proposed Grade A contour will include Lexington (pop. 17,205),[10] Salisbury (pop. 22,515) and Spencer (pop. 3,075). In the northwest, it will include Lenoir (pop. 14,705) and Morganton (pop. 13,625). The Grade A gain area would include 341,721 persons in an area of 3,406 square miles, all in North Carolina. Substantial rural populations will also be included for the first time. These and other pertinent data in the Grade A gain area are set forth in Appendix I. (WBTV Ex. 1, pp. 10, 15, 36, 37, 42, 61).

Grade A loss area

7. The proposed move to the north of the present site will decrease the Grade A coverage of WBTV in the south and southwest. With respect to the center of Charlotte, the present Grade A contour extends 30 miles to the south and 41 miles to the southwest whereas the proposed Grade A contour extends 21 miles to the south and 29 miles to the southwest. This retraction in coverage will withdraw Grade A service from an area of 750 square miles which contains a population of

[7] Charlotte also has 8 AM and 1 FM station.
[10] These seven population figures are taken from Advance Final 1970 U.S. Census.

57,545 persons of which 13,884 persons in an area of 134 square miles reside in North Carolina and the remainder in South Carolina. The relevant data depicting conditions in the Grade A loss area are set out in Appendix II.

Grade B gain area

8. The proposed facilities will move WBTV's Grade B contour in a northerly direction from its present position at the southern border of Ashe, Alleghany and Surry Counties, North Carolina not only across these entire counties but into the state of Virginia to encompass all of Grayson County and most of Carroll County, Virginia. In the northeast, the Grade B contour will be moved from the outskirts of Winston Salem [11] to include Greensboro, North Carolina as well as Winston Salem. In the west and northwest, the expansion will encompass Asheville, North Carolina and nearly all of Johnson County, Tennessee. In the east, the extension of some 20 miles will embrace all of Randolph County, North Carolina (WBTV Ex. 1, pp. 9, 15). The total gain area contains 7,215 square miles inhabited by 878,815 persons (WBTV Ex. 1, pp. 8, 9, 46, 48). Of this 72.9% of the area and 88.9% of the population are in North Carolina. The gain and other data relating to Grade B gain are set out in Appendix III.

9. In the proposed Grade B gain area the number of other Grade B services varies from a minimum of three to a maximum of ten [12] (WBTV Ex. 1, pp. 4, 9, 28). Only three small areas in the gain area receive three other services. The first such area at the extreme northwest corner of South Carolina in Greenville County is served by WSPA–TV (CBS), WFBC–TV (NBC) and WLOS–TV (ABC). The second such area is in Johnson County, Tennessee some 6 to 12 miles west of the northwest corner of North Carolina. This area is served by WJHL–TV (CBS), WKPT–TV (ABC) and WCYB–TV (NBC). The third such area is in Wilkes County, North Carolina.[13] This area is served by WJHL–TV (CBS), WCYB–TV (NBC), and WSJS–TV (NBC). Since each of these areas is served by a CBS affiliate, proposed WBTV would act as a second CBS source (WBTV Ex. 1, pp. 25 to 28).

10. Four Grade B services are available in some 15% of the gain area. In Ashe County and adjacent parts of Alleghany and Wilkes Counties, North Carolina, Johnson County, Tennessee, Washington and Grayson Counties, Virginia, the stations providing the four services are WJHL–TV (CBS), WCYB–TV (NBC), WKPT–TV (ABC) and WSJS–TV (NBC). In northern Carter County and western Johnson County in Tennessee, the stations providing the four services are WJHL–TV (CBS), WCYB–TV (NBC), WKPT–TV (ABC) and WLOS–TV (ABC). In central Carroll County, Virginia, the four services are from WSJS–TV (NBC) and the three Roanoke stations WDBJ–TV (CBS), WSLS–TV (NBC) and WRFT–TV (ABC). A very small area about 25 miles north of Greenville, South Carolina receives its four services from WSPA–TV (CBS), WFBC–

[11] There is a slight penetration of Winston Salem by the present WBTV Grade B contour in the southwestern corner of the city (WBTV Ex. 11, p. 9).

[12] The areas of maximum service (seven to ten services) are located in Surry, Forsyth, Guilford, Rockingham, Stokes and Randolph Counties (WBTV Ex. 1, pp. 25, 28).

[13] The three areas contain about 10, 50 and 35 square miles, respectively (WBTV Ex. 1, p. 28).

TV (NBC), WLOS–TV (ABC) and WCYB–TV (NBC). Thus, these four service areas are supplied with all three network services. Only a very small area in Surry County with four services is without ABC service and another very small area in Richmond and Montgomery Counties with four services is without CBS service (WBTV Ex. 1, pp. 25–28).

11. Station WFMY–TV, Greensboro, North Carolina, provides CBS Grade B service in the proposed Grade B gain area as far south as the southeastern corner of Montgomery County. The proposed WBTV operation would provide a first "fulltime" [14] Grade B CBS service to one area having a total population of 14,104 persons residing in an area of 268 square miles. This area lies within portions of the counties of Richmond, Montgomery, and Anson, North Carolina, and Chesterfield and Marlboro Counties, South Carolina. The proposed WBTV operation would provide a second "fulltime" Grade B service to 612,454 persons in an area of 3,429 square miles, a third to 224,781 persons in an area of 3,270 square miles and a fourth to 27,476 persons in an area of 248 square miles. If stations WBTW, WRDU–TV and WTVD (which are only "partly" [2] CBS affiliated) are considered, the first CBS service would be provided to 478 persons in a 16 square mile area, a second to 170,632 persons in an area of 2,001 square miles, a third to 598,599 persons in an area of 3,896 square miles and a fourth to 109,106 persons in an area of 1,302 square miles (WBTV Ex. 1, pp. 9, 10, 25–28).

Grade B loss area

12. The proposed withdrawal of Grade B service generally along the southern sector of the present Grade B periphery affects a strip 130 miles long with a maximum width of 9 miles situated entirely in South Carolina and 55 to 85 miles from Charlotte, North Carolina. It contains a total area of 960 square miles and a population of 54,163. This loss and other Grade B service data in the Grade B loss area are set out in Appendix IV. (WBTV Ex. 1, pp. 10, 15, 50, 51).

Summary of Grade B population and area gained and lost resulting from the WBTV tall tower proposal

13. Taking into account both the gain and loss in Grade B coverage by proposed station WBTV discloses the net gain as follows: (WBTV Ex. 1, p. 53).

	Population	Area (sq. mi.)
Total Proposed Grade B	2,799,784	22,055
Total Present Grade B	1,975,132	15,800
Proposed Grade B Gain Population and Area	878,815	7,215
Proposed Grade B Loss Population and Area	54,163	960
Grade B Net Gain Resulting from WBTV Tall Tower Proposal	824,652	6,225

[14] "Fulltime" is defined as affiliated with only one network; "partly" is defined as affiliated with more than one network (Tr. 59).

THE UHF IMPACT ISSUE

14. In assaying the overall aspects of the impact on UHF stations, active and prospective, in the areas of concern, respecting WBTV operating as proposed, a balanced judgement of foreseeable benefits as well as detriments is encompassed within the broad framework of the public interest standard. Among others, but of particular significance, WBTV will provide besides a signal in excess of City Grade for Charlotte, an improvement in the signal it now provides to the persons within its present Grade A and Grade B areas. Notably WBTV will bring a Grade B signal to some 878,815 people for the first time, over 700,000 of whom reside in North Carolina; some 54,160 persons all of whom reside in South Carolina will lose its Grade B service. Also, its Grade A signal will reach some 340,000 persons in North Carolina for the first time while in excess of 50,000 persons most of whom reside in South Carolina will lose the Grade A signal operating as proposed. Of those who would receive Grade A service for the first time some 207,748 (1970 Census) reside in the Charlotte ADI [15] (Area of Dominant Influence); additionally 25 cities with an excess of 1,000 population will receive WBTV's Grade A service, 18 of what will gain a first CBS Grade A service. (WBTV Ex. 3, pp. 9–16). This prospective service will, of course, provide the not inconsiderable benefits of the whole range of news, public affairs and entertainment programming WBTV will broadcast.

15. Those authorized and prospective UHF stations in the areas of concern, Charlotte and Winston Salem-Greensboro-High Point, contemplated within any adverse impact flowing from the proposed WBTV operation are the following:

IN THE CHARLOTTE AREA

Community	Channel	Call	ERP (kW)	HAAT (ft)	Network
Charlotte, N.C.	18	WCCB–TV	5,000	1,295	ABC.
Charlotte, N.C.	36	WRET–TV	1,330	1,350	IND.
Hickory, N.C.	14	WHKY–TV	21.9	600	IND.
Rock Hill, S.C.	30	Vacant	21.9	600	
Kannapolis, N.C.	64	Vacant	21.9	600	

IN THE WINSTON SALEM-GREENSBORO-HIGH POINT AREA

Greensboro, N.C.	48	WUBC	676	610	IND.
Greensboro, N.C.	61	Vacant	676	610	
Winston Salem, N.C.	45	Vacant	676	610	
Lexington, N.C.	20	Vacant	21.9	600	

16. Operating as proposed WBTV would expand to considerable degrees its coverage in square miles and population reach in both the Grade A and Grade B contours affecting the service areas of the stations in the two market areas described above; the details of which respecting the Charlotte area are set out in Appendix V and respecting Winston Salem-Greensboro-High Point areas are more fully set out in Appendix VI.

[15] A term of art used as a tool in the audience measuring services of ARB, one of the audience measuring organizations prominently utilized in the broadcast business.

17. WBTV's decision to file the pending application was not "because of the competitive impact on [its] balance sheet or [its] profit and loss statement" (Tr. 506). WBTV is a profitable station, as well as the dominant television station in its area of operation (Tr. 502–503). Further, the post 1954 additional competing stations have not resulted in a lessening of WBTV's program service (Tr. 501–502).

18. From 1960 to the present, WBTV has had the largest net weekly circulation in the Charlotte market (Tr. 518–519) and its revenue has increased during the period of 1960 to 1969 by 87%; its income during the same period has increased by 109%. WBTV's rates have also increased: the July 1968 rate card shows prime time for 30 seconds costing $375.00, the 1971 rate for the same period has increased to $450.00; the Class A rate during this period has increased from $130.00 to $300.00; the Class B rate has increased during this period from $75.00 to $90.00; and the Class C rate from $34.00 to $40.00 (Tr. 545–546).[16] In 1969, the average ratio of pretax profit to revenue for the Charlotte market was 32%. WBTV's was above this average (Tr. 541).

19. In the Charlotte, North Carolina, television market are the following television stations, all located in the city of Charlotte: WBTV, Channel 3 (CBS); WSOC, Channel 9 (NBC); WCCB, Channel 18 (ABC); and WRET, Channel 36 (Independent) (WBTU Ex. 3, Table 9, p. 2).

20. Detailed information and data of the Charlotte market television revenue and income and other significant circulation or audience data are set out in Appendix VII.

21. Similar data for the Greensboro-Winston Salem-High Point market are set forth in Appendix VIII.

22. WBTV expects to increase its audience in gain counties because of the improvement in its signal and by providing programming which viewers will prefer over those presently available (Tr. 523–524, 557). Among the programs which WBTV presently carries and intends to continue are its regularly scheduled *sports* programs of regional interest, including live coverage of Atlantic Coast Conference basketball games, weekly wrestling matches, NFL football, golf tournaments and weekly interviews with the football coaches of Duke University and North Carolina State University. In addition, WBTV will continue its regularly scheduled program *The Scene Tonight*, scheduled weekdays 5:30 to 6:30 p.m., and 11:00 to 11:30 p.m. Approximately one-third of this news program is devoted to regional and area news, sports and weather. A separate feature of the program is *Carolina Camera*, which includes stories from throughout the Carolinas (WBTV Ex. 3, pp. 15, 16).

23. WBTV will also continue its regularly scheduled program *Kirby's Rascals*, a children's cartoon and film feature program scheduled Saturdays, 1:30–2:30 p.m., and Sundays 12:00–12:30 p.m.; *Business News*, Sundays, 6:20–6:30 p.m., featuring market reports, labor and industry news; *For the Record*, scheduled Sundays, 6:30–7:00 p.m., consisting of an in depth look at topics of local or statewide interest; *The Morning Scene*, a news interview program scheduled

[16] WBTV has a single rate card for all types of advertising time (Tr. 524).

weekdays, 7:30–8:00 a.m.; *The Pat Lee Show*, scheduled weekdays 12:25 to 12:30 p.m., consisting of decorating and fashion hints for homemakers; *The Betty Feetor Show*, carried weekdays 1:00–1:30 p.m., featuring recipes and homemaking hints; *Pastors Face Your Questions*, scheduled Saturdays 2:30–3:00 p.m., a panel program featuring area ministers; *Almanac*, an agricultural program, aired weekdays 6:30–6:40 a.m.; and *WBTV Reports*, a monthly half hour documentary series carried from 10:00–10:30 p.m., on Tuesdays, which presents topics of interest to people in the Carolinas.

24. WBTV will continue its daily editorials and will augment its news staff to serve the needs of the new Grade B area. In addition, the WBTV News Manager will make a tour through the new Grade B area to inform people in the various communities of WBTV's desire to serve community needs (WBTV Ex. 3, pp. 10–16). WBTV's promotion department will actively promote the station throughout the gain counties, including the G–WS–HP area (Tr. 607–608). WBTV also expects to be carried on the CATV systems in Greensboro and Winston Salem, which represents the largest single concentrated gain of population (Tr. 605–607).

25. Briefly stated, the respective witnesses for the applicant and the respondents both "skilled" and lay using the same or similar basic data arrived at mainly opposite conclusions. In a word, applicant's witnesses contend that whatever effect the proposed tall-tower will have on authorized and prospective UHF stations in the concerned areas, at worst, that effect will be minimal. Certainly not of any degree—substantially adverse—to warrant denial of its application. On the other side respondents' witnesses contend, principally on the theory—at odds with applicant's witnesses—that UHF stations cannot survive solely on locally generated advertising revenues, thus, the further incursions into the UHF areas, present and prospective, by the proposed operation, will tend to shut off national spot revenues to those UHF stations and, hence, effectively foreclose their viability. On this point, and in spite of the respected credentials of the several witnesses on both sides, a finding or findings of meaningful precision based on their opinions eludes the firm grasp. At best, the varied opinions, each given its weight following adequate cross-examination, tend to neutralize each other. Other factual conditions, principally engineering in nature, are at hand in the record which permit skirting obscurities in the several opinions.

ULTIMATE FINDINGS AND CONCLUSIONS

1. Faced with the application of WBTV for authority to increase antenna height and change its transmitter site, under the given issues and as reflected in the evidence of record, a determination must be made whether the loss of service to areas presently served comports with the public interest; and whether the applicant's proposal to expand its VHF facilities will impair the ability of authorized or prospective UHF broadcast stations in the concerned areas to compete effectively or would jeopardize in whole or in part, the continuation of existing UHF television service. Primary emphasis on the impact issue will be directed towards the conditions affecting authorized or

prospective UHF stations in the Greensboro-Winston Salem-High Point area with a lesser emphasis on those conditions in the Charlotte, North Carolina area. The reasons for this approach should unfold hereafter.

2. Jefferson Standard Broadcasting Company proposes to change facilities of VHF television station WBTV, a CBS affiliate, operating on Channel 3 at Charlotte, North Carolina. The transmitter site would be moved from a point 15 miles west of Charlotte to a new location 28 miles north of the city. The antenna height above average terrain would be increased from 1,086 ft. to 1,800 ft. There would be no change in the present effective radiated power of 100 kilowatts.

3. Charlotte, population 241,178, is the largest city in North Carolina and is located near the southern border of the state 82 miles southwest of Greensboro, North Carolina. Charlotte is the county seat of Mecklenburg County and the principal city of the Charlotte Urbanized Area and Standard Metropolitan Statistical Area. Two VHF and two UHF commercial stations and one UHF educational station operate there.

4. Under Issue 1 (areas and populations) a fair crystallization of the substantive evidence of record would suggest the following:

A. *Favorable Attributes of the Proposed Operation*

(1) There would be a gain of 341,721 persons within the proposed WBTV Grade A contour for an increase of 34% above the present Grade A population. A total of 208 persons would receive a first Grade A service (white area), 66,517 persons would receive a second Grade A service (gray area), 52,999 persons a third and 72,539 persons a fourth.

(2) A first CBS Grade A service would be provided to 224,943 persons, however, all of them presently receive CBS Grade B service from WBTV.

(3) There would be a gain of 878,815 persons within the proposed WBTV Grade B contour for an increase of 45% above the present Grade B population.

(4) A first fulltime CBS Grade B service would be provided to 14,104 persons.

(5) Grade A overlap between WBTV and a prospective UHF station at Rock Hill, S.C. (pop. 33,846) would be decreased from 96.7% to 77.2% of the Grade A population of Rock Hill prospective station.

(6) The WBTV City Grade contour would no longer encompass Rock Hill, S.C. and the WBTV Grade A contour would. The WBTV signal intensity in Rock Hill would be decreased from 3 dbu above City Grade to 1.5 dbu above Grade A.

B. *Unfavorable Attributes of the Proposed Operation*

(1) A total of 57,545 persons would lose WBTV Grade A service causing a Grade A gray area of 1,208 persons, a two-service area including 1,507 persons, a three-service area including 36,615 persons and a four-service area including 18,011 persons. However, WBTV would continue to provide Grade B service to the Grade A loss area.

(2) A total of 29,107 persons would be left with no CBS Grade A service. However, WBTV would continue to provide CBS Grade B service thereto.

(3) A total of 54,163 persons would lose WBTV Grade B service causing a Grade B three-service area including 20,627 persons and a four-service area including 6,626 persons. However, at least one CBS Grade B service is available to almost all of the Grade B loss area from WSPA–TV or WNOK–TV.

(4) Grade A overlap between WBTV and UHF Station WCCB–TV (ABC), Charlotte, N.C. (pop. 241,178) would be increased from 74.4% to 83.9% of the WCCB–TV Grade A population and a CBS Grade A service would be provided to all of the added area for the first time although CBS Grade B service is now available therein from present WBTV.

(5) Grade B overlap between WBTV and UHF Station WCCB–TV (ABC), Charlotte, North Carolina, would be increased from 80.5% to 97.7% of the WCCB–

TV Grade B population. However, about 60% of the added area receives CBS Grade B service from another station (WFMY–TV).

(6) Grade A overlap between WBTV and UHF Station, WRET–TV (IND), Charlotte, N.C. would be increased from 74.8% to 83.7% of the WRET–TV Grade A population and a CBS Grade A service would be provided to all of the added area for the first time although CBS service is now available therein from present WBTV.

(7) Grade B overlap between WBTV and UHF Station WRET–TV (IND), Charlotte, N.C. would be increased from 80.7% to 96.8% of the WRET–TV Grade B population. However, about 60% of the added area receives CBS Grade B service from another station (WFMY–TV).

(8) Grade A overlap between WBTV and UHF Station WHKY–TV (IND), Hickory, N.C. (pop. 20,569) would be increased from 81.3% to 100% of the WHKY–TV Grade A population and a CBS Grade A service would be provided to about half of the added area for the first time although CBS Grade B service is now available therein from present WBTV.

(9) The WBTV City Grade contour would encompass Hickory, N.C. for the first time and the WBTV signal intensity in Hickory would be increased from 4 dbu above Grade A to 12 dbu above City Grade. However, two other CBS stations (WSPA–TV and WJHL–TV) respectively place a signal intensity of 14 dbu and 10.5 dbu above Grade B in the community.

(10) Grade A overlap between WBTV and a prospective UHF station at Kannapolis, N.C. (pop. 36,293) would be increased from 73.7% to 100% of the Grade A population of the Kannapolis prospective station and a CBS Grade A service would be provided to all of the added area for the first time although CBS Grade B service is now available therein from present WBTV.

(11) The WBTV City Grade contour would encompass Kannapolis, N.C. for the first time and the WBTV signal intensity in Kannapolis would be increased from 4.5 dbu above Grade A to 8 dbu above City Grade and no other CBS signal of Grade B intensity or better is available in the community.

(12) Grade A overlap between WBTV and UHF Station WUBC (IND), Greensboro, N.C. (pop. 144,076) would occur for the first time and would include 1.5% of the WUBC Grade A population and a CBS Grade A service would be provided to all of the added area for the first time, although CBS Grade B service is now available therein from present WBTV.

(13) Grade B overlap between WBTV and UHF Station WUBC (IND), Greensboro, N.C. would be increased from 15.3% to 68.2% of the WUBC Grade B population. However, all of the added area receives CBS Grade B service from another station (WFMY–TV).

(14) Grade A overlap between WBTV and a prospective UHF station in Greensboro, N.C. would occur for the first time and would include 3.6% of the Grade A population of the Greensboro prospective station and a CBS Grade A service would be provided to all of the added area for the first time although CBS Grade B service is now available therein from present WBTV.

(15) Grade B overlap between WBTV and a prospective UHF station at Greensboro, N.C. would be increased from 13.6% to 65.1% of the Grade B population of the Greensboro prospective station, however, all of the added area receives CBS Grade B service from another station (WFMY–TV).

(16) The WBTV Grade B contour would encompass Greensboro, N.C., for the first time and the WBTV signal intensity in Greensboro would be increased from 12.5 dbu below Grade B to 4 dbu above Grade B. However, another CBS station (WFMY–TV) places a signal intensity of 37 dbu above City Grade in the community.

(17) Grade A overlap between WBTV and a prospective UHF station at Winston Salem, N.C., (pop. 132,913) would occur for the first time and would include 15.3% of the Grade A population of the Winston Salem prospective station and a CBS Grade A service would be provided to all of the added area for the first time although CBS Grade B service is now available therein from present WBTV.

(18) Grade B overlap between WBTV and a prospective UHF station at Winston Salem, N.C., would be increased from 26.2% to 83.2% of the Grade B population of the Winston Salem prospective station, however, all of the added area receives CBS Grade B service from other stations (WFMY–TV, WJHL–TV and WDBJ–TV combined).

(19) The WBTV Grade B contour would encompass Winston Salem, N.C. for the first time and the WBTV signal intensity in Winston Salem would be in-

creased from 1.5 dbu below Grade B to 16 dbu above Grade B. However, another CBS station (WFMY–TV) places a signal intensity of 3.5 dbu above Grade A in the community.

(20) Grade A overlap between WBTV and a prospective UHF station at Lexington, N.C. (pop. 17,205) would occur for the first time and would include 47.7% of the Grade A population of the Lexington prospective station and a CBS Grade A service would be provided to all of the added area for the first time although CBS Grade B service is now available therein from present WBTV.

(21) Grade B overlap between WBTV and a prospective UHF station at Lexington, N.C. would be increased from 41.4% to 100% of the Grade B population of the Lexington prospective station. However, all of the added area receives CBS Grade B service from another CBS station (WFMY–TV).

(22) The WBTV Grade A contour would encompass Lexington for the first time and the WBTV signal intensity in Lexington, N.C. would be increased from 6.5 dbu above Grade B to 1.0 dbu above Grade A. However, another CBS station (WFMY–TV) places a signal intensity of 19 dbu above Grade B in the community.

Issue 1

5. Issue 1 (areas and populations) may be disposed of on the basis of the engineering findings. The above conclusions detail the favorable and unfavorable technical aspects of WBTV's proposed operation. These considerations, prompt the further conclusion that the loss of service resulting from WBTV's proposal is outweighed by gains in service. Of particular significance, while a total of 57,545 persons would lose WBTV Grade A service, there would be a gain of 341,721 persons within the proposed WBTV Grade A contour. In addition, although grant of WBTV's proposal would cause a Grade A gray area with 1,208 persons, WBTV's proposed operation would permit 66,517 persons to receive a second Grade A service. Additionally, while a total of 54,163 persons would lose WBTV Grade B service, a grant would result in a gain of 878,815 persons within the proposed WBTV Grade B contour. Accordingly, Issue (1) will be resolved favorably to WBTV.

Issue 2 (UHF impact)

6. A fair test of this issue under the evidence adduced requires a prefatory observation with the object of placing into focus the foundation stone which prompted the Commission in the first instance to set this case for legal contest, the necessary statutory finding of the public interest not being discernible at the threshold. As the Designation Order describes:

> While the Commission encourages television broadcast stations to operate with maximum facilities in order to make the most efficient use of the channel assignment, it cannot overlook its concern for fostering the development of both existing and potential UHF stations. By ordering an issue regarding UHF impact, a full record will be established to formulate a basis for determining a choice between these two policies. (23 FCC 2d p. 933, See also *Cosmos Broadcasting Corporation*, 21 FCC 2d, 729, 733 (Review Board 1970); *Eighth Report and Order* FCC 71–92, Docket No. 14229, released February 1, 1971).

7. Whatever the frequency of cases putting to the crucible of litigation these two policies, *Cosmos*, *supra*, clearly enunciated the touchstone of choice:

> It is definitely not the Commission's policy "to insulate every UHF station from any possible small wind of VHF impact where there is a substantial service benefit involved in a different course." . . . Where substantial adverse impact on UHF service has been shown, the choice must be made in favor of the Commission's [UHF] protection policy. . . . (*Cosmos*, *supra*, at 733).

8. WBTV's present competitive position is *not* a factor to be considered under the balancing test. Without doubt, WBTV is a profitable station, as well as the dominant television station in the Charlotte market. The record establishes that WBTV's revenue has increased during the period 1960 to 1969 by 87%. Its income during the same period has increased by 109%. During the period 1960 to the present time, WBTV has maintained the largest net weekly circulation in the Charlotte market. Based on ARB audience estimates released May 1970, WBTV has a net weekly circulation of 415,000 homes as compared with 315,000 for WSOC, 143,000 for WCCB and 34,000 for independent UHF station WRET. Moreover, although WBTV cites the addition of new television competition as the principal reason for its filing of the captioned application, such competition has not resulted in a lessening of WBTV's program service.

9. On the other hand, the *present competitive position* of independent UHF stations WRET–TV, Charlotte, and WUBC, Greensboro, are of critical significance.

10. WRET–TV is a struggling operation facing stiff competition in the Charlotte market. WRET's revenue in 1969 was $123,631, representing 1.26% of the total revenue of television stations in the Charlotte market ($9,832,246). It also suffered a deficit of $245,855 in 1969. Although poor in comparison to other Charlotte market TV stations, 1969 represents an improvement over 1967. In 1967 WRET's total revenue was $21,713 (0.25%) of total Charlotte revenues of $8,628,734. There are no income figures for WRET for 1967, however, in 1968 its losses were $280,089.

11. WRET's share of audience in WBTV's proposed Grade A and B gain counties in the Charlotte ADI is further reflective of its poor competitive position. In the six Grade A gain counties, WBTV's share of audience (total week hours and prime hours) ranges from a low of 34.8 and 35.3% in Rowan County to a high of 60.3 and 60.2% in Alexander County. WRET's ranges from a low of 0.1 and 0.0% in Alexander County to a high of 2.3 and 2.9% in Cabarrus County. In the five Grade B gain counties, WBTV's share ranges from a low of 8.0 and 8.1% in Richmond County to a high of 53.4 and 51.9% in Ashe County. WRET's ranges from a low of 0 and 0.0% in Ashe, Watauga and Mitchell Counties to a high of 3.9 and 2.5% in Richmond County.

12. WUBC's competitive position is even more precarious. On July 23, 1970, WUBC filed a petition for voluntary bankruptcy and a trustee has been appointed. Because of its poor financial condition, WUBC went off the air on July 26, 1970 and continues to remain off the air.

13. WUBC's poor economic condition is not difficult to discern. Its total revenue in 1969 was $70,575 (0.96%) of the total revenue in the Greensboro-Winston Salem-High Point market ($7,328,079). Also, it suffered a deficit of $133,664 in 1969. Its 1969 revenue was an improvement over its 1967 revenue of $4,965 (0.09%) of total market revenues of $7,328,079. WUBC suffered a loss of $50,076 in 1967.[17] Compounding its difficulties, WUBC has a net weekly circulation of 13,000 TV homes

[17] In 1968 WUBC's revenue was $59,944. Its operating deficit was $212,461.

as compared with a range of 280,000 to 350,000 for the three network affiliated VHF stations.

14. Audience share studies show that WBTV does not *presently* pose a significant competitive force in the Greensboro-Winston-Salem-High Point ADI. WBTV's share in four of the fifteen Grade B gain counties is 0.0 and 0.0%. Its share in six other counties ranges from a low of 0.2 and 0.0% to a high of 2.6 and 2.4%. WBTV has its largest shares of audience in Montgomery (16.6 and 16.1%); Alleghany (18.5 and 17.1%); Wilkes (39.9 and 36.2%); and Grade A gain Davie County (20.3 and 25.7%).

15. Two additional UHF stations (WCCB, Charlotte, and WHKY, Hickory, North Carolina) operate in the Charlotte market. WUBC, previously discussed, is the only UHF station presently in operation in the Greensboro-Winston Salem-High Point market.

16. WCCB, affiliated with the ABC network, is credited, as previously noted, with 143,000 television homes. The record does not contain information as to its revenue and income. WCCB's share of audience in the six WBTV Grade A gain counties in the Charlotte ADI ranges from a low of 1.0 and 0.8% in Rowan County to a high of 7.7 and 11.1% in Cabarrus County. Its share in the six WBTV Grade B gain counties in the Charlotte ADI ranges from a low of 0.9 and 0.0% in Ashe, Watauga and Mitchell Counties to a high of 3.9 and 5.6% in Anson County. The record is silent concerning the competitive position in the Charlotte ADI and the revenue and income of WHKY, Hickory.

17. Respecting the Charlotte area, the engineering findings are persuasive that there is presently extensive Grade A and Grade B overlap between WBTV and WRET and WCCB. Grade A overlap between WBTV and WRET is presently 74.8% and grant of this proposal would increase such overlap to 83.7%. Similarly, Grade A overlap between WBTV and WCCB would increase from 74.4% to 83.9%. Grade B overlap between WBTV and WCCB would increase from 80.5% to 97.7%. Grade B overlap between WBTV and WRET would increase from 90.7% to 96.8%. In the case of WHKY, Grade A overlap would increase from 81.3% to 100%. The present and proposed Grade B contours of WBTV overlap all of the area within the Grade B contour of WHKY–TV.

18. Similarly, the record establishes that there is presently extensive overlap between WBTV and prospective UHF stations in the Charlotte area. In the case of a prospective Rock Hill, South Carolina, UHF station, there would be a decrease in Grade A overlap and WBTV's Grade B contour encompasses the Grade B contour of the prospective station. In the case of Kannapolis, Grade A overlap would be increased from 73.7% to 100%; present and proposed Grade B overlap is 100%.

19. That WBTV is the dominant station in the Charlotte area from ARB market data alone seems without doubt. The Grade A and B gain area studies disclose that WBTV already holds a substantial segment of the audience and that WCCB and WRET's shares are insignificant. Coupled with the fact, as noted earlier, that the Grade B overlap presently between WBTV and WRET, WBTV and WCCB is, respectively, 80.7% and 80.5%, it does not appear that the additional

overlap (17%) occasioned by WBTV's proposal would materially affect the status of these UHF stations, although it certainly will not be a spur to further development and growth. In light of the extensive overlap already existing between WBTV and potential Charlotte area UHF stations, there emerges prudent doubt that grant of the proposal would not materially hinder the development of these potential UHF stations. Who, one might ask, would be willing to risk the uncertainties attendant to UHF broadcasting in a market already dominated by a powerful VHF operator about to become more powerful? The vacant channels (64 and 30) Kannapolis and Rock Hill, to beg the question, will not enhance their present scale of attractiveness to entrepreneurs on the advent of the operation of the proposed tall-tower. But the task here is to ascertain from the record if there is a substantial adverse impact on present and potential UHF stations on the occasion of a grant, not the perhaps ineffable unattractiveness of vacant channels.

20. While WBTV's move would not affirmatively improve the chances of Charlotte area UHF stations, neither can it be concluded that it would substantially harm their chances for success, although reasonable doubts persist on the prospects of occupancy of vacant and potential channels there, assuming the presence of the proposed tall-tower. As to the Charlotte area, those doubts, however hesitantly, will be resolved in favor of the applicant.

21. The Greensboro-Winston Salem-High Point area is much another matter and a far different picture. The evidence is persuasive and makes clear that WBTV's *present* penetration into this area ranges from non-existent to minimal. However, it is equally persuasive and clear under its proposal, WBTV's penetration would be significantly increased, posing a very real threat to UHF growth and development, in that tri-city market.

22. The present Grade A contour of WBTV does not penetrate the Grade A contour of WUBC, an independent UHF station in Greensboro. Grade A overlap between proposed WBTV and WUBC would enclose 1.5% of the WUBC Grade A population. More significantly, Grade B overlap between WBTV and WUBC would be increased from 15.3% to 68.2% of the WUBC Grade B population. Proposed Grade B overlap represents a gain of over 620,000 persons.

23. WBTV's impact on potential UHF stations in the area would be equally, if not more, severe, and would hinder, if not prevent, the development of such operations. UHF Channel 61, assigned to Greensboro, is vacant. The present WBTV Grade A contour does not overlap the Grade A contour of prospective UHF station in Greensboro, the proposed Grade A contour would overlap 3.6% of the Grade A population of the prospective station. Grade B overlap would be increased from 13.6% to 65.1%. Similarly, Channel 45 in Winston Salem is vacant. The present WBTV Grade A contour does not overlap the Grade A contour of the prospective station; the proposed Grade A overlap would be 15.3%. More important, the Grade B overlap would be increased from 26.2% to 83.2%. Likewise, present Grade A contour of WBTV does not overlap the Grade A contour of the prospective Lexington station; the proposed Grade A overlap would be 47.7%. The Grade B overlap would be increased from 41.4% to 100%.

24. The impact of the move and power increase proposed by WBTV on the Greensboro-High Point-Winston Salem market is further illustrated by the fact that WBTV's present Grade B contour only penetrates Winston Salem slightly in the southwestern corner of the city. The proposed Grade B contour will encompass all of Winston Salem, High Point and Greensboro. The WBTV signal intensity in Greensboro would be increased from 12.5 dbu below Grade B to 4 dbu above Grade B. Similarly, the WBTV signal intensity in Winston Salem could be increased from 1.5 dbu below Grade B to 16 dbu above Grade B. Equally important from an impact standpoint is the extent of penetration by the WBTV proposal into counties comprising the major core of the Greensboro-Winston Salem-High Point market. The proposal would, for the first time, result in Grade B penetration of Guilford, Stokes and Rockingham Counties. The penetration would be, respectively, 95% (268,917), 99.5% (23,095), and 20.2% (14,367). Additionally, Grade B penetration in Forsyth, Randolph and Surry Counties would be increased, respectively, by 90.8% (180,858), 92.4% (70,036), and 91.6% (45,897). The significance of these dramatic increases lies in the fact that it is in the "metro area", the very core of the Greensboro-Winston Salem-High Point market, where WUBC must look to sell its advertising. It is recognized that WBTV is a CBS affiliate and that CBS programming is already available to the population of these counties from WFMY–TV. However, this penetration represents one more highly competitive signal fractionalizing the audience available for UHF viewing. This fractionalization gains importance when it is recognized that WBTV's non-network programming is attractive and would appeal to the audience interested in non-network programming.

25. WBTV's share of audience in its proposed Grade A and Grade B gain counties is presently *de minimis*. WBTV forecasts increases in audience in these counties. It appears that these forecasts, which are no more than an estimate, in any event, considerably underestimate the potential audience changes. Nevertheless, using these figures as a basis, it seems certain that WBTV will sharply cut into the potential UHF audience. (See page 5, Appendix VIII).

26. WBTV expects to increase its audience because of the improvement of its signal and by providing programming which viewers will prefer over those presently available. WBTV broadcasts a number of attractive non-network programs, including varied sports events, children's programs, and a new interview program. Insofar as the UHF impact issue is concerned, such programming will, necessarily, adversely affect independent UHF station WUBC's chances to counter program successfully against its 3 VHF competitors in the Greensboro-Winston Salem-High Point market, as well as its potential 4th VHF competitor (WBTV).

27. Aside from audience fractionalization, WBTV's proposed operation will have other deleterious consequences. WBTV suggests that a grant of its proposal will likely result in the shift of Montgomery and Wilkes Counties from the Greensboro-Winston Salem-High Point ADI to the Charlotte ADI. Witnesses for respondents concluded that more than two counties will be affected. The loss of these ADI counties more than likely will affect the ADI ranking of the Greensboro-

Winston Salem-High Point market, with a probable corresponding loss of national spot revenues. This loss will be even greater than under ordinary circumstances because of the ranking of the Greensboro-Winston Salem-High Point market below the 50th rank (51st at present), as compared to Charlotte (35th). There is evidence that this results from the selectivity of national advertisers in placing money in markets below the 30th ranking and where, as here, concentration of money in the Charlotte market would permit coverage not only of Charlotte, but also of Greensboro-Winston Salem-High Point.[18]

28. Loss of national revenue in the Greensboro-Winston Salem-High Point market would, of course, reduce the amount of money from such sources available to the stations in the market. Second, it would also adversely affect UHF chances of obtaining local advertising revenue. The loss of national dollars could cause VHF stations to lower their rates in order to maintain their level of billing. VHF rates would then be closer to UHF rates and would, conceivably, be a better buy as far as local advertisers are concerned, causing a switch from UHF to VHF. WUBC, which is least saleable, will lose what little it has, ensuring, most probably, its permanent demise.

29. WBTV's proposed move could be the occasion to adversely affect WUBC's ability to purchase attractive program packages. Thus, WBTV could buy up non-network as well as off-network program packages and by broadcasting them in the Greensboro-Winston Salem-High Point market, effectively diminish, if not eliminate, an audience for future showing by stations in that market. Also, the prospects of a bonus of a Grade B signal going into that market would be an added incentive to an advertiser to select WBTV. Additionally, WBTV's placement of a fourth VHF signal into a clearly defined market (Greensboro-Winston Salem-High Point) could trigger a material change in and, thus, upset established film buying patterns, since film, a staple in the broadcast business, particularly in independent non-network operations, are in the main sold on Grade B coverage. Overlapping program contracts between the Charlotte and Greensboro-Winston Salem-High Point markets would, in all likelihood, result in increased film costs to the detriment of already foundering WUBC.

30. In sum, this is not a close case. The given task here is to effectuate or, as the case may be, interpret existing policy, and no more. The adverse economic effect on WUBC resulting from WBTV's proposal is clearly discernible. WUBC's continued existence is precarious, at best. A grant here could well be the *coup de grace* to one presently in great economic pain. The Commission has made clear that the marginal condition of a UHF station is a factor to consider in assessing adverse economic impact. *WLCY–TV, Inc.*, 25 FCC 2d 832.[19] Equally, premised on the evidence adduced, it is abundantly persuasive that a grant to WBTV will impair, if not totally frustrate, the development of allocated UHF channels in the Greensboro-Winston-Salem-High Point market.

[18] The 1969 national and regional revenue for the Charlotte and Greensboro-Winston Salem-High Point markets was $5,918,399 and $3,874,898, respectively.

[19] See also *WLCY–TV, Inc.*, 28 FCC 2d 353, where the Commission emphasized that until the disparity is "eliminated and UHF becomes substantially equal and fully competitive", the question of "UHF impact" must continue to be of substantial concern.

31. Save for otherwise precise engineering data and accepted trade and industry sources or "tools" of general applicability, cases of this kind depend in great measure on the reliability of not entirely precise or scrutable information and data from the minds and mouths of a variety of skills or callings, one way or another engaged in or utilized by the various components of the broadcast industry. To a large degree a studied exercise in the forecasting of probabilities is the key element in a hoped for fair and just solution.

32. Often, weight to be given testimonial evidence in this forecasting, whether it be so-called expert opinion [20] (seldom in accord; more often in conflict depending on the sponsoring party) or lay, it seems, is reduced to a headcount of industry-related academic degrees or equivalent knowledge of or experience in the business of broadcasting. Given the conditions of virtually the same basic data and information on which expert or experiential testimony is received and a resulting high divergence or contradiction, the efficacy of what remains tends to evanesce. Perhaps, if the highly pragmatic nature of administrative proceedings, unwedded to the rigors of the common law, needs and is best served by the expertise of several disciplines or quasi-disciplines in contested proceedings, as with the regular judiciary and to avoid less frustrating deliberation and selection, if needed, either an "independent" expert could be summoned by the trier-of facts with the attendant expenses shared by the litigants or some other method could be adopted which is geared to better assurance of "neutrality" in pursuit of the truth. In any event, this aside out of the way, all who have testified have been accorded their proper due, respecting weight, which reason suggests or compels.

33. Thus, the choice is encountered between encouraging television stations to operate with maximum facilities and the policy of fostering the development of UHF broadcasting. Where substantial adverse impact has been shown, as in this case, the choice is imperative and must be in favor of protecting UHF growth and development. See *Gala Broadcasting Co.*, 13 RR 2d 103.

Premised on the foregoing and the public interest so requiring, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion under Section 1.276 of the Rules, the instant application of Jefferson Standard Broadcasting Company (WBTV) BE AND IS HEREBY DENIED.

JAMES F. TIERNEY,
Hearing Examiner,
Federal Communications Commission.

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[20] Cf. *Wigmore on Evidence*, Third Edition, Vol. 2; (1940) Sec. 563(2).

APPENDIX I—WBTV GRADE A POPULATION GAINS[5]

County[1]	Total population	Present grade A population	Proposed grade A population	Population gained by proposed grade A	Percent county population gained
Greensboro-High Pt.-Winston-Salem ADI:					
Caldwell	55,769	2,127	55,345	53,218	95.4
Wilkes	47,509		39,966	39,966	84.1
Davidson	94,366		40,139	40,139	42.5
Davie	18,718		18,718	18,718	100.0
Yadkin	24,329		19,320	19,320	79.4
Forsyth	207,880		8,496	8,496	4.1
Surry	50,112		3,647	3,647	7.3
Subtotal				183,504	
Charlotte ADI:					
Rowan	89,666	30,250	89,666	59,416	66.3
Burke	57,398	10,465	56,018	45,553	79.4
Alexander	18,599	1,722	18,599	16,877	90.7
Iredell	71,572	55,918	71,572	15,654	21.9
Stanly	42,215	1,978	14,295	12,317	29.2
Cabarrus	73,750	70,272	73,750	3,478	4.7
Union	[2] 53,970	25,577	14,320	788	1.5
Watauga	22,860		447	447	2.0
Subtotal				154,530	
Greenville-Spartanburg-Asheville ADI:					
Rutherford	[3] 45,607	3,675	5,874	3,301	7.2
McDowell	27,818		386	386	1.4
Subtotal				3,687	
Total				[4] 341,721	

[1] North Carolina, unless otherwise stated.
[2] WBTV would lose 12,015 persons and gain 788 persons, a net loss of 11,257 persons.
[3] WBTV would lose 1,102 persons and gain 3,301 persons, a net gain of 2,199 persons.
[4] Gain in North Carolina=341,721.
[5] All population data used herein are taken from 1970 Preliminary U.S. Census, unless otherwise stated (WBTV Exs. I, I-A, II-A, V).

Other grade A services to grade A gain area

1. The Grade A contours of thirteen television stations intersect the Grade A gain area and serve the following portions thereof: (WBTV Ex. 1, pp. 17, 54; Ex. 1-A).

Station	Affiliation	Channel	Location	Area (sq. mi.)	Population	Population percentage
WLOS-TV	ABC	13	Asheville, N.C.	411	45,764	13.4
WSOC-TV	NBC	9	Charlotte, N.C.	1,269	137,855	40.3
WRET-TV	IND	36	Charlotte, N.C.	1,348	143,387	42.0
WCCB-TV	ABC	18	Charlotte, N.C.	1,545	158,211	46.3
WUBC	IND	48	Greensboro, N.C.	75	10,634	3.1
WHKY-TV	IND	14	Hickory, N.C.	133	24,303	7.1
WGHP-TV	ABC	8	High Point, N.C.	1,251	146,528	42.9
WSJS-TV	NBC	12	Winston Salem, N.C.	2,247	219,245	64.2
WFBC-TV	NBC	4	Greenville, S.C.	7	683	0.2
WSPA-TV	CBS	7	Spartanburg, S.C.	483	63,547	18.6
WJHL-TV	CBS	11	Johnson City, N.C.	991	113,437	33.2
WKPT-TV	ABC	19	Kingsport, Tenn.	312	24,180	7.1
WCYB-TV	NBC	5	Bristol, Va.	343	13,628	4.0

2. A minimum of none and a maximum of six[1] other Grade A services[2] are provided to the WBTV Grade A gain area (WBTV Ex. 1, pp. 2, 11, 18). The sparsely served areas and populations are as follows: (WBTV Ex. I–A).

Number of services	Area (sq.mi.)	Population	Population percentage
No other grade A	5	242	0.1
One other grade A	764	66,517	19.5
Two other grade A	583	52,999	15.5
Three other grade A	660	72,539	21.2
Four other grade A	533	36,296	10.6
Five or more grade A	861	113,128	33.1

The area presently receiving no Grade A service[1] is located in Alexander County. The areas receiving one Grade A service are located in the southeastern third of Wilkes County, the western half of Yadkin County, the northern third of Alexander County and the eastern fourth of Caldwell County. Station WSJS–TV (NBC) serves the major portion and WJHL–TV (CBS) serves the remainder except for a small portion served by WHKY–TV (IND) (WBTV Ex. 1, pp. 16, 18).

3. Of the 341,721 persons in the proposed Grade A gain area, 224,943 persons in an area of 2,275.2 square miles located largely in the Charlotte and Greensboro-High Point-Winston-Salem Areas of Dominant Influence would obtain a first CBS Grade A service from proposed WBTV.[2] The gain area within the Charlotte ADI includes all or part of the counties of Rowan, Alexander, Iredell, Stanley, Cabarrus and Union. The gain area within the Greensboro-High Point-Winston-Salem ADI includes all or part of the counties of Wilkes, Davidson, Davie, Yadkin, Forsyth and Surry. Within the two ADI's, 62,473 persons reside in cities over 1,000 population (WBTV Ex. 1, pp. 11, 12).

4. A total of 56,654 persons in an area of 703.4 square miles in the Grade A gain area would receive a second CBS Grade A service from proposed WBTV. Such area would include all or parts of the counties of Burke, Alexander and Watauga in the Charlotte ADI, Caldwell and Wilkes in the Greensboro-High Point-Winston-Salem ADI, and Rutherford and McDowell in the Greenville-Spartanburg-Asheville ADI. Within the gain area in the three ADI's 18,380 persons reside in the cities over 1,000 population (WBTV Ex. 1, p. 12).

5. A total of 60,124 persons in an area of 427.4 square miles in the Grade A gain area would receive a third CBS Grade A service from proposed WBTV. Such area would include all or parts of the counties of Caldwell in the Greensboro-High Point-Winston-Salem ADI, Burke in the Charlotte ADI and Rutherford and McDowell in the Greenville-Spartanburg-Asheville ADI. Within the gain area in the two ADI's, 18,176 persons reside in cities over 1,000 population (WBTV Ex. 1, p. 12).

6. The following cities of 1,000 or more persons would receive a first, second or third CBS Grade A signal from proposed WBTV: (WBTV Ex. V, p. 1; revised p. 61 of Ex. 1).

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[1] The maximum area (receiving five or six Grade A services) are located mostly in Davis, Davidson, and Rowan Counties with smaller portions in Iredell, Alexander, Caldwell and Burke Counties (WBTV Ex. 1, pp. 16, 18). Only the area in Caldwell and Burke Counties now receives CBS service. It is provided by WSPA–TV and WJHL–TV (WBTV Ex. 1, pp. 16, 17, 18).

[2] The Grade A gain area falls *entirely within the* present Grade B contour of WBTV. Including present WBTV, a minimum of 5 and a maximum of 12 Grade B services are available to the Grade A gain area. (Obtained by superimposing Ex. I, p. 16 on Ex. II, p. 19 and Ex. II–A, pp. 13, 16).

[1] Grade A service as used herein means that the pertinent areas receive a Grade A signal intensity or better. Similarly, Grade B service refers to a Grade B signal intensity or better.

[2] All of the 341,721 persons within the proposed Grade A gain area presently receive CBS Grade B service from WBTV (WBTV Ex. I, P. 15).

City	Population [1]	County	First CBS	Second CBS	Third CBS	Other non-CBS
North Carolina:						
North Wilkesboro	3,357	Wilkes	X			1
Wilkesboro	1,974	Wilkes	X			1
Elkin	2,899	Surry	X			1
Jonesville	1,659	Yadkin	X			1
Yadkinville	2,232	Yadkin	X			1
Granite Falls	2,388	Caldwell		Part	Part	1 and a portion
Hudson	2,820	Caldwell		X		1
Lenoir	14,705	Caldwell		X		1
Stony Point	1,001	Alexander	X			4
Taylorsville	1,231	Alexander	X			2
Cooleemee	1,115	Davie	X			5
Mocksville	2,529	Davie	X			5
Lexington	17,205	Davidson	X			5
East Spencer	2,217	Rowan	X			5
Granite Quarry	1,344	Rowan	X			5
Salisbury	22,515	Rowan	X			5
Spencer	3,075	Rowan	X			5
Rowan Mills	1,184	Rowan	X			5
South Salisbury	2,199	Rowan	X			5
Mount Pleasant	1,174	Cabarrus	X			4
Drexel	1,431	Burke			X	1
Morganton	13,625	Burke			X	1
Valdese	3,182	Burke			X	0

[1] From Advance Final Report 1970 U.S. Census.

The cities of Morganton, Drexel, and Valdese are within the Grade A contours of two CBS affiliates WJHL–TV and WSPA–TV. Hudson and Lenoir are within one, WJHL–TV and Granite Falls is within one, WJHL–TV and part of another, WSPA–TV. The remaining 17 cities do not receive a CBS Grade A service.[1] (WBTV Ex. 1, pp. 16, 18).

APPENDIX II—WBTV GRADE A POPULATION LOSSES

County [2]	Total population [3]	Present grade A population	Proposed grade A population	Population lost by proposed grade A	Percent of county population lost
Greenville-Spartanburg-Asheville ADI:					
Cherokee, S.C.	36,044	30,459	8,861	21,598	59.9
Chester, S.C.	29,238	5,920		5,920	20.2
Rutherford, N.C.	45,607	3,675	5,874	1,102	2.4
Union, S.C.	28,715	155		155	0.5
Subtotal				28,775	
Charlotte ADI:					
York, S.C.	83,677	83,650	71,357	12,293	14.7
Union, N.C.	[3] 58,970	25,577	14,320	12,045	22.3
Lancaster, S.C.	42,557	5,271	1,576	3,695	8.7
Cleveland, N.C.	71,298	71,298	70,561	737	1.0
Subtotal				28,770	
Total				[4] 57,545	

[1] Of the 57,545 persons losing WBTV Grade A service, 38,544 live in rural areas and communities of less than 1,000 (population in cities of 1,000 or more is 19,001) (WBTV Ex. 1, p. 13).
[2] WBTV would lose 1,102 persons and gain 3,301 persons, a net gain of 2,199 persons.
[3] WBTV would lose 12,045 persons and gain 788 persons, a net loss of 11,257 persons.
[4] Loss in North Carolina=13,884.

[1] All of the cities are within the Grade B contours of present WBTV(CBS) and either WSPA–TV(CBS), WJHL–TV(CBS) or WFMY–TV(CBS) (WBTV Ex. 1, pp. 16, 25–27).

Other grade A services to grade A loss area

1. The Grade A contours of seven television stations enclose various portions of the Grade A loss area as follows:[1] (WBTV Ex. 1, pp. 19–21, 55: Ex. 11–A, p. 40).

Station	Affiliation	Channel	Location	Area (sq.mi.)	Population	Population percentage
WLOS–TV	ABC	13	Asheville, N.C.	111.5	20,562	35.7
WSOC–TV	NBC	9	Charlotte, N.C.	540.9	34,268	59.5
WRET–TV	IND	36	Charlotte, N.C.	511.9	33,554	58.3
WCCB–TV	ABC	18	Charlotte, N.C.	574.9	35,421	61.6
WIS–TV	NBC	10	Columbia, S.C.	265.0	14,238	24.7
WFBC–TV	NBC	4	Greenville, S.C.	109.0	20,430	35.5
WSPA–TV	CBS	7	Spartanburg, S.C.	399.5	28,106	48.8

2. A minimum of one and a maximum of 5 Grade A services are available within the Grade A loss area (WBTV Ex. 1, pp. 3, 13, 21). A total of 28,438 persons in an area of 387.3 square miles or 49% of the WBTV Grade A population loss still receives a Grade A CBS service from another station (WBTV Ex. 1, p. 13). The minimum area include 1,208 persons (2.1%) in an area of 40.5 square miles located in Cherokee and Union Counties and is served by WSPA–TV (CBS) (WBTV Ex. 1, pp. 29, 31). Two Grade A services are available to 1,507 persons in an area of 57 square miles, three Grade A services are available to 36,615 persons (63.6%) in an area of 229.4 square miles, four to 18,011 persons (31.3%) in an area of 418.5 square miles and five or more to 204 persons (0.4%) in an area of 4.5 square miles in the Grade A loss area (WBTV Ex. 11–A, pp. 40, 41).

Summary of grade A population and area gained and lost resulting from the WBTV tall tower proposal

3. Taking into account both the gain and loss in Grade A coverage by proposed Station WBTV discloses the net gain as follows: (WBTV Ex. 1, p. 42).

	Population	Area (sq. Mi.)
Total proposed grade A	1,301,125	7,172
Total present grade A	1,016,949	4,620
Proposed grade A gain population and area	341,721	3,046
Proposed grade A loss population and area	57,545	749.9
Grade A net gain from WBTV tall tower proposal	248,176	2,656.1

[1] Station WBTV will continue to provide Grade B service to the Grade A loss area (WBTV Ex. 1, p. 15). The Grade B contours of twelve television stations enclose various portions of it. WSOC–TV, WRET–TV and WCCB–TV place a Grade B contour over all of the Grade A loss area; WGHP–TV (ABC), Ch. 8, High Point, N.C. serves 3,622 persons (6.3%) in 15.4 square miles; WLOS–TV, 26,365 persons (45.8%) in 351.3 square miles; WFBC–TV, 39,804 persons (67.2%) in 577.7 square miles; WSPA–TV, 42,913 persons (74.6%) in 525 square miles; WJHL–TV (CBS) Ch. 11, Johnson City, Tenn., 466 persons (0.8%) in 3.9 square miles; WCYB–TV (NBC), Ch. 5 Bristol, Va., 1,778 persons (3.1%) in 19.3 square miles; WIS–TV, 36,671 persons (63.7%) in 624 square miles; WNOK–TV (CBS), Ch. 19, Columbia, S.C., 1,619 persons (2.8%) in 47.6 square miles; WOLO–TV (ABC), Ch. 25, Columbia, S.C., 1,741 persons (3%) in 52.8 square miles (WBTV Ex. 1, pp. 3, 23; Ex. 11–A, p. 38). A minimum of 4 and a maximum of 8 Grade B services are available to the Grade A loss area, four being provided to 11,010 persons (19.1%) and five or more to 46,535 persons (80.9%) (WBTV Ex. 1, pp. 3, 24; Ex. II–A, p. 39). Four other Grade B services are available to 11,010 persons (19.1%) in 115.8 square miles, and five or more to 46,535 persons (80.9%) in 634.1 square miles (WBTV Ex. 11–A, p. 39).

APPENDIX III—WBTV GRADE B POPULATION GAINS

County [1]	Total population	Present grade B population	Proposed grade B population	Population gained by proposed grade B	Percent county population gained
Greensboro-High Point-Winston Salem ADI:					
Guilford	283,182	----------	268,917	268,917	95.0
Forsyth	297,880	27,022	297,880	180,858	90.8
Randolph	75,800	5,282	75,318	70,036	92.4
Surry	50,112	4,215	50,112	45,897	91.6
Stokes	23,204	----------	23,095	23,095	99.5
Rockingham	71,263	----------	14,367	14,367	20.2
Patrick, Va	14,980	----------	8,565	8,565	57.2
Moore	37,815	----------	8,032	8,032	21.2
Alleghany	7,815	----------	7,815	7,815	100
Davidson	94,366	84,508	94,366	9,858	10.4
Montgomery	18,383	10,515	18,324	7,809	42.5
Wilkes	47,509	42,050	47,509	5,459	11.5
Yadkin	24,095	21,205	24,095	2,890	12.0
Chatham	28,686	----------	466	466	1.6
Subtotal				661,778	
Greenville-Spartanburg-Asheville ADI:					
Buncombe	135,424	1,224	43,589	42,365	31.3
Henderson	40,939	2,584	16,108	13,524	33.0
Yancey	12,351	769	11,730	10,961	88.7
Madison	14,938	----------	1,663	1,663	11.1
Greenville, S.C	[2] 236,900	23,502	12,494	540	0.2
McDowell	27,818	27,655	27,818	163	0.6
Subtotal				69,216	
Charlotte ADI:					
Ashe	18,768	279	18,768	18,489	98.5
Watauga	22,660	7,599	22,660	15,061	66.5
Richmond	38,927	766	11,241	10,475	26.9
Avery	11,649	5,042	11,649	6,607	56.7
Mitchell	13,186	5,713	13,171	7,458	56.6
Anson	21,313	20,076	21,313	1,237	5.8
Subtotal				59,327	
Bristol-Kingsport-Johnson City ADI:					
Carter, Tenn	42,384	----------	22,905	**22,905**	54.0
Johnson, Tenn	11,063	----------	11,063	11,063	100
Washington, Va	40,133	----------	2,866	2,866	7.1
Unicoi, Tenn	15,014	----------	3,587	3,587	23.9
Smyth, Va	30,616	----------	2,898	2,898	9.5
Sullivan, Tenn	124,461	----------	622	622	0.5
Subtotal				43,941	
Roanoke-Lynchburg ADI:					
Carroll, Va	25,794	----------	22,252	22,252	86.3
Grayson, Va	18,045	----------	18,045	18,045	100
Wythe, Va	21,048	----------	2,042	2,042	9.7
Floyd, Va	9,488	----------	77	77	0.8
Subtotal				42,416	
Florence ADI:					
Chesterfield, S.C	[3] 32,956	16,541	18,374	1,978	6.0
Marlboro, S.C	26,959	----------	159	159	0.6
Subtotal				2,137	
Total				[4] 878,815	

[1] North Carolina, unless otherwise stated.
[2] WBTV would lose 11,548 persons and gain 540 persons, a net loss of 11,008 persons.
[3] WBTV would lose 145 persons and gain 1,978 persons, a net gain of 1,833 persons.
[4] Gain in North Carolina=781,216.

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Other grade B services to grade B gain area

1. The Grade B contours of twenty five television stations enclosed various portions of the Grade B gain area as follows: (WBTV Ex. 1, pp. 26, 27, 57).

Station	Affiliation	Channel	Location	Percent
WLOS-TV	ABC	13	Asheville, N.C	0-25
WANC-TV	NBC	21	Asheville, N.C	0-25
WSOC-TV	NBC	9	Charlotte, N.C	0-25
WRET-TV	IND	36	Charlotte, N.C	0-25
WCCB-TV	ABC	18	Charlotte, N.C	0-25
WTVD	CBS/NBC	11	Durham, N.C	0-25
WRDU-TV	CBS/NBC [1]	28	Durham, N.C	25-50
WFMY-TV	CBS	2	Greensboro, N.C	25-50
WUBC	IND	48	Greensboro, N.C	25-50
WGHP-TV	ABC	8	High Point, N.C	25-50
WRAL-TV	ABC	5	Raleigh, N.C	0-25
WECT	NBC	6	Wilmington, N.C	0-25
WSJS-TV	NBC	12	Winston-Salem, N.C	50-75
WIS-TV	NBC	10	Columbia, S.C	0-25
WBTW	CBS/ABC	13	Florence, S.C	0-25
WFBC-TV	NBC	4	Greenville, S.C	0-25
WSPA-TV	CBS	7	Spartanburg, S.C	0-25
WJHL-TV	CBS	11	Johnson City, Tenn	25-50
WKPT-TV	ABC	19	Kingsport, Tenn	25-50
WBIR-TV	CBS	10	Knoxville, Tenn	0-25
WCYB-TV	NBC	5	Bristol, Va	50-75
WLVA-TV	ABC	13	Lynchburg, Va	0-25
WDBJ-TV	CBS	7	Roanoke, Va	25-50
WSLS-TV	NBC	10	Roanoke, Va	25-50
WRFT-TV	ABC	27	Roanoke, Va	0-25

[1] Per program.

APPENDIX IV—WBTV GRADE B POPULATION LOSSES

County [1]	Total population	Present grade B population	Proposed grade B population	Population lost by proposed grade B	Percent of county population lost
Greenville-Spartanburg-Asheville ADI:					
Laurens	48,501	15,856	848	14,988	30.9
Newberry	28,742	8,029	1,425	6,604	23.0
Greenville	[2] 236,960	23,502	12,494	11,548	4.9
Spartanburg	169,745	169,745	163,703	6,042	3.6
Union	28,812	28,812	28,556	256	0.9
Subtotal				39,438	
Columbia ADI:					
Fairfield	19,601	18,532	7,661	10,871	55.5
Kershaw	33,341	7,993	4,284	3,709	11.1
Subtotal				14,580	
Florence ADI:					
Chesterfield	[3] 32,956	16,541	18,374	145	0.4
Subtotal				145	
				54,163	

[1] All counties are in South Carolina.
[2] WBTV would lose 11,548 persons and gain 540 persons, a net loss of 11,008 persons.
[3] WBTV would lose 145 persons and gain 1,978 persons, a net gain of 1,833 persons.

Other grade B services to grade B loss area

1. The Grade B contours of thirteen television stations enclose various portions of the Grade B loss area as follows [1] (WBTV Ex. 1, pp. 29–31, 59; Ex. 11A, p. 36).

[1] The Grade A contours of seven television stations enclose portions of the Grade B loss area so that a minimum of none and a maximum of three Grade A services are available therein (WBTV Ex. 1, pp. 4, 33, 34, 60).

Station	Affiliation	Channel	Location	Area (sq. mi.)	Population	Population percentage
WJBF	ABC	6	Augusta, Ga.	363	18,504	35.3
WRDW–TV	CBS/NBC	12	Augusta, Ga.	232	8,694	16.6
WATU–TV	IND	26	Augusta, Ga.	31	1,063	2.1
WLOS–TV	ABC	13	Asheville, N.C.	744	31,016	59.1
WSOC–TV	NBC	9	Charlotte, N.C.	301	6,942	13.8
WRET–TV	IND	36	Charlotte, N.C.	262	5,787	11.1
WCCB–TV	ABC	18	Charlotte, N.C.	255	5,791	11.1
WIS–TV	NBC	10	Columbia, S.C.	744	33,762	64.4
WNOK–TV	CBS	19	Columbia, S.C.	668	24,320	44.9
WOLO–TV	ABC	25	Columbia, S.C.	672	23,812	44
WBTW	CBS/ABC	13	Florence, S.C.	151	2,682	5.1
WFBC–TV	NBC	4	Greenville, S.C.	637	39,058	74.4
WSPA–TV	CBS	7	Spartanburg, S.C.	640	39,415	75.1

2. A minimum of 3 and a maximum of 8 Grade B services are available within the Grade B loss area (WBTV Ex. 1, pp. 4, 10, 31). The minimum area is located in Greenville, Spartanburg and Laurens Counties and is served by WSPA–TV (CBS), WFBC–TV (NBC) and WLOS–TV (ABC). Another small portion of the minimum loss area lies in Fairfield County[2] and is served by WIS–TV (NBC), WNOK–TV (CBS) and WOLO–TV (ABC) (WBTV Ex. 1, pp. 29, 31). Although only three Grade B services are available to 20,627 persons (39.3%) in an area of 263 square miles, chiefly in Greenville, Spartanburg and Laurens Counties, all three networks are provided. Four Grade B services are available to 6,626 persons (12.7%) in an area of 23 square miles and five or more are available to 25,241 persons (48.1%) in an area of 674 square miles in the Grade B loss area (WBTV Ex. IIA, p. 37). The loss area would still receive a minimum of none and a maximum of two other CBS affiliated Grade B services (WBTV Ex. I, pp. 10, 29). A minimum of one fulltime CBS service would be provided throughout partly by WSPA–TV and partly by WNOK–TV except in a small area in Chesterfield County where WBTW carries CBS and ABC (WBTV Ex. 1, pp. 29, 30).

APPENDIX V

Proposed WBTV "Impact" in the Charlotte Area

1. Proposed WBTV would have an impact on existing or prospective UHF stations in Charlotte, Hickory, Kannapolis, North Carolina and Rock Hill, South Carolina. The populations of the various communities and counties in which they are located and the respective distances of the communities from Charlotte are listed below: (WBTV Ex. II, p. 9; Advance Final Reports 1970 U.S. Census).

Community	Population	County	Population	Distance from Charlotte (miles)
Charlotte	241,178	Mecklenburg	354,656	
Hickory	20,569	Catawba	90,873	45 NNW
Kannapolis	36,293	Cabarrus and	74,629	23 NNE
		Rowan	90,035	
Rock Hill	33,846	York	85,216	23 SW

[2] The maximum areas (including seven and eight other services) lie mostly in Newberry and Kershaw Counties (Ex. 1, pp. 29, 30).

The various local existing and prospective facilities are:

Station	Channel	Community	ERP (kw)	HAAT (ft.)	Network
WBTV	3	Charlotte	100	1,086	CBS
WSOC–TV	9	Charlotte	316	1,180	NBC
WRET–TV	36	Charlotte	1,330	1,350	IND
WCCB–TV	18	Charlotte	5,000	1,295	ABC
WHKY–TV	14	Hickory	21.9	600	IND
Vacant	64	Kannapolis	21.9	600	
Prop. alloc	66	Monroe	21.9	600	
Prop. alloc	53	Gastonia	21.9	600	
Vacant	30	Rock Hill	21.9	600	

2. *Impact on WCCB–TV (ABC) and WRET–TV (IND), Charlotte, N.C.*—The two existing Charlotte UHF stations, WCCB–TV and WRET–TV, provide television coverage to substantially the same area. Present and proposed WBTV involve considerable Grade A and Grade B overlap with both stations, the proposed operation of WBTV causing an increase over the present overlap situation. Quantitative data as to the specific areas and populations in the overlap areas are as follows: (WBTV Ex. II, pp. 22, 23, 26, 27).

	WCCB–TV		WRET–TV	
	Area (sq. mi.)	Population	Area (sq. mi.)	Population
Total Grade A	8,223	1,308,977	7,913	1,249,821
Present Grade A overlap	4,089	973,624	3,902	[1] 934,492
Percent		74.4%		74.8%
Proposed Grade A overlap	4,996	1,097,957	4,656	1,046,072
Percent		83.9%		83.7%
Grade A not overlapped by proposed WBTV	3,227	211,020	3,257	203,749
Percent		16.1%		16.3%
Total Grade B	14,569	2,087,384	14,116	2,005,916
Present Grade B overlap	12,424	1,681,113	11,821	[1] 1,619,378
Percent		80.5%		80.7%
Proposed Grade B overlap	13,679	2,038,968	12,886	1,941,376
Percent		97.7%		96.8%
Grade B not overlapped by proposed WBTV	890	48,416	1,230	64,540
Percent		2.3%		3.2%

[1] Stated another way, WRET–TV presently provides Grade A coverage to 315,329 persons and Grade B coverage to 386,538 persons not so served by existing WBTV. These figures would be reduced to 203,749 and 64,540, respectively, by proposed WBTV.

3. The following stations respectively provide Grade A and Grade B service to the above areas of increased Grade A and Grade B overlap caused by proposed WBTV: (WBTV Ex. II, pp. 34, 36).

Station	Network	WCCB–TV		WRET–TV	
		Percentage of increased grade A overlap	Percentage of increased grade B overlap	Percentage of increased grade A overlap	Percentage of increased grade B overlap
WHKY–TV	IND	0– 25		0– 25	
WCCB–TV	ABC			all	75–100
WCYB–TV	NBC		0– 25		
WUBC	IND	0– 25	50– 75	0– 25	50– 75
WRDU–TV	CBS/NBC		75–100		75–100
WDBJ–TV	CBS		0– 25		
WSLS–TV	NBC		0– 25		
WTVD	CBS/NBC		25– 50		25– 50
WRAL–TV	ABC		25– 50		25– 50
WECT	NBC		0– 25		0– 25
WFMY–TV	CBS		75–100		75–100
WRET–TV	IND	75–100	75–100		
WBTW	CBS/ABC		0– 25		0– 25
WSOC–TV	NBC	75–100	75–100	75–100	75–100
WGHP–TV	ABC	50– 75	75–100	50– 75	75–100
WIS–TV	NBC		0– 25		0– 25
WSJS–TV	NBC	75–100	50– 75	75–100	50– 75
Assumed					
Lexington		25– 50	0– 25	25– 50	25– 50
Assumed					
Kannapolis		0– 25		0– 25	
Assumed					

As indicated above, WFMY TV, Greensboro, N.C. provides CBS Grade B service to 75–100% of the areas of increased Grade B overlap of both WCCB–TV and WRET–TV. From 2 to 5 other Grade A services are available to the increased area of Grade A overlap of WRET–TV and from 1 to 5 to that of WCCB–TV, and from 5 to 9 other Grade B services are available to about 95% of each increased area of Grade B overlap, the remaining 5% receiving a minimum of 3 (WBTV Ex. I, pp. 18, 2).

4. Other Grade B services available within the WCCB–TV and WRET–TV Grade B Contours are: (WBTV Ex. II–A, pp. 28, 29, 30, 31).

Station [1]	Network	Ch.	Location	Population percentage		Area percentage	
				WCCB–TV	WRET–TV	WCCB–TV	WRET–TV
WBTV	CBS	3	Charlotte, N.C.	80.9	80.7	85.3	83.7
Prop; WBTV	CBS	3	Charlotte, N.C.	97.5	96.8	93.9	91.3
WSOC–TV	NBC	9	Charlotte, N.C.	96.9	99.5	96.9	98.8
WRET–TV	IND	36	Charlotte, N.C.	95.8		94.1	
WCCB–TV	ABC	18	Charlotte, N.C.		99.4		97.1
WHKY–TV	IND	14	Hickory, N.C.	11.7	11.9	9.4	9.3
WFMY–TV	CBS	2	Greensboro, N.C.	31.2	30.6	27.1	26.1
WUBC	IND	48	Greensboro, N.C.	26.7	22.8	14.5	13.3
WGHP–TV	ABC	8	High Point, N.C.	56.9	57.1	47.1	47.0
WSJS–TV	NBC	12	Winston Salem, N.C.	52.4	51.5	44.8	42.4
WLOS–TV	ABC	13	Asheville, N.C.	24.2	23.4	22.9	21.2
WFBC–TV	NBC	4	Greenville, S.C.	26.9	26.4	28.5	27.3
WSPA–TV	CBS	7	Spartanburg, S.C.	43.6	43.6	38.1	36.2
WJHL–TV	CBS	11	Johnson City, Tenn.	13.4	12.4	16.0	13.9
WKPT–TV	ABC	19	Kingsport, Tenn.	7.0	6.3	6.7	5.3
WCYB–TV	NBC	5	Bristol, Va.	19.5	16.3	19.3	17.2
WDBJ–TV	CBS	7	Roanoke, Va.	0.4		0.6	
WSLS–TV	NBC	10	Roanoke, Va.	0.4		0.6	
WTVD	CBS/NBC	11	Durham, N.C.	2.1	2.2	4.0	4.3
WRDU–TV	CBS/NBC	28	Durham, N.C.	15.3	15.0	11.7	11.3
WRAL–TV	ABC	5	Raleigh, N.C.	2.1	2.2	4.0	4.3
WECT	NBC	6	Wilmington, N.C.	2.4	2.9	4.2	5.5
WIS–TV	NBC	10	Columbia, S.C.	18.7	19.7	34.4	40.4
WNOK–TV	CBS	19	Columbia, S.C.	3.7	3.9	11.8	12.0
WOLO–TV	ABC	25	Columbia, S.C.	3.8	4.0	12.1	12.4
WBTW	CBS/ABC	13	Florence, S.C.	4.7	5.6	14.0	16.0

[1] For the facilities and network affiliation of other services used in these findings, see WBTV Ex. II–A, pp. 10, 14, 15.

5. A minimum of 3 and a maximum of 11 Grade B services are available within the WCCB–TV Grade B contour under the present operation of WBTV and a minimum of 4 and a maximum of 11 [1] are available under the proposed. The services are distributed as shown below: (WBTV Ex. II–A, pp. 3, 16, 17, 29).

Number of services	Under present WBTV		Under proposed WBTV	
	Population	Area (sq. mi.)	Population	Area (sq. mi.)
Three	223 (0.01%)	10		
Four	161,624 (7.8%)	1,075	151,803 (7.3%)	907
Five or more	1,917,606 (92.2%)	13,484	1,927,560 (92.7%)	13,662

6. A minimum of 2 and a maximum of 11 [1] Grade B services are available within the WRET–TV Grade B contour under the present and proposed operations of WBTV. The services are as follows: (WBTV Ex. II–A, pp. 3, 21, 22, 32).

Number of services	Under present WBTV		Under proposed WBTV	
	Population	Area (sq. mi.)	Population	Area (sq. mi.)
Two	2,577 (0.13%)	33	2,577 (0.13%)	33
Three	4,930 (0.25%)	94	4,707 (0.23%)	73
Four	151,863 (7.57%)	1,050	149,969 (7.46%)	1,033
Five or more	1,846,546 (92.05%)	12,930	1,848,663 (92.18%)	12,977

7. *Impact on WHKY–TV (IND), Hickory, N.C.*—The Grade A contour of present WBTV overlaps an area of 377 square miles including 93,314 persons or 76.8% of the total area of 491 square miles and 81.3% of the total population of 114,841 persons within the Grade A contour of WHKY–TV. Proposed WBTV's Grade A contour would encompass the entire Grade A contour of WHKY–TV. Both the present and proposed WBTV Grade B contours encompass the entire area of 1,364 square miles containing 243,763 persons within the Grade B contour of WHKY–TV (WBTV Ex. II, pp. 22, 23, 26, 27; Ex. II–A, pp. 23, 24).

8. The area of increased Grade A overlap receives other Grade A services in part from six stations. WJHL–TV (CBS) serves 50–75%; WCCB–TV (ABC) and WSJS–TV (NBC), 25–50%; and WSPA–TV (CBS), WRET–TV (IND) and WSOC–TV (NBC), 0–25% thereof (WBTV Ex. 11, pp. 11, 34).

9. Approximately half of the area of increased Grade A overlap receives CBS Grade A service from WJHL–TV, Johnson City, Tenn. and about 25% from WSPA–TV, Spartanburg, S.C., the latter area falling within the WJHL–TV area. Thus, about half of the area of increased Grade A overlap presently receives no CBS Grade A service (Ex. II, p. 11).

10. *Impact on Prospective UHF Stations in Kannapolis, N.C. and Rock Hill, S.C.*—Assuming that the prospective UHF stations for the various channels at Kannapolis and Rock Hill were to have the same effective radiated power and antenna height above average terrain as WHKY–TV, but employing the 600 ft. elevation in all directions, their two Grade B contours would be completely encompassed by the Grade B contours of both present and proposed WBTV (WBTV Ex. II, pp. 3, 4, 15). The respective Grade B contours contain the following areas and populations: (WBTV Ex. II, pp. 26, 27).

Prospective UHF Station	Area (Sq. Mi.)	Population
Rock Hill	2,075	552,650
Kannapolis	2,075	546,377

[1] In Caldwell and Alexander Counties (WBTV Ex. II–A, pp. 13, 15, 16, 17, 18, 21, 22).

11. The Grade A contour of the two prospective UHF stations, however, would be overlapped to varying degrees by the Grade A contours of present and proposed WBTV. Proposed WBTV would reduce the Grade A overlap with the Rock Hill prospective station and would increase it with the Kannapolis prospective station as shown in the following table: (WBTV Ex. II, pp. 22, 23).

	Rock Hill UHF		Kannapolis UHF	
	Area (sq. mi.)	Population	Area (sq. mi.)	Population
Total grade A	755	95,277	755	171,682
Present grade A overlap	723	92,087	558	126,597
Percent	96.7%		73.7%	
Proposed grade A overlap	414	73,525	755	171,682
Percent	77.2%		100%	
Grade A not overlapped by WBTV	341	21,752	None	None
Percent	22.8%		None	None

12. In the entire area where the Grade A overlap with Kannapolis would be increased, other Grade A services are available from WCCB–TV (ABC), WRET–TV (IND), WSOC–TV (NBC) and WGHP–TV (ABC). WSJS–TV (NBC) serves 75–100%. Assumed Lexington would serve less than 25%. None of these stations is a CBS network affiliate (WBTV Ex. II, p. 34).

Pertinent signal strengths (dbu) [6]

37. The following listed values are predicted field intensities (dbu) in the communities of Charlotte, Hickory and Kannapolis, North Carolina and Rock Hill, South Carolina: (WBTV Ex. VI)

Station	Network	Charlotte	Hickory	Kannapolis	Rock Hill
WBTV	CBS	12 above CG [1]	4 above A	4.5 above A	3 above CG.
WBTV Prop.	CBS	6 above CG	12 above CG	8 above CG	1.5 above A.
WCCB–TV	ABC	37 above CG	3 above A	20 above CG	9 above CG.
WSOC–TV	NBC	26 above CG	1.5 above A	16 above CG	9 above CG.
WGHP–TV	ABC	2.5 above B	11.5 below B	4 above A	17 below B.
WSJS–TV [4]	NBC	3 below B	10.5 above B	2 above A	21.5 below B.
WRET–TV	IND	27 above CG	1 above A	17 above CG	7.5 above CG.
WHKY–TV	IND	11.5 below B	30 above CG		
WLOS–TV	ABC	13 below B	6.5 above B		
WSPA–TV	CBS	2.5 above B	14 above B	10 below B	8 above B.
WKPT–TV	ABC	25.5 below B	1 above B		
WJHL–TV	CBS	25 below B	10.5 above B		
WCYB–TV	NBC	15.5 below B	11.5 above B		
WFBC–TV	NBC			13 below B	3 above B.
WIS–TV [4]	NBC	3 below B	26.5 below B	18.5 below B	12 above B.
WUBC	IND			11.5 below B	34.5 below B.
WFMY–TV	CBS			0.5 below B	24.5 below B.
WFMY–TV [3]	CBS	9 above B	1 above B	0.5 above A	5 below B.
Rock Hill [5]		2.5 above B	22 below B	14 below B	40 above CG. [2]
Kannapolis [5]		2 above B	12.5 below B	40 above CG [2]	14 below B.
Winston-Salem [5]				0.5 above B	27.5 below B.
Greensboro [5]				9 below B	33 below B.
Lexington				4 below B	33 below B.

[1] A is Grade A; B is Grade B; CG is City Grade.
[2] Greater than 40 above CG.
[3] BPCT–4412.
[4] WSJS–TV and WIS–TV serve a portion of the city of Charlotte with a Grade B signal.
[5] Prospective operation.
[6] Calculated at reference point of city.

APPENDIX VI

Existing and Prospective UHF Stations in the Winston Salem-Greensboro-High Point Area

1. Proposed WBTV also affects existing or prospective UHF stations in the communities of Greensboro, Winston Salem and Lexington, North Carolina. All except Lexington are located in the Greensboro-Winston Salem-High Point Standard Metropolitan Statistical Area which is comprised of Guilford, Forsyth, Randolph and Yadkin Counties and has a population of 603,895.

2. Greensboro, with a population of 144,076, is the county seat of Guilford County (pop. 288,590). High Point is also in Guilford County and has a population of 63,204. It is situated 14 miles southwest of Greensboro, Winston Salem, about 24 miles west of Greensboro, has a population of 132,913 and is the county seat of Forsyth County (pop. 214,348). Randolph County, which borders Guilford County on the south, has a population of 76,358. Yadkin County, which borders Forsyth County on the west, has a population of 24,599.

3. Lexington, 30 miles southwest of Greensboro, is the county seat of Davidson County (95,627) and has a population of 17,205. In the SMSA there are three existing VHF television stations, one operating UHF television station and two vacant UHF allocated channels. Lexington, outside the SMSA, has one allocated UHF channel. The various local existing and prospective facilities are:[1] (WBTV Ex. II, p. 20; Ex. I, p. 26).

Station	Channel	Community	ERP (Kw)	HAAT (ft.)	Network
WFMY-TV	2	Greensboro	100	720	CBS.
WGHP-TV	8	High Point	316	1,270	ABC.
WSJS-TV	12	Winston Salem	316	1,965	NBC.
WUBC	48	Greensboro	676	610	IND.
Vacant	61	Greensboro	676	610	
Vacant	45	Winston Salem	676	610	
Vacant	20	Lexington	21.9	600	

4. *Impact on WUBC (IND), Greensboro, N.C.*—Present WBTV's Grade A contour does not penetrate the Grade A contour of WUBC. However, the proposed WBTV Grade A contour would. Both the present and proposed WBTV Grade B contours penetrate the Grade B contour of WUBC, the latter increasing the extent of overlap. The overlap data are as listed below: (WBTV Ex. II, pp. 24, 25, 28, 29).

	WUBC[1]	
	Area (sq. mi.)	Population
Total Grade A	3,275	798,111
Present grade A overlap		
Proposed grade A overlap	66	11,707 (1.5%.)
Grade A not overlapped by proposed WBTV	3,209	786,404 (98.5%.)
Total grade B	6,965	1,142,086
Present grade B overlap	1,243	174,313 (15.3%.)
Proposed grade B overlap	3,765	778,370 (68.2%)
Grade B not overlapped by proposed WBTV	3,200	363,716 (31.8%.)

[1] The evidence also discloses that the proposed WBTV Grade A contour would overlap 72,269 persons in the WUBC Grade B contour; the present WBTV Grade B contour overlaps 66,598 persons in the WUBC Grade A contour; and the proposed WBTV Grade B contour would overlap 525,197 persons in the WUBC Grade A contour. All figures were obtained from 1960 U.S. Census data (WGHP-TV Ex. 1, 18, 19, 20).

[1] With respect to the center of the city, the present WBTV site is 91.6 miles from Greensboro, 73.7 miles from Winston Salem and 62.8 miles from High Point. The proposed WBTV site is 77 miles from Greensboro, 55.9 miles from Winston Salem and 62.5 miles from High Point. The WFMY-TV site at Greensboro is 85.5 miles from Charlotte and its proposed site, 71.3 miles (Tr. 45, 46; WBTV Ex. I, p. 15).

5. The following stations provide Grade A and Grade B service to the above respective areas of increased overlap: (WBTV Ex. I, p. 27; Ex. II, p. 15, 35, 37)

Station	Network	Percentage of WUBC increased grade A overlap	Percentage of WUBC increased grade B overlap
WCYB–TV	NBC		0–25
WFMY–TV	CBS		all
WLVA–TV	ABC		0–25
WGHP–TV	ABC	all	75–100
WRDU–TV	CBS/NBC		50–75
WRFT–TV	ABC		25–50
WTVD	CBS/NBC		0–25
WRAL–TV	ABC		0–25
WDBJ–TV	CBS		25–50
WSLS–TV	NBC		25–50
WSJS–TV	NBC	all	all
WRET–TV	IND	0–25	25–50
WSOC–TV	NBC	0–25	25–50
WCCB–TV	ABC	50–75	25–50
Assumed			
Lexington		50–75	0–25
Assumed			
Greensboro		50–75	75–100
Assumed			
Winston Salem		all	75–100

As indicated above, WFMY–TV provides CBS Grade B service to all of the increased area of Grade B overlap and WDBJ–TV, 25–50% of it (WBTV Ex. II, pp. 15, 37).

6. Other Grade B services available within the Grade B contour of WUBC are tabulated below: (WBTV Ex. II–A, p. 26).

Station	Network	Channel	Location	Population percentage	Area percentage
WBTV	CBS	3	Charlotte, N.C.	13.0	17.8
WBTV (prop.)	CBS	3	Charlotte, N.C.	68.2	54.1
WSOC–TV	NBC	9	Charlotte, N.C.	40.1	27.2
WRET–TV	IND	36	Charlotte, N.C.	40.1	27.0
WCCB–TV	ABC	18	Charlotte, N.C.	43.3	30.4
WFMY–TV	CBS	2	Greensboro, N.C.	100	100
WGHP–TV	ABC	8	High Point, N.C.	98.4	93.2
WSJS–TV	NBC	12	Winston Salem, N.C.	100	100
WCYB–TV	NBC	5	Bristol, Va.	0.3	0.7
WLVA–TV	ABC	13	Lynchburg, Va.	21.5	32.5
WDBJ–TV	CBS	7	Roanoke, Va.	28.7	46.7
WSLS–TV	NBC	10	Roanoke, Va.	28.7	46.7
WRFT	ABC	27	Roanoke, Va.	21.9	32.5
WTVD	CBS/NBC	11	Durham, N.C.	17.5	[1] 45.5
WRDU–TV	CBS/NBC	28	Durham, N.C.	68.6	56.1
WRAL–TV	ABC	5	Raleigh, N.C.	17.5	[1] 45.5

[1] Inspection of Ex. II–A, p. 11, discloses that these percentages are in the order of 30%.

7. A minimum of 3 and a maximum of 9 other Grade B services are available within the WUBC Grade B contour. From 4 to 10 would be available under the proposed operation of WBTV (WBTV Ex. II–A, pp. 3, 11, 12). The specific populations and areas receiving various numbers of Grade B services are as follows: (WBTV Ex. II–A, p. 27).

Number of services	Population		Area (sq. mi.)	
	Under present WBTV	Under proposed WBTV	Under present WBTV	Under proposed WBTV
Three	723 (0.06%)		2.3	
Four	179,288 (15.7%)	1,760 (0.2%)	308	16.5
Five or more	962,075 (84.24%)	1,140,326 (99.8%)	6,654.7	6,948.5

8. The Grade B contours of WFMY–TV (CBS) and WSJS–TV (NBC) encompass the entire Grade B contour of WUBC. WGHP–TV (ABC) provides such service to 98.4% of WUBC's Grade B population. The remaining area not receiving ABC Grade B service is located in the northern third of WUBC's Grade B service area where it is available from WLVA–TV (ABC) and WRFT–TV (ABC). Thus, all three network services are available throughout WUBC's Grade B coverage area (WBTV Ex. II–A, p. 9).

9. *Prospective UHF Stations in Greensboro and Winston Salem, N.C.*—For the purpose of evaluating the impact of proposed WBTV on prospective UHF stations on the two vacant channels at Greensboro and Winston Salem, it was assumed that the effective radiated power and antenna height above average terrain would be the same as those of WUBC, Greensboro, N.C. The antenna height of 610 ft. was employed in all directions. Site locations were assumed to be within the two cities. The Grade A contour of present WBTV would not overlap the Grade A contours of the prospective UHF stations at Greensboro and Winston Salem, however, the proposed WBTV Grade A contour would (WBTV Ex. II, pp. 3, 12). The Grade B contours of both present and proposed WBTV would overlap the Grade B contours of both prospective UHF stations (WBTV Ex. II, p. 16). The areas and populations in the several overlap areas are given in the following table: (WBTV Ex. II, pp. 24, 25, 28, 29).

PROSPECTIVE UHF STATIONS

	Greensboro		Winston Salem	
	Area (sq. mi.)	Population	Area (sq. mi.)	Population
Total grade A	3,421	800,117	3,421	714,541
Present grade A overlap	None	None	None	None
Proposed grade A overlap	91	28,985 (3.6%)	964	109,598 (15.3%)
Grade A not overlapped by proposed WBTV.	3,330	780,132 (96.4%)	2,457	604,943 (84.7%)
Total grade B	7,088	1,140,731	7,088	1,137,415
Present grade B overlap	1,444	155,458 (13.6%)	2,804	298,015 (26.2%)
Proposed grade B overlap	3,828	742,931 (65.1%)	5,723	946,823 (83.3%)
Grade B not overlapped by proposed WBTV.	3,260	397,800 (34.9%)	1,365	190,592 (16.8%)

10. The above areas of increased Grade A and Grade B overlap caused by proposed WBTV receive corresponding service from the following: (WBTV Ex. II, pp. 11, 12, 14, 16, 35, 37).

Station	Network	Assumed Greensboro		Assumed Winston-Salem	
		Percentage of increased grade A overlap	Percentage of increased grade B overlap	Percentage of increased grade A overlap	Percentage of increased grade B overlap
WCYB–TV	NBC	----------	----------	----------	0–25
WFMY–TV	CBS	----------	all	----------	75–100
WLVA–TV	ABC	----------	0–25	----------	0–25
WUBC	IND	50–75	75–100	0–25	75–100
WGHP–TV	ABC	all	all	75–100	75–100
WRDU–TV	CBS/NBC	----------	50–75	----------	50–75
WRFT–TV	ABC	----------	50–75	----------	50–75
WTVD	CBS/NBC	----------	0–25	----------	0–25
WRAL–TV	ABC	----------	0–25	----------	0–25
WDJB–TV	CBS	----------	0–25	----------	25–50
WSLS–TV	NBC	----------	0–25	----------	25–50
WSJS–TV	NBC	all	75–100	all	all
WRET–TV	IND	50–75	25–50	25–50	25–50
WSOC–TV	NBC	25–50	25–50	25–50	25–50
WCCB–TV	ABC	75–100	25–50	50–75	25–50
Assumed					
Lexington		75–100	0–25	25–50	0–25
Assumed					
Greensboro				0–25	75–100
Assumed					
Kannapolis				0–25	[1] 25–50
Assumed					
Winston-Salem		all	75–100		

[1] WBTV Ex. II, pp. 11, 12, 14, 16.

Station WFMY–TV Greensboro, N.C. provides CBS Grade B service to all of the increased Grade B overlap area of assumed Greensboro. It also provides such service to 75–100% of the increased Grade B overlap area of assumed Winston-Salem and WDBJ–TV provides CBS Grade B service to 25–50% thereof.[2]

11. The assumed site of the prospective UHF station at Greensboro is 13 miles southeast of the site of WUBC. As the result, most of the prospective Grade B coverage area would lie within WUBC's Grade B contour and be the recipient of the same other competing services. (WBTV Ex. II, p. 16). In the common area, however, the number of competing services would be increased by one since WUBC is also a competitive signal with respect to the prospective station. As a consequence, the area of 308 square miles with 179,288 residents who were identified as having only 4 other services as regards WUBC must be considered to have 5 other services as regards the prospective UHF station. Because of the site displacement, the prospective station will provide Grade B coverage to the east, southeast and south essentially to parts of five counties not served by WUBC. These parts are the eastern third of Orange County, the central 40% of Chatham County, the northern 20–25% of both Moore and Montgomery Counties and the eastern 25–30% of Rowan County (WBTV Ex. 11, p. 16). WFMY–TV (CBS) and WGHP–TV (ABC) serve all of the five parts (WBTV Ex. II–A, pp. 9, 13). The three parts in Orange, Chatham and Moore receive three additional Grade B services from WRDU–TV (CBS/NBC), WRAL–TV (ABC) and WTVD (CBS/NBC) (WBTV Ex. II–A, pp. 9, 13). The three parts in Montgomery and Rowan Counties receive 3 additional services from WCCB (ABC), WRET–TV (IND) and WSOC–TV (NBC), all in Charlotte, N.C. (WBTV Ex. II–A, pp. 9, 13). Thus, all of the area that would be served by the prospective UHF station has 5 or more Grade B television services with the single exception of a small area of 2.3 square miles with 723 persons in Forsyth County who are served only by WUBC (IND), WFMY–TV (CBS), WSJS–TV (NBC) and WGHP–TV (ABC) (WBTV Ex. II–A, pp. 9, 11, 27). Accordingly, there are 5 or more competitive television signals available to 99.9% of the population of 1,140,731 persons that would be served by the prospective UHF station in Greensboro. A maximum of 9 services are available in southern Randolph County (WBTV Ex. II–A, pp. 9, 11). Since WFMY–TV provides CBS Grade B service to all of the WUBC Grade B area as well as the differential area described above, it would provide CBS Grade B service to all of the area within the Grade B contour of the prospective Greensboro UHF station.

12. The assumed site of the prospective UHF station at Winston Salem is 20 miles west southwest of the site of WUBC at Greensboro (WBTV Ex. II, p. 16). The Grade B contour of the prospective station would penetrate WUBC's Grade B contour a maximum distance of 74 miles and overreach the site of WUBC by 27 miles. Conversely, the Grade B contour of WUBC would overreach the assumed site by 27 miles (WBTV Ex. II, p. 16). In this commonly served area, the minimum number of Grade B services is four which occurs only in a small area in Forsyth County containing 23 square miles and 723 persons. The maximum of 10 services in the common area occurs in Randolph and Caswell Counties (WBTV Ex. II–A, pp. 9, 11, 27; Ex. II, p. 16). Beyond the Grade B contour of WUBC to the northwest, west, southwest and south, the prospective UHF station for Winston Salem would provide Grade B coverage to parts of 11 counties, namely, Carroll, Surry, Wilkes, Yadkin, Alexander, Iredell, Cabarrus, Stanly, Rowan, Montgomery and Randolph (WBTV Ex. II, p. 16). The number of Grade B services available in the area within the Grade B contour of the Winston Salem prospective UHF station that is not common to WUBC (differential area) varies from 3 in Wilkes County in the western sector to 9 in Randolph County in the southern sector.

13. Stations WFMY–TV, WDBJ–TV, WJHL–TV and present WBTV provide CBS Grade B service to portions of the differential area so that among them such service is provided to all of it (WBTV Ex. I, pp. 25, 28; Ex. II, p. 16; Ex. II–A, pp. 13, 16). Thus, since WFMY–TV provides CBS Grade B service to all of the WUBC Grade B area, all of the area within the Grade B contour of

[2] Station WJHL–TV, Johnson City, Tenn. also provides CBS Grade B service to the southwestern corner of Surry County so that, together, all three stations provide CBS Grade B service to all of the added Grade B overlap area of assumed Winston-Salem (WBTV Ex. I, p. 25; Ex. II, p. 17).

the Winston Salem prospective UHF station presently receives CBS Grade B service.

14. *Prospective UHF station in Lexington, N.C.*—A prospective UHF station at Lexington, North Carolina, operating with the same effective radiated power and antenna height above average terrain as WHKY–TV, Hickory, N.C. but employing the antenna height of 600 ft. in all directions, would suffer no overlap between its Grade A contour and the Grade A contour of present WBTV. However, the proposed Grade A contour of WBTV would overlap the Grade A contour of the prospective UHF station and both the present and proposed Grade B contours of WBTV would overlap the Grade B contour of the prospective Lexington operation. The size of the overlap areas is given below: (WBTV Ex. II, pp 24, 25, 28, 29).

PROSPECTIVE LEXINGTON UHF STATION

	Area (sq. mi.)	Population
Total grade A	755	147,973
Present grade A overlap	None	None
Proposed grade A overlap	398	70,518 (47.7%)
Grade A not overlapped by proposed WBTV	357	77,455 (52.3%)
Total grade B	2,075	510,493
Present grade B overlap	1,547	211,533 (41.4%)
Proposed grade B overlap	2,075	510,493 (100%)
Grade B not overlapped by proposed WBTV	None	None

15. The following Grade A and Grade B services are available to the corresponding areas of increased Grade A and Grade B overlap of the assumed Lexington UHF operation: (WBTV Ex. II, pp. 11, 12, 14, 16, 35, 37).

Station	Network	Assumed Lexington	
		Percentage of increased grade A overlap	Percentage of increased grade B overlap
WFMY–TV	CBS	----------	all
WUBC	IND	0–25	all
WGHP–TV	ABC	all	all
WRDU–TV	CBS/ABC	----------	75–100
WTVD	CBS/NBC	----------	0–25
WRAL–TV	ABC	----------	0–25
WSJS–TV	NBC	all	all
WRET–TV	IND	75–100	50–75
WSOC–TV	NBC	75–100	50–75
WCCB–TV	ABC	75–100	75–100
Assumed			
Greensboro		0–25	all
Assumed			
Winston Salem		75–100	all
Assumed			
Kannapolis		0–25	[1] 25–50

[1] WBTV Ex. II, pp. 11, 12, 14, 16.

Station WFMY–TV provides CBS Grade B service to all of the increased area of Grade B overlap caused by proposed WBTV. Stations WFMY–TV (CBS), WGHP–TV (ABC) and WSJS–TV (NBC) provide Grade B service to all of the assumed Lexington Grade B service area and from 5 to 9 such services are available therein (WBTV Ex. I., pp. 25, 28; Ex. II–A, pp. 13, 16).

Predicted signal strengths (dbu) [4]

16. The following are predicted signal intensities (dbu) in the communities of Greensboro, Winston Salem, High Point and Lexington: (WBTV Ex. VI)

Station	Network	Greensboro	Winston Salem	High Point	Lexington
WBTV	CBS	12.5 below B [2]	1.5 below B	4 below B	6.5 above B.
WBTV Prop.	CBS	4 above B	16 above B	12 above B	1 above A.
WCCB-TV	ABC	2.5 below B	4.5 above B	5 above B	4.5 above B.
WUBC	IND	8.5 above CG	2 above CG	3.5 above CG	8.5 above B.
WSOC-TV	NBC	7 below B	2 above B	3 above B	1.5 above A.
WFMY-TV	CBS	37 above CG	3.5 above A	2.5 above CG	19 above B.
WFMY-TV [1]	CBS	18 above CG	7.5 above CG	22 above C	10.5 above CG
WGHP-TV	ABC	15.5 above CG	6.5 above CG	20.5 above CG	15 above CG.
WSJS-TV	NBC	9 above CG	18.5 above CG	10 above CG	16 above CG.
WRET-TV	IND	5.5 below B	2.5 above B	4 above B	4 above A.
WRDU-TV	CBS/NBC	0.5 above CG	0.5 above B	8.5 above B	
WSPA-TV	CBS				29 below B.
WFBC-TV	NBC				26 below B.
WIS-TV	NBC				35.5 below B.
Greensboro [5]		40 above CG	5 above A	10.5 above CG	1 above A.
Winston Salem. [5]		5.5 above A	40 above CG [3]	7 above CG	4 above CG.
Lexington [5]		4.5 below B	5.5 above B	7 above B	40 above CG. [3]
Rock Hill [5]					33.5 below B.
Kannapolis [5]					4 below B.

[1] BPCT-4412.
[2] A is Grade A; B is Grade B; CG is City Grade.
[3] Greater than 40 dbu above City Grade.
[4] Calculated at reference point of city.
[5] Prospective operation.

GROWTH OF TELEVISION COMPETITION IN THE CHARLOTTE AREA SINCE 1954

Overlapping Station	Percent of Grade B Overlap of WBTV Grade B	
	October 18, 1954	October 18, 1970
WLOS-TV, Asheville, N.C.	39.5	39.5
WANC-TV, Asheville, N.C.	1.7	1.4
WCCB-TV, Charlotte, N.C.	8.2	76.7
WFMY-TV, Greensboro, N.C.	7.4	[3] 16.2
WSJS-TV, Winston Salem, N.C.	8.7	36.4
WTOB-TV, Winston Salem, N.C.	3.7	
WIS-TV, Columbia, S.C.	13.2	32.2
WNOK-TV, Columbia, S.C.	4.3	12.8
WOLO-TV, Columbia, S.C. [1]	1.5	12.9
WBTW, Florence, S.C.	8.2	12.4
WFBC-TV, Greenville, S.C.	36.2	44.4
WGVL, Greenville, S.C.	7.4	
WJHL-TV, Johnson City, Tenn.	3.7	26.5
WGHP-TV, High Point, N.C.		32.0
WRET-TV, Charlotte, N.C.		73.7
WRDU-TV, Durham, N.C.		2.5
WUBC, Greensboro, N.C.		7.7
WPDT, Florence, S.C. [2]		
WSOC-TV, Charlotte, N.C.		75.3
WCYB-TV, Bristol, Va.		30.6
WKPT-TV, Kingsport, Tenn.		15.3
WHKY-TV, Hickory, N.C.		8.4
WSPA-TV, Spartanburg, S.C.		55.1
WDBJ-TV, Roanoke, Va.		0.1
WSLS-TV, Roanoke, Va.		0.1

[1] Formerly WCCS-TV
[2] Authorization cancelled July 15, 1969.
[3] WFMY-TV's tall tower proposal (File No. BPCT-4412).

17. In 1954, WBTV provided the only CBS Grade B service to an area of 11,704 square miles within which resided 1,362,177 persons. Currently, WBTV provides the only Grade B CBS service to 1,417 square miles (a decrease of 88%) within which 251,713 persons reside, based on 1970 U.S. Census data (a decrease of 82%). In 1954, WBTV provided the only Grade B signal to an area

of 3,595 square miles within which 343,851 persons resided; a second Grade B signal to 4,197 square miles within which 528,916 persons resided; and a third Grade B service to 5,314 square miles within which 365,149 persons resided (WBTV Ex. 3, p. 6; Ex. VII).[1]

APPENDIX VII—MARKET DATA—CHARLOTTE

Category	Charlotte	WRET (%)	Combined WCCB, WHKY,[1] WSOC and WBTV
Total Rev.—1969	$9,832,246	$123,631 (1.26%)	$9,708,615
Total Rev.—1968	9,933,898	89,439 (0.99%)	9,844,459
Total Rev.—1967	8,628,734	21,713 (0.25%)	8,607,021
NW Rev.—1969	2,129,871	None	2,129,871
NW Rev.—1968	2,011,774	None	2,011,774
NW Rev.—1967	2,261,211	Not reported	Not available
Spot Rev.—1969	5,918,399	66,305 (0.11%)	5,912,094
Spot Rev.—1968	5,334,976	4,561 (0.09%)	5,330,415
Spot Rev.—1967	4,401,315	Not reported	Not available
Local Rev.—1969	3,260,014	117,326 (3.60%)	3,142,688
Local Rev.—1968	2,897,211	84,878 (2.93%)	2,812,333
Local Rev.—1967	2,254,160	Not reported	Not available
Income—1969	3,100,962	(245,855) (0%)	3,346,817
Income—1968	2,677,017	(280,089) (0%)	2,491,253

(WBTV Ex. 3, Table 17)

[1] WHKY, Hickory, North Carolina, Channel 14 (Ind.), is located in the Charlotte ADI (WBTV Ex. 3 Table 10, p. 2).

(WBTV Ex. 3, Table 17).

1. A breakdown of WBTV's revenue sources for the period of 1967–1968 reveals as follows:

	Network	Spot	Local
1969	12.7%	56.6%	26.2%
1968	12.4%	58.9%	28.7%
1967	15.1%	58.7%	26.2%

(Tr. 571)

2. The Charlotte market, based on ARB data released in the late Fall of 1970, has an ADI TV Households Rank of 35 (Tr. 306). In this connection, based on 1969 ARB data, the Charlotte market was ranked 40th (WBTV Ex. 3, Table 9). The table set forth below, compiled from 1969 ARB TV Market Analysis Statistics, shows audience distribution among Charlotte stations during specified viewing periods:

Category:		*Charlotte*
Metro area TV households	(10.7%)	114,800
ADI TV households	(36.8%)	393,500
Survey area TV households	(100.0%)	1,069,500
ADI TV households rank		40
Prime time households and rank	(45)	209,300
ABC prime time households and rank	(160) (WCCB)	18,600
CBS prime time households and rank	(22) (WBTV)	121,300
NBC prime time households and rank	(55) (WSOC)	65,100
Ind. prime time households and rank	(46) (WCTU)[1]	4,300
9 a.m.–midnight households and rank	(42)	130,900
ABC 9 a.m.–midnight households and rank	(168) (WCCB)	9,700
CBS 9 a.m.–midnight households and rank	(19) (WBTV)	78,000
NBC 9 a.m.–midnight households and rank	(50) (WSOC)	39,400
Ind. 9 a.m.–midnight households and rank	(49) (WCTU)	3,800

[1] WCTU has changed its call letters to WRET.

[1] The information contained in paragraphs—and—was offered by WBTV for the limited purpose of providing background information as to the reasons for its filing of the captioned application (Tr. 503–504).

3. According to ARB audience estimates released May 1970, WBTV has a net weekly circulation of 415,000 homes as compared with 315,000 for WSOC, 143,000 for WCCB and 34,000 for WRET. The same source also estimates 55,300 color households in the Charlotte metro area; 158,800 in its Area of Dominant Influence (ADI) and 407,900 in the total survey area (TSA); and 105,500 UHF households in the Charlotte metro area; and 299,600 in its ADI. UHF households in the TSA were not estimated (WBTV Ex. 3, Table 10).

4. The Charlotte market ADI consists of the "metro area" counties of Mecklenburg (101,300 TV households) and Union (13,500 TV households) and the following additional counties (with the number of TV households shown in parenthesis): Alexander (5,000), Anson (5,900), Ashe (5,500), Avery (2,700), Burke (15,700), Cabarrus (21,900), Caldwell (15,100), Catawba (25,200), Cleveland (19,400), Gaston (40,400), Iredell (20,400), Lincoln (8,800), Mitchell (3,500), Richmond (11,000), Rowan (26,500), Stanly (13,700) Watauga (4,400), Lancaster (11,000) and York (22,500) (WBTV Ex. 3, Table 9, p. 2).[1]

5. WBTV and UHF stations audience shares in Grade B and Grade A Gain Counties located in the Charlotte ADI (total week hours and prime hours), based on 1969 ARB TV County studies, is tabulated below:

GRADE B

County	WBTV	WCCB	WRET
Ashe	53.4 & 51.9	0.0 & 0.0	0.0 & 0.0
Watauga	43.2 & 37.2	0.0 & 0.0	0.0 & 0.0
Richmond	8.0 & 8.1	2.7 & 3.0	3.9 & 2.5
Avery	43.3 & 39.6	0.4 & 1.0	0.1 & 0.1
Mitchell	45.0 & 44.8	0.0 & 0.0	0.0 & 0.0
Anson	31.3 & 31.3	3.9 & 5.6	1.1 & 2.4

(WBTV Ex. 3, Table 16.)

GRADE A

County	WBTV	WCCB	WRET
Rowan	34.8 & 35.3	1.0 & 0.8	1.0 & 0.4
Caldwell	56.5 & 51.7	0.4 & 0.3	0.1 & 0.1
Burke	53.3 & 49.7	0.4 & 0.4	0.3 & 0.3
Alexander	60.3 & 60.2	1.0 & 1.0	0.1 & 0.0
Stanly	43.9 & 37.9	2.6 & 4.1	2.0 & 2.7
Cabarrus	52.3 & 49.9	7.7 & 11.1	2.3 & 2.9

(WBTV Ex. 3, Table 12, pp. 2–8.)

APPENDIX VIII

Market Data—Charlotte-Winston-Salem-High Point

1. The G–WS–HP,[1] North Carolina, market contains the following television stations: WFMY–TV, Greensboro, Channel 2 (CBS); WGHP–TV, High Point, Channel 8 (ABC); WSJS, Winston-Salem, Channel 12 (NBC); and WUBC, Greensboro, Channel 48 (Ind.) (WBTV Ex. 3. Table 9, p. 3). On July 23, 1970, WEAL, Inc., licensee of WUBC, filed a petition for voluntary bankruptcy and on July 24, 1970, Mr. William Zuckerman was appointed trustee. Because of its poor financial condition, WUBC went off the air on July 26, 1970. It has remained off as of this date (WFHY–TV Ex. 6, pp. 2–3).

67. The distribution of G–WS–HP market television revenue and income is shown in the following table:

[1] All of the above counties with the exception of Lancaster and York Counties, South Carolina, are located in North Carolina (WBTV Ex. 3, Table 9, p. 2).

[1] Greensboro-Winston-Salem-High Point.

Category	G–WS–HP	WUBC (%)	Combined WFMY, WGHP & WSJS
Total Rev.—1969	$7,328,079	$70,575 (0.96)	$7,257,504
Total Rev.—1968	6,571,370	59,944 (0.90)	6,512,426
Total Rev.—1967	5,591,989	4,965 (0.09)	5,587,024
NW Rev.—1969	1,604,597	1,700 (0.01)	1,602,897
NW Rev.—1968	1,511,497	None	1,511,497
NW Rev.—1967	2,899,309	Not Reported	Not Available
Spot Rev.—1969	3,874,898	None	3,874,898
Spot Rev.—1968	3,423,652	5,838 (0.02%)	3,417,814
Spot Rev.—1967	2,899,309	Not Reported	Not Available
Local Rev.—1969	2,901,163	70,203 (2.42)	2,830,960
Local Rev.—1968	2,439,913	53,981 (2.21)	2,385,932
Local Rev.—1967	1,736,739	Not Reported	Not Available
Income—1969	2,390,430	(133,664)	2,524,094
Income—1968	1,654,731	(212,461)	1,867,192
Income—1967	1,311,563	(50,076)	1,361,639

[1] WUBC and WHKY have 0.0% shares in each of the Grade B and Grade A counties.

(WBTV Ex. 3, Table 18).

3. The G–WS–HP market, based on ARB data released in the late Fall of 1970, has an ADI TV Households Rank of 51 (Tr. 306). In this connection, based on 1969 ARB data, the market was ranked 49 (WBTV Ex. 3, Table 9). The table set forth below, compiled from 1969 ARB TV Market Analysis Statistics, shows G–WS–HP audience distribution:

Category:	G–WS–HP	
Metro area TV households	(19.9%)	177,100
ADI TV households	(36.8%)	328,300
Survey area TV households	(100.0%)	891,500
ADI TV households rank		49
Prime time households and rank	(49)	190,800
ABC prime time households and rank	(54) (WGHP)	53,000
CBS prime time households and rank	(41) (WFMY)	83,100
NBC prime time households and rank	(67) (WSJS)	54,100
Ind. prime time households and rank	(63) (WUBC)	600
9 a.m.-midnight households and rank	(45)	120,200
ABC 9 a.m.-midnight households and rank	(43) (WGHP)	35,200
CBS 9 a.m.-midnight households and rank	(36) (WFMY)	51,900
NBC 9 a.m.-midnight households and rank	(65) (WSJS)	32,400
Ind. 9 a.m.-midnight households and rank	(63) (WUBC)	700

(WBTV Ex. 3, Table 9).

4. According to ARB audience estimates released May 1970, WFMY has a net weekly circulation of 346,000 homes as compared with 280,000 for WSJS, 350,000 for WGHP and 13,000 for WUBC. The same source also estimates 77,600 color households in the G–WS–HP metro area; 132,000 in the ADI area; and 342,200 in the TSA area; and 128,400 UHF households in the G–WS–HP metro area; and 212,800 in the ADI area. UHF households in the TSA were not estimated (WBTV Ex. 3, Table 10).

5. The G–WS–HP market ADI consists of the "metro area" counties of Forsyth (6,200 TV households), Guilford Inner (40,400), Guilford Outer (42,900), Randolph (21,500), and Yadkin (6,100) and the following additional counties with the number of TV households shown in parentheses): Alamance (28,600), Alleghany (2,500), Caswell (4,500), Chatham (7,800), Davidson (27,000), Davie (5,100), Montgomery (5,300), Moore (11,000),[1] Rockingham (21,500), Stokes (6,600), Surry (14,700), Wilkes (12,600), and Patrick (4,000).[2]

6. WBTV and UHF shares[3] in Grade B and Grade A Gain Counties located

[1] The above data is based on 1969 ARB market analysis. Since the 1969 analysis, ARB has reassigned Moore County to the Raleigh-Durham ADI (WBTV Ex. 3, Table 9, p. 3).

[2] All the counties are located in North Carolina, with the exception of Patrick, which is located in Virginia.

[3] WHKY has 0.0, & 0.0 shares in each of the Grade B and Grade A counties; WCCB has 0.0 & 0.0 shares in each of the Grade B counties with the exception of the following: Davidson—0.2 & 0.2; and Montgomery—1.3 & 3.9; WCCB also has 0.6 & 0.0 shares in the Grade A Gain County of Davie; and WRET has 0.0 & 0.0 shares in each of the Grade B and Grade A counties with the exception of the following Grade B counties: Surry—0.9 & 0.6, and Davidson—1.2 & 1.2 (WBTV Ex. 3, Table 16).

in the G–WS–HP ADI (total week hours and prime hours), as well as the total Charlotte G–WS–HP share, based on 1969 ARB TV County studies, is tabulated below:

County	WBTV	WUBC	Charlotte	G–WS–HP
Guilford Inner	0 .0 & 0 .0	0.9 & 0.8	0 .1 & 0 .1	98.6 & 98.3
Guilford Outer	0 .2 & 0 .1	0.8 & 1.2	0 .3 & 0 .2	98.0 & 98.6
Forsyth	0 .7 & 0 .7	0.3 & 0.1	1 .3 & 1 .0	97.8 & 98.0
Randolph	0 .5 & 0 .4	0.1 & 0.2	0 .7 & 0 .5	97.0 & 97.7
Surry	2 .6 & 2 .4	0.1 & 0.3	4 .7 & 4 .5	95.1 & 95.0
Stokes	0 .0 & 0 .0	0.6 & 1.0	0 .0 & 0 .0	92.4 & 87.6
Rockingham	0 .0 & 0 .0	1.0 & 0.5	0 .0 & 0 .0	85.7 & 88.6
Patrick	0 .3 & 0 .0	0.0 & 0.0	0 .3 & 0 .0	77.0 & 79.3
Moore [4]	0 .1 & 0 .3	0.0 & 0.0	1 .7 & 3 .3	48.3 & 51.7
Alleghany	18.5 & 17.1	0.0 & 0.0	21.2 17.8	65.4 & 72.2
Davidson	5 .5 & 3 .4	0.0 & 0.0	11.4 & 8 .9	88.1 & 90.7
Montgomery	16.6 & 16.1	0.0 & 0.0	45.1 & 48.2	54.2 & 51.8
Wilkes	39.9 & 36.2	0.0 & 0.0	45.0 & 41.5	53.9 & 56.9
Yadkin	8 .1 & 10.0	0.0 & 0.0	10.0 & 10.7	90.0 & 89.2
Chatham	0 .0 & 0 .0	0.0 & 0.0	0 .0 & 0 .0	52.3 & 53.3
GRADE A				
Davie	20.3 & 25.7	0.0 & 0.0	33.1 & 40.9	66.7 & 59.9

[4] As pointed out previously, Moore County has since been assigned to the Raleigh-Durham ADI.

(WBTV Ex. 3, Table 16, Table 13 pp. 2–16; Table 14, p. 4.)

7. WBTV anticipates a 10% increase in audience and revenue as a result of a grant of its application (Tr. 514). It has hopes that Wilkes and Montgomery Counties will shift from the G–WS–HP ADI to the Charlotte ADI (WBTV Ex. 3, p. 9). As indicated by the table below, WBTV envisions an increase in its audience in most of the gain counties in the G–WS–HP ADI, as well as a number of counties in the Charlotte ADI.[1]

	Audience change (percent)
Charlotte:	
Ashe	1 to 4.9
Watauga	5 to 9.9
Richmond	5 to 9.9
Avery	10 to 14.9
Mitchell	5 to 9.9
Anson	1 to 4.9
Burke	1 to 4.9
Caldwell	5 to 9.9
Catawba	1 to 4.9
Rowan	5 to 9.9
G–WS–HP:	
Forsyth (Metro)	1 to 4.9
Randolph (Metro)	1 to 4.9
Surry	10 to 14.9
Stokes	1 to 4.9
Rockingham	1 to 4.9
Moore	1 to 4.9
Alleghany	10 to 14.9
Davidson	10 to 14.9
Montgomery	5 to 9.9
Wilkes	1 to 4.9
Yadkin (Metro)	5 to 9.9
Davie	5 to 9.9

(WBTV Ex. 1, Table 5, pp. 1–2).[2]

[1] **WBTV's proposal will not result in a population gain in the following counties: Anson, Burke, Caldwell, Catawba and Rowan.**

[2] **The only gain counties in the G–WS–HP ADI in which WBTV does not anticipate an audience increase are Guilford (Metro), Patrick, and Chatham Counties. WBTV's judgments concerning audience level changes are based on the strength of its signal, present and proposed, competing signals in each county, primarily CBS stations; and an examination of ARB share studies (Tr. 511–12).**

F.C.C. 73-927

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of LAKE COUNTY CABLE TV, INC., GARY, IND.	CAC-1057, CSR-313 IN092
GARY COMMUNICATIONS GROUP, INC., GARY, IND.	CAC-1547 IN079
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted September 6, 1973; Released September 18, 1973)

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

1. On August 25, 1972, Lake County Cable TV, Inc., (hereinafter referred to as "LCC"), a wholly-owned subsidiary of TelePrompTer Corporation, filed an application (CAC-1057) for a certificate of compliance to commence cable television service at Gary, Indiana, a community located in the Chicago, Illinois television market (#3). On November 13, 1972 Gary Communications Group, Inc., (hereinafter referred to as "GCG"), filed an application (CAC-1457) for a certificate of compliance to likewise begin cable television service at Gary, Indiana. Both systems will be constructed with an excess of 30 channels [1] and propose to offer approximately 175,415 residents of Gary the following television broadcast signals:

WLS-TV (ABC, Ch. 7), Chicago, Ill.
WMAQ-TV (NBC, Ch. 5), Chicago, Ill.
WBBM-TV (CBS, Ch. 2), Chicago, Ill.
WTTW (Educ., Ch. 11), Chicago, Ill.
WXXW (Educ., Ch. 20), Chicago, Ill.
WGN-TV (Ind., Ch. 9), Chicago, Ill.
WCIU-TV (Ind., Ch. 26), Chicago, Ill.
WFLD-TV (Ind., Ch. 32), Chicago, Ill.
WSNS (Ind., Ch. 44), Chicago, Ill.
WCFL-TV [2] (C.P., Ch. 38), Chicago, Ill.
WNDU-TV (NBC, Ch. 16), South Bend, Ind.
WSBT-TV (CBS, Ch. 22), South Bend, Ind.
WCAE (Educ., Ch. 50), St. John, Ind.
WVTV (Ind., Ch. 18), Milwaukee, Wis.
WTTV (Ind., Ch. 4), Bloomington, Ind.

The applicants assert the right to carry all the above-listed signals except WVTV and WTTV pursuant to 76.65 of the Commission's

[1] Both systems state that they will fully comply with Section 76.251 of the Rules including full access services (public, educational, governmental, and leased).
[2] When operational.

Rules.[3] The applicants assert the right to carry WVTV and WTTV pursuant to Section 76.61(c) of the Rules.

2. On January 11, 1973 GCG filed a petition for special relief (CSR–313), urging the Commission to withhold LCC's certification, alleging LCC deliberately had adopted a wiring plan which interfered with GCG's. On March 16, 1973 LCC filed an objection to the application of GCG, urging dismissal of GCG's application for certificate of compliance on the grounds that the application was procedurally deficient and that GCG had interfered with LCC's wiring. After entering into an agreement to regulate their wiring practices under the auspices of, and supervised by the Board of Public Works and Safety of the City of Gary, both parties stipulated on June 1, 1972 to a dismissal of the petition for special relief and the objection to the application. Consequently, both the petition for special relief and the objection are dismissed, and both applications will now be considered as unopposed.

3. LCC and GCG both hold non-exclusive franchises to operate cable television systems at Gary, Indiana. LCC's franchise was originally granted to its predecessor corporation on January 17, 1967; transfer of the franchise was approved and the franchise amended on December 17, 1970. GCG's franchise was granted on September 5, 1972.

4. At the outset, these two unopposed applications raise the issue of whether the Commission should consolidate for its consideration two or more applications for certificates of compliance that have been filed at different times for the same community. In *A.N. Cable TV Company, Inc.*, FCC 73–830, ____ FCC 2d ____, the Commission recently found that expedited processing of the second of two applications for the same community was desirable where one applicant had already received a certificate and delay would likely prejudice the economic success of the second applicant. LCC's and GCG's applications present a similar situation. We conclude that where, as here, two or more applications are ripe for Commission action and involve the same community, good administration indicates that we endeavor to consolidate the applications, if feasible, and consider them when the first application filed is ripe. We emphasize, however, that consolidation is a matter of discretion rather than right.

5. Having determined to consolidate LCC's and GCG's applications, we now turn to their merits. Since neither is opposed, no contested issue exists. Nevertheless it is necessary to consider each applicant's franchise according to the criteria established in Section 76.31 of the Commission's Rules.

6. LCC's franchise was awarded by the Mayor and Common Council of the City of Gary on January 17, 1967 after a full public proceeding, in which LCC's legal, character, financial and other qualifications were fully considered. The subsequent transfer of the franchise on December 17, 1970 occurred only after a similar proceeding. The franchise is for a term of 25 years, and requires an annual fee of 5 percent. Initial subscriber rates are established which can only be changed after public

[3] On September 1, 1971, LCC filed a notification pursuant to former Section 74.1105 of the Rules to carry all the above-listed signals except WVTV and WTTV. This notification was unopposed.

hearings and approval by both the Board of Public Works and Safety and the Common Council of the City of Gary. LCC states that it does and will maintain a local business office in Gary and the franchise specifies a method for resolving complaints. The franchise requires installation to commence within six months after receipt of Commission certification, and LCC commits itself to energize cable in a substantial percentage of the franchise area each subsequent year until completion of the system. Only substantial consistency with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, *CATV of Rockford, Inc.*, FCC 72–105, 38 FCC 2d 10 (1972), *reconsideration denied* FCC 73–293, 40 FCC 2d 493 (1973).[4] We find that this franchise substantially complies with Section 76.31 of the Rules in a manner sufficient to justify a grant of LCC's application until March 31, 1977.

7. GCG's franchise was not granted until September 5, 1972. Accordingly, full compliance with the standards of Section 76.31 of the Rules is required. Though its application raises some questions, GCG has made the requisite showing of compliance. A May 8, 1973 letter from Mayor Hatcher recites that GCG's franchise was awarded only after a full public proceeding in which GCG's legal, character, financial and other qualifications were fully considered. The franchise is for a duration of fifteen years. The franchise requires installation to commence within nine months after certification, and if the system does not continue construction to the satisfaction of the city, the city has reserved the right to revoke the franchise. Also, GCG states that the system will commence operations within 90 days after receipt of its certificate of compliance. The franchise establishes initial subscriber rates which can only be changed after public hearings and approval by both the Board of Public Works and Safety and the Common Council of the City of Gary. GCG states that it does and will continue to maintain a local business office in Gary. Though the franchise does not explicitly specify a subscriber complaint procedure, it does require GCG to provide the "highest quality" service and empowers the City to make necessary investigations. Moreover, both GCG and the City have made satisfactory representations to the Commission that they will establish an appropriate system; we will accept these in this situation. The franchise explicitly states that it is "subject to all other pertinent laws, rules and regulations"—a provision which we interpret as complying with Section 76.31(a)(6) of the Rules. Though GCG's franchise purports to ban "Pay TV," this provision is inoperative under the Commission's long-standing decision in *Pierson, Ball & Dowd*, FCC 71–946, 31 FCC 2d 747 (1971).

8. The main difficulty with GCG's franchise is its provision for a five percent franchise fee. Specifically, the franchise provides that GCG "pay the City five (5) percent of gross service receipts exclusive of connection income collected by it in the City of Gary in the preceding year." We interpret this to mean five percent of "*gross subscriber revenue*" as specified in Section 76.31(b) of the Rules.

[4] Appeal pending *sub nom., Winnebago Television Corporation* v. *FCC and USA*, No. 73-1561 (D.C. Circuit).

9. The five percent figure additionally raises a question under Section 76.31(b)[5] whether the fee will "interfere with the effectuation of federal regulatory goals" and is "appropriate in light of the planned regulatory program." It appears from GCG's letter of July 17, 1973, that the franchise fee will not "interfere with the effectuation of federal regulatory goals." GCG has submitted projected financial data which demonstrates that even with the imposition of a five percent fee, its subscriber base will produce revenue sufficient to allow it to carry out its public service obligations under the Rules. Its projection of almost $100,000 available for expenditure should enable it to provide local origination, access and other services.

10. Similarly, the City of Gary has made a showing that GCG's franchise fee is necessary for its "planned local regulatory program." Mayor Hatcher's letter of July 18, 1973, indicates the funds will be used to create a new regulatory unit within the City government. His letter specifies in reasonable detail the powers, responsibilities and qualifications of the City's proposed Director of Cable Television. Though even greater specificity would be desirable, this showing contains the elements of a "planned local regulatory program" that we were seeking in 76.31(b) and in ordinary circumstances the Commission might consider it acceptable, but in the instant case the City has failed to take into account that it will also be deriving a five percent franchise fee from LCC. Thus, we do not believe that this showing acceptably meets the criteria established in 76.31(b).

11. Our rules and procedures contemplate that a franchise subject to the provisions of Section 76.31 must strictly adhere to those standards before a certificate of compliance will be issued. However, the unique and potentially inequitable circumstances of these applications require different treatment. In *A.N. Cable, supra*, the Commission granted a certificate of compliance to an applicant whose 5% franchise fee was not satisfactorily justified, because a local competitor had previously been certified whose franchise only had to meet the "substantial consistency" test. Had we not done so, there was the likelihood that the applicant would have been forced to compete at a severe disadvantage. However, our certification was limited to March 31, 1977. We believe that GCG's application poses an analogous situation to the *A.N. Cable* case. Consequently, we will grant GCG's application to March 31, 1977, at which time both GCG and LCC (see Paragraph 6 *supra*) be required to resubmit their franchises before our certification can be renewed.

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

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[5] Section 76.31(b) provides in pertinent part:

> The franchise fee shall be reasonable (e.g., in the range of 3–5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds 3 percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings by the franchisee, that it will not interfere with the effectuation of Federal regulatory goals in the field of cable television, and, by the franchising authority, that it is appropriate in light of the planned local regulatory program . . . .

Accordingly, IT IS ORDERED, That the "Objection to Application" filed March 16, 1973, by Lake County Cable TV, Inc., IS DISMISSED.

IT IS FURTHER ORDERED, That the "Petition for Special Relief" (CSR–313) filed on January 11, 1973, by Gary Communications Group, Inc., IS DISMISSED.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance" (CAC–1057) filed by Lake County Cable TV, Inc., IS GRANTED and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance" (CAC–1547) filed by Gary Communications Group, Inc., IS GRANTED and an appropriate certificate of compliance will be issued.

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

F.C.C. 73–993

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AN INQUIRY RELATIVE TO THE FUTURE USE OF THE FREQUENCY BAND 806–960 MHz; AND AMENDMENT OF PARTS 2, 18, 21, 73, 74, 89, 91, AND 93 OF THE RULES RELATIVE TO OPERATIONS IN THE LAND MOBILE SERVICE BETWEEN 806 AND 960 MHz	Docket No. 18262

MEMORANDUM OPINION AND ORDER

(Adopted September 19, 1973; Released September 26, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. On August 17, 1973, 1) the United States Department of Justice (DOJ)—through its Assistant Attorney General in charge of the Antitrust Division, and 2) the Office of Telecommunications Policy (OTP)—by its Director, submitted in letters addressed to the Chairman of this Commission, views and comments which are highly relevant to the very important policy matters that are under consideration in this proceeding.

2. It is the opinion of the Commission that the views expressed by the Department of Justice and the Office of Telecommunications Policy should, in the public interest, be considered in this proceeding, and that the public should be afforded an opportunity to reply or respond to the views expressed.

3. In view of the foregoing and pursuant to the authority contained in Section 4(i) and Section 301 of the Communications Act of 1934, as amended, IT IS ORDERED, That the above-referenced letters from the U.S. Department of Justice and the Office of Telecommunications Policy (copies of which are attached hereto) are accepted and incorporated into the official records of this proceeding; and that interested persons may file replies directed to the matters contained in the above-referenced letters no later than October 19, 1973.

4. In accordance with the provisions of § 1.419 of the Commission's Rules, an original and 14 copies of all replies shall be furnished the Commission.

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

ATTACHMENT A

OFFICE OF TELECOMMUNICATIONS POLICY,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., August 17, 1973.

Hon. DEAN BURCH,
Chairman, Federal Communications Commission,
Washington, D.C.

DEAR DEAN: The allocation of additional frequencies for the mobile radio services which is under consideration in Docket No. 18262 presents the Commission with a unique opportunity to expand the availability of improved mobile communication services. The Commission has available, for the first time in many years, sufficient additional spectrum to enable the adoption of new and improved procedures for allocating and using the radio spectrum to assure the continued development of mobile communications.

Naturally, this new allocation poses major policy issues whose resolution is extremely important to the public. The Office of Telecommunications Policy has undertaken analyses of these issues and has reviewed the comments of the various parties to this proceeding in the light of fundamental goals and objectives of national communications policy. On the basis of this analysis, we have arrived at certain conclusions which are set forth in the enclosed statement.

This proceeding affords the Commission with an excellent opportunity to make mobile communications widely available to large numbers of businesses and consumers alike, and to significantly enhance both the quantity and the quality of mobile radio services. We believe that the policy which we propose achieves those objectives.

The need for a policy commitment to a nationwide, standardized mobile telephone system has not been demonstrated at this time. Indeed, such a commitment could unduly restrict technological and marketing innovation. The Commission should, however, require a capability for interconnection of all mobile telephone systems with the landline telephone network and with each other so that local or regional systems can evolve into a nationwide system if justified by future demand.

We recommend a regulatory approach to mobile communications services that relies as much as possible on competition in meeting customers' needs for mobile communications services. In general, all technically and financially qualified entities should be permitted to offer any mobile communications services. This policy should result in more diverse service offerings at competitive prices and vigorous technological innovation to improve and expand those services.

The frequency allocation and assignment process should be as flexible as possible to accommodate future needs, while at the same time providing incentives to make efficient use of the spectrum. We believe that these objectives can best be achieved by holding a substantial portion of the spectrum in reserve to be made available as required in the future. The remaining available spectrum should be allocated for the provision of (1) mobile telephone service by wireline common carriers and (2) all mobile radio services by any qualified entity on a competitive basis, with no further detailed suballocations within these blocks. This will not deter financial commitments on the part of potential entrants, and will afford maximum flexibility within each allocation for new or expanded service offerings.

Finally, we believe that the availability of the 900 MHz band for mobile radio services offers an opportunity for experimentation with procedures which would permit market mechanisms to augment the regulatory process in the area of spectrum efficiency. Such methods might include *pro forma* transferability of licenses between mobile users and the adoption of license fee schedules reflecting spectrum value.

We believe that this policy will enable the widest possible flexibility for serving the mobile communications needs of the public. It will also lead to more efficient use of spectrum resources, provide incentives for technological innovation by means of competition and permit the benefits of such innovation to flow directly to consumers of mobile services.

Sincerely,

CLAY T. WHITEHEAD, *Director.*

Conclusions and Recommendations of the Office of Telecommunications Policy Regarding Land Mobile Radio Service in the 900 MHz Band (FCC Docket No. 18262)

I. INTRODUCTION

In the past, the availability of mobile radio services has been largely restricted to commercial and business users, as well as state and local governmental agencies. The general public has benefited greatly by the use of mobile radio by these private and public entities, but only indirectly. There is a need to make low-cost mobile communications services available directly to the consumer and to allow for the expansion of mobile radio use by entities providing goods and services to the consumer. In this regard the allocation of additional frequencies in the 900 MHz band provides an excellent opportunity for the Commission to foster the development of new service concepts and new technologies so that the benefits of mobile communications can be brought to all members of the public.

A major issue posed in this proceeding is whether the increased availability of mobile communications services is best achieved by a regulatory commitment to a monopoly system premised upon a particular technology or by the creation of a diverse competitive environment. OTP believes that the needs of mobile communications users can best be met by an approach which enables customers themselves to determine, through market mechanisms, the most efficient and cost-effective use of the spectrum resource.

II. NATIONWIDE STANDARDIZED MOBILE TELEPHONE SYSTEM

Although a nationwide, standardized mobile telephone system, dependent upon a particular technology, might well come to supplement the nationwide public message telephone system, no need has been adequately demonstrated for immediate commitment to or implementation of such a system. The mobile telephone service market does not appear to exhibit strong natural monopoly features, and there is no conclusive information as to whether there are economies of scale sufficiently substantial to justify a policy commitment to a single system or a particular technology. In a period of rapid technological change, there are significant risks attendant to a commitment of a substantial portion of spectrum to a particular technology (however innovative it may presently appear) for the provision of mobile telephone service on a nationwide basis. Such a commitment could unduly inhibit further technological development and impede the growth of mobile telephone services.

Moreover, the propagation characteristics of the 900 MHz band make it most suitable for use in the top 25 to 30 major markets where high capacity systems may be required, whereas remaining areas of the country might be better served by smaller systems operating at lower frequencies.

Despite the lack of justification for a regulatory commitment to a single nationwide mobile telephone system, there is, nevertheless, a need to create an environment for mobile communications that would

not preclude the development of a nationwide service in the future if justified by consumer demand. Such an environment can be created by the adoption of a spectrum allocation and assignment policy which will be responsive to future changes in demand.

III. FREQUENCY ALLOCATION AND ASSIGNMENT

The Commission's allocation and assignment policies should facilitate the availability of new services as rapidly as possible. However, in view of the many technical and market issues which are as yet unresolved, the Commission should preserve flexibility with respect to future spectrum needs in the 900 MHz band. OTP recommends that the total 115 MHz available be allocated initially into "blocks" of sufficient size to motivate industry to undertake the necessary investments for product and market development. These allocations, however, should not exhaust at the outset the total available spectrum so as to result in overcommitment in any particular service category. Such a course could inhibit or distort growth in other service categories as consumer demand shifts in the future.

To this end, approximately 14 MHz of the available 115 MHz should be allocated for the exclusive use of wireline common carriers for the provision of tariffed mobile telephone services and ancillary dispatch services. Based on current market projections available to the FCC, it appears that this amount will be sufficient to accommodate present and near term mobile telephone service needs in the major markets.

Approximately 40 MHz of the available spectrum should be allocated for any mobile service to be offered on a non-rate regulated competitive basis (e.g., mobile telephone, dispatch, paging, etc.).

The balance of approximately 61 MHz should be held in reserve so that the Commission can expand or modify its initial allocations if warranted by demand. This will afford both common carrier and competitive entities a reasonable expectation that additional frequencies adjacent to their respective initial allocations will be available if and when warranted.

It is recognized that the new, so-called cellular technology which has been proposed for mobile telephone service might eventually require systems of relatively high channel capacity. However, this technology has not yet been proven and, as stated earlier, the demand for mobile telephone service has not been sufficiently demonstrated to justify a present allocation of a substantial portion of the spectrum to this service, either to wireline carriers or to others who might wish to introduce this technology.

Nevertheless, the development of cellular technology should not be discouraged—it should be permitted to develop in steps keyed to technological progress and growth in consumer demand. In order to avoid the need for subsequent re-engineering of equipment if the use of high capacity cellular technology proves justified by demand, parties proposing the use of this technology may wish to incorporate into their initial equipment design the capability for eventual high capacity operation. The Commission should, therefore, identify specific frequencies within the initial allocations where possible, or within the

reserve, if necessary, which could be incorporated into the initial equipment design for these systems in addition to those frequencies already allocated. These frequencies could not be assigned or used for other types of services until after the present uncertainties surrounding market demand have been resolved and technical results for high capacity mobile telephone service have been satisfactorily evaluated. Further, these additional frequencies would be assigned for mobile telephone service only as necessary to provide sufficient capacity to meet substantiated customer demands.

In this manner, parties would be permitted to design cellular systems with the assurance that, if warranted by demand and system performance, specific additional frequencies eventually will be allocated for this type of service. Conversely, if the expected demand for a high capacity mobile telephone service does not materialize within a reasonable, pre-established period of time, these frequencies would become available for allocation to other mobile services as needed.

Beyond the allocation of frequencies for common carrier and competitive services, there should be no further initial suballocation within the band to particular user categories such as public safety, transportation, industrial, etc. These user groups should be permitted to take full advantage of the availability of multi-user trunked systems, private single or multi-channel arrangements, or private trunked systems, depending on their needs. This should afford the opportunity for all private and governmental entities to use high quality and efficient systems which will conserve spectrum and which may avert future reliance on exclusive suballocations.

Naturally, the advantage of mobile communications must be readily available to local government and public safety institutions which are significantly dependent upon such services. In this regard, local government entities should be encouraged to accommodate, where possible, all their mobile service functions on a single shared trunked system, either private or multi-user. Similarly, adjacent municipalities may wish to combine their services on such a single system. While there may be a need at some future time to reassess the need for exclusive suballocations in view of the unique characteristics of public safety functions, we believe that, for the present, all users including local governments should attempt to make maximum use of the emerging high quality and spectrum-efficient systems.

IV. COMPETITION IN MOBILE SERVICES

Mobile communications services heretofore have been provided on a common carrier basis or by private systems. In the course of its deliberations in Docket No. 18262, the Commission has been presented with numerous innovative proposals including new technologies and new service concepts. For example, several parties have proposed to offer multi-user, multi-channel (trunked) dispatch services for hire. Such services would provide the mobile communications customer with an alternative to privately-owned systems and to the services offered by tariffed mobile telephone systems. In addition, this service concept should afford more efficient use of the spectrum than a proliferation of private systems.

The history of the mobile communications industry has been characterized by competitive free enterprise which has stimulated growth even in the face of spectrum limitations. Further policies should foster and expand this competitive environment. OTP recommends a policy which will permit existing and new services to be made available in a timely manner and at competitive prices in response to consumer demand. Such a policy is consistent with the Commission's recent approach to domestic satellite communications and specialized common carriers. There is every indication that a competitive policy will be even more fruitful here, since it is capable of benefiting the consumer directly.

The Commission's allocation of frequencies in the 900 MHz band should allow the provision of all types of service (mobile telephone, dispatch, paging, etc.) on a competitive basis by all potential entrants. All mobile communications services, with the exception of those provided by wireline common carriers as discussed below, must be permitted to develop without the encumbrances of rate regulation. By creating an environment which will accommodate numerous, competitive suppliers, the need for rate regulation is obviated; the multiplicity of competing systems (and the potential for new entrants) will assure competitive pricing. Accordingly, the Commission should authorize systems upon a showing of minimum technical and financial qualifications and in accordance with the minimum spectrum efficiency standards it establishes. There should be no necessity for a showing of continued economic viability.

Questions have been raised in the course of the Commission's deliberations in Docket No. 18262 concerning the participation of wireline common carriers, mobile radio equipment manufacturers and radio common carriers in the mobile communications services market.

A. WIRELINE CARRIERS

Because of the local monopoly advantages enjoyed by wireline common carriers in the provision of switched telephone service and the consequent potential for interservice cross-subsidy, telephone carriers should not be permitted to participate in the non-regulated portion of the mobile communications market in their own telephone service area. In any event, it would appear that the largest such carrier, AT&T, would necessarily be limited by the terms of the Western Electric consent decree from participating in a non-regulated activity. However, wireline common carriers should be permitted to provide rate regulated mobile telephone service, whether by means of cellular or other technology, as an extension of their regulated public switched telephone service. These carriers could also offer dispatch services on a rate regulated basis only as an adjunct to their mobile telephone services.

B. RADIO COMMON CARRIERS

Unlike wireline common carriers, radio common carriers need not operate on a local monopoly basis. Hence, there is no justification for precluding them from offering licensed but otherwise non-regulated

mobile services (mobile telephone, dispatch or other) on a competitive basis. However, it is central to OTP's policy that the non-regulated environment essential to competitive market activity be preserved. There may, therefore, be a need for federal preemption regarding all licensed competitive services in order to assure that radio common carriers (or their subsidiaries) and others providing multi-user services would not be subject to rate regulation by other jurisdictions.

C. RADIO EQUIPMENT MANUFACTURERS AND SUPPLIERS

We see no justification for excluding mobile radio equipment manufacturers and suppliers from the operation of mobile communications systems, whether multi-user systems for hire or otherwise. However, in order to provide mobile service customers adequate flexibility in the choice of equipment and to assure full and fair competition in both the mobile radio service and equipment supply markets, interoperability of all mobile equipment with any base station and terminal equipment should be required by the Commission. The actual development of specific interoperability standards to implement this requirement should, however, be left to the industry. In addition, the Commission might require as a condition to any license that the licensee place its customer on notice that mobile equipment from any manufacturer may be used with the system.

In order to allow full competition among and between mobile communications services, all land mobile radio systems should be guaranteed access to the public switched telephone network on a non-discriminatory basis. This access might be by manual or automatic dial capability by private or multi-user dispatch systems.

D. FAIR COMPETITION

While it is expected that the policy we have proposed will permit full and fair competition in the market for mobile communications services, we believe that there will be a continuing need for FCC and Department of Justice oversight as the industry develops. Both the public message telephone industry and the mobile radio manufacturing industry are characterized by companies with substantial economic power. Therefore, both the Commission and the Department of Justice should closely scrutinize the use of large financial and marketing resources by these companies in the emerging mobile communications markets and should take appropriate action to correct abuses if and when they occur. Particularly, the FCC should safeguard against the anticompetitive dangers presented by cross-subsidization between the landline public message telephone service and mobile communications services on the part of the wireline carriers.

V. TECHNICAL AND ECONOMIC EFFICIENCY IN THE USE OF THE SPECTRUM

For all of the mobile communications services we have discussed, the Commission should impose at the outset enforceable, minimum standards of spectrum efficiency for the allocation, assignment and use of

the 900 MHz frequencies. We expect that the FCC's Spectrum Management Task Force, as well as the Interdepartmental Radio Advisory Committee, will continue to make significant progress in the area of spectrum efficiency standards.

It is important that the Commission continue to encourage industry experimentation in areas such as channel spacing, through experimental assignments and other means, in order to further improve spectrum efficiency, particularly with regard to cellular technology. If past technical innovation through such experimentation is any guide, even the most optimistic projections of market demand for mobile communications may be accommodated in less spectrum than has been specified in some of the cellular system proposals submitted to the Commission.

Furthermore, in order to foster greater economic efficiency in the use of mobile radio frequencies, the Commission should permit the transferability of operating rights for licensed services on a relatively *pro forma* basis to allow market mechanisms to provide added flexibility in spectrum utilization by mobile users.

But on a long term basis, it would be appropriate to introduce stronger economic incentives for efficient spectrum use. One possibility would be to adopt a schedule of license fees reflecting in part the scarcity value of the spectrum being used. In this manner, inefficient systems would be discouraged in those areas where spectrum or channel congestion is a major problem. The feasibility of a plan to assess such fees in the government bands for which OTP has responsibility is now under consideration, and we urge the Commission in the same direction.

ATTACHMENT B

DEPARTMENT OF JUSTICE,
Washington, D.C.

HON. DEAN BURCH,
Chairman,
Federal Communications Commission,
Washington, D.C.

DEAR CHAIRMAN BURCH: In Docket No. 18262 the Commission has been considering the need to allocate additional spectrum to meet the demands for land mobile communications services and the best method of allocating such additional spectrum among the various parties desiring to provide such services. In 1968 the Commission concluded that the demands for land mobile services could be met on a long-term basis only by the allocation to such services of additional spectrum. The Commission initially determined to allocate an additional 115 MHz to the land mobile service, *Notice of Inquiry and Notice of Proposed Rule Making*, Docket No. 18262, 14 FCC 2d 311 (1968).

The Department of Justice is the executive agency charged with the responsibility of enforcing the federal antitrust laws and promoting competition generally throughout the economy. The Department has followed the developments in Docket No. 18262 with considerable interest since it appeared that the economic characteristics of land mobile communications services marked the industry as one in which competition is not only feasible but also highly desirable. Indeed, in 1970 when the Commission indicated that it contemplated allocating 75 of the additional 115 MHz exclusively to wireline common carriers for the development of a high capacity common carrier mobile system (including both mobile telephone and dispatch services), *First Report and Order and Second Notice of Inquiry*, Docket No. 18262, 19 R.R. 2d 1663 (1970), the Department felt compelled to offer its views to the Commission.

The Department of Justice submitted on August 7, 1970, a *Memorandum* urging the Commission to reconsider that part of its Order which restricted development and future use of the 806–881 MHz band exclusively to wireline telephone carriers. In its *Memorandum* the Department suggested that it would be premature to foreclose the use of that band to radio common carriers ("RCCs") in advance of the development of technology to utilize it fully. We suggested that such a restriction would be undesirable at that time since it would seriously dilute the incentives of RCCs and equipment suppliers to commit resources to solve the problem of how best to serve the public interest in the effective use of the new spectrum allocated to land mobile services. In view of the potential impact of exclusion from use of the 806–881 MHz band upon the ultimate viability of the RCCs, we urged the Commission to refrain from any action that might prematurely lessen competition and reduce incentives for technological development.

The Commission subsequently deleted its restriction limiting development of the 806–881 MHz band to wireline telephone companies. Instead, the Commission encouraged all interested parties to submit and offer proposals for an effective and efficient use of the spectrum for both public and private services. *Second Memorandum Opinion and Order*, Docket No. 18262, 31 FCC 2d 50 (1971).

Subsequent to that decision numerous interested parties have submitted data and proposals to the Commission with respect to how the additional 115 MHz should be allocated among potential providers of land mobile communication services. The Commission is presently considering these submissions with a view toward reaching a final decision which will provide the means of meeting this nation's increasing needs for land mobile communication services in an efficient and flexible manner. The Department of Justice offers the following comments in an effort to assist the Commission in its efforts.

In recent years the courts have repeatedly recognized that competition can promote the public interest even in regulated industries and that regulatory agencies must consider the promotion of competition as an important component in their statutory public interest considerations. See *e.g.*, *Gulf States Utility Co.* v. *FPC*, 41 U.S.L.W. 4637 (May 14, 1973); *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968); *United States* v. *RCA*, 358 U.S. 334 (1959). Of course, the Commission has repeatedly recognized the value of promoting competition in communications services. It has established policies of promoting competitive entry in a number of communications services in recognition that competition provides a means of stimulating rapid technological innovation. The Commission has also recognized that competition can spur common carrier response to user demand for service innovation and provide incentives to control costs in order to maintain attractive user rates. See *e.g.*, *In the Matter of Allocation of Microwave Frequencies Above 890 Mcs*, Docket No. 11866, 27 FCC 359 (1959), 29 FCC 825 (1960); *Computer Services Inquiry*, Docket No. 16979, 28 FCC 2d 291 (1970), *Specialized Common Carrier Decision*, Docket No. 18920, 29 FCC 2d 870 (1971); and *Domestic Satellite Decision*, Docket No. 16495, 24 RR 2d 1942 (1972). In our opinion, the development of land mobile services at 900 MHz provides the Commission with still another opportunity to foster competition as a means of effectively meeting the nation's communication needs.

A number of the proposals and comments filed in Docket No. 18262 raised competitive issues of considerable significance. AT&T has proposed that the Commission allocate the entire 75 MHz presently designated by the Commission for common carrier services for use by wireline telephone carriers. In our opinion, the effect of granting this entire block of spectrum for the exclusive use of the wireline telephone carriers would be to seriously damage the ability of RCCs to participate in a meaningful fashion in the growth of the land mobile service envisioned by the Commission. The filings in this proceeding indicate that the demand for land mobile services will be highest in the nation's largest urban areas. User demand in such markets is expected to greatly exceed the relatively limited amount of spectrum currently available to RCCs. Precluding RCC access to the 900 MHz band, therefore, would be expected to seriously inhibit the RCCs' potential for sustained growth as well as their ability to add new and attractive services in response to user demands. In addition, depriving the RCCs of the opportunity to participate in this spectrum band might prevent them from obtaining even limited economies of scale which would enable them to better compete with the wireline carriers and private systems.

Even if the Commission allowed the RCCs to utilize a portion of the 40 MHz which the Commission has presently designated for private system use, allocation of an entire 75 MHz band exclusively to the wireline carriers would have a pronounced anticompetitive effect. In such an event, private systems, RCCs and multiple-user systems would find themselves at a competitive disadvantage against the wireline carriers in meeting increased future demands and obtaining limited economies of scale. Absent clear evidence indicating the foreseeable need for wireline carrier mobile systems approaching the magnitude of 75 MHz, a grant of that size to the wireline carriers would not be in the public interest in view of its likely adverse competitive impact on pricing and technological diversity.

In the past land mobile service users have been provided with a diversity of offerings in competition with the services of the wireline carriers. Therefore, it is our opinion that Commission action granting AT&T's request, which would at least seriously impair the future competitive viability of RCCs, multiple-user and private systems, could only be justified upon certain clear findings that approval of AT&T's request was necessary to serve the public interest.

To be specific, we do not believe that the Commission should allocate to AT&T the 75 MHz that it has requested unless the Commission finds, on the basis of clear evidence that (a) there is a clearly foreseeable near-term demand for wireline carrier mobile systems utilizing 75 MHz, and (b) that superior technical efficiencies afforded by a 75 MHz wireline carrier mobile system with attendant near-term savings to users would clearly outweigh the long-term benefits which would be expected to be achieved from technological and economic competition.

In our opinion, the information available to the Commission in this proceeding does not indicate that either of these conditions could be met. From the proposals of the various parties it appears that foreseeable demands for wireline carrier mobile systems will not require quantities of spectrum approaching the magnitude of that requested by AT&T, except perhaps in the largest cities. The Commission apparently has reached the same conclusion. *Second Memorandum Opinion and Order*, Docket No. 18262, 31 FCC 2d at 51–2.

Moreover, the filings before the Commission do not indicate anything approaching a consensus to the effect that authorization of wireline common carrier systems of 75 MHz would be necessary to provide significant technological or economic efficiencies. On the contrary, a number of the parties have asserted that the development of such a large system, particularly in advance of sufficient customer demand, would be both technologically and economically inefficient. See *e.g.*, *Comments of the Land Mobile Section of the Communications and Industrial Electronics Division of the Electronic Industries Association*, July 7, 1972, pp. 12–16; and, *Further Comments of the Mobile Radio Department, General Electric Co.*, July 20, 1972, pp. 10–14.

If the Commission should conclude either that near-term demand for wireline carrier mobile communications systems would not require an exclusive nationwide grant of 75 MHz to such systems, or that the existing evidence does not clearly indicate that authorizing systems of that magnitude is necessary to avoid serious technological or economic inefficiency, it should not grant AT&T's request. For in such an event we do not believe there would be any public policy justification for authorizing such a large grant to the wireline carriers when such a grant could seriously impair the competitive viability of other potential providers of land mobile services, thereby depriving the public of the service and innovation benefits which the resultant competition would normally engender.

As indicated above, our review of the filings in this proceeding leads us to believe that foreseeable demand and economies of scale would not justify the authorization of an exclusive grant of 75 MHz to the wireline carriers. Rather, we suggest that the Commission should adopt an allocation plan which would make available significant amounts of spectrum for potential use by wireline common carriers, RCCs, multiple-user systems and private systems, with a significant amount of spectrum placed in reserve. Such an allocation plan would provide incentives designed to promote competitive entry into the land mobile field. In addition, it would avoid a premature commitment of spectrum at a time when rapid technological development is taking place. Holding some of the spectrum in reserve would have an additional public benefit. It would provide an incen-

tive for the various types of land mobile systems to *demonstrate* that they can make the most efficient use of the spectrum held in reserve. The adoption of such an allocation plan which promotes competition and creates incentives for rapid technological development would be most in keeping with the Commission's duty to promote the effective utilization of this nation's communications resources.

AT&T has applied for authorization to supply dispatch service together with mobile telephone service in a single system. Whether wireline telephone carriers should be allowed to enter the previously competitive dispatch business presents a number of competitive issues. Dispatch service has traditionally been provided in a very competitive environment and from all indications such should continue to be the case. Consequently, exclusion of the wireline carriers from the dispatch market would not deprive dispatch customers of the benefits of competition. The advantages adherent in the telephone service monopoly enjoyed by the wireline carriers vis-a-vis potential competitors in other communications services are competitively significant. The need to avoid cross-subsidization which would burden the customers of the monopoly service and disadvantage competitors is a concern with which the Commission is all too familiar. The same is true with respect to interconnection, or access, problems. Moreover, the competitive concern with allowing wireline telephone companies to enter into the previously competitive dispatch market is exacerbated in the present case because it appears that the foreseeable near-term demand for dispatch service will far exceed the demand for mobile telephone service. Thus, there is a justifiable concern that the wireline carriers, if authorized to provide a dual system, would concentrate upon dispatch rather than the mobile telephone service which is more closely related to the monopoly telephone service.

In view of the above, the Commission could conclude that (a) denying the wireline carriers access to the dispatch market would not deprive dispatch customers of the benefits of competition, and (b) allowing wireline carriers to provide dispatch service would raise serious anticompetitive dangers, the mitigation of which could only be assured by a considerable expenditure of Commission resources. Such findings would justify a Commission conclusion that the public interest would be best served by excluding the wireline carrier from the dispatch business.

Generally, we believe that competition is best served by exclusion of the wireline carriers from markets where others are capable of providing service on a competitive basis. It therefore follows that entry by such carriers, with attendant regulation, should be permitted only upon the clearest showing that allowing wireline carriers to provide mobile telephone and ancillary dispatch service in a single, unitary system would provide significant economies not achievable by other means and could be expected to foster price and technological competition in the dispatch business. Only if such a showing is made should the Commission approve such a system. In adopting such a decision, however, the Commission should indicate that it intends to apply harsh sanctions to any wireline carrier it finds engaging in anticompetitive practices.

Irrespective of whether the Commission authorizes wireline carriers to provide dispatch services, the Commission should insure that other providers of land mobile services are allowed to interconnect with the fixed telephone plant on a reasonable and nondiscriminatory basis. It is a basic tenet of antitrust law that a monopolist may not refuse to deal with other parties where the effect of such refusal may be to expand or preserve the monopolist's power. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927). The Commission has recognized the desirability of insuring reasonable interconnection to the telephone network in other situations in which the wireline carriers may be viewed as competitors of parties which need to interconnect in order to compete. *Domestic Satellite Decision*, *supra*, at p. 1955; and *Allocation of Frequencies in the 150.8–162 Mc/s Band*, Docket No. 16778, 12 FCC 2d 841 (1968). *Cf.*, *Carterfone*, 13 FCC 2d 420 (1968).

In addition to adopting a policy which would stimulate competition in the efficient utilization of land mobile resources, the Commission should also seek to preserve the opportunity for competition in mobile equipment manufacturing and equipment related markets. Competition in the equipment markets would provide system operators and individual users the substantial benefits (in terms

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of rapid equipment innovation, more responsive services and lower prices) generally resulting from competition.

We note that AT&T has indicated its intent to provide only the shared equipment portion of its proposed systems and to depend on general trade sources for development and manufacture of mobile units. (*AT&T Comments*, December 20, 1971, p. 3). If the Commission authorizes wireline carriers *General Telephone Company of Southwest* v. *United States*, 449 F.2d 846, at 860–861 (5th Cir. 1971).

Certain of the RCCs have expressed concern over having to rely upon supplier equipment manufacturers which are competing with the RCCs in providing mobile services. The RCCs have indicated concern over possible discrimination with respect to obtaining needed equipment and other types of anticompetitive practices. Attempts by equipment manufacturers which are providing land mobile services to impede the competitive efforts of other providers of service through discrimination in equipment supply would raise serious antitrust questions. As a result, we believe that the Commission should make it clear that evidence of discrimination in equipment supply or other types of anticompetitive activity by equipment manufacturers operating systems will be subject to severe Commission sanctions including license revocation.

We hope that these comments will assist the Commission in developing an efficient and competitive mobile land communications system and request that this letter be made part of the public record in this proceeding.

Sincerely yours,

THOMAS E. KAUPER,
Assistant Attorney General,
Antitrust Division.

F.C.C. 73-934

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
MADISON COUNTY CABLEVISION, ALTON, ILL.	CAC-2168 IL174
MADISON COUNTY CABLEVISION, WOOD RIVER, ILL.	CAC-2169 IL173
MADISON COUNTY CABLEVISION, EAST ALTON, ILL.	CAC-2170 IL172
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted September 6, 1973; Released September 18, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID CONCURRING IN THE RESULT.

1. Madison County Cablevision has filed the above-captioned applications for certificates of compliance to begin cable television service at Alton, East Alton and Wood River, Illinois,[1] communities located in the St. Louis, Missouri television market (#11). Cablevision proposes to carry the following television broadcast signals:

KMOX-TV (CBS, Ch. 4), St. Louis, Mo.
KSD-TV (NBC, Ch. 5), St. Louis, Mo.
KTVI (ABC, Ch. 2), St. Louis, Mo.
KPLR-TV (Ind., Ch. 11), St. Louis, Mo.
KDNL-TV (Ind., Ch. 30), St. Louis, Mo.
KETC (Educ., Ch. 9), St. Louis, Mo.
WGN-TV (Ind., Ch. 9), Chicago, Ill.
WSNS (Ind., Ch. 44), Chicago, Ill.

Cablevision's applications are opposed by 220 Television, Inc., licensee of Station KPLR-TV, St. Louis, Missouri, which objects to Cablevision's proposed carriage of the two Chicago independent stations, and Cablevision's Section 76.251 access proposal.

2. 220 Television contends that Cablevision's proposed carriage of WGN-TV and WSNS is inconsistent with the leapfrogging provisions of 76.61(b)(2)(i) [2] of the Rules because Chicago (#3) is the third

[1] These communities will be referred to as "Metroplex," a term used in Illinois to describe the above-named adjacent communities.

[2] Section 76.61(b)(2)(i) of the Rules provides in pertinent part that:

(2) Independent stations. (i) For the first and second additional signals, if any, a cable television system may carry the signals of any independent television station: Provided, however, That if signals of stations in the first 25 major television markets (see § 76.51(a)) are carried pursuant to this subparagraph, such signals shall be taken from one or both of the two closest such markets, where such signals are available. If a third additional signal may be carried, a system shall carry the signal of any independent UHF television station located within 200 air miles of the reference point for the community of the system (see § 76.53), or, if there is no such station, either the signal of any independent VHF television station located within 200 air miles of the reference point for the community of the system, or the signal of any independent UHF television station.

NOTE.—It is not contemplated that waiver of the provisions of this subparagraph will be granted.

closest top twenty-five television market to Metroplex—the two closest being Indianapolis-Bloomington, Indiana (#16), and Kansas City, Missouri (#22). In support of its contention 220 Television submits an engineering statement which shows that Kansas City is closer to Metroplex than is Chicago.[3] The distances as tabulated by 220 Television are as follows:

City	Distance from Chicago, Ill. (miles)	Distance from Kansas City, Mo. (miles)
Wood River	244.84	242.65
Alton	245.66	237.31
East Alton	244.23	241.72

220 Television calls attention to the note to Section 76(b)(2)(i) which indicates that waivers of this rule are not contemplated, and asserts that Cablevision has not adequately justified a waiver.

3. In response to 220 Television's contentions, Cablevision argues that even based on 220 Television's measurements, Kansas City is closer than Chicago to Wood River by only 2.19 miles, to Alton by 8.35 miles, and to East Alton by 2.52 miles. Cablevision states that these measurements represent differences ranging from less the 1% to less than 4% of the total distances involved between Kansas City and Chicago to the Metroplex, which at most reflects *de minimis* leapfrogging. Cablevision asserts that it has long been Commission policy that small mileage differences are not decisionally significant, citing in support of this proposition Paragraph 9 of the *Further Notice of Proposed Rule Making* in Docket 18397, 22 FCC 2d 603 (1969).[4] Furthermore, Cablevision contends that carriage of the proposed Chicago signals is not essentially inconsistent with the Commission's leapfrogging policy. It states that in Paragraph 92 of the *Cable Television Report and Order*,[5] the Commission set forth some of the criteria involved in its leapfrogging policy, including the desirability of diversity in programming; the desire not to create superstations of the top major market station at the expense of smaller stations; and the desirability of carrying regional or in-state stations to provide programming of more likely interest in the cable community. While acknowledging that the requested stations are located in a market that the Commission pinpointed in Paragraph 92 as ones likely to generate superstations, Cablevision argues that the Chicago stations are in-state stations vis-a-vis the Metroplex. Cablevision points out that the residents of the Metroplex receive all their television news

[3] In its application Cablevision states that measurements made at various points in the Metroplex resulted in *de minimis* mileage differences between Kansas City and Chicago, and that essentially Metroplex is equidistant from Kansas City and Chicago.

[4] In Paragraph 9 of the *Further Notice of Proposed Rule Making* in Docket 18397, the Commission stated:

> In proposing to require that CATV systems refrain from leapfrogging, we did not intend to propose that fractions of miles or de minimis (e.g., less than 5 miles) differences would be determinative. It should generally suffice to measure comparative distances on a map with a ruler or a pair of dividers, even though this method is not as accurate as computations based on geographic coordinates.

[5] 36 FCC 2d 141, 179 (1972).

from St. Louis and that the St. Louis stations do not regularly cover the activities of the Illinois state legislature in Springfield, while the Chicago stations do. It asserts that the importation of Kansas City or Indianapolis-Bloomington stations will not remedy this defect.

4. We believe that Cablevision's proposed carriage of the Chicago stations is in these circumstances justified. The distance here involved is small, at most less than 4% of the total distance concerned. Furthermore, in these circumstances, minor deviation from Section 76.61(b)(2)(i) will further the policy of the Rules to encourage in-state programming of more interest to the residents of the cable community. Accordingly the Commission will grant Cablevision's request to carry WGN–TV and WSNS in the Metroplex. Compare *Western TV Cable Corporation*, FCC 73–152, 39 FCC 2d 624, *reconsideration pending*.

5. In its application Cablevision states that its systems will have capacity for twenty or more channels, and will designate a specific channel for public access; a specific channel for use by local educational authorities; and a specific channel for local governmental use. Cablevision specifies that use of the educational and governmental channels will be developed in cooperation with the local entities affected, and anticipates that one dedicated channel will be used initially for each of the three classes of access channels. Cablevision argues that "it is more likely that use of the access channels in the cohesive Metroplex area will be greater if the channels are programmed to the maximum extent possible during the initial phases of their use." This goal, Cablevision contends, will be best accomplished by combining the public access, educational and governmental programming of each of the three Metroplex communities on one of each type of dedicated channels. Cablevision gives its assurance that an additional six channels will be reserved for access use "in the event that the three channels became fully utilized or local entities involved in the three communities require an alternative" to its plans. Cablevision also points out that its origination facilities will be centrally located, and easily reached by private or public transportation, and that the system will maintain a mobile studio to facilitate public, educational and governmental use of its facilities throughout the Metroplex area.

6. 220 Television contends that Cablevision's above-described proposal for the provision of access services pursuant to Section 76.251 of the Rules is deficient. That, while proposing to operate in three communities, Cablevision will provide only one set of access channels, and maintain production facilities at only one location. 220 Television asserts that this proposal requires a waiver of the requirements of Section 76.251, and in this case a waiver is not justified because the population of the three communities is too large.[6] In response, Cablevision argues that 220 Television has misconstrued its proposal for access channels, and submits that its plans meet and will fulfill the access requirements contemplated by the Commission, while at the same time providing flexibility in order to meet future requirements.

[6] See the following table:

	Persons
Alton	39,700
Wood River	13,186
East Alton	7,306

Cablevision points out that its studio will be located in the largest of the three communities, Alton, which is centrally located, being approximately three miles from downtown East Alton and approximately four miles from downtown Wood River. Additionally, discrete access service will be provided by means of a mobile studio, in effect, two facilities serving three communities. Cablevision also calls attention to Paragraph 90 of the *Reconsideration of the Cable Television Report and Order*[7] where the Commission stated that fully described access proposals for "conglomerate" systems will be certified if the integrity of the Commission's access plan is safeguarded. Cablevision asserts that its access proposal meets the standards established in Paragraph 90. Finally, Cablevision notes that its proposals for use of access channels represent the system's plans for providing access service. It states that should the Commission find these plans unacceptable, it can and will provide such services in the manner the Commission deems appropriate.

7. We have examined Cablevision's access proposal and we agree with 220 Television that it deviates from the requirements of Section 76.251 and requires a partial waiver. We believe Cablevision has not sufficiently justified such a partial waiver. The Commission recognizes that with the use of access channels we are entering into an experimental and developmental period. Cablevision believes that its plan, rather than hindering the use of access, will stimulate and maximize its use. While recognizing that this argument might have merit, the Commission believes that it was incumbent upon the applicant to make a more detailed showing to justify a waiver of the Rules. This it has failed to do. Accordingly Cablevision will be required to provide separate access channels in the three communities.

8. Although not raised in the objections, we believe it appropriate to note certain variations in Cablevision's franchises from the standards of Section 76.31 of the Commission's Rules. The franchise for Alton was granted on January 14, 1970; for Wood River, on September 2, 1969; and for East Alton on September 16, 1969—all prior to the March 31, 1972 effective date of the Commission's new cable television rules. All three franchises were awarded in full public proceedings affording due process including submission of proposals and public hearings before the city councils of the three communities. The city councils considered Cablevision's legal, character, financial, and technical qualifications and the feasibility of its construction plans. All three franchises call for an annual fee ranging from 3% to 6½% depending on the number of subscribers Cablevision has obtained. Initial subscriber rates are established which can only be changed with the approval of the respective city councils involved. Further, Cablevision has assured the Commission that it will request the cities to consider any increases in subscriber rates at a full public proceeding affording due process to the public, the city and the systems. The franchises each require Cablevision to maintain and furnish telephone answering service and system maintenance service to subscribers daily from 7:00 a.m. until midnight. Cablevision is also

[7] 36 FCC 2d 326 (1972).

required to furnish each subscriber with a telephone number to register complaints. In addition, Cablevision has assured the Commission that it will maintain a business office in the Metroplex area and will designate an employee to investigate and resolve service complaints. Cablevision states that it will also maintain a record of all subscriber complaints and the disposition of such complaints. The record will be maintained on public file at Cablevision's local business office. The franchise duration for Wood River is 15 years, and the franchises for Alton and East Alton are for a duration of 25 years. Finally, Cablevision states that it will seek modification of the franchises to conform to future modifications in the Commission's Rules. Only substantial consistency with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10 (1972), *reconsideration denied* FCC 73–293, 40 FCC 2d 493 (1973).[8] We find that these franchises substantially comply with Section 76.31 of the Rules in a manner sufficient to justify a grant of Cablevision's applications until March 31, 1977.

9. 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." Madison County Cablevision has requested a waiver of the Illinois Commerce Commission, and a hearing on its request was held before the Illinois Commerce Commission on July 19, 1973. While a decision in that case is expected in the near future, Cablevision is not yet in receipt of said waiver. Accordingly, we will condition the effectiveness of our certification herein on a demonstration by Cablevision of compliance with Order No. 71–2983 of the Circuit Court of the 19th Judicial Circuit, McHenry County, Illinois. *Illinois Commerce Commission*, FCC 72–949, 37 FCC 2d 875.

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

Accordingly, IT IS ORDERED, That the "Opposition to Application for Certificate of Compliance" filed April 18, 1973, by 220 Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–2168, CAC–2169, CAC–2170) for certificates of compliance filed by Madison County Cablevision ARE GRANTED and that appropriate certificates of compliance will be issued.

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

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[8] Appeal pending *sub nom., Winnebago Television Corporation* v. *FCC and USA*, Case No. 73–1561 (D.C. Circuit).

F.C.C. 73-956

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF MILLBECK BROADCASTERS, INC., LICENSEE OF RADIO STATION WILZ, ST. PETERSBURG BEACH, FLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted September 11, 1973; Released September 18, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING TO THE REDUCTION OF THE FORFEITURE; COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated April 18, 1973, addressed to Millbeck Broadcasters, Inc., licensee of Radio Station WILZ, St. Petersburg Beach, Florida, and (2) a response to the Notice of Apparent Liability received June 15, 1973.

2. The Notice of Apparent Liability for two thousand dollars ($2,000) was issued pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended, for the following apparent violations:

(a) Section 73.40(b)(3) in that at the time of inspection the transmitter presented a definite safety hazard to operating personnel since (1) the safety interlocks were disabled, (2) the protective screen on the back of the transmitter was removed, and (3) the high voltage RF choke was exposed.

(b) Section 73.40(b)(3)(iv) in that the antenna base fencing was inadequate. The base fencing for both towers was in need of repair and no longer provided the protection for which it is required.

(c) Section 73.47(b) in that the licensee failed to provide data concerning equipment performance measurements as required by Section 73.47(a). (Equipment performance measurements for the two years prior to the May 19, 1972 inspection were not available.)

(d) Section 73.67(a)(2) in that means are not provided for the transmitter to become inoperative in the event of a short circuit, open circuit, grounds or other line faults in the remote control circuits.

(e) Section 73.111(a) in that various operators failed to sign the program logs when starting duty and again when going off duty on the following days: April 8, 11, 12, 14, 15, 17, 21, and 26, 1972; and in that the program log indicates that no operator was on duty for the following periods: April 21, 1972 from 6:00 to 7:00 p.m., April 25, 1972 from 6:00 to 6:30 p.m., and April 27, 1972 from 6:00 to 6:30 p.m.

(f) Section 73.114 (a)(5) and (b) in that the maintenance logs were deficient in the following respects:

(1) Monitoring points measurements were not entered for the month of April 1972, although entries are required to be made every 30 days.

(2) Entries were not made to indicate the amount of time devoted to the daily inspection.

(g) Section 73.933 [now 73.932] in that on May 16, 1972, the EBS monitor receiver was not installed in the control room but located in another part of the building.

(h) Non-compliance with the terms of the station's current authorization in that the licensee failed to comply with requirements that the common point current, base currents of each tower, phase monitor sample loop current, and phase indications readings be taken within two hours of the time that the station went into operation with the directional antenna system by remote control and that the readings be entered in the operating log daily on the following days: April 2, 7, 9, 15, 16, 23, 24, 30, and May 1, 1972.

(i) Section 73.112(a)(2)(ii) in that an entry was not made in the program log showing the duration of each commercial message (continuity in sponsored programs) in each hour for the following programs:

(1) On May 11, 1972, WILZ broadcast from approximately 6:02 to 6:30 a.m. the program "Bright Spot Hour" containing a commercial announcement of approximately 3 minutes 48 seconds duration advertising an album of recorded music for sale at a price of $4.00.

(2) On the same day WILZ broadcast from approximately 6:30 to 7:00 a.m. the program "Family Altar" containing a commercial announcement of approximately one minute 42 seconds duration advertising a record album for sale in exchange for a "gift" to the program's producers.

(3) On May 12, 1972, WILZ broadcast the "Bright Spot Hour" containing a 3 minute 30 second commercial announcement. On the same day WILZ broadcast the "Family Altar" containing a 2 minute 14 second announcement.

(4) On May 16, 1972, WILZ broadcast the "Family Altar" containing a 2 minute 18 second commercial announcement.

(5) On the same day, WILZ broadcast the "Camp Meeting Hour" from 7:30 to 7:45 a.m. which contained commercial announcements totalling 2 minutes 31 seconds duration advertising record albums for sale.

All the previously specified programs were listed on the WILZ program logs as simply containing "commercial continuity." However, the total duration of commercial matter was not entered as required by Section 73.112(a)(2)(ii).

(2)(ii).

(j) Section 1.526 in that the licensee did not have available for inspection a file containing the required material on May 16, 1972, and apparently did not have the public file available for inspection after about April 20, 1972.

3. The violations noted in items (a) through (j) above were observed during an inspection and investigation of WILZ conducted May 4, 16, and 19, 1972. The Notice of Apparent Liability was also issued to include apparent violations noted in another inspection conducted January 12, 1973, which disclosed further violations of some of the same Rules for which the licensee was cited in the earlier inspection, as follows:

(a) Section 73.47(b) in that the licensee failed to provide data concerning equipment performance measurements since the data submitted by the licensee for measurements conducted on August 13, 1972, and January 14, 1973 did not contain the required data for audio response (repeated from previous inspection).

(b) Section 73.67(a)(3) in that the licensee did not immediately cease operation from the remote control point when the remote lines became inoperative on December 7, 8, 9, 10, and 17, 1972.[1]

(c) Section 73.114(a)(5) in that the maintenance log did not contain an entry of the monitoring point measurements for the month of January 1973 (repeated from previous inspection).

(d) Section 73.932 in that at the time of the inspection the required EBS receiver was not installed (repeated from previous inspection).

4. The licensee's response to the Notice of Apparent Liability does not deny the violations set out above. The response instead attempts

[1] Although this citation does not specify precisely the same subsection of 73.67(a) as that specified in the previous citation (Section 73.67(a)(2)), both violations are similar and involve faulty operation by remote control.

to blame its violations on the Commission's licensing policies of Radiotelephone Operators. The licensee states:

> In the opinion of the licensee, all violations cited by the Tampa Marine Office on May 4th, 16th and 19th, 1972, of a technical nature, are the direct result of actions or inaction by the first class operators who accepted the position of chief engineer at WILZ, and responsibilities that are incumbent on the position.

Licensee further states:

> [Some of the] violations . . . indicate that perhaps the fault lies in the certification procedures used by the Commission and relied upon by the licensees with respect to the licensing of first class operators.

The licensee's response offers other explanations for some of the violations. With regard to the violations of Section 73.67 of the Rules dealing with remote control, the licensee states that WILZ ceased remote control operations until corrective action could be taken to install a proper remote control unit. The licensee argues that the violations of Section 73.922 of the Rules for which it was cited concerning irregularities in its Emergency Broadcast System (EBS) equipment were not duplicated during the 1972 and 1973 inspections. The licensee says the violation was not identical since in the May 1972 violation, ". . . the monitor was operating but not in the control room as required. In the January inspection, the monitor was being repaired." With further regard to the violations involving the EBS receiver, the licensee stated that it could not understand the Commission's attitude in stating in the Notice of Apparent Liability that the licensee's "explanations of the other violations discovered in January 1973 do not appear adequate to relieve you of liability for them." The licensee states, "For instance, referring to paragraph #5 of Letter 'B', the monitor was in fact performing properly and there was no violation."

Licensee argues that it has not willfully violated the terms of the license, nor been negligent in pursuing the correction of problems as they arose. Licensee suggests, "Possibly a better system for control of violations would be to make the station's chief engineer responsible to the Commission for the proper operation of a transmitting facility, and liable for any penalties that are incurred by his negligence."

The licensee concludes its response by citing its recent financial hardships and says, "With this in mind, a forfeiture in the amount of two thousand dollars under the circumstances, would, in the licensee's opinion, be unduly burdensome and create a severe hardship on the station at a critical juncture in its history." The licensee then requests that the Commission review the response and reconsider its decision in issuing the Notice of Apparent Liability.

5. We have considered the licensee's response and the circumstances in this case, and we are not persuaded to remit or mitigate the forfeiture. This proceeding is based upon those violations occuring within one year preceding the issuance of the Notice of Apparent Liability, and we find all the violations to be repeated within this period. The licensee offers no justification for any of the violations for which it was cited other than the negligence or misfeasance of its chief engineer, and would attempt to shift the responsibility for the violations to the Commission since we licensed the engineer. We have stated many times

that a licensee will not be excused for the acts of its employees. *Empire Broadcasting Corp.*, 25 FCC 2d 69 (1970). Further, as we said in *Central Pennsylvania Broadcasting Company*, 22 FCC 2d 632 (1970), "The qualifications evidenced by the Commission's issuance of a first-class radiotelephone operator license cannot be extended to shield a licensee from its responsibility to comply with the terms of its authorization." [2]

With regard to the licensee's explanation concerning its defective remote control equipment, that it ceased operation until the equipment could be repaired, the evidence fails to indicate that WILZ ceased operation on the days on which it was cited for violation. The licensee's argument that it should not be penalized for its violations of Section 73.932 of the Rules regarding its EBS equipment is not persuasive. Even though the EBS monitor may have been operating properly in some other part of the WILZ studios, the Rule indicates that a licensee is in violation unless the monitor is in operative condition with its termination at the transmitter control point. Since the equipment was, in the case of the 1972 inspection, not at the transmitter control point, and in the 1973 inspection was inoperative, the Rule was violated both times, and the violation is repeated.

We are not persuaded by licensee's argument that the licensee was not negligent in pursuing corrective action. Since we have found that violations to be repeated, we find it unnecessary under the Communications Act of 1934, as amended, to make any additional determination as to whether the licensee's actions constituted willful violations. *Paul A. Stewart*, FCC 63–411, 25 RR 375. Further, licensees will not be excused for past violations because of corrective action. *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966).

As to licensee's suggestion that Commission-licensed operators should be responsible to the Commission for the proper operation of a transmitting facility, we note the provisions of Section 303(m) of the Communications Act which gives authority to the Commission to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee has violated any provision of law which the Commission is authorized to administer, or regulations made by the Commission. However, such proceedings are separate from proceedings involving the responsibility of the licensee for properly supervising its employees.

We believe that a forfeiture is warranted in this case especially in view of the licensee's repeated violations noted in the 1973 inspection. This is especially appropriate since the licensee had an opportunity to take corrective action and did not do so following the 1972 inspection. We turn now to that portion of the licensee's response citing its recent financial hardships and stating that a forfeiture of the amount specified in the Notice of Apparent Liability ($2,000) would "create

[2] In *Central Pennsylvania* the licensee of WKVA, Lewistown, Pennsylvania had argued that the licensee's responsibilities for violations of the Rules should be shared by the Commission since it had certified the qualifications of the station's first-class operator by issuing a license to him. In ordering payment of the forfeiture we said:

> The Commission's issuance of a radio operator license does not relieve a licensee employing the holder thereof from its obligation to supervise the operation of its station and to assure compliance with applicable technical requirements.

a severe hardship on the station at a critical juncture in its history." In light of this representation and other information available to us regarding the financial condition of the licensee, we have determined to reduce the amount of the forfeiture to $1,500. We emphasize, however, that the amount of forfeiture is being reduced primarily because of the licensee's financial condition.

6. In view of the foregoing, IT IS ORDERED, That Millbeck Broadcasters, Inc., licensee of Radio Station WILZ, St. Petersburg Beach, Florida, FORFEIT to the United States the sum of one thousand five hundred dollars ($1,500) for repeated violation of the terms of the station authorization, Section 73.40, 73.47, 73.67, 73.111, 73.114, 73.933 [now 73.932], 73.112, and 1.526 of the Commission's Rules. Payment of the Forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of the forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

7. IT IS FURTHER ORDERED, That the Acting Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Millbeck Broadcasters, Inc., licensee of Radio Station WILZ, St. Petersburg Beach, Florida.

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

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
JOHN CERVASE, NEWARK, N.J.
Concerning Personal Attack Re Station
WNET–TV, New York, N.Y.

AUGUST 24, 1973.

JOHN CERVASE, Esq.,
423 Ridge Street,
Newark, N.J.

DEAR MR. CERVASE: This will refer to your complaint of May 8, 1973 against WNET–TV, New York, New York, alleging that the licensee failed to comply with the Commission's Rules regarding the broadcast of personal attacks.[1] You allege that on the April 17, 1973 WNET–TV *Black Journal* program, Mr. Adhimu Chunga, while being interviewed in regard to a recent school boycott attacked you by name saying that you were a "political opportunist" which you believe constituted a personal attack and caused "damage to your character and credibility, as a citizen, attorney and candidate." You state that you wrote WNET–TV and requested that it supply you with a script of the program and an opportunity to respond, but such request was rejected by the station on the ground that Mr. Chunga's brief remarks, although concededly unfavorable, were but a mild form of derision and did not constitute a personal attack. You request the Commission to find WNET–TV in violation of the personal attack rule and to direct it to afford you an adequate opportunity to present a response.

We note that in response to a Commission inquiry of May 23, WNET–TV stated that in addition to its belief that the remark in question did not constitute a personal attack, the statements in question were made in the course of a bona fide news interview and as such would be exempt from the personal attack rule under Section 73.679 (b) (3) of the Commission's Rules.

As defined by Section 73.679 (a), a personal attack is an attack "made upon the honesty, character, integrity or like personal qualities of an identified person or group." In reviewing personal attack complaints, the Commission's function is not to substitute its own judgment for that of the licensee, but to determine whether the licensee has acted reasonably and in good faith in arriving at its decision as to whether a personal attack has been made. *Sidney Willens and Russell Millin*, 33 FCC 2d 304, (1972).

We are unable to conclude that WNET–TV was unreasonable in its judgment that the "political opportunist" remark by Mr. Chunga did

[1] Pleadings filed are as follows:
1. Complaint filed May 8, 1973.
2. WNET–TV's response of June 1, 1973.
3. Complainant's reply to WNET–TV's response filed June 19, 1973.

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not constitute a personal attack within the meaning of the Commission's Rules and precedent. While the comment may have been a disparaging one, this is not a situation where we feel the Commission would be warranted in overriding the judgment of a licensee. Not every unfavorable reference to an individual constitutes a personal attack. See *Jack Luskin*, 23 FCC 2d 874 (1970); *Mrs. Frank Diez*, 27 FCC 2d 859 (1971).

With respect to WNET–TV's general obligations under the fairness doctrine, it should be noted that fairness only requires the broadcaster to take affirmative steps to afford a reasonable opportunity for presenting contrasting viewpoints on controversial issues of public importance in the station's overall programming. Because 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, no particular person or group is entitled to appear on the station. In this regard, WNET–TV's May 23 response to Commission inquiry indicates that contrasting viewpoints on the school boycott received considerable coverage in the station's overall programming.

In view of the foregoing conclusion that a personal attack did not occur, it is not necessary for us to reach a determination as to whether the *Black Journal* is entitled to exempt programming status. Therefore, we are unable to conclude that WNET–TV was unreasonable in its judgment that the remark in question did not constitute a personal attack or that the station has otherwise failed to comply with the fairness doctrine. Accordingly, no further Commission action appears to be warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

ARTHUR L. GINSBURG,
Acting Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 73-950

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUESTS FOR WAIVER OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k) OF THE COMMISSION'S RULES) IN CONNECTION WITH SPORTS EVENTS, BY COLUMBIA BROADCASTING SYSTEM AND NATIONAL BROADCASTING CO.

MEMORANDUM OPINION AND ORDER

(Adopted September 11, 1973; Released September 14, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER H. REX LEE CONCURRING IN THE GRANT OF THE WAIVERS FOR SPORTS RUN-OVER BUT DISSENTING TO GRANT OF OTHER WAIVER REQUESTS. COMMISSIONER JOHNSON DISSENTING.

1. The Commission here considers certain requests for waiver of the prime time access rule (Section 73.658(k) of the Commission's Rules) with respect to various sports events to be televised on networks during the fall and early winter of 1973. These requests were filed by Columbia Broadcasting System, Inc. (CBS) on August 24, 1973 and by National Broadcasting Company, Inc. (NBC) on August 7, 1973, with additional requests and information submitted August 23 and August 31. Since a general decision in the overall prime time access rule proceeding, Docket 19622, is expected fairly early this fall, we do not here consider the post-season pro football games included in these requests, occurring after December 16, 1973, which present some circumstances different from regular-season games.

2. Aside from the post-season football games mentioned, CBS requests a blanket waiver to cover its Sunday fall NFL National Football Conference football telecasts, tentatively scheduled to include 21 games on 13 dates between September 16 and December 9. All of these games, and whatever others may be included in the schedule, will start no later than about 4 p.m. E.T. (3 p.m. C.T., etc.), and waiver is sought only in the event of a "runover" beyond three hours, or after 7 p.m. E.T., to permit stations to carry the games to completion plus the usual three hours of evening CBS programs.

3. NBC's request is somewhat more elaborate. It asks for a similar blanket "runover" waiver for national or regional coverage of regular season NFL American Football Conference games scheduled to begin no later than 4 p.m. E.T. and which are expected to conclude no later than 7 p.m. E.T. (6 p.m. C.T.) The request also includes various post-season baseball game telecasts in October, the American and National League playoff games and then the World Series. These may be summarized as follows:

(a) "Runover" waivers for afternoon playoff and World Series games (the latter, at least, preceded by pre-game shows) where the telecast, or the second game of a playoff double-header, will start about 4 p.m. E.T., or where two playoff games will start at about 2 and about 3:30 E.T. and NBC will switch back and forth during the latter part of the afternoon;

(b) Two or three weekday evening World Series games starting with a pregame show at 8 p.m. E.T.:

(1) "Runover" waiver is sought for the Mountain time zone stations, where the program will start at 6 p.m. E.T. and could run later than 9 p.m. M.T. (prime time in the Mountain zone is 6–10 p.m.).

(2) For Pacific time zone owned and affiliated stations, where prime time is 7–11 p.m. P.T. and the World Series telecast (evening in the East) will occur from about 5 to 8 p.m. P.T., it is requested that stations be permitted to schedule programs on the assumption that the World Series telecast will occupy only one hour of prime time, so that stations may follow it with two hours of material such as a special West Coast "network" schedule for NBC affiliates, or movies which are "off-network" and recently shown in the market.[2]

(3) Extension of the "network news following an hour of local news" waiver concept, which has prevailed under the rule,[3] to permit presentation of the NBC evening news by West Coast stations immediately *after* the World Series, about 8 p.m. P.T., if they have preceded the World Series with an hour of local news or public affairs programs.

4. CBS and NBC make essentially the same arguments. It is asserted that "runover" waivers were specifically contemplated in the original Report and Order in Docket No. 12782[3] and have been granted for the past two seasons; and, for that matter, all policy questions presented by these requests have been previously acted on.[4] Both networks argue that we should reach a decision now, and not wait until the overall proceeding concerning the prime time access rule, Docket No. 19622 is decided. That decision is not expected before late September and the parties here must make scheduling and sales plans which cannot wait until that time. They also point out that a decision now would be in accordance with the Commission policy of maintaining the *status quo*, which, in these instances, would include waivers of types previously granted.[5] The networks say that all of the events, including pre-game shows, if there are to be any, have been scheduled in such a way so as to minimize the possibility of intrusion into the access period by runovers, or to limit such intrusions to the less populous time zones. They also state that although there have been numerous requests for these runover type waivers, they are, for these events at least, seldom used (none for CBS regular season football games in 1972). Finally, both networks argue that the full presentation of the events under consideration to their conclusion is in the public interest.

DISCUSSION AND CONCLUSIONS

5. Upon consideration of the above, we are of the view that, except as noted below, these requested waivers should be granted. With respect to the CBS and NBC regular-season professional football games,

[1] In the rest of the U.S., the World Series telecast will be the only NBC programming on these evenings.

[2] Footnote 36 of the Report and Order in Docket No. 12782, 23 FCC 2d 382, 395 (May 7, 1970).

[3] Footnote 35 of the Report and Order in Docket 12782, 23 FCC 2d 392.

[4] *Various Requests for Waivers in Connection With Sports Events*, 32 FCC 2d 58 (October 1971); and 37 FCC 2d 110 (September 1972). See also *Network News Following Sports Events*, 37 FCC 2d 573 (October 1972).

[5] The networks cite *Mutual of Omaha* (*Wild Kingdom*), FCC 73–696, 27 R.R. 2d 1567, released July 17, 1973.

waiver for these has been granted on the same basis in two previous years. It appears from past experience unlikely that they will last longer than three hours in the normal course of events, so that a 4 p.m. E.T. starting time appears appropriate and within the principle of "footnote 35", noted above. The same appears true of NBC's afternoon playoff and World Series baseball games, with one qualification: That where a pre-game show is involved, the game itself should start by 4:15 p.m. E.T. (in other words, we are prepared to assume that these games themselves will last no longer than 2:45 in the absence of extra inning play, but not that they will be completed in 2:30 or less).

6. As to the evening World Series requests, as has been mentioned before these present no problems in the Eastern and Central time zones, which is where the bulk of the top 50 markets and their TV homes are located, provided they start no earlier than 8 p.m. E.T. As was the case last year (see 37 FCC 2d 573), we believe that waiver is warranted, to take care of possible "runovers" beyond three hours for the game telecasts themselves, in the Mountain time zone, and, on the West Coast, to permit the carriage of the game itself at the beginning of prime time, plus two additional hours of material which is not eligible for unrestricted presentation during prime time under the rule (e.g., recently shown movies). We have noted in previous decisions the problems involved in these zones, when special live "simultaneous" material such as sports must be fitted into the usual pattern of delayed broadcasting; and we believe a similar approach is appropriate here. With respect to permitting Mountain and Pacific zone stations to carry the NBC nightly news on these evenings after the World Series (provided the station has presented an hour of local news just before the World Series), we granted this waiver last year (see 37 FCC 573) and see no reason to change our conclusions. However, it appears that this waiver should be subject to the same conditions imposed in our 1972 action: that these stations regularly carry on the same day of the week (in the absence of live, simultaneous network programming) an hour of local news or public affairs followed by network news; that they in fact carry on this particular day an hour of local news or public affairs immediately before the World Series; and that (taking into account the fact that two waivers apply to these situations) a half-hour of prime time on these stations remain free for the presentation of non-network material not restricted by the rule.

7. As to the arguments concerning the *status quo*, pending the overall decision, this policy was adopted late last year and early in 1973, when it appeared that decision in Docket 19622 would be reached by May or June of this year. This has not occurred; moreover, while decision is expected rather shortly, it does not appear likely that any substantial change in the rule will be put into effect before fall 1974. Therefore, as stated in another recent decision, we have, to some extent, modified this principle. However, in connection with the present matters, there is nothing in the comments filed in Docket 19622, or other circumstances, which indicate an approach different from that which has been adopted in the past, and therefore we are continuing the waiver policies adopted last year and before.

8. In view of the foregoing, IT IS ORDERED, That: notwithstanding the limitations contained in Section 73.658(k), during the period ending December 16, 1973:

(a) Stations affiliated with (or owned commonly with) CBS and NBC networks MAY CARRY TO COMPLETION professional baseball or regular-season football games (but not including any post-game material), without any of the time counting toward the permissible three hours of network prime-time programming, provided the game itself starts no later than about 4 p.m. E.T., or where it is a playoff or championship baseball game preceded by a "pre-game show" and the game itself starts no later than about 4:15 p.m. E.T.;

(b) Stations affiliated or under common ownership with the NBC network in the Mountain and Pacific time zones MAY SCHEDULE AND PRESENT NBC evening World Series telecasts, and other NBC or off-network or recently shown movie programming the same evening, on the assumption that the World Series telecast occupies no more than three hours of prime time in the Mountain time zone and no more than one hour of prime time in the Pacific time zone; and

(c) Stations affiliated or under common ownership with the NBC network in the Mountain and Pacific time zones MAY PRESENT the *NBC Nightly News* following the World Series telecasts, without its counting toward the permissible three hours of network, off-network or recently shown movie programming, where all of the following conditions are met:

(1) At least a half-hour of prime time on the evening involved shall be devoted to material which is not network programming, off-network material, nor feature film shown in the market within the past two years;

(2) the station presents, immediately before the World Series, a full hour of local news or public affairs (except for commercial announcements or PSA's); and

(3) the station's regular schedule, when live simultaneous network programming is not involved, for the same day of the week as that involved in the waiver, includes an hour of local news or public affairs and a half-hour of network news between the hours of 5 and 7:30 p.m. local time.

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

F.C.C. 73-991

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of RCA GLOBAL COMMUNICATIONS, INC. Proposed Revisions to Tariff F.C.C. No. 58 for AVD Channels Between Guam and Thailand	Docket No. 19542

ORDER

(Adopted September 19, 1973; Released September 24, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. We have before us a Motion to Terminate this proceeding filed on June 12, 1973 by RCA Global Communications, Inc. (RCA). RCA has also requested special permission to file on less than statutory notice a rate of $4775 per month for alternate voice/data channels between Guam and Thailand to become effective one day after the termination of this proceeding. This filing has not been opposed by the other parties to the proceeding.

2. RCA had originally filed a rate of $4475 per month for these channels. However, since RCA had shown that its costs for this service were $4822 per month, we suspended it and ordered an investigation, 35 F.C.C. 2d 891 (1972). A prehearing conference was held before Assistant Chief Administrative Law Judge Jay Kyle on September 11, 1972, at which time it was agreed that discussions should take place between the parties and the Commission staff to determine whether stipulations could be agreed upon that would resolve any factual issues, leaving any legal issues to be decided on the basis of briefs. After much discussion, it appears that an agreement complete enough to resolve this proceeding is not possible. However, rather than face the prospect of a lengthy hearing, RCA requests permission to withdraw the $4475 rate and replace it with a $4775 rate.* This new rate appears to be compensatory and will satisfy the objections to the old rate and thus obviates any need for continuing this investigation.

Accordingly, IT IS ORDERED, that the above-referenced Motion to Terminate this proceeding filed by RCA Global Communications, Inc. is GRANTED and Docket No. 19542 is hereby TERMINATED;

IT IS FURTHER ORDERED, that RCA Global Communications, Inc. is given special permission to withdraw its rate of $4475 per month for alternate voice/data channels between Guam and Thailand and to file on less than statutory notice a rate of $4775 per month to become effective one day after this Order is adopted.

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

*The $4822 monthly cost originally shown by RCA has subsequently been reduced to $4775 as the result of several actual cost components being lower than forecasted.

F.C.C. 73-893

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
SALEM BROADCASTING CO., INC., SALEM, N.H.	Docket No. 19434 File No. BP-18325
NEW HAMPSHIRE BROADCASTING CORP., SALEM, N.H.	Docket No. 19435 File No. BP-18479
SPACETOWN BROADCASTING CORP., DERRY, N.H.	Docket No. 19436
For Construction Permits	File No. BP-18492

MEMORANDUM OPINION AND ORDER

(Adopted September 6, 1973; Released September 11, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. This proceeding, involving the above-captioned mutually exclusive applications for new daytime only Class II-D stations on 1110 kilohertz, was designated for hearing on various issues by our Memorandum Opinion and Order, FCC 72-136, 33 FCC 2d 672, released February 15, 1972.

2. Presently before us are the following matters: (a) a joint petition for waiver, filed March 20, 1973, by Salem Broadcasting Co., Inc. (Salem), and New Hampshire Broadcasting Corp. (New Hampshire); (b) oppositions filed March 29 and 30, 1973, by the Chief, Broadcast Bureau and by Spacetown Broadcasting Corp. (Spacetown), respectively; and (c) a joint reply filed April 12, 1973, by Salem and New Hampshire. In order to place the above matters in their proper perspective, it is necessary to recount briefly herein some recent developments which have substantially altered the posture of this proceeding since it was last before us.

3. After we designated this proceeding for hearing Spacetown filed a motion to enlarge issues based upon information contained in the 1970 U.S. Census Report, contending that the most recent information now available for Salem, New Hampshire, raises substantial and material questions of fact regarding whether or not the proposals of Salem and New Hampshire still fall within the exceptions to the Commission's prohibited overlap rule, Section 73.37.[1] In its Memorandum Opinion and Order, FCC 72R-333, 38 FCC 2d 1970, released November 22, 1972, the Review Board generally agreed with Spacetown's contentions in this respect and, accordingly, added hearing issues to

[1] At the time of designation and based upon the most recent information then available to the Commission (1960 U.S. Census Report), we concluded that even though these two proposals violated Section 73.37(a), they were nevertheless acceptable for filing and could be granted, if otherwise appropriate, because they qualified under an exception to the overlap rule [Section 73.37(b)], which provides that a first standard broadcast station in a community of any size wholly outside of an urbanized area may be authorized notwithstanding prohibited overlap.

this proceeding to determine whether petitioners' applications violate Section 73.37a), and if so, whether the proposals still fall within the exceptions to the overlap rule as contained in Section 73.37(b) or whether they should be dismissed.[2]

4. In view of the above developments, Salem and New Hampshire (hereafter petitioners) have filed the instant joint petition for waiver of Section 73.37 of the Rules. Essentially, they contend that they should not have been penalized because the town of Salem has increased in population; that they have prosecuted their applications in good faith and had no control over these new developments which now call into question their prior eligibility under the exceptions to the Commission's overlap rule; that, in any event, their proposals conform to the spirit of the Commission's pronouncements set forth in the *Report and Order* [Docket No. 15084, 29 FR 9492 at 9495, 2 RR 2d 1658 at 1668 (1964)] adopting this particular rule and the exceptions thereto; [3] and that, consequently, a waiver is justified in this case.

5. We believe that it would be premature to consider the merits of the petitioners' request for waiver at this juncture of the proceeding and on the basis of the information before us.[4] To adopt such a procedure now would undermine the orderliness of the Commission's processes. We do not, however, believe that the events described above should foreclose development at the evidentiary hearing of the parties' arguments for and against waiver, if it is determined that the petitioners' applications do not qualify for an exception to the rule.[5] The actions taken herein should not be construed as indicating how the waiver request should be disposed of, if indeed such a disposition is eventually required.

6. In view of the foregoing, we are convinced that both the public interest and the Commission's processes will be better served by dismissing the petitioners' request for waiver on the grounds that it is prematurely before us, and by modifying, of our own motion, the appropriate hearing issues in this proceeding in accordance with the above determinations. Also on our own motion, we shall delete hearing Issues (a) and (d), which were added by the Review Board (38 FCC 2d 170 at page 182). In our opinion, the matters to be explored under those hearing issues were acknowledged by the petitioners upon the filing of their applications and were appropriately considered prior to the Commission's acceptance of such applications; the recent developments in this proceeding have not raised any substantial or material questions of fact

[2] The Review Board also refused to consider both a request for waiver of Section 73.37 by Salem and New Hampshire and a request to consider proffered information submitted by these two applicants which attempted to show their eligibility under another exception to the overlap rule.

[3] Petitioners contend that their proposals will achieve the results stated by the Commission in that rulemaking proceeding; *i.e.*, to provide at least one local broadcast station to as many communities as possible, except where relatively small communities (under 25,000 population) "largely of a suburban character" are involved, because such communities may be served by stations in nearby urban areas.

[4] Any determinations by us with respect to a waiver of the rule at this stage of the proceeding may very well be academic, since petitioners have contended in these pleadings, as well as in pleadings before the Review Board, that their proposals in fact qualify under a different exception contained in Section 73.37(b) when tested against the most recent population figures for the town of Salem.

[5] As we construe the Review Board's Memorandum Opinion and Order (*supra*, at paragraph 3) adding hearing issues [Issues (b) and (e)] to this proceeding, in the event it is determined in the evidentiary hearing that the petitioners do not now qualify under the exceptions contained in Section 73.37(b), their applications could be summarily dismissed without the opportunity to present their cases for waiver of the rule.

regarding these matter; and consequently, no useful purpose would be served by further delving into these matters in the evidentiary hearing.

7. Accordingly, IT IS ORDERED, That the joint petition for waiver, filed March 20, 1973, by New Hampshire Broadcasting Corp. and Salem Broadcasting Co., Inc., IS DISMISSED without prejudice.

8. IT IS FURTHER ORDERED, That the hearing issues added in this proceeding by the Review Board (38 FCC 2d 170 at 182) ARE MODIFIED as follows:

(1) Hearing Issues (a) and (d) ARE DELETED in their entirety;

(2) Hearing Issue (b) IS AMENDED to read: "to determine whether the application of Salem Broadcasting Co., Inc., still falls within any of the exceptions contained in Section 73.37(b) of the Commission's Rules and, if not, whether a waiver of Section 73.37 should be granted or the application dismissed"; and

(3) Hearing Issue (e) IS AMENDED to read: "To determine whether the application of New Hampshire Broadcasting Corp. still falls within any of the exceptions contained in Section 73.37(b) of the Commission's Rules and, if not, whether a waiver of Section 73.37 should be granted or the application dismissed."

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

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
COMMITTEE TO ELECT ABRAHAM D. BEAME,
NEW YORK, N.Y.
Concerning Section 315, Political Broadcast Re Station WNBC–TV

SEPTEMBER 13, 1973.

JEROME M. KAY, Esq.,
Committee to Elect Abraham D. Beame,
111 East 48th Street,
New York, N.Y.

DEAR MR. KAY: This is in reply to your telegram dated September 11, 1973 concerning the appearance of Mr. Abraham D. Beame on Television Station WNBC–TV, New York, New York, during the September 15, 1973 Democratic National Committee's (hereinafter DNC) telethon on the NBC–TV network.

In your correspondence you state that the telethon has been paid for by DNC; that the New York State Democratic Committee has agreed to pay the "local cut-in" charges for one to five minutes of local time during the DNC's telethon; that the time will feature Mr. Beame, the legally qualified Democratic candidate for Mayor of New York City, who will make an appeal for contributions to the state and national Democratic Committees; that WNBC–TV has refused your request for Mr. Beame's appearance on the basis that the licensee would have to provide equal time at equal rates to other legally qualified candidates; that the licensee's refusal to allow you to purchase time constitutes censorship, violates Section 315 of the Communications Act, and would deprive the New York State Democratic Party of the opportunity to generate important campaign funds; and that the Commission should direct WNBC–TV to permit Mr. Beame to appear during the local time.

NBC, licensee of WNBC–TV, was furnished with a copy of your telegram and orally advised the Commission that it will sell to Mr. Beame 30 or 60 second spot announcements in "station break time" during the course of the DNC telethon. However, it will not allow Mr. Beame to appear during the portion of the time purchased on the NBC network by DNC.

Section 315 of the Communications Act of 1934, as amended, states that if a licensee permits any person who is a legally qualified candidate for any public office to use a broadcasting station, he must afford "equal opportunities" to all other such candidates for that office in the use of such broadcasting station. If a legally qualified candidate appears on a bona fide newscast, bona fide news interview, bona fide news documentary or on-the-spot coverage of a bona fide news event,

such an appearance will not be deemed a use of a broadcasting station within the meaning of Section 315.

The Democratic National Committee telethon is not an exempt program within the meaning of Section 315. Therefore a "use" of the broadcast facilities by Mr. Beame, a legally qualified candidate for Mayor of New York City, would create an obligation on the part of WNBC–TV to provide "equal opportunities" to all other legally qualified opposing candidates. Neither Section 315 nor any other Commission rule, regulation or policy requires a licensee to sell specific time segments to a candidate for public office or to permit a candidate to appear on any particular program. *KTRM*, 40 FCC 331(1962); *W. Roy Smith*, 18 FCC 2d 747 (1969). Licensees are required to make their facilities effectively available to candidate for public office. However, there is no indication here that WNBC–TV has failed to do this with respect to Mr. Beame's candidacy, particularly since it is willing to sell Mr. Beame station break time during the telethon, and you do not allege that WNBC–TV has refused to sell time to Mr. Beame to advocate his candidacy. In this connection, it should be noted that you wish Mr. Beame to appear "for the purpose of soliciting contributions to the state and national Democratic Committees," and you do not contend that WNBC–TV has refused to permit a representative of the local or state Democratic Party to appear to solicit funds.

Under these circumstances, your request must be 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.

F.C.C. 73-970

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTIONS 83.326(a) AND 83.364(a)(3) TO ALLOW SHIPS AND SURVIVAL CRAFT ENGAGED IN PUBLIC CORRESPONDENCE TO DEFER THE 15-MINUTE IDENTIFICATION REQUIREMENT UNTIL THE END OF A MESSAGE OR THE END OF A TELEPHONE CONVERSATION	Docket No. 19776

REPORT AND ORDER

(Adopted September 19, 1973; Released September 24, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. On July 2, 1973, we released a Notice of Proposed Rule Making in this docket to amend the rules as indicated in the caption above. That notice was published on July 9, 1973, in the Federal Register (38 F.R. 18256) and provided for the filing of comments and reply comments on August 13, 1973, and August 22, 1973, respectively. The time for filing comments and reply comments has expired, and only one comment was filed. That comment was by the American Institute of Merchant Shipping and supported the proposed rule changes. We conclude, therefore, that the rules should be changed as proposed.

2. Accordingly, IT IS ORDERED, That Part 83 of the rules IS AMENDED as indicated in the attached Appendix effective November 2, 1973. Authority for the promulgation of these rules is contained in Section 4(i) and Section 303(e), (f) and (r) of the Communications Act of 1934, as amended.

3. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

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

APPENDIX

Part 83 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 83.326(a) is amended to read as follows:

§ 83.326 Identification of stations.

(a) All radiotelegraph emissions of a ship station or a survival craft station shall be clearly identified by transmission therefrom of the official call letters assigned to that station for telegraphy by the Commission. These call letters shall be transmitted by telegraphy in accordance with § 83.325 and the procedure set forth in the International Radio Regulations and by means of the class of emission normally used by the station for telegraphy: Provided, That they shall be transmitted at intervals not exceeding 15 minutes whenever transmission is sustained for a period exceeding 15 minutes, except when a ship station is engaged

in transmitting public correspondence communications, the identification may be deferred until completion of each communication with any other station.

* * * * * * *

2. Section 83.364(a)(3) is amended to read as follows:

§ 83.364 Identification of station.

(a) * * *

(3) At intervals not exceeding 15 minutes whenever transmission is sustained for a period exceeding 15 minutes, except when a ship station is engaged in transmitting public correspondence communications in which case the identification may be deferred until completion of each communication with any other station.

* * * * * * *

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
STRAUS COMMUNICATION, INC., UNITED CHURCH OF CHRIST, AND CONSUMER FEDERATION OF AMERICA
For Declaratory Ruling Regarding Announcements by National Association of Broadcasters

SEPTEMBER 7, 1973.

STRAUS COMMUNICATION, INC.,
OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST,
CONSUMER FEDERATION OF AMERICA,
c/o Moore, Berson & Bernstein, 660 Madison Avenue, New York, N.Y.

GENTLEMEN: This refers to your May 14, 1973 request for a declaratory ruling regarding the distribution of two separate series of promotional announcements (titled "Radio Free America") by the National Association of Broadcasters (NAB) to member radio stations throughout the United States.[1] Specifically, you ask:

(1) Do these announcements (the NAB spots), either singly or as a series, constitute the discussion of one side of a controversial issue of public importance within the meaning of the Commission's fairness doctrine?
(2) Do these announcements require sponsor identification under Section 73.119(d) of the Commission's Rules?
(3) Should these announcements be logged as commercial?

In support of your request you argue that the NAB spots are not mere promotional announcements, but are industry arguments against radio advertising reforms and changes in the commercially-supported broadcast system. You contend that "radio advertising" is a controversial issue of public importance, citing several aspects of broadcast advertising which are the subject of FCC and FTC inquiries as well as present consumer and public-interest group efforts to effect major changes in the broadcast-advertising system policies. You state that "the NAB has attempted to organize a massive campaign to answer the people who 'would like to change our broadcast system so drastically that it could no longer operate as a free enterprise,'. . . while depriving these groups of an opportunity to explain the arguments for regulation of commercials."

You further state that the Office of Communication, United Church of Christ, has written to a number of radio stations "offering spot announcements presenting a consumer viewpoint on issues of broadcast regulations and advertising discussed in the NAB spots."

[1] Other pleadings include NAB's "Response to Request for Declaratory Ruling" of May 31, 1973, Stern Community Law Firm's comments of June 7, 1973, and your "Memorandum in Reply to Response to Request for Declaratory Ruling" of June 8, 1973.

Finally, you contend that a "prompt declaratory ruling" is needed since otherwise the Commission "will probably be burdened with a multiplicity of repetitious complaints"; that licensees "will be put to the inconvenience and expense of answering these complaints"; and that groups and individuals associated with you will be put to much effort and expense "which may be fruitless or avoidable." You state that station WMCA, New York, "has been advised that the NAB spots are available" and believes that the ideas expressed "are significant and may be controversial." You further assert that "WMCA seeks guidance as to its responsibilities as a licensee."

In response, the NAB contends that "the issuance of a declaratory ruling in this matter would be inappropriate" and also that, "in any event, the spot announcements in question do not present one side of a controversial issue of public importance." First, NAB submits that the spots are part of an annual broadcast promotional campaign, but that since station WMCA is not a member of NAB, and since contractual obligations prohibit the broadcast of the spots on WMCA, the station cannot be regarded as a party in interest. In addition, NAB argues that you have not complied with established Commission procedures for fairness doctrine complaints in that you failed to first contact licensees regarding your complaint, and that you failed to cite "any licensee's failure to comply with the fairness doctrine."

NAB asserts that declaratory rulings have no place in the Commission's administration of the fairness doctrine because "the licensee, not the Commission, must determine whether or not a controversial issue of public importance is involved." Further, NAB states that a declaratory ruling in this case would create a massive administrative burden, opening the door "to thousands of similar requests."

NAB claims that the spots "cannot be characterized as a controversial issue of public importance" because they simply inform the public how the system of broadcasting is supported by advertising, allowing broadcasting "to remain free of government control." NAB characterizes the spots as industry puffery and denies any reference to "consumerism" in the spots. Citing *Anthony R. Martin-Trigona*, 24 FCC 2d 157 (1970), NAB contends that the Commission has ruled that promotional announcements which deal with broadcasting in general do not raise fairness doctrine questions regarding implicit, specific aspects of broadcasting.

In reply to NAB's response, you concede that the request for declaratory ruling does not meet the "procedural requirements for filing fairness doctrine complaints", but you state that your motion is not a fairness complaint, but rather a request for declaratory ruling. You claim that the Commission has "often indicated that it would render interpretations to broadcasters who were uncertain about their obligations," and you state that the United States Court of Appeals for the Second Circuit sustained a Commission declaratory ruling concerning the broadcast of certain State lottery information. *New York Broadcasters Association* v. *U.S.*, 414 F. 2d 990 (1969). Moreover, you argue that the issues involved in the NAB spots are "national issues concerning the regulation of broadcast advertising" and that "the Commission has often entertained fairness complaints against networks under simi-

lar circumstances, even though the responsibility for program judgment lies with the licensee."

You assert that WMCA has standing because at least one other non-NAB station, WRVR, New York, has received the spot announcements. You claim that several thousand licensees received the NAB spots and that they "have been broadcast by many of them."

Finally, you argue that the spots themselves clearly relate to "people who argue for reforms which broadcasters contend would destroy the economic base of broadcasting." You distinguish *Anthony R. Martin-Trigona, supra*, asserting that it "did not deal with this kind of campaign, but rather with some announcements about 'free, commercially-sponsored television' which Mr. Martin-Trigona thought represented an implied attack on pay television." You state that this "was nothing like the many faceted argument about the social benefits of commercial advertising, the references to dictatorships and attacks on critics which characterize the Radio Free America series." [2]

Your request apparently is based upon Section 1.2 of the Commission's Rules and Regulations which states:

> The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

The issuance of a declaratory ruling, however, is a matter of Commission discretion. See Section 554(e), Title 5, Part I, Chapter 5, Subchapter II of the Administrative Procedure and Judicial Review Act. In matters concerning the applicability of the fairness doctrine to particular broadcasts, we do not believe it is appropriate to issue declaratory rulings. At the core of the fairness doctrine is the licensee's obligation to make the initial determination as to whether a controversial issue of public importance is involved and, if so, how best to present contrasting views on the issue if they have not already been presented. It has been the Commission's experience that if, prior to recourse to the Commission, the complaint is brought to the licensee's attention, the licensee will often be able to show that it has fairly treated the issue in question through its overall programming or otherwise satisfy the complainant. If, after contacting the licensee, the complainant is not satisfied that the licensee has fulfilled its obligations and if the Commission is so advised in pertinent, factual detail (see *Allen C. Phelps*, 21 FCC 2d 12, 13 (1969)), then the Commission will, in appropriate cases, request a statement from the licensee and provide the complainant with an opportunity to comment on the licensee's statement if the complainant so desires. Thereafter, on the basis of all available information, the Commission will attempt to determine whether the licensee's actions under the circumstances can be said to be reasonable and in good faith. "The Commission acts in essence as an 'overseer' but the initial and primary responsibility for fairness, bal-

[2] In comments filed by Stern Community Law Firm it is argued that many "consumer and public interest groups" have expressed "strong disagreement" with the NAB position (communicated by the NAB General Counsel to licensees) that the messages do not involve the discussion of a controversial issue of public importance. Stern argues that "the reluctance of broadcasters to present points of view contrary to their own on these subjects and the obvious self-serving nature of the announcements in question necessitates Commission action . . . [concerning] the uncertainty surrounding the proper logging and identification procedures to be followed."

ance and objectivity rests with the licensee." *CBS* v. *DNC* (BEM), 412 U.S. — (May 29, 1973).

Your petition seeks a departure from these established procedures for handling fairness doctrine complaints in favor of a declaratory ruling. However, you advance only general allegations of a potential administrative burden and inconvenience and expense to broadcasters and concerned listeners.[3] While you refer to an adverse ruling by the NAB General Counsel, who stated that the spots do not generate fairness doctrine obligations for licensees, you present no evidence that the NAB General Counsel's advice (which is not binding upon licensees) has been relied upon by individual licensees, and we do not believe that his view raises a controversy warranting our adoption of a special procedure with respect to this matter. The distribution of the spots to numerous licensees does not indicate whether or not there has been a failure to meet the requirements of the fairness doctrine by any licensee, or raise a duty in any licensee to demonstrate compliance. *Ms. Evelyn Sarson* (ACT), 39 FCC 2d 702, 704–705 (1973). We believe that normal fairness procedures should be followed here.

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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[3] Some of the spots apparently ran for several months prior to the filing of this request and, except for the June 28, 1973 complaint against KRRV, Sherman, Texas, filed by the United Church of Christ, the Commission is unaware of any fairness doctrine complaint or of any request from a licensee regarding its logging or sponsorship identification requirements.

F.C.C. 73–928

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re Application of TEXAS BROADCASTING CORP., ASSIGNOR and THE TIMES MIRROR CO., ASSIGNEE For Assignment of Licensee of Station KTBC–TV, Austin, Tex.	BAPLCT–109

SEPTEMBER 6, 1973.

THE TIMES MIRROR CO.,
Times Mirror Square,
Los Angeles, Calif.

GENTLEMEN: This is with regard to your application for assignment of license of Station KTBC–TV, Austin, Texas from Texas Broadcasting Corporation to the Times Mirror Company (BAPLCT–109).

Pending before the Commission is a petition filed against the renewal of Times Mirror Company's license for Station KDFW–TV, Dallas-Fort Worth, Texas by Civic Telecasting Corporation which charges Times Mirror and two other licensees of Dallas-Fort Worth stations of conspiring to monopolize the broadcast industry in that market. Your assignment application, by amendment filed on May 31, 1973, disclosed the pendency of a suit, *SEC* v. *GeoTek Resources Fund, Inc.*, et al. U.S. District Court, Northern District of California, Civil Action No. C 73–0819–SW, which contains allegations of fraud and misrepresentations and in which Otis Chandler, Vice Chairman of the Board and Director of Times Mirror and publisher of its newspaper, *The Los Angeles Times*, is named a defendant. By amendment to your assignment application filed on July 17, 1973, Otis Chandler has stated that in the event of a grant of the KTBC–TV application, he will not participate either directly or indirectly in the operation of KTBC–TV or in any corporate decisions relating thereto until the earlier of the resolution of the GeoTek suit in his favor or until the Commission approves of such participation.

Additionally, the assignment application shows that Aetna Life and Casualty Company owns in excess of one percent of Times Mirror and in excess of one percent of other companies with multiple broadcast holdings. These interests put Aetna in violation of the Commission's multiple ownership rules (Sections 73.636, 73.240 and 73.35 of the Rules). Aetna, on March 30, 1973 filed a request for rulemaking in connection with its ownership interests (RM–2169) and assignee requests that the application be granted subject to the outcome of the Aetna petition.

In view of the above matters and based upon our determination that the applicants are otherwise fully qualified and that the public interest will be served thereby, the Commission has this day granted your

application for assignment of license of Station KTBC–TV subject to the following conditions:

1. This grant is made subject to the outcome of and without prejudice to any action the Commission may deem necessary as a result of the final determinations in the following proceedings:

(a) The petition to deny filed against the pending license renewal of KDFW–TV, Dallas-Fort Worth, Texas by Civic Telecasting Corporation;

(b) The Petition filed on March 30, 1973 by Aetna Life and Casualty Company for rulemaking in connection with its ownership interests in broadcast licensees (RM–2169).

(c) *SEC v. GeoTek Resources Fund, Inc., et al.*, U.S. District Court, Northern District of California, Civil Action No. C 73–0819–SW.

2. This grant is also made subject to the condition that Otis Chandler be effectively separated from participation directly or indirectly in the operation of KTBC–TV or in any corporate decisions relating thereto until such time as the Commission affirmatively acts to dissolve these restrictions. This condition is without prejudice to whatever action the Commission may deem appropriate as a result of the charges against Mr. Otis Chandler in the case of *SEC v. GeoTek Resources Fund, Inc.*, et al. U.S. District Court, Northern District of California, Civil Action No. C 73–0819–SW or the charges against him in related private civil suits.

Chairman Burch abstaining from voting. Commissioner Johnson not participating. Commissioner H. Rex Lee dissenting and issuing a statement. Commissioners Reid and Wiley concurring in the result.

By Direction of the Commission,
Vincent J. Mullins, *Acting Secretary.*

Dissenting Statement of Commissioner H. Rex Lee

I cannot agree with the majority's decision to grant, on a conditional basis, the application for assignment of the license of Station KTBC–TV, Austin, Texas, from Texas Broadcasting Corporation to The Times Mirror Company. The assignee is the parent corporation of The Times Herald Printing Company, the licensee of Station KDFW–TV, Dallas-Fort Worth, Texas, and former licensee of Station KTTV, Los Angeles, California, and is effectively controlled by the Chandler family group, which, either directly or indirectly, owns about 35% of the issued and outstanding common stock of The Times Mirror Company. The license of Station KDFW–TV has been deferred since 1971 because of charges of antitrust violations by The Times Herald Printing Company and other Dallas-Fort Worth television licensees, which are contained in a pending civil suit and in petitions to deny the renewal applications of these Dallas-Fort Worth stations. The civil antitrust action, brought by UHF, Inc.,[1] charges the defendants with monopolizing the television industry in the Dallas-Fort Worth area and with discriminating against KMEC–TV through their newspaper interests. Action on Civic Telecasting Corporation's petition to deny is being deferred until the Commission has received sufficient

[1] See *UHF, Inc.* v. *The Times Herald Printing Company, T. H. Liquidating Company and the A. H. Belo Corporation*, Civil Action No. 3–4156–A, filed September 9, 1970, in the United States Court for the Northern District of Texas, Dallas Division. The principals of UHF, Inc., who were previously involved in the operation of UHF television Station KMEC–TV in Dallas, acting through Civic Telecasting Corporation, have formally petitioned to deny the license renewal applications of The Times Herald and the other Dallas-Forth Worth stations on essentially the same grounds raised in the antitrust action.

information relating to the allegations made in the civil antitrust suit and in the petition to deny to permit the discharge of its statutory responsibilities.[2]

The allegations raised in the Texas civil suit and in the petition to deny are extremely serious, especially since they concern the possible misuse of broadcast facilities in the furtherance of an alleged restraint of trade. Although the actions complained of apparently occurred prior to the acquisition of control of The Times Herald Printing Company by Times Mirror in 1970, it is significant that Times Herald principals retained important positions in the management of the Dallas television station and newspaper after the 1970 acquisition. Moreover, any remedial action that might be appropriate as a result of an inquiry into the antitrust charges would have to be directed against the licensee of KDFW–TV, which is currently owned by the assignee. In such circumstances, consideration of the assignment application should be deferred by the Commission until it disposes of the petition to deny, filed by Civic Telecasting Corporation. It only seems prudent to delay final approval of the KTBC–TV acquisition by Times Mirror until after the Commission has received sufficient information relating to the antitrust charges to permit a determination that Times Mirror principals bear no responsibility for the alleged wrongdoing and possess the necessary qualifications to acquire an additional broadcast facility. Therefore, I cannot agree with the majority's decision to condition grant of the KTBC–TV assignment application upon final disposition of the petition to deny the KDFW–TV license renewal.

I am also concerned about the fact that the assignee is currently involved in a civil antitrust action in a federal district court in California. In *Aero Products Research, Inc.* v. *The Times Mirror Company*, U.S. District Court, C.D.Cal., No. 71–1873–EC, the plaintiff, who manufactures and distributes aviation educational material and pilot supply items, has claimed that a wholly-owned subsidiary of Times Mirror, Jeppesen and Co., entered into a conspiracy with the plaintiff's largest distributor-customer in order to eliminate the plaintiff from competition. It has also been alleged that Times Mirror, Jeppesen and Sanderson Films, Inc. (another large seller of pilot supply items and aviation educational material which Times Mirror acquired in 1968) conspired and attempted to monopolize trade in the aviation educational industry. On May 29, 1973, the jury rendered a general verdict in which Times Mirror was found to have violated Sections 1 and 2 of the Sherman Act and pursuant to which the plaintiff was awarded treble damages in the amount of $2,303,301. On June 18, 1973, Times Mirror filed a motion for judgment notwithstanding the verdict or for new trial. On August 27, 1973, the assignee submitted an amendment to the assignment application in which it contends that

[2] It should be noted that by Order, FCC 73–542, released May 24, 1973, the Commission designated for hearing the renewal application of Station WFAA–TV, Dallas, with the competing application of WADECO, Inc. and conditioned any grant of the WFAA–TV renewal application on whatever action may be appropriate as a result of the Court's decision in the Texas antitrust action. The designation Order also indicated that further orders in the proceeding may be issued, depending upon the disposition of the Civic Telecasting Corporation petition to deny. At the same time, the Commission granted *pro forma* applications for assignment of the license of Stations WFAA–AM–FM–TV from A. H. Belo Corporation to Beaumont Television Corporation and for transfer of control of Beaumont from Belo to three voting trustees. See FCC 73–544, released May 23, 1973.

the pending antitrust litigation in California is not sufficient basis for the Commission to order a hearing or other inquiry into Times Mirror's character qualifications or to delay action on the KTBC–TV acquisition. The assignee asserts that no *final* determination has been made in the litigation and that even if final adjudication goes against it, no serious qualifications issue would be raised thereby, especially in light of Times Mirror's excellent overall record of compliance with the antitrust laws. Nevertheless, the assignee agrees to accept a grant of the assignment application that would specifically reserve the Commission's authority to take any appropriate action in light of future determinations in the *Aero Products Research* case.

In my own view, the jury's finding of antitrust misconduct by Times Mirror raises serious questions about the assignee's basic qualifications, and, as a result, I am unable to make the statutory determination required by Section 309 of the Communications Act that grant of the KTBC–TV assignment application, even on a conditional basis, is in the public interest. While it is true that the antitrust litigation in question has not progressed beyond the trial court stage and involves activities of the Times Mirror and its subsidiaries in a non-broadcast context. I cannot dismiss the significance of such anticompetitive conduct in terms of the qualifications of Times Mirror to acquire an additional broadcast facility. Unlike our decisions in *Westinghouse Broadcasting Company, Inc.*, FCC 62–24, 22 RR 1023, and *General Electric Company*, FCC 64–641, 2 RR 2d 1038, I am unable to rely on the quality of Times Mirror's past broadcast record or on the noninvolvement of the assignee's top management as reasons to favor grant of the assignment application. In such circumstances, I would either defer our consideration of the KTBC–TV acquisition until final resolution of the *Aero Products Research* case or designate the assignment application for hearing to inquire into the underlying basis for the antitrust suit and the effect thereof on the assignee's qualifications.[3] As a practical matter, I would not permit Times Mirror to acquire another broadcast facility at the very time that substantial questions have been raised concerning its conduct by a jury verdict in an antitrust suit in California. Apparently the antitrust litigation does not concern the majority, for it fails to impose a condition on the grant of the assignment application, which would specifically reserve the Commission's jurisdiction to take any necessary action as a result of a final decision in the *Aero Products Research* proceeding—in spite of the fact that Times Mirror has consented to the imposition of such a condition.

Another matter also deserves comment. In February, 1973, the Securities and Exchange Commission instituted a civil action against GeoTek Resources Fund in which Otis Chandler (shareholder and vice chairman of Times Mirror) has been named a defendant. See *SEC* v. *GeoTek Resources Fund, Inc.*, U.S. District Court, N.D. Cal., No. C 73–0819–SW. The SEC complaint charges the defendants with numerous violations of the Securities Act, with fraud and misrepresentation and with using the facilities of the *Los Angeles Times* (pub-

[3] See my dissenting statement in regard to the Commission's grant of the application for assignment of the license of Station WAXY–FM, Ft. Lauderdale, Florida, from Broward County Broadcasting Company to RKO General, Inc., Public Notice of December 26, 1972 (Report No. 11206).

lished by Times Mirror) to further unlawful schemes. The *GeoTek* case raises very serious questions concerning the character qualifications of Otis Chandler who, as vice chairman of board of directors and publisher of the assignee's principal newspaper, is a very substantial principal in the assignee. As noted earlier, the Chandler family effectively exercises control over Times Mirror, which enhances the importance of his positions in the assignee. Moreover, the alleged improper use of the *Los Angeles Times* in furtherance of fraudulent schemes compounds the gravity of the SEC charges insofar as they bear on Times Mirror's qualifications to acquire an additional broadcast facility. Even though the majority attempts to minimize the impact of the *GeoTek* case by imposing a condition on the grant of the assignment application, which precludes Mr. Chandler's participation in the KTBC–TV operation during the pendency of the *GeoTek* case and related private civil suits, the gravity of the SEC charges, especially those concerning the alleged misuse of newspaper facilities, raises substantial questions about Times Mirror's qualifications. Therefore, I would either delay consideration of the Austin acquisition until final resolution of the *GeoTek* proceeding or designate the assignment application for hearing to inquire into Mr. Chandler's conduct.

Finally, I must strongly disagree with the majority's decision to condition grant of the assignment application on the Commission's resolution of a petition for rule making, filed on March 30, 1973, by Aetna Life and Casualty Company. Aetna, in conjunction with other companies under common control, owns in excess of 1% of the stock of Times Mirror and other multiple broadcast licensees. These stock interests exceed the limitations imposed by our multiple ownership rules. In its pending petition, Aetna requests the Commission to change the benchmark applicable to insurance companies from 1% to 5%; however, the Commission has not initiated a rule making proceeding based upon Aetna's request and has not proposed any increase in the benchmark applicable to insurance companies under our multiple ownership rules. Therefore, it is inappropriate to permit the continued violation of our existing rules by Aetna pending our consideration of its rule making request and in the absence of a specific proposal by the Commission to raise the applicable benchmark. A proper condition on the grant of the assignment application would require Aetna's compliance with our multiple ownership rules within a reasonable period.

Since the matters noted above (with the exception of the Aetna investment in the assignee) raise serious questions about Times Mirror's qualifications, I am unable to conclude that grant of the KTBC–TV assignment application is in the public interest. As a result, I would not approve acquisition of the Austin television station by the assignee at this time.

Dissenting Statement of Commissioner H. Rex Lee

ERRATUM

In a statement, which I released on September 7, 1973, dissenting to the majority's decision to grant, on a conditional basis, the application for assignment of the license of Station KTBC–TV, Austin, Texas,

from Texas Broadcasting Corporation to The Times Mirror Company, I referred to the pendency of a civil action, brought by the Securities and Exchange Commission against GeoTek Resources Fund, in which Otis Chandler (a shareholder and vice chairman of Times Mirror) has been named a defendant.[1] In my dissenting statement, I indicated that the SEC complaint charged the defendants with numerous violations of the Securities Act, with fraud and misrepresentation and with using the facilities of the *Los Angeles Times* (published by Times Mirror) to further unlawful schemes and that the *GeoTek* case raised serious questions concerning the qualifications of Mr. Chandler, who is a very substantial principal in the assignee. I, therefore, urged that the gravity of the SEC charges, especially those concerning the alleged misuse of newspaper facilities, required a delay in the consideration of the Austin acquisition by Times Mirror until final resolution of the *GeoTek* proceeding or an evidentiary inquiry by the Commission into Mr. Chandler's conduct.

My statements about the nature of the SEC complaint were based on information supplied by the Broadcast Bureau, which it had obtained from the SEC. However, it appears that, contrary to my recitation of the facts, the formal SEC complaint contained no mention of the possible involvement of the *Los Angeles Times*. I regret that my dissenting statement was not accurate in this regard, and I take this opportunity to make the necessary correction. Nevertheless, I still adhere to my prior position that the charges contained in the SEC complaint and the other matters raised concerning Times Mirror raise substantial questions about the assignee's qualifications that effectively preclude my approval of the KTBC–TV acquisition.

[1] See *SEC* v. *GeoTek Resources Fund, Inc.*, U.S. District Court, N.D.Cal., No. C 73–0819–SW. The correct date for the institution of this civil action should be May, 1973 rather than February, 1973 as previously indicated on page 4 of my dissenting opinion.

F.C.C. 73R-327

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of: THE UNITED TELEPHONE CO. OF PENNSYLVANIA, INC. For Certificate of Convenience and Necessity to Construct and Operate Cable Facilities in Hanover, Pa.	Docket No. 19711 File No. P-C-7720

MEMORANDUM OPINION AND ORDER

(Adopted September 14, 1973; Released September 18, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. This proceeding involves the application of the United Telephone Company of Pennsylvania, Inc. (United Telephone) for a certificate of public convenience and necessity, pursuant to Section 214 of the Communications Act of 1934, as amended, to construct and operate channel service facilities in Hanover, Pennsylvania. By Memorandum Opinion and Order, 40 FCC 2d 359, 38 FR 8473, published April 2, 1973, the Commission designated the application for hearing on five issues, including an issue (Issue 4) to determine whether United Telephone has engaged in monopolistic or anti-competitive practices in dealing with cable television companies.[1] The issue was designated in response to allegations made by Radio Hanover, Inc. (Radio Hanover)[2] in a petition to deny United Telephone's application. Radio Hanover based its allegations, in part, on an anti-trust complaint it filed against United Telephone in a United States District Court in Pennsylvania.[3] The Commission also ordered that any grant to United

[1] The issue reads as follows:
(4) To determine whether United Telephone Company of Pennsylvania, in connection with the provision of cable television service in the Hanover, Pennsylvania, area has engaged in any practices which are:
(a) anticompetitive or monopolistic; or
(b) contrary to the public interest standards of the Communications Act; or
(c) in violation of any rule, decision, of [or] policy of the Federal Communications Commission.

[2] Radio Hanover is the licensee of two Pennsylvania radio stations: WHVR (AM), Hanover, and WYCR (FM), York.

[3] *Radio Hanover, Inc.* v. *United Utilities, Inc., et al.*, Case No. 9875 (M.D. Pa., filed March 2, 1967). By way of background, on October 19, 1966, the Borough Council of Hanover, Pennsylvania, granted CATV franchises to Radio Hanover and Penn-Mar CATV, Inc., a corporation consisting of United Transmission, Inc., a subsidiary of United Telephone, and two other parties (United Transmission, Inc. has since sold its interest). The Council instructed both franchise holders that they could not erect poles within the Borough without express authority of the Council. Meanwhile, Radio Hanover contacted United Telephone, whose poles could be utilized for a CATV distribution cable, for the purpose of constructing a CATV system on United Telephone's poles. After being informed by United Telephone that it would not enter into an agreement for leasing of space on its poles, but that it could construct the distribution cables itself and lease them to the CATV companies, Radio Hanover filed the above-mentioned civil anti-trust suit against United Telephone, United Transmission, Inc., and United Utilities, Inc. (the parent corporation), as well as the other parties composing Penn-Mar CATV, Inc., alleging a conspiracy to monopolize CATV and broadband coaxial cable services in violation of the Sherman Antitrust Act.

Telephone would be conditioned on the outcome of Radio Hanover's law suit. Now before the Review Board is a motion to delete, or in the alternative, to amend and enlarge issues, filed April 17, 1973, by United Telephone,[4] requesting either the deletion of Issue 4 from this proceeding or the deferment of such issue until the completion of the pending anti-trust suit. In the alternative, United Telephone requests that the Review Board amend the aforementioned issue [5] and specify two qualifications issues against Radio Hanover. The requested issues would inquire into alleged anti-trust violations by Radio Hanover.[6]

DELETION OF ISSUE 4

2. In support of its request for deletion or deferment of Issue 4, United Telephone contends that the issue is unnecessarily duplicative of the issue pending in the civil anti-trust suit; that consideration of Issue 4 will infringe upon United Telephone's constitutional right to trial by jury since its evidence will be exposed to Radio Hanover prior to trial; that the Commission does not have primary jurisdiction over Issue 4; that Radio Hanover is barred by Section 207 of the Communications Act of 1934, as amended, from pursuing its remedy in two forums; that deletion of Issue 4 will insure that the Commission does not engage in retroactive lawmaking; and that the issue violates the Administrative Procedure Act.[7] In the alternative, United Telephone argues that if the Board does not delete Issue 4, the issue must be amended to ". . . preclude litigation in this proceeding of the matters at issue in the antitrust suit, while allowing the Commission to consider alleged monopolistic practices of United [Telephone] which . . . could have relevance to the determination of whether . . ." a 214 Certificate should be granted and to ensure that United Telephone's practices will be tested under the law prevailing at the time it began providing channel services to CATV operators. Penn-Mar supports United Telephone's request to delete or amend Issue 4. Radio Hanover, the Cable

[4] Also before the Review Board are the following related pleadings: (a) opposition, filed May 21, 1973, by Radio Hanover; (b) opposition, filed May 21, 1973, by the Cable Television Bureau; (c) opposition, filed May 21, 1973, by the Common Carrier Bureau; (d) comments of Penn-Mar CATV, Inc., filed May 21, 1973; (e) amended certificate of service, filed May 23, 1973, by Penn-Mar; (f) reply, filed June 11, 1973, by United Telephone. Radio Hanover and Penn-Mar were made parties to the proceeding in the designation Order.

[5] United Telephone requests that the Board amend Issue 4 to read as follows:

To determine whether the channel service facilities described in the application have been used or presently are being used by the United Telephone Company of Pennsylvania in furtherance of an attempt to monopolize CATV service or broadband communications in Hanover, Pennsylvania.

[6] The requested issues read as follows:

To determine whether Radio Hanover, a licensee of radio stations in Hanover and York, Pennsylvania, in its effort to acquire an exclusive CATV franchise and exclusive pole attachment rights on telephone company poles in Hanover, Pennsylvania, has engaged in any acts or practices which are either

(a) anticompetitive or monopolistic; or

(b) contrary to the public interest standard of the Communications Act; or

(c) in violation of any rule, decision or policy of the Federal Communications Commission.

To determine in light of the facts adduced at the hearing, whether Radio Hanover is qualified to continue as a radio licensee of this Commission and/or to enter the Hanover, Pennsylvania market as a CATV operator.

[7] Specifically, United Telephone asserts: (a) that Radio Hanover did not submit specific allegations of fact concerning Issue 4, nor did it supply the requisite affidavit of a person having personal knowledge of the underlying facts; (b) that the phrase "public interest standards" in Issue 4 lacks specificity; and (c) that part (c) of Issue 4 is objectionable on its face since it provides United Telephone with inadequate notice as to which rule, decision, or policy it may have violated.

Television Bureau, and the Common Carrier Bureau oppose the request.

3. The Review Board will deny United Telephone's request to delete Issue 4. First, as correctly noted in each of the oppositions, the Review Board has consistently held that it will not delete issues designated by the Commission absent a compelling showing of unusual circumstances. See, *e.g.*, *Charles W. Holt*, 37 FCC 2d 64, 65–66, 24 RR 2d 1002, 1003–1006 (1972). In our view, United Telephone has not made such a showing. In particular, there are no new *factual* allegations showing changed conditions since designation that warrant deletion of Issue 4. Rather, petitioner relies on numerous legal arguments, which do not constitute an adequate basis for deletion of issues. Second, where, as here, the designation Order contains a reasoned analysis of a particular matter, the Review Board is foreclosed from substituting its judgment for that of the Commission. *Atlantic Broadcasting Co.* (*WUST*), 5 FCC 2d 717, 8 RR 2d 991 (1966); *Fidelity Radio, Inc.*, 1 FCC 2d 661, 6 RR 2d 140 (1965). See also *Empire Communications Company*, 33 FCC 2d 721, 23 RR 2d 827 (1972). In our opinion, the Commission fully considered the question of exploring, in this proceeding, possible anticompetitive practices by United Telephone. See paragraphs 5, 14, 15 and 16 of the designation Order, 40 FCC 2d at 360, 363 and 364. That being the case, we are precluded from deleting Issue 4. Likewise, we are not persuaded that the issue should be modified. United Telephone was put on notice of the allegations against it and it has not shown any reason why the issue, as presently framed, should be reworded. *Cf. Charles W. Holt*, *supra*.

ENLARGEMENT OF ISSUES

4. United Telephone's request for the addition of issues against Radio Hanover (see note 5, *supra*) is predicated upon the argument that Radio Hanover will be the sole beneficiary of any decision denying United Telephone's Section 214 application. In addition, United Telephone argues in its reply that every aspect of the practical problems concerning the national communications structure encountered in specific geographical areas should be examined. The Review Board does not believe that it would be appropriate to add the requested issues. Radio Hanover is a party to this proceeding, but it is not an applicant for any Commission authorization. Therefore, this is not the proper forum for determining whether Radio Hanover is qualified to continue as a Commission licensee.

5. Accordingly, IT IS ORDERED, That the motion to delete, or in the alternative, to amend and enlarge issues, filed April 17, 1973, by United Telephone Company of Pennsylvania, IS DENIED.

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

F.C.C. 73-983

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF THE UNIVERSITY OF FLORIDA,
LICENSEE OF RADIO STATION WRUF,
GAINESVILLE, FLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

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

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER REID CONCURRING IN THE RESULT; COMMISSIONER WILEY CONCURRING IN PART AND DISSENTING IN PART AND STATING: "I WOULD MITIGATE THE FINE AS TO WRUF."

1. The Commission has under consideration (1) its Memorandum Opinion and Order adopted March 13, 1973, addressed to The University of Florida, licensee of Radio Station WRUF, Gainesville, Florida, assessing a forfeiture of $2,000 for broadcast of information concerning a lottery, and (2) the licensee's Application for Mitigation or Remission of Forfeiture dated April 11, 1973.

2. In the Application for Mitigation or Remission of Forfeiture, licensee describes the circumstances leading to the violations and states that it does not challenge the determination that all elements of a lottery were present. Licensee states that although Station WRUF is owned and operated by The University of Florida, "it must stand on its own" and receives no funds either from the State of Florida or the University, that the station is a training ground for students, and that "the emphasis of the station is not upon profit but upon public service." Licensee contends that it broadcast the announcements by mistake and that it was not done with any intent to violate the law. Licensee asserts that the station does not make large profits, that in order to pay the forfeiture it might be necessary to take special steps because the station is supposed to be self-sustaining, and that payment of such a forefeiture might have an "adverse effect upon the training program."

Also licensee states:

> The case is sufficiently similar to *Williamsburg County Broadcasting, Inc.*, 30 F.C.C. 2d 173, 22 R.R. 2d 150 (1971), to warrant mitigation to a more equitable amount, at very least. In that case a newspaper promotion ran on the station in a heavier schedule than this promotion ran on WRUF. It was clearly a lottery in its early stages, but was revised subsequently. The station was fined only $500. It is certainly difficult to see why the station in *Williamsburg County* can be fined $500.00 while WRUF is fined four times that amount, particularly since the illegality in this case was more opaque. Both stations took reasonable steps, including obtaining assurances that an attorney had been consulted, to resolve

this question but WRUF took them before accepting the copy. If one justified a rather nominal fine, so does the other.

Licensee requests that the Commission "exercise its equity powers and let [it] off with a warning."

3. The circumstances surrounding the violations and the licensee's financial condition were considered previously. Licensee now contends that it did not intentionally violate that law, although it does not challenge the determination that all elements of a lottery were present. Section 503 of the Communications Act of 1934, as amended, provides for issuance of forfeitures for violation of 1304, Title 18 of the United States Code, but makes no reference to any requirement that the violations be intentional. Having previously found that the licensee violated Section 1304, we find it unnecessary to make any determination as to whether the violations were, in fact, intentional. Regarding the *Williamsburg County* case [1] and argument based thereon, we are not persuaded to mitigate the forfeiture. The Commission, in determining the amount of a forfeiture assessed under Section 503 of the Communications Act, considers many factors, including the seriousness of the violations, the circumstances under which they were committed, their duration and the financial condition of the licensee. *Laury Associates, Inc.*, 27 FCC 2d 870 (1970). Further, the licensee will not be excused because the station is licensed to the University of Florida. Station WRUF is licensed as a commercial station and as such is expected to meet all the requirements of the statutes, and the Commission's Rules and policies governing the operation of commercial broadcast stations. Considering the licensee's request and all the circumstances in this case, we are not persuaded to remit or mitigate the forfeiture.

4. In view of the foregoing, IT IS ORDERED, That the application for mitigation or remission of forfeiture IS DENIED.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to The University of Florida, licensee of Radio Station WRUF, Gainesville, Florida.

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

[1] We note that subsequent to assessment of the $500 forfeiture, the Commission by Memorandum Opinion and Order adopted December 1, 1971, 32 FCC 2d 633 (1971), remitted the forfeiture because additional information filed by the licensee showed that no lottery had in fact been conducted.

F.C.C. 73-976

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
WCSV, INC. (WCSV), CROSSVILLE, TENN.
Has: 1520 kHz, 250 W, Day
Requests: 1520 kHz, 5 kW (1 kW-CH), Day
For Construction Permit

MEMORANDUM OPINION AND ORDER

(Adopted September 19, 1973; Released September 26, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it for consideration the above-captioned and described application for a power increase of daytime station WCSV, Crossville, Tennessee, and the applicant's request for waiver of the revised rules adopted February 21, 1973, to govern the acceptance of applications for new standard broadcast stations and major changes (including power increases) in existing stations.[1]

2. The application was first tendered on April 16, 1973. On April 26, 1973, the application was returned because the applicant had provided no showing that the proposal was in compliance with the new allocation standards. The application was retendered on May 30, 1973, accompanied by its request for a waiver.

3. The proposed WCSV power increase does not comply with section 73.37(e)(3) (ii) or (iii) because (1) all of the community of Crossville, Tennessee, is included within the existing WCSV 5 mV/m contour, and (2) all of the proposed WCSV gain area now receives primary service from other standard broadcast stations.

4. In support of its request for waiver, the applicant stresses the population growth between 1960 and 1970, and after 1970 in Crossville and Cumberland County, of which Crossville is the county seat. Between 1960 and 1970, the population of Crossville increased 15.3 percent, while the population of Cumberland County increased 8.4 percent. The applicant also submitted letters from prominent individuals and other documents endorsing the proposed power increase.

5. One of the supporting documents is a study made by the Upper Cumberland Development District at the request of WCSV. The District was established by resolution of the Tennessee State Planning Commission pursuant to an act of the Tennessee General Assembly and contains fourteen counties. Although it is not stated explicitly, the Development District's report implies that Cumberland County is one of the fourteen counties in its district. The objectives and purposes of the Development District are stated in some detail, but it may be a

[1] *Broadcast Station Assignment Standards*, 39 FCC 2d 645, 26 RR 2d 1189 (1973).

fair summary of those purposes to state that the District's concern is with the development of the economic, industrial, social, physical and cultural resources in its region.

6. One of the letters endorsing the proposed power increase is signed by Mr. William E. Mayberry, Jr., who identifies himself as the Chairman of the Crossville Regional Planning Commission. The Planning Commission, like the Development District, was established under Tennessee law. According to the letter, the purpose of the Commission is to control the subdivision developments in Crossville and in the area within a five-mile radius of the Crossville city limits. The Commission is also responsible for the guidance of the orderly planning for proper land use and for a major road plan. Mr. Mayberry advises that the Crossville City Commissioners have not annexed any area since 1959.

7. The study submitted by the Development District on behalf of the applicant includes a map on which are located 34 development subdivisions, most of which are outside the corporate limits of Crossville, and some—perhaps four—may be partially within and partially outside the Crossville city limits, although this is not clear. Both the applicant and the Development District contend that, for the purpose of determining the appropriate power authorization for WCSV, this Commission should take into account the population growth which has occurred outside the municipality of Crossville but within what is described as the "jurisdictional boundary" of the Crossville Regional Planning Commission.

8. The applicant speaks in terms of the "city" of Crossville and Crossville's two governments. In context, the term "city" refers not to the Crossville municipality but to the region under the jurisdiction of the Crossville Regional Planning Commission. The "two governments" refers both to the mayor-commissioner governed municipality and to the region under the jurisdiction of the Planning Commission. The applicant describes the circumstances of the population growth in Cumberland County with some emphasis on the growth in the immediate vicinity of Crossville as unique.

9. This agency, of course, recognizes the fact that the Planning Commission performs a function which is governmental in nature, and we recognize the possibility of some relationship between the municipality and the Planning Commission. The letter of the Chairman of the Planning Commission is on a letterhead of the City of Crossville. The mayor of Crossville, John Dooley, is a member of the Planning Commission, as is one of the city commissioners, Everette Warner. However, it appears clear from the information before us that the WCSV waiver request is based primarily on the contention that increased power is desired to serve as much area *outside the corporate limits of Crossville* as is possible. In our Report and Order adopting revised rules to govern the acceptance of applications for new standard broadcast stations and major changes (including power increases) in existing stations (see footnote [1] *supra*), it was emphasized that power increases would be authorized only if it could be demonstrated that the applicant's existing operation would not provide adequate service to its city of license, or that a first aural service would be provided to a substantial area or population. In this regard, engineering

studies on file (submitted by WCSV) as well as our own studies reveal that the present operation of WCSV provides service in accordance with our rules to all of the *corporate limits* of Crossville. (We would note that in addition to WCSV two other stations are licensed to Crossville, WAEW (AM) and WAEW–FM). In addition, our studies reveal that the proposed power increase would not provide a first primary service to any area or population since the proposed gain area receives service from other existing stations. Recently, in denying an applicant's request for waiver of our rules to permit a power increase, we stated: [2]

> In addition, under section 307(b) of the Communications Act, the Commission's mandate to provide for a fair, efficient and equitable distribution of radio service includes the consideration of operating *power*. The proper distribution and utilization of power is, of course, as important to efficient allocation as is the consideration of frequencies. Inefficient utilization of power depletes available spectrum space as certainly as improper utilization of frequencies. . . . We cannot conclude that a power increase which would merely add an additional service is in the public interest.

10. Insofar as service to Cumberland County is concerned, we would note that if we were to attempt to authorize power increases so as to permit existing stations to serve their entire home county rather than city of license, the required power in many instances, would be so great that the standard broadcast band could not possibly accommodate all of the existing stations (over 4,300).[3] As we previously stated, all of the area which would be served by the proposed WCSV power increase receives service from existing stations. Also, we cannot agree that the situation in Cumberland County is unique. It is common knowledge that in many regions in this country there has been substantial population growth in suburban areas.

11. After full consideration of the applicant's contentions and the material submitted in support of those contentions, the Commission is not persuaded that the requested waiver is warranted.

12. Accordingly, IT IS ORDERED, That the request of WCSV, Inc., for waiver of section 73.37(e)(3) of the Commission's rules IS HEREBY DENIED.

13. IT IS FURTHER ORDERED, That the application IS RETURNED as unacceptable for filing.

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

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[2] *KACY, Inc.*, FCC 73–483, adopted May 9, 1973, 40 FCC 2d 1090 27 RR 2d 829.
[3] On the basis of field intensity measurement data on file, it appears that WCSV would not provide a 5 mV/m signal to all of Cumberland County even if the maximum power (50,000 watts) permitted in the broadcast band were authorized.