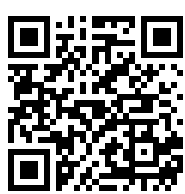

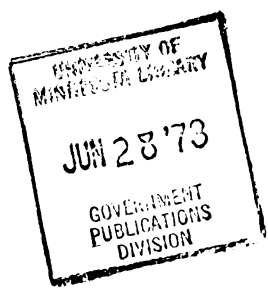

# FEDERAL COMMUNICATIONS COMMISSION REPORTS

## DECISIONS AND REPORTS OF THE FEDERAL COMMUNICATIONS COMMISSION OF THE UNITED STATES

February 24, 1964 to July 26, 1965

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Volume 45
(Part 2)

(This volume is bound in two parts, the first part containing pages 1–1292 and the second part pages 1293–2546.)

## REPORTED BY THE COMMISSION

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# FEDERAL COMMUNICATIONS COMMISSION

JUNE 1, 1972

DEAN BURCH, *Chairman*

| | |
|---|---|
| ROBERT T. BARTLEY | H. REX LEE |
| ROBERT E. LEE | CHARLOTTE T. REID |
| NICHOLAS JOHNSON | RICHARD E. WILEY |

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## TABLE OF ABBREVIATIONS

AM—Amplitude Modulation.
Act—Communications Act of 1934, as amended, 47 U.S.C. 151 et seq.
Amer. B/cing Cos.—American Broadcasting Companies.
Amer. Tel. & Tel.—American Telephone and Telegraph.
Assn.—Association.
B/c—Broadcast.
B/cers—Broadcasters.
B/cing—Broadcasting.
CATV—Community Antennae Television.
Col. B/cing Sys.—Columbia Broadcasting System.
ComSat Corp.—Communications Satellite Corporation.
Co.—Company.
Corp.—Corporation.
CP—Construction Permit.
FCC—Federal Communications Commission.
FM—Frequency Modulation.
Inc.—Incorporated.
ITT World Comm.—International Telephone and Telegraph World Communications.
National B/cing Cos.—National Broadcasting Companies.
Rule—Rules and Regulations of the Federal Communications Commission.
Satellite Act—Communications Satellite Act, 47 U.S.C. 701 et seq. (1962).
TV—Television.
UHF—Ultra High Frequency.
VHF—Very High Frequency.

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F.C.C. 64R–99

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| RALPH HENG D.B.A. TRI-STATE COMMUNICATIONS CO., LIBERAL, KAN. | Docket No. 15228 |
| For a Construction Permit To Establish a New Two-Way Common Carrier Station in the Domestic Public Land Mobile Radio Service in Liberal, Kans. | File No. 356–C2–P–62 |
| TWO-WAY RADIO COMMUNICATIONS CO. OF KANSAS, INC. | |
| For a Construction Permit To Add a Second Channel to the Existing Two-Way Common Carrier Station KAF–650 in the Domestic Public Land Mobile Radio Service in Liberal, Kans. | Docket. No. 15229 File No. 2549–C2–P–62 |
| For a Construction Permit To Change the Location and Equipment for the Base Station KAF–650 in the Domestic Public Land Mobile Radio Service in Liberal, Kans. | Docket No. 15230 File No. 10–C2–P–63 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSTAINING.

1. The Review Board has before it for consideration a motion for enlargement of issues, filed December 30, 1963, by Two-Way Radio Communications Company of Kansas, Inc. (Two-Way), and related pleadings.[1] Two-Way urges that the issues be enlarged as against Ralph Heng, d/b as Tri-State Communications Company, (Heng) to include the following issues in addition to those already included in the Commission's designation Order:

To determine in the light of the evidence adduced on issues (c) and (d) whether Ralph Heng possesses the necessary character qualifications to be a licensee.[2]

To determine whether there have been repeated errors, inaccuracies, nondisclosures of material facts, and/or inadvertent statements in the above-captioned application, amendments thereto, pleadings, and prosecution of the application, and, if so, whether they reflect such negligence, carelessness, ineptness, or disregard of the Commission's processes that the Commission can-

[1] Also before the Board are: opposition, filed January 14, 1964, by Ralph Heng; and reply, filed January 17, 1964, by Two-Way.

[2] Existing issue (c) is a misrepresentation issue relating, among other things, to Heng's legal status, and issue (d) requires a determination of the facts and circumstances under which Heng obtained certain affidavits.

not rely upon the applicant to fulfill the duties and responsibilities of a licensee.

To determine the legal status of the applicant in application File No. 356–C2–P–62 and whether Ralph Heng d/b as Tri-State Communications Company or Tri-State Communications Company, Inc., is the real party in interest in that application.

2. The factual allegations underlying these requested issues were brought to the Commission's attention by Two-Way in (1) its reply to the opposition to its petition to deny Heng's application, filed November 22, 1961, and (2) its opposition to Heng's petition for grant without hearing, filed April 10, 1962. In brief, these facts are representations made by Heng in his Business Radio Service and Domestic Radio Service applications concerning the location of his radio tower; representations made by Heng in his Domestic Radio Service application concerning his financial and business affairs and the legal status of the applicant; and Heng's submission of purported affidavits in connection with his Domestic Radio Service application. Two-Way first asserts that if Heng did in fact misrepresent or withhold facts, such conduct would raise a question as to his character qualifications, and that the conclusionary public interest issue (e), does not contain "character issue" language. Next, Two-Way contends that if the evidence adduced does not warrant Heng's character disqualification, there should be an issue to determine whether Heng is so careless and inept that he "would not be an acceptable licensee." Finally, since there appears to be some question as to whether Heng or Tri-State Communications Company, Inc. is the real party in interest, Two-Way requests an issue directed to this end.

3. Heng, in his opposition, asserts that petitioner has made no new allegations, that the Commission has already fully considered the matters referred to in the preceding paragraph, that petitioner is really asking for a reconsideration of the Commission's Memorandum Opinion and Order, and that this is beyond the authority of the Review Board. Two-Way's reply takes issue with the latter argument, saying that "the Board's power to amend, modify, enlarge or delete issues necessarily carries with it the power to reconsider the Commission's order of designation."

4. There is no need to add either the requested character qualifications issue or the real party in interest issue. While the inclusion of such issues would not have been inappropriate under the circumstances of this case, the issues specified by the Commission permit an inquiry into the matters referred to by the petitioner, and the conclusionary public interest issue requires a determination as to whether in the light of the facts adduced under the issues specified by the Commission a grant would be in the public interest. This latter determination includes, of course, a consideration of any adverse character evidence adduced pursuant to the issues specified by the Commission.

5. The Board will, however, add the second of Two-Way's requested issues. Not until after the release of the Commission's designation Order in this proceeding was this type of issue framed for the first time. See *Beamon Advertising, Incorporated*, FCC 63R–467, 1 RR 285 (1963). The facts alleged by petitioner support the addition of such an issue: e.g., Heng's construction of a

tower at a site different from that used in his Business Service application; a five month delay in notifying the Commission of the latter fact even after his attention was drawn to it; repetition of his tower site location error in his Domestic Public Land application; submission by Heng of affidavits which may not have been sworn to by the signatories; and submission of almost identical balance sheets for Heng and a controlled corporation.

Accordingly, IT IS ORDERED, This 24th day of February, 1964, That the petition to enlarge issues, filed December 30, 1963, by Two-Way Radio Communications Company of Kansas, Inc., IS GRANTED as indicated herein, and DENIED in all other respects; and the issues in this proceeding ARE ENLARGED by the addition of the following issue:

> To determine whether there have been repeated errors, inaccuracies, non-disclosures of material facts, and/or inadvertent statements in the Heng (Tri-State) application, amendments thereto, pleadings, and prosecution of the application, and, if so, whether they reflect such negligence, carelessness, ineptness, or disregard of the Commission's processes that the Commission can not rely upon the applicant to fulfill the duties and responsibilities of a licensee.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–164

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
LIABILITY OF MERCHANTS BROADCASTERS, INC., LICENSEE OF STATION WAIL, BATON ROUGE, LA.
For Forfeiture

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER ABSENT.

Apparent Liability dated November 13, 1963, addressed to Merchants Broadcasters, Inc., licensee of Station WAIL, Baton Rouge, Louisiana, and (2) the response to the Notice of Apparent Liability by the licensee filed December 16, 1963.

1. The Commission has under consideration (1) its Notice of

2. The material facts leading to the Notice of Apparent Lia-

operating log at least once each hour. Phase Monitor Loop Current Ratio may be read and logged in lieu of base currents provided base currents are read and

bility are as follows: Station WAIL is licensed for operation on 1460 kilocycles with a power of 5 kilowatts daytime and 1 kilowatt with a directional antenna at night. The station license contains a condition which was incorporated by reference in the last certificate of license renewal, and is as follows:

Phase indications and antenna base currents shall be read and entered in the

logged at least once daily.[1]

3. On January 29, 1963, Station WAIL was inspected and an Official Notice of Violation was issued on February 1, 1963, citing the station for, among other things:

Noncompliance with the terms of the station authorization: The base currents were not read at least once daily which is required when the phase monitoring sample currents are read and entered in the operating log. (The entries made in the operating log for the daily base currents were fictitious as the readings at the base of the towers were not actually made.) (When Operator Mackey was on duty.)

At the time of the inspection, the inspecting engineer obtained from Operator James A. Mackey a signed statement to the effect that Mr. Mackey never read the antenna base currents as required by the license, but entered fictitious readings obtained from the chart posted with phasing equipment. From the official WAIL transmitter logs it appeared that on at least January 4, 11, 19, 25

[1] This is a standard condition which is included in all licenses for directional antennas involving phase monitor sampling currents. It was included in the license first authorizing a directional antenna for WAIL (then WAFB) on September 1, 1949. The condition has been contained or incorporated in each succeeding license.

and 26, 1963, Mr. Mackey was the operator on duty from 5:15 p.m. to 12:15 a.m., the only hours on those dates during which the station operated with its directional pattern.

4. In its response to the Official Notice of Violation the licensee stated that it was "shocked" to learn that Mr. Mackey had been making entries in the transmitter log which were based on a chart rather than on actual readings. The licensee explained that Mr. Mackey and other employees had been informed of the seriousness of the violation and licensee promised that in the future all entries in the operating log were to be personally observed. In addition, the licensee submitted a copy of instructions to its employees with respect to keeping the operating logs up to date, which also was not being done at the time of the inspection, in violation of Section 3.111(b) (now section 73.111(b)) of the the Rules.

5. On June 6, 1963, a special inspection of WAIL revealed that, as in January, the operating log was an hour behind in violation of Section 73.111(b) of the Rules. The operator on duty [2] was requested to take transmitter readings but although he logged 5.3 amps for the antenna current, he did not read the meter. The operator stated that 5.3 was a constant factor and was not read.

6. Thereafter, the Notice of Apparent Liability was issued because it appeared (1) that licensee willfully or repeatedly failed to operate WAIL substantially as set forth in its license and (2) that licensee willfully or repeatedly violated Section 3.111(b) (now 73.111(b)) of the Commission's Rules. The Notice indicated that for its failure to observe the terms of its license and the Commission's Rules, licensee, pursuant to Section 503(b)(1)(A) and (B) of the Communications Act of 1934, as amended, incurred a total apparent liability in the amount of five hundred dollars ($500).

7. In its response to the Notice of Apparent Liability, licensee admits "that antenna base currents were not being properly determined and logged as detected in the January 29, 1963 inspection," but it contends without further explanation that the violations were neither willful nor repeated. Obviously, the admitted failure to operate WAIL substantially as set forth in the station license through the failure to make the required readings and through the entry into the log of fictitious meter readings on at least January 4, 11, 19, 25 and 26, 1963, was repeated. We have stated on numerous occasions that the word "repeatedly" as used in Section 503(b) of the Communications Act means simply more than once. See *Friendly Broadcasting Company*, 23 RR 893. Similarly, we find that the violations of Section 73.111(b) of the Rules were repeated in that the WAIL operating log was ascertained to be one hour behind during both the inspections of January and June 1963. That the antenna base currents may have been read and logged as required since the January 29, 1963 inspection as contended by the licensee and that no citation was issued for the same violation following the June 1963 inspection neither justify nor excuse the violations occurring several times prior to the January 1963 inspection.

[2] The log indicated that the operator was on duty but it was discovered that the transmitter operating position was unattended since the operator was having lunch.

8. In our opinion, the violations as charged were not only repeated, which in itself is sufficient statutory grounds to sustain an action for forfeiture, but were also willful. In this regard it should be pointed out that the Commission's examination of the composite week operating logs which accompanied the licensee's last renewal application (granted May 29, 1962), revealed meter readings which showed no variations, reflected highly improbable conditions and raised serious questions as to the validity of the readings. Further, these logs contained no entries showing that the tower base current meter readings had been made during the directional mode of operation as required by the terms of the existing license. When apprised of these shortcomings in its renewal application, the licensee responded, on April 29, 1961, that in the future all meters would be read before making adjustments and that "each night barring severe storm conditions base current meters will be read and logged in the proper place." However, as stated above, notwithstanding the licensee's promises made in 1961, the inspection of January 29, 1963, disclosed that the required base current readings were not being made. Even after this inspection and following licensee's further promises that all entries in the operating log were to be personally observed by responsible officers and were to be entered in the log on a current basis by the operator on duty, the subsequent inspection of June 6, 1963, revealed that fictitious readings were being logged for the antenna current and that Section 73.111(b) of the Rules still was being violated. The violations could, and indeed should, have been easily avoided. The Commission is entitled to high standards of conduct from its broadcast licensees. *Midwest Radio-Television, Inc.*, FCC 63–1024.

9. Licensee contends (presumably as a factor in mitigation) that the WAIL voltage, current and frequency remain almost constant. Attached to its response are voltage charts furnished by the local electric company which appear to illustrate the stability of electrical service to WAIL. However, even if ideal conditions of power supply exist and even if the WAIL operating power "will normally be constant" such facts do not excuse licensee's failure to comply with the stated terms of the license requirement that the base currents be read and logged at least once daily.

10. Lastly, licensee objects to the use of the word "fictitious" in the Notice of Apparent Liability when referring to its meter readings. Licensee contends that the meter readings were not fictitious because they were based on a chart posted next to the remote indication meters associated with each antenna.[3] Despite the licensee's objection to our choice of words the fact remains that the entries made in the operating log for the daily base currents were not based upon readings of the meter itself as required and were therefore not genuine.

We have decided, taking into consideration the extent and seriousness of the violations and the actions of the licensee, as well as all other factors raised by licensee in its response, not to reduce the amount of the forfeiture.

[3] Presumably licensee is referring to a Base Current Calibration Chart.

Accordingly, in view of the foregoing, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, that Merchants Broadcasters, Inc., licensee of Radio Station WAIL, Baton Rouge, Louisiana, FORFEIT to the United States the sum of five hundred dollars ($500). Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to the provisions of Section 504(b) of the Communications Act and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days from the receipt of this Memorandum Opinion and Order.

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 Merchants Broadcasters, Inc., licensee of Station WAIL, Baton Rouge, Louisiana.

Adopted February 26, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–145

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Application of<br>ROCKFORD BROADCASTERS, INC. (ASSIGNOR)<br>and<br>WROK, INC. (ASSIGNEE)<br>For Consent to the Voluntary Assignment of License and Construction Permit of Stations WROK and WROK–FM, Rockford, Ill., Including Remote Pickups KE–5820 through KE–5822, KSJ–272 | Files Nos.<br>BAPL–298;<br>BALH–588;<br>BASCA–115;<br>BALRE–962 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY ABSTAINING FROM VOTING; COMMISSIONER LOEVINGER ABSENT.

1. In a petition filed on November 22, 1963, the National Association of Broadcast Employees and Technicians, requests the Commission to reconsider and vacate its grant of the captioned application and to designate it for hearing (1) to determine whether the grant will hurt certain employees of the station without any outweighing public interest, and (2) to determine whether the assignee has the requisite character qualifications of a licensee in light of its conduct toward the employees and its attitude toward the National Labor Relations Act.

2. In support of its requests petition alleges in substance that the assignee has reduced its engineering staff from 4 to 2, and has allocated to announcers certain operating work which had been done by engineers; that the assignee has refused to extend the old contract and has terminated pension and savings plans; and that assignee's lawyer refused to meet with NABET representatives unless and until NABET presented proof that it continued to represent the two remaining engineers.

3. In its opposition filed December 10, 1963, assignee states that it has met all the commitments it made to the Commission concerning labor relations; that the two engineers who left did so at their own volition; that the functions transferred to the announcers are performed by combination announcer-operators in the majority of radio stations in this country because of technological advances in the industry; that the Commission had been informed that the old labor contract had expired and that assignee was not prepared to extend the savings and pension plans; that it was willing to negotiate with NABET after the remaining two engineers stated that they wished NABET to represent them; and that it held col-

lective bargaining sessions with NABET and the engineers on October 16 and 29, 1963.

4. As we said when we granted the captioned application, the Commission considers that—in making the requisite judgments as to the public interest—it is called upon to take into account circumstances which raise questions as to whether the would-be station licensee has conformed with the letter and intent of the National Labor Relations Act.

5. With these considerations in mind, we examined the labor relations policy proposed by the assignee and found that its proposed course of action was not contrary to the policy of the Labor Relations Act. *Rockford Broadcasters, Inc.*, 1 RR 2d 405. Petitioner has presented no new material to indicate that WROK, Inc., has deviated from the representations it made to this Commission concerning collective bargaining,[1] and consequently we find no grounds to alter our decision that the grant of the application was in the public interest.

In view of the foregoing, IT IS ORDERED, This 19th day of February, 1964, that the Petition for Reconsideration filed by the National Association of Broadcast Employees and Technicians IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[1] We have been advised that on November 8, 1963, NABET filed a complaint with the NLRB alleging that WROK, Inc., had refused to bargain collectively, had attempted to bargain with employees individually without the presence of a bargaining agent, had unilaterally changed working conditions without negotiating, and had thereby violated the National Labor Relations Act. On December 26, the Regional Director of the NLRB informed NABET that he had carefully investigated and considered the allegations, and on the basis of this investigation had refused to issue a complaint. NABET appealed the decision of the Regional Director. The General Counsel of the NLRB denied this appeal on February 19, 1964.

F.C.C. 64–201

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

ADJUSTMENT OF PRESUNRISE OPERATING DISPUTES } Public Notice

BY THE COMMISSION: COMMISSIONERS HYDE AND FORD ABSENT.

By telegram adopted March 4, the Commission informed Radio Station WEEE, Rensselaer, New York, that it had no objection to that station operating during specified pre-sunrise hours with power reduced to 500 watts.

Even though licensed as a "daytime only" Class III standard broadcast station, WEEE had, until last year, operated during pre-sunrise hours with its full licensed power of 5 kilowatts under the permissive provisions of Section 73.87 of the Rules.

On June 4, 1963, WEEE was directed to refrain from further operation prior to local sunrise, pursuant to Section 73.87(b) of the Commission's Rules. This action was taken after a complaint was received from Station WFBR, Baltimore, alleging that interference was being caused within the complainant's protected nighttime service area as a result of WEEE's 5 kilowatt early morning operation.

This action, which allows WEEE to resume part of its former early morning service on a reduced-power basis, is the outgrowth of an agreement reached between WEEE and WFBR, and will remain in effect until final resolution of matters involved in rule making Docket No. 14419 or until a valid interference complaint is received from some other source.

Until recently, Section 73.87 had been applied on a "go no-go" basis. For unlimited time stations causing interference this meant a return to their licensed nighttime modes; for "daytime only" stations like WEEE it meant a complete cessation of pre-sunrise operation, frequently resulting in loss of the only early morning service to a community. As a result of this action, Section 73.87 will be administered to allow pre-sunrise operation with power graduated downward to a level of mutual acceptance or, absent such acceptance, downward to the extent that it does not cause objectionable interference to the complaining station. Specific proposals should be submitted to the Commission for its consideration.

Where a probable justification for the continuance or resumption of a local service is shown and the dispute cannot be satisfactorily resolved in the manner described above, the Commission will give sympathetic consideration to waiver of the current "freeze" on the acceptance of standard broadcast allications (FCC 62–516) in order to entertain applications for specified hours

operation by stations against which pre-sunrise complaints have been filed. Such applications will, if compliance with treaty obligations is demonstrated, be designated for hearing to determine whether the need for the local service outweights the need for the service lost due to interference.

Complaints not lending themselves to adjustment by power cutbacks or to adjudication by hearing will be honored in accordance with Section 73.87(b) of the Rules. As in the past, the complaining station must establish that it is in fact on the air during the pre-sunrise period with its authorized nighttime facilities; that the station complained of is operating during the same period with its authorized daytime facilities; and that interference to the complaining station is indicated by engineering calculations based on the skywave propagation curves contained in Figure 2, Section 73.190 of the Commission's Rules.

The policy of conditioning all construction permits for new Class III stations (and major changes in existing Class III stations) against pre-sunrise operation, which has been in effect since January 29, 1962 (FCC 62–98), remains unchanged by this action.

Adopted March 4, 1964.

FEDERAL COMMUNICATIONS COMMISSION.

F.C.C. 64–188

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| SPANISH INTERNATIONAL TELEVISION COMPANY, INC., PATERSON, N.J. | Docket No. 15089<br>File No.<br>BPCT–3032 |
| PROGRESS BROADCASTING CORP., PATERSON, N.J. | Docket No. 15090<br>File No.<br>BPCT–3067 |
| BARTELL BROADCASTERS, INC., PATERSON, N.J. | Docket No. 15091<br>File No.<br>BPCT–3103 |
| TRANS-TEL CORP., PATERSON, N.J. | Docket No. 15092 |
| For Construction Permits for New Television Broadcast Stations | File No.<br>BPCT–3114 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND FORD ABSENT; COMMISSIONER LEE DISSENTING.

1. This proceeding involves the mutually exclusive applications of Spanish International Television Company, Inc. (SITC), Progress Broadcasting Corporation (Progress), Bartell Broadcasters, Inc. (Bartell), and Trans-Tel Corp. (Trans-Tel) for construction permits for new television broadcast stations in Paterson, New Jersey. At this time,[1] we have before us the motion of Trans-Tel for an Order to require SITC to amend its application to make it more definite and certain and related pleadings.[2]

2. Trans-Tel requests that an Order be entered in pursuance of Section 1.514(b) of our Rules, formerly Section 1.304(b), requiring SITC to amend its application so as to make it more definite and certain. Trans-Tel argues that SITC has not supplied the necessary information concerning the business and other broadcast interests of Emilio Azcarraga, who is a 20% stockholder in SITC. The motion is opposed by SITC, which asserts that evidence upon this matter can be adduced during the hearing without requiring non-essential amendments. The Broadcast Bureau supports the motion and points out that the more orderly procedure would be for SITC to amend its application to supply the contem-

[1] The delay in our consideration of this matter was caused by the stay imposed by our Order (FCC 63–694, released July 26, 1963) in this proceeding, which has been lifted by our Order of February 27, 1964.

[2] Motion for Order to require amendment filed by Trans-Tel on June 14, 1963; Opposition filed by SITC on June 24, 1963; Reply filed by Trans-Tel on June 27, 1963; Comments filed by Broadcast Bureau on July 8, 1963; Supplement to Reply filed by Trans-Tel on July 18, 1963; and Motion to Strike Supplement to Reply filed by SITC on July 24, 1963.

plated information concerning the business and other broadcast interests of Mr. Azcarraga.

3. In answer to question 19(a) in Section II of our application Form 301, the applicant indicated only that "Mr. Azcarraga has extensive radio-television interests in the Republic of Mexico". Our application form requires more than generalized information concerning the business and other broadcast interests of each party to an application. The specific information was not supplied by SITC for Mr. Azcarraga's interests in the Republic of Mexico, and no facts have been presented by SITC which would justify the omission of this information from its application. Therefore, Trans-Tel's motion for an Order requiring SITC to amend its application will be granted. *John J. Keel* tr/as *Radio Reading,* 5 Pike & Fischer, R.R. 1115 (1949); and *Community Telecasting Co.,* 19 Pike & Fischer, R.R. 938 (1960).

4. In this connection, the supplement to its reply filed by Trans-Tel tends to support its present motion by pointing out other possible broadcast interests of Mr. Azcarraga, which were not specified by SITC in its application. For this reason, the requested waiver of Section 1.45 of our Rules will be granted and SITC's motion to strike that supplement will be denied.[3]

Accordingly, IT IS ORDERED, This 4th day of March, 1964, that the motion for Order to require amendment filed by Trans-Tel Corp. on June 14, 1963, IS GRANTED, and Spanish International Television Company, Inc., SHALL SUBMIT an amendment to its application consistent with this Memorandum Opinion and Order within twenty days; and

IT IS FURTHER ORDERED, That the request of Trans-Tel Corp. for waiver of Section 1.45 of the Rules IS GRANTED and the supplement to its reply filed by Trans-Tel Corp. on July 18, 1963, IS ACCEPTED; and

IT IS FURTHER ORDERED, That the petition to strike filed by Spanish International Television Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[3] While relying upon its petition to strike, SITC has reserved the right to file a supplement to its opposition. However, SITC has in substance taken the position that its generalized answer concerning Mr. Azcarraga's radio and television interests is sufficient. As noted above, we do not agree, and, since no prejudice will result to SITC under these circumstances, we do not believe that our decision in this matter should be delayed any further.

F.C.C. 64R–125

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| UNITED ARTISTS BROADCASTING, INC., CLEVELAND, OHIO | Docket No. 15248<br>File No.<br>BPCT–3168 |
| CLEVELAND TELECASTING CORP., CLEVELAND, OHIO | Docket No. 15249<br>File No.<br>BPCT–3191 |
| THE SUPERIOR BROADCASTING CORP., CLEVELAND, OHIO | Docket No. 15250<br>File No.<br>BPCT–3243 |
| For Construction Permits for New Television Broadcast Stations | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON CONCURRING AND ISSUING A STATEMENT.

1. The Review Board has before it for consideration a motion to delete, modify and enlarge issues, filed by Cleveland Telecasting Corp. (Cleveland) on January 16, 1964.[1] Cleveland requests the deletion of five issues as to itself and the addition of "Suburban" and legal qualifications issues as to United Artists Broadcasting, Inc. (United Artists).

2. Several issues were designated by the Commission as to Cleveland (FCC 63–1161, released December 23, 1963). Cleveland filed a petition for leave to amend on January 13, 1964, which it contends would moot five of the issues.[2] These are: legal qualifications (citizenship inquiry); ownership, management, and control of station; financial qualifications; location of main studio; and minimum separation rules as to transmitter site. Cleveland asserts that this proposed amendment makes it unnecessary to adduce evidence on the above issues. A post-designation amendment, even though it purports to eliminate the need for a given hearing issue, does not constitute an appropriate basis on which to request deletion of the hearing issue. See *L. B. Wilson, Incorporated,* FCC 63R–58, 24 RR 1018 (1963), and cases therein cited.

3. Cleveland urges that a "Suburban" issue be added in order to determine the efforts made by United Artists to ascertain the programming needs of the Cleveland area. This contention is based solely on the facts that United Artists currently has applications

[1] Also before the Board are: Broadcast Bureau's opposition, filed February 3, 1964; opposition, filed February 3, 1964, by United Artists Broadcasting, Inc.; and reply, filed February 13, 1964, by Cleveland.

[2] This amendment was substantially granted in a Memorandum Opinion and Order released February 25, 1964 (FCC 64M–158).

for television construction permits in three cities (Cleveland, Ohio; Houston, Texas; and Boston, Massachusetts), and the financial and staffing proposals for all three stations are identical while there is a substantial similarity in program proposals. Program similarity is allegedly shown by a statistical comparison of advertising, commercial vs. sustaining, program categories, etc. Cleveland alleges that the foregoing raises a question as to whether United Artists has ascertained the particular needs and interests of the Cleveland area.

4. United Artists, in its opposition, states that the statistical data used by Cleveland to show similar programming is misleading; that there are substantial differences in the three applications; that United Artists has tailored its proposed programming to fit the area's needs; and that any questions pertaining thereto can be considered under the standard comparative issue. The Broadcast Bureau also opposes the addition of a programming issue. It asserts that Cleveland has merely pointed out superficial similarities in programming but has not shown that United Artists did not ascertain this particular area's needs. Cleveland, in its reply, asserts that sufficient similarity has been shown to raise a question which should be resolved by inclusion of a specific issue.

5. The mere showing that the percentages for types of shows are similar in three applications is insufficient to indicate a failure to ascertain a particular area's needs. For example, each proposal would devote approximately 10% of air time to "Talks", but the programs themselves are different in each city. One of the "Talk" programs in each city will be an events or calendar program for that city, and the news will be least 50% local. In the "Education" category, Cleveland will get a TV classroom, Boston will get a school calendar program, and Houston will get a mixture of discussion and entertainment called Teenage Time.[3] There are differences in the other categories, too. Cleveland has not shown that the *programs* are similar in the three proposals, rather only that the amount of air time given over to each category is similar. Therefore, Cleveland's request for a "Suburban" issue will be denied.

6. Cleveland also requests a legal qualifications issue as to United Artists. It alleges that it has not been established that at least 75% of the voting stock of United Artists is owned or voted by United States citizens, and that the United Artists application reveals that 14.5% of its stock is held by investment houses as nominees for investors and that this substantial amount of unknown ownership may raise "cross-interest" problems.

7. United Artists' opposition asserts that the random sample of stockholders which was made to check on citizenship is sufficient to satisfy Section 310(a)(5) of the Communications Act of 1934, as amended, and that a complete survey would be impossible. United Artists also asserts that a broad policy inquiry into the cross-interest problem is not practical in a hearing such as this one. The Broadcast Bureau also opposes Cleveland's request for a legal qualifications issue. It asserts that United Artists' showing is rea-

[3] This is the applicant's classification of the program.

sonable for Section 310(a)(5) purposes. As to the cross-interest problem, the Bureau agrees that there is a cause for concern, but does not think an issue is necessary. It refers to the Commission's Metromedia letter [4] and urges that a similar non-voting condition be attached to any grant which United Artists receives.

8. A general legal qualifications issue will not be added. United Artists currently has three applications for television construction permits. In the Boston, Massachusetts, proceeding (Docket Nos. 15323, *et al.*), the Commission designated a multiple ownership issue and a Section 310(a)(5) issue on the same facts as are present here, FCC 64–96, released February 12, 1964. In the other United Artists proceeding in Houston, Texas (Docket Nos. 15212, *et al.*), TVue Associates, Inc. requested a legal qualifications issue on the same facts, just as Cleveland has done here. The Review Board added a Section 310(a)(5) issue and a multiple ownership issue (FCC 64R–89, released February 18, 1964), citing the Boston designation Order. On the citizenship inquiry, the Board stated that "it is incumbent upon United Artists to make a showing which provides a reasonable basis for determining the percentage of its stock that is held by American citizens." The Board held that surveying all of the stockholders is not an "impossible burden", and that if a sampling method is used, its precise basis must be shown. The Board added a multiple ownership issue because a "significant portion of the voting stock of United Artists Corporation is owned by holding companies, nominees, or others, for and on behalf of persons unknown." For the reasons set forth in the two above-mentioned Orders, multiple ownership and Section 310(a)(5) issues will be added.

Accordingly, IT IS ORDERED, This 5th day of March, 1964, That the motion to delete, modify and enlarge issues, filed January 16, 1964, by Cleveland Telecasting Corp., IS GRANTED to the extent indicated herein, and in all other respects DENIED; and that the issues in this proceeding ARE ENLARGED by the addition of the following issues:

To determine whether a grant of the application of United Artists Broadcasting, Inc., would be consistent with the provisions of Section 310(a)(5) of the Communications Act of 1934, as amended.

To determine whether a grant of the application of United Artists Broadcasting, Inc., would be consistent with the provisions of Section 73.636 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF BOARD MEMBER JOSEPH N. NELSON

I concur in the result reached by the majority. I do not, however, join in some of the views contained in paragraph 8 of the Opinion

[4] The letter to Metromedia, Inc. (FCC 63–1186, dated December 27, 1963) concerned a possible violation of the multiple ownership rules if an assignment of stations was consummated. The Commission permitted the assignment on the condition that the offending stockholders (mutual funds) agree not to vote their stock or attempt to influence company policies.

for the reasons set forth in my Concurring Statement in *TVUE Associates, Inc.*, (FCC 64R–89). I stated there, in pertinent part:

In light of the Commission's action with respect to the *Boston* application of *United Artists*, as indicated in the Commission's Order (FCC 64–96) of February 5, 1964, the framing of an issue as to citizenship and multiple ownership appears appropriate. However, the rationale set forth in the majority opinion goes far beyond that of the Commission in the Boston proceedings and requires the observation that *United Artists'* showing herein as to its compliance with the citizenship requirements of the Act is consistent with other citizenship showings heretofore accepted by the Commission. *In re Harry F. Rice*, BTC–4050 (application granted July 25, 1962); *In re Thomas P. Johnson*, BTC–2590 (application granted November 20, 1957).

F.C.C. 64–212

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| KTIV TELEVISION CO., (KTIV), SIOUX CITY, IOWA<br>For Construction Permit To Make Changes in the Facilities of Television Broadcast Station KTIV | Docket No. 15374<br>File No.<br>BPCT–3127 |
| PEOPLES BROADCASTING CORP. (KVTV)<br>SIOUX CITY, IOWA<br>For Construction Permit To Make Changes in the Facilities of Television Broadcast Station KVTV | Docket No. 15375<br>File No.<br>BPCT–3128 |
| CENTRAL BROADCASTING CO. (WHO–TV)<br>DES MOINES, IOWA<br>For Construction Permit To Make Changes in the Facilities of Television Broadcast Station WHO–TV | Docket No. 15376<br>File No.<br>BPCT–3138 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE ABSENT.

1. The Commission has before it for consideration: (a) The above-captioned application of KTIV Television Company (KTIV), licensee of Television Broadcast Station KTIV, Channel 4, Sioux City, Iowa; (b) the application of Peoples Broadcasting Corporation (KVTV), licensee of Television Broadcast Station KVTV, Channel 9, Sioux City, Iowa; (c) the application of Central Broadcasting Company (WHO–TV), licensee of Television Broadcast Station WHO–TV, Channel 13, Des Moines, Iowa; (d) "Petition to Deny" filed January 11, 1963, by Northwest Television Company (KQTV), licensee of Television Broadcast Station KQTV, Channel 21, Fort Dodge, Iowa, against (a) and (b), above; (e) "Opposition" filed February 20, 1963, by KTIV and KVTV jointly, to (d), above; (f) Reply, filed March 15, 1963, by petitioner to (e), above; (g) "Joint Petition for Immediate Consideration and Grant" filed May 22, 1963, by KTIV and KVTV, jointly; (h) "Opposition" filed May 31, 1963, by KQTV to (g), above; (i) Reply filed June 10, 1963, by KTIV and KVTV, jointly, to (h), above; (j) "Petition to Deny" filed February 11, 1963, by KQTV against (c), above; (k) "Opposition" filed March 20, 1963, by KQTV against (j), above; and, finally, (m), Reply, filed April 16, 1963, by petitioner to (k), above.

2. KTIV seeks authority to change the site of the transmitter of Station KTIV from its present location 8 miles north of Sioux

City, Iowa, to a site 11 miles northeast of Sioux City (4 miles east and ¾ of a mile north of James, Iowa) 7 miles in the direction of Fort Dodge, Iowa, where it proposes to share a common tower with Station KVTV. The proposal also contemplates a change of antenna height above average terrain from the present 770 feet to 1,915 feet. No change in effective radiated power is involved. The KVTV proposal involves a change of site from 41st and Howard Streets in Sioux City, an increase of antenna height above average terrain from 720 feet to 2,025 feet, and an increase of visual effective radiated power from 288 kw to 310 kw.

3. WHO–TV seeks authority to change the site of its transmitter from its present location one mile south of Mitchellville, Iowa, to a site 2 miles northwest of Polk City, Iowa (15.5 miles north northwest of Des Moines, Iowa), a move of 22 miles toward Fort Dodge, Iowa. The proposal also contemplates an increase of antenna height above average terrain from 780 feet to 1,545 feet. No change in effective radiated power is proposed.

4. At the present time, neither Station KTIV nor Station KVTV places a Grade A or Grade B signal into KQTV's Grade B coverage area, although WHO–TV's Grade A contour barely intersects KQTV's Grade B contour and the present WHO–TV Grade B contour lies well within the KQTV Grade A contour. The present overlap of the WHO–TV and KQTV Grade B contours encompasses 19,743 persons (11.6% of the population within the KQTV Grade B contour) and 789 square miles. Operating as proposed, Station KTIV and Station KVTV would, for the first time, place Grade B signals within KQTV's Grade A and Grade B coverage areas; WHO–TV would, for the first time, place a Grade A signal over parts of the City of Fort Dodge itself, and the proposed WHO–TV predicted Grade B contour would extend 19 miles beyond KQTV's transmitter site, covering 66% of the present KQTV coverage area. Moreover, the present KQTV Grade B contour is invaded by the Grade B signals of three additional VHF stations and the Grade A signal of yet another. Petitioner's Grade A contour is penetrated by the Grade B contours of four VHF stations (including WHO–TV) and the Grade A contour of one of them. Thus, Station KQTV, the only UHF station in Iowa and the only television station in Fort Dodge,[1] finds its service contours invaded by seven VHF stations and it is to the further encroachment by three of these that petitioner objects.

5. Petitioner alleges that a grant of all or any of these applications would result in immediate, severe, and permanent economic injury to it and therefore claims standing as a "party in interest" within the meaning of Section 309(d)(1) of the Communications Act. We find that the Petition to Deny complies with the statutory requirements and, accordingly, that the petitioner has such standing. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470.

6. Station KQTV is affiliated with the NBC network. Station

[1] Television Broadcast Translator Station K70CL, with its antenna on the Station KQTV tower, picks up the signals of Television Broadcast Station KRNT-TV, Channel 8, Des Moines, Iowa (CBS-affiliated), and rebroadcasts on Channel 70 in Fort Dodge.

KTIV carries ABC and NBC and Station KVTV carries ABC and CBS, while Station WHO–TV is an NBC affiliate. Petitioner fears that the further incursion of the NBC–affiliated VHF stations would jeopardize its own NBC affiliation.

7. Simply stated, the Commission is asked to prevent the further encroachment by the applicants into the area presently served by the Fort Dodge UHF station. KQTV states that it is operating at a loss, but that, in the past five years, it has made progress toward economic stability. As the only UHF station in Iowa and the only television station in the City of Fort Dodge, Station KQTV's coverage area includes a "UHF island" which will not be included within the predicted Grade B contours of any of the applicants in the event of a grant of these applications. KQTV alleges, however, that a grant of any or all of the applications would deprive it of vital advertising revenues and would result in its certain demise. This, KQTV states, would leave a "white area" in the so-called "UHF island", depriving the residents of their only television service. The applicants, on the other hand, seek to show that the improvement of their facilities and the consequent expansion of their coverage areas would bring television service to persons and areas now receiving no television service and new television service to persons and areas now within the coverage area of only one station, with no concomitant loss of service to anyone. The Sioux City applicants (KTIV and KVTV) allege that the economic effect of their proposed moves on KQTV would be *de minimis*.

8. The Commission's concern with the plight of UHF stations in a VHF–dominated area is too well known to require further discussion here. That concern is, however, even more acute where, as here, the UHF station appears to be in a precarious financial condition. We do not propose to provide a "protected contour area" for KQTV, but rather we are interested in the effect on the public interest of the possible demise of KQTV in the event of a grant of any or all of these applications. In *Triangle Publications, Inc.* (29 FCC 315; affirmed, 291 F. 2d 342), we said:

> The inescapable conclusion to be drawn from the record herein is that an existing UHF station will suffer losses in income following the introduction of a new or improved VHF signal into the market area of a UHF station. The same is true of our experience in general.

The question which the Commission must determine is whether a grant of any, or all of these applications may occasion the demise of KQTV and, if so, whether the local television service which may be lost thereby could be replaced by the new service which the applicants propose. The demise of KQTV becomes of paramount importance to the extent that the service which might be lost thereby could not be replaced. In the matter now before us, the Commission is not able to determine, from the pleadings, the areas and populations which may gain or lose television service in the event of a grant of these applications, nor the areas and populations which may lose service by the demise of KQTV, nor what other television service is available in such areas. Furthermore, we do not know what the effect may be on the public interest of a grant of only one or two of the applications. These questions, together

with the question of whether grant of any or all of the applications would impair the ability of KQTV to survive, should be explored in an evidentiary hearing.

9. Petitioner requests that the three applications be designated for hearing in a consolidated proceeding, alleging that the question raised by each application with respect to the impact on Station KQTV's ability to survive and, ultimately, on the public interest, is common to all and can be most expeditiously explored in a single proceeding. The applicants, however, contend that each is entitled to have its application considered unfettered by the problems which petitioner may have with any of the other applicants. Applicants cite *Wabash Valley Broadcasting Corp.* (FCC 59–466; 18 RR 559) as authority for the proposition that consolidation is not warranted merely on the basis of the convenience of one who is a party in more than one proceeding. However valid this proposition may be, it has no applicability in the instant matter. In *Wabash Valley,* the common party was applicant for two different channels in the same community, each application being mutually exclusive with that of another applicant. Unlike *Wabash Valley,* the situation in which the petitioner finds itself is not of its own making; neither does it have a choice of whether it will appear in one or another of the proceedings if it is to protect its vital interests. Furthermore, the basic issues raised by the pleadings, i.e. the impact of the incursion of each of three VHF stations into the coverage area of Station KQTV on the ability of that station to survive, is common to all three applications. Under these conditions, it is difficult to see how the proper dispatch of the Commission's business and the ends of justice could be better served by three proceedings than by one. We are of the view that the question raised by the petitioner in all three instances can be more expeditiously resolved through consolidation into a single proceeding and we will, accordingly, order consolidation upon our own motion. Since this solution commends itself even without the petitioner's request, the question raised by the applicants as to the sufficiency of the petitioner's pleadings in this respect, is moot.

Except as indicated by the issues specified below, the Commission finds that KTIV Television Company, Peoples Broadcasting Corporation, and Central Broadcasting Company, are legally, technically, financially and otherwise qualified to construct and operate as proposed. However, the Commission is unable to make the statutory finding that a grant of any of the above-captioned applications would serve the public interest, convenience and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below.

Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications of KTIV Television Company, Peoples Broadcasting Corporation, and Central Broadcasting Company, ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the areas and populations which may be expected to gain or lose television service in the event of a grant of the above-captioned applications, or any of them, and the availability of other television service to such areas and populations.

2. To determine whether a grant of the above-captioned applications, or any of them, would impair the ability of Television Broadcast Station KQTV to compete effectively, or would jeopardize, in whole or in part, the continuation of its existing service.

3. To determine, if Issue 2, above, is resolved in the affirmative, the areas and populations, if any, which may be expected to lose television service and the availability of other television service to such areas and populations.

4. To determine, in the light of the evidence adduced pursuant to Issues 1, 2, and 3, above, whether a grant of the above-captioned applications, or any of them, would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations.

5. To determine, in the light of the evidence adduced pursuant to Issues 1, 2, and 3, above, whether a grant of the above-captioned applications, or any of them, would be consistent with the objective of providing at least one television service to all parts of the United States and each community with at least one television broadcast service.

6. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the above-captioned applications of KTIV Television Company, Peoples Broadcasting Corporation and Central Broadcasting Company, or any of them, would serve the public interest, convenience and necessity.

IT IS FURTHER ORDERED, That Northwest Television Company IS MADE A PARTY TO THE PROCEEDING; and

IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to Issues 2 and 3 herein IS HEREBY PLACED upon Northwest Television Company; and

IT IS FURTHER ORDERED, That the Petitions to Deny filed by Northwest Television Company ARE GRANTED; the Joint Petition for Immediate Consideration and Grant, filed by KTIV Television Company and Peoples Broadcasting Corporation, jointly, IS DISMISSED as moot; and

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

IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934,

as amended, and Section 1.594(a) of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rules, and shall advise the Commission of the publication of such notice as required by Section 1.594(g) of the Rules.

Adopted March 11, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–128

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| WHDH, INC. (WHDH–TV), BOSTON, MASS. | Docket No. 15204 |
| For Renewal of License | File No. BRCT–530 |
| CHARLES RIVER CIVIC TELEVISION, INC., BOSTON, MASS. | Docket No. 15205 File No. BPCT–3164 |
| BOSTON BROADCASTERS, INC., BOSTON, MASS. | Docket No. 15206 File No. BPCT–3170 |
| GREATER BOSTON TV CO., INC., BOSTON, MASS. | Docket No. 15207 File No. |
| For Construction Permits for New VHF Television Broadcast Stations | BPCT–3171 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER SLONE CONCURRING; BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it for consideration a petition to enlarge issues, filed November 18, 1963, by Charles River Civic Television, Inc. (Charles), and related pleadings.[1] Charles requests the addition of legal and character qualifications issues and an issue to determine whether there has been an unauthorized transfer of control, all as to WHDH, Inc. (WHDH), the existing licensee in this comparative case.

2. Charles' first allegation is that WHDH's parent company, the Boston Herald-Traveler Corp. (Herald-Traveler), may not have the necessary legal or character qualifications to be a licensee.[2] In support of this allegation, Charles sets out the fact that WHDH filed Form 301 information with respect to the Herald-Traveler stockholders in 1954 when the original WHDH application was filed, but that no such information has been filed since that time despite the fact that there have been changes in stockholders.[3] All that have been filed are Form 303 renewal applications and Form 323 Ownership Reports,[4] and Charles alleges that even in

[1] Also before the Board are: opposition, filed December 10, 1963, by WHDH, Inc.; Broadcast Bureau's comments, filed December 10, 1963; and reply, filed December 19, 1963, by Charles.

[2] WHDH is wholly owned by Herald-Traveler.

[3] Form 301 information must be filed for officers and directors, and 3% stockholders. Section II of Form 301 requires extensive information to be set out concerning the business and financial interests and identity of the above-named persons.

[4] Renewal Form 303 does not require any information as to directors, officers or stockholders. Form 323 must be filed for all stock transfers involving an officer or director, or a stockholder holding more than 1% of the stock. No information about the stockholder is required except his name, address and percentage holding of stock.

the latter case WHDH has been remiss because it has failed to identify the beneficial owners of some of the stock.[5] Thus, Charles' main complaint is that the lack of Form 301 information about some of Herald-Traveler's current stockholders makes it difficult, if not impossible, to determine that WHDH is legally qualified. Charles did uncover some information which a current Form 301 would have revealed about WHDH.[6] These facts, plus WHDH's failure to identify the beneficial owners of the Herald-Traveler stock, lead Charles to its allegations of a lack of legal and character qualifications.

3. The Broadcast Bureau opposes Charles' request because it does not "specifically challenge" WHDH's legal and character qualifications. The Bureau asserts that evidence on the matters raised by petitioner can be adduced under the standard comparative issue, and if the matters are shown to be significant, issues can be added later. WHDH also opposes the petition, and points out that it has complied with all the Commission Rules. It states that Form 301 information is required only of new applicants; that WHDH is not a new applicant; that only Form 303 need be filed for renewal applicants such as WHDH; and that it has duly filed a Form 303 plus the periodic Form 323 Ownership Reports.

4. WHDH is correct in stating that it has filed all of the required forms. However, this case is not the usual renewal proceeding. WHDH received a four month license on September 25, 1962 (FCC 62–986, 24 RR 255 (1962), in a decision in which special circumstances were involved. In December, 1962, the Commission released an Order directing that new applications would be accepted (FCC 62–1319, 25 RR 80 (1962)). The three applications now consolidated with WHDH were filed early in 1963. Under these circumstances, WHDH cannot be treated as an ordinary renewal applicant. This situation is more closely analogous to a hearing with all new applicants. Accentuating the need for Form 301 information is the great turnover of officers, directors and principal stockholders in Herald-Traveler since 1954. Thus, Form 301 information is needed as to Herald-Traveler in order to properly evaluate WHDH's legal qualifications for the purposes of this proceeding. Further, the facts set out in footnote 6, *supra*, raise a multiple ownership question under Section 73.636 of the Commission's Rules. Issues directed to these questions will therefore be added. However, Charles' request for a character qualifications issue will be denied. WHDH has filed all required forms, and has

[5] 12.22% of the Herald-Traveler stock is held by an irrevocable voting trust. This is the largest single bloc of stock. WHDH's Form 323 does not contain the identity of the beneficial owners, although such information is required by that form.

[6] Some of the information which Charles has uncovered, plus information from Commission files, has revealed the following:

1. Merrill Lynch, a brokerage firm, owned 1.01% of Herald-Traveler as of December 31, 1963. It also owned, as of October 31, 1963, 6.85% of RKO-General, licensee of WNAC–TV in Boston; more than 1% of Westinghouse Broadcasting Co., licensee of WBZ–TV in Boston, as of July 31, 1963; and more than 1% of American Broadcasting-Paramount Theaters, Inc., as of December 31, 1959.

2. Salkeld and Co., an investment firm, owned 4.11% of Herald-Traveler as of November 30, 1963; and more than 1% of American Broadcasting-Paramount Theaters, Inc., which owns the permissible limit of broadcast properties.

3. There is a total of four new 3% stockholders since 1954, and no Form 301 information exists for them. One 3% stockholder in 1954, Sidney Winslow, Jr., died in 1963 and his estate now holds the stock (7.60%). Winslow was a director as was Robert B. Choate, who also died in 1963. Similar shifts in officers have occurred.

not been shown to have misrepresented any facts. Thus, there are no allegations that impinge upon its character.

5. Charles' next allegation is that there has been an unauthorized transfer of control of Herald-Traveler, the parent corporation of WHDH. Section 310(b) of the Communications Act of 1934, as amended, requires Commission consent to a transfer of control of a licensee (or parent corporation, as here). Such a transfer occurs when the licensee's original owners no longer own 50% of the licensee. To help enforce Section 310(b), the Commission requires changes in stock ownership to be reported (FCC Form 323). However, when a licensee corporation has 50 or more stockholders, the Commission, as a matter of convenience, only requires stock transfers to be reported in the case of stockholders who own 1% or more of the stock, and officers and directors. Because of this fact, Charles asserts that a different test for transfer of control must be used under Section 310(b) for widely held corporations. Charles suggests that the control of such a licensee rests in the hands of those stockholders whose stock transfers must be reported. Charles calls these stockholders the "control group". Applying its theory to the subject case, Charles shows the following:

*"Control group" makeup*

| Control group | Percent of control group stock | Percent of all Herald-Traveler stock |
|---|---|---|
| 1954 | 100.0 | 31.9 |
| 1963 old (1954 remainder) | 37.5 | 19.7 |
| 1963 new | 62.5 | 33.0 |
| | 100.0 | 52.7 |

Those stockholders who owned 100% of the "control group" stock in 1954 now own only 37.5% of the "control group", a shift of 62.5%. Charles' theory labels this a transfer of control.

6. Charles' suggested test of control for a widely-held licensee is not satisfactory. The stockholders in the 1954 "control group" only owned 31.9% of Herald-Traveler in 1954, so they never had *de jure* control of the corporation to transfer. The total apparent shift in stock by these 1954 people was a little over 12%, from 31.9% to 19.7%. The total stock transfer figure is undoubtedly somewhat higher because the new members of the "control group" now own 33% of all Herald-Traveler stock, whereas in 1954 they either owned no stock or else did not own enough to be in the "control group". But Charles' 1954 "control group" had no *de jure* control and it has not been shown that they had *de facto* control, thus Charles has failed to allege facts sufficient to show that there *has* been a transfer of control. Therefore, an issue as to whether there has been an unauthorized transfer of control under Section 310(b) of the Act will not be added.

7. However, Charles has cast some negative doubts about Herald-Traveler's control. For example, none of the major 1954 stockholders remain; there are four new 3% shareholders; and there has been a large turnover in the board of directors and officers. The first issue added below requires information to be sub-

mitted by WHDH, Inc. comparable to the information required by Section II of FCC Form 301. On the basis of this information and any other pertinent evidence, a determination of where control of WHDH, Inc.'s parent corporation, the Boston Herald-Traveler Corp., presently lies must be made in order to arrive at a meaningful determination of the standard comparative issue.

Accordingly, IT IS ORDERED, This 11th day of March, 1964, That the petition to enlarge issues, filed November 18, 1963, by Charles River Civic Television, Inc., IS GRANTED as indicated herein, and DENIED in all other respects; and the issues in this proceeding ARE ENLARGED by the addition of the following issues:

To determine, with respect to the stockholders, directors, and officers of WHDH, Inc.'s parent corporation, the Boston Herald-Traveler Corp., the information required by Section II of FCC Form 301, and, in light of the evidence adduced, to determine whether WHDH, Inc. is legally qualified.

To determine whether a grant of the application of WHDH, Inc. would be consistent with the provisions of Section 73.636 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–135

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of SPANISH INTERNATIONAL TELEVISION CO., INC., PATERSON, N.J. | Docket No. 15089 File No. BPCT–3032 |
| BARTELL BROADCASTERS, INC., PATERSON, N.J. | Docket No. 15091 File No. BPCT–3103 |
| TRANS-TEL CORP., PATERSON, N.J. For Construction Permits for New Television Broadcast Stations | Docket No. 15092 File No. BPCT–3114 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

1. Trans-Tel Corp. requests deletion of Issue 9 which would inquire into whether a grant of its application would be consistent with the provisions of Section 3.636(a)(1) [now Section 73.636(a)(1)] of the Rules.[1] Trans-Tel contends that the common overlap interests between Station WHNB–TV and Trans-Tel are significantly less than assumed by the Commission; that, since WHNB–TV is operating with a new and improved antenna system[2], the amount of overlap involved will be only nine square miles with an estimated population of 708 encompassed therein; and that the overlap area now receives services of eight VHF commercial television stations. Petitioner argues that there is no justification for the issue since it is obvious that two stations would not serve "substantially the same area", citing *Clarksburg Publishing Company* v. *FCC*, 225 F.2d 511 (D.C. Cir. 1955), 12 RR 2024; *Jefferson Standard Broadcasting Corp.*, FCC 60–21 19 RR 656 (1960); that the Commission has repeatedly authorized very significant amounts of Grade B overlap, where the stations served separate communities and where there was no Grade A overlap, citing *KWTX Broadcasting Company*, FCC 62–181, 22 RR 1043 (1962); *Abilene Radio and Television Company*, FCC 61D–95, 22 RR 154 (1961); *Modern Broadcasting Company of Baton Rouge, Inc.*, FCC 60D–83, 20 RR 353 (1960); and that in the above-cited cases, the Grade B overlap raised a *prima facie* issue as to whether the station served "substantially the same" area; whereas the actual overlap here is *de minimis* and no *prima facie* issue of substantiality is posed.

[1] The Review Board has before it for consideration a motion to delete issue, filed June 14, 1963, by Trans-Tel Corp.; opposition, filed July 8, 1963, by the Broadcast Bureau; and reply, filed July 16, 1963, by Trans-Tel Corp.

[2] WHNB-TV has been operating under STA since April 3, 1963 (BPCT–3113).

2. Although it is argued that the overlap area involved is *de minimis*, such matters should be resolved in evidentiary hearing and not through interlocutory pleadings requesting deletion of issue pertaining thereto. Should it be found that there is a violation of the rule, the overlap, while not absolutely disqualifying, would be a factor for comparative consideration. *Rollins Broadcasting Co.*, FCC 61–2, 21 RR 54 (1961). The Review Board thus concurs with the position of the Broadcast Bureau, and the motion to delete the overlap issue will be denied.

Accordingly, IT IS ORDERED, This 13th day of March, 1964, That the motion to delete overlap issue, filed June 14, 1963, by Trans-Tel Corp. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

F.C.C. 64–228

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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| In the Matter of<br>REVOCATION OF LICENSE OF RADIO STATION WTIF, INC.<br>FOR STANDARD BROADCAST STATION WTIF, TIFTON, GA. | Docket No. 15176 |
| In Re Applications of<br>WDMG, INC.<br>For Renewal of License of Standard Broadcast Station WDMG, Douglas, Ga. | Docket No. 15177<br>File No. BR–1709 |
| WMEN, INC.<br>For Renewal of License of Standard Broadcast Station WMEN, Tallahassee, Fla. | Docket No. 15274<br>File No. BR–3030 |
| B. F. J. TIMM, JACKSONVILLE, FLA.<br>For Construction Permit | Docket No. 15275<br>File No. BP–13649 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT; COMMISSIONER COX NOT PARTICIPATING.

1. The Commission has before it for consideration (1) a Request for Bill of Particulars and For Other Relief filed on February 28, 1964, by Radio Station WTIF, Inc., WDMG, Inc., WMEN, Inc., and B. F. J. Timm seeking (a) discovery, (b) a bill of particulars, (c) a review of rulings respecting burden of proof and burden of proceeding initially, and (d) expedition; (2) an opposition thereto filed by the Chief, Broadcast Bureau, on March 10, 1964; (3) a reply to such opposition filed by WTIF, WDMG( WMEN and Timm on March 16, 1964; and (4) an application for review of an Order of the Chief Hearing Examiner (FCC 64M–195) filed by these same petitioners on March 12, 1964. Each of these requests is discussed below.

*Request for Discovery*

2. Petitioners request discovery of the following matters: (a) any statement or statements made or given to Commission personnel by the following individuals: Ralph Edwards, Station WWGS, Tifton, Georgia Joseph V. Trankina, Jr., Station WOKA, Douglas, Georgia; Thomas Carr, Atlanta, Georgia; Marshall W. Rowland, Station WQIK, Jacksonville, Florida; Carol C. (Mrs. Marshall W.) Rowland, Jacksonville, Florida; Andy Garrison, Contractor, Tifton, Georgia; former employees of Radio Station

WTIF, Inc.,[1] and (b) Any documents in the Commission's possession relating to the value of the assets of Station WSIZ, Douglas, Georgia, at the time of their purchase in 1958 by WDMG, Inc.

3. Petitioners assert that, "The refusal of the Bureau to make available . . . a list of witnesses whom it intends to call, copies of the statements of witnesses made to Commission personnel, or copies of documentary evidence upon which the Bureau intends to rely has . . . deprived respondent and applicants of sufficient knowledge of the matters at issue either to prepare a petition for reconsideration of the designation orders [2] or to adequately prepare for the hearing."

4. These requests for discovery will be denied. The Commission has consistently held that the contents of staff investigatory reports are intra-agency memoranda prepared solely for use by the Commission and that their contents are not open to public inspection under the provisions of 47 C.F.R. 0.406 nor available in a prehearing discovery proceeding. *C. J. Community Services,* 12 Pike & Fischer, R.R., 281; *Mid-South Broadcasting Co.,* 12 Pike & Fischer, R.R., 1447; *Nevada Telecasting,* 16 Pike & Fischer, R.R. 220; *Palmetto Broadcasting Co.,* 21 Pike & Fischer, R.R. 569; *Melody Music,* 24 Pike & Fischer, R.R. 463. Further, the contents of investigatory reports are uncontrolled by the hearing process and the reports themselves are not admissible in evidence. Adequate preparation of petitioners' defense does not require the perusal of documents in the Commission's possession, which, in any event cannot be considered by the Commission in its adjudicatory disposition of the proceeding, unless introduced as evidence. In the latter case, they would, of course, be available to the petitioner, *Palmetto,* and *Nevada, supra.* Additionally, as pointed out by the Commission in *Nevada,* it may well be that none of the witnesses who gave statements may be called to testify at the hearing. Thus, the grant of the motion for discovery would do no more than permit exploration of documents possessed by the Commission which are not a part of the record and which may never become relevant to it. *Nevada, supra.* Furthermore, in the event Bureau counsel should adduce evidence in the course of the hearing and the Examiner is satisfied its nature is such that petitioners could not have reasonably anticipated its introduction, petitioners could protect themselves by requesting an appropriate continuance. *Palmetto, supra.*

5. *Roviaro* v. *United States,* 353 U.S. 53 (1957), cited by petitioners, does not aid them in their quest for discovery for the instant case cannot be equated to a criminal proceeding. Even assuming the Code of Federal Criminal Procedure were applicable, petitioners would still not be entitled to the documents requested.

[1] In their reply to the Bureau's opposition to petitioners' request for a bill of particulars, petitioners state that, "Since the filing of the Request, it has been learned that additional persons were interviewed by Commission personnel." Petitioners then add the names of five individuals, all of Douglas, Georgia, to those whose statements they seek.

[2] In three separate orders, the Commission designated for consolidated hearing the matter of revocation of license of Radio Station WTIF, Inc., for Station WTIF, Tifton, Georgia (Order to Show Cause, FCC 63-870, released September 30, 1963); application for renewal of license of Station WDMG, Douglas, Georgia (Order, FCC 63-871, released September 30, 1963); and applications for renewal of license of Station WMEN, Tallahassee, Florida, and for construction permit for a new standard broadcast station in Jacksonville, Florida (Order, FCC 64-36, released January 17, 1964).

The Jencks Act, 18 U.S.C. 3500(a) provides, in pertinent part, that no statement or report in the possession of the United States made by prospective government witnesses to an agent of the government can be the subject of a subpoena, discovery, or inspection *until the witness has testified on direct examination in the trial.*

6. Petitioners' contention that the non-availability of this information hampers its case is unfounded. Initially, the matters involved in this proceeding are entirely within the knowledge of petitioners. There are two principals here involved: B. F. J. Timm, 100% stockholder of WDMG, Inc., the licensee of standard broadcast station WDMG, Douglas, Georgia; 100% stockholder of WMEN, Inc., the licensee of standard broadcast station WMEN, Tallahassee, Florida; 47% stockholder of WTIF, Inc., the licensee of standard broadcast station WTIF, Tifton, Georgia, and applicant for a construction permit for a new standard broadcast station in Jacksonville, Florida; and Carl N. Todd, the holder of 51% of the stock of WTIF, Inc., and former holder of the construction permit for standard broadcast station WREA, Alma, Georgia. The specific issues in this consolidated proceeding encompass, *inter alia,* questions relating to whether Timm engaged in improper conduct designed to prevent competition in Douglas, Georgia; whether Timm was the real party in interest in the application filed by Todd for radio station WREA for the purpose of impeding the construction of station WSIZ, Douglas, Georgia; whether Timm engaged in misrepresentations or demonstrated a lack of candor in statements filed with the Commission in connection with the closing of station WSIZ; whether Timm assumed control of station WTIF in violation of 47 USC 310(b); whether Timm possesses the financial qualifications to construct and operate the proposed station at Jacksonville, Florida; and whether Timm possesses the requisite character qualifications to be a licensee of the Commission. With regard to Todd, the Commission is concerned with whether Todd submitted false statements in connection with various applications filed with the Commission; whether Todd, in conspiracy with Timm, filed an application for a new radio station in Alma for the purpose of impeding and barring the construction of a new radio station in Douglas, Georgia; and whether Todd violated the provisions of 47 USC 310(b) in connection with station WTIF.

7. In addition to the fact, as just illustrated, that the matters involved in this proceeding are entirely within the knowledge of petitioners, it is also pointed out that since the pendency of this hearing, the Broadcast Bureau has furnished petitioners with a transcript of tape recordings of an interview between Commission investigators and Carl N. Todd. Further, pursuant to a request of W. C. Todd, the father of Carl N. Todd, Bureau counsel has furnished petitioners with a copy of a signed statement secured from W. C. Todd (Tr. 77).

*Request for Bill of Particulars*

8. Petitioners allege that, "Preparation for the evidential hearing (which is scheduled to commence on March 24, 1964) is severely hampered through lack of sufficient knowledge of the

factual premises underlying the hearing issues, due to the vague and generalized allegations of the designation orders." In this regard, petitioners cite Section 5 (a) of the Administrative Procedure Act (5 U.S.C.A. § 1005 (a)) which provides in pertinent part as follows: "Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." Our review of the designation orders, cited in footnote 2, *supra,* makes it manifestly clear that the issues recited therein specifically delineate the matters involved in this proceeding. Furthermore, the appearing clauses which precede the recitation of the issues set forth precisely the grounds for placing these matters in issue.

9. Moreover, the lack of merit attaching to petitioners' contention that they have not received adequate notice is demonstrated by the fact that petitioners have never indicated at any prehearing conference, of which there were three, or in any other manner that the designation orders required clarification or that they were not fully informed as to the issues. In actuality, it appears that what petitioners seek by their request for a bill of particulars is the right to obtain in advance of hearing the evidentiary matters upon which the Broadcast Bureau intends to rely. The Commission has made it clear that such pleadings may not be used as vehicles for obtaining a listing of evidence. See *Dispatch, Inc.,* 10 Pike & Fischer, R.R. 1190; *Palmetto, supra;* and *KWK Radio, Inc.,* 21 Pike & Fischer, R.R. 301.

*Request for Review of Rulings Respecting Burden of Proof and Burden of Proceeding Initially*

10. Petitioners request that the Commission review a determination of the Review Board, affirming a ruling of the Examiner, to the effect that the ultimate burden of proving that a renewal of the license of WDMG, Inc., would be in the public interest will rest upon the licensee, while the ultimate burden of proving that the license of Station WTIF should be revoked will lie with the Bureau.[3] Since the decision of the Review Board was released December 12, 1963 (FCC 63R–543) and no petition for review was filed within the required time period, petitioners' request at this time is untimely and, no good cause having been demonstrated for the delay, such request for review is procedurally defective and must be dismissed. Assuming *arguendo* that this request were to be considered on its merits, no legal support exists for placing the burden of proof with respect to the renewal proceeding on the Broadcast Bureau. See 47 U.S.C. 309 (e) and *Charles P. B. Pinson, Inc.* v. *F.C.C.,* —— F.2d ——, 25 Pike & Fischer, R.R. 2081. Moreover, even where the same basic character issues are involved in a consolidated renewal and revocation proceeding regarding the same licensee, the Commission has required that the burden of proof and the burden of going forward regarding the renewal proceeding be placed upon the applicant. *WMOZ, Inc.,* 36 F.C.C. 202. In view of the agreement reached herein (Tr. 74) that this case will proceed according to the order of docket num-

[3] The Review Board's decision was released prior to the consolidation herein of the Tallahassee and Jacksonville applications, Docket Nos. 15274 and 15275.

bers, the Broadcast Bureau will first present its evidence relating to the revocation of license of Radio Station WTIF, Tifton, Georgia. This being so, we find no merit to petitioners' alternative request that the revocation matter be severed from the renewal and construction permit applications and that the hearing upon the latter applications be continued until completion of the hearing upon the revocation matter.

*Application for Review*

11. Petitioners request that we review an Order of the Chief Hearing Examiner (FCC 64M–195), released March 9, 1964, directing that the proceedings herein be moved to Douglas, Georgia, upon their completion in Tifton, Georgia. In support of this request, petitioners allege that the Chief Hearing Examiner's Order of March 9, 1964, is null and void since it is beyond the scope of the authority delegated to him. Section 0.351 of our Rules sets forth this authority. Subsection (a) thereof authorizes the Chief Hearing Examiner to make "initial specifications of the time and place of hearing." According to petitioners, the Chief Hearing Examiner's Order is not an "initial specification" of the place of hearing; therefore, he was without authority to act and, accordingly, his Order is a nullity.

12. We disagree with this position. It was not until January 17, 1964, that the Commission designated the four applications here involved into a consolidated hearing. This being so, the March 9, 1964 Order of the Chief Hearing Examiner is the "initial specification" of the time and place of hearing which the Chief Hearing Examiner is empowered to make. Petitioners' application for review will, accordingly, be denied.

*Request for Expedition*

13. Petitioners request expeditious consideration of their pleadings just considered in view of the fact that the hearing herein is scheduled to commence on March 24, 1964. This request is granted.

Accordingly, IT IS ORDERED, This 18th day of March, 1964, that petitioners' request for a bill of particulars and for other relief IS DENIED in all respects except insofar as the request for expedition is concerned, the latter being GRANTED.

IT IS FURTHER ORDERED, That petitioners' application for review of the Chief Hearing Examiner's Order, released March 9, 1964 (FCC 64M–195) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64-245

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of<br>ROBERT C. WHITELEY, JR., AND KATHARINE WHITELEY D.B.A. TIPTON COUNTY BROADCASTERS (WKBL), COVINGTON, TENN. | Docket No. 14818<br>File No. BR-2982 |
| SHELBY COUNTY BROADCASTER'S, INC. (WHEY), MILLINGTON, TENN. | Docket No. 14819<br>File No. BR-3656 |
| For Renewal of Licenses | |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HENRY, CHAIRMAN; AND COX NOT PARTICIPATING; COMMISSIONER HYDE ABSENT.

1. The interlocutory matters here under consideration relate to the above-captioned applications to renew the licenses of Stations WKBL, Covington, Tennessee, and WHEY, Millington, Tennessee. A statement of the background of this proceeding may be helpful to an understanding of the pending pleadings.

2. WKBL is licensed to Tipton County Broadcasters, a partnership consisting of Robert C. Whiteley and his wife Katharine Whiteley; WHEY is licensed to Shelby County Broadcaster's, a corporation composed of John Latham and the aforementioned Robert C. Whiteley. The issues, in most part concern Station WHEY and its licensee, Shelby County. Briefly summarized, the issues inquire into alleged improper assumption and transfer of control over WHEY, "trafficking," misrepresentation, illegal removal of the WHEY main studio, and the financial and character qualifications of Shelby County (Latham & Robert C. Whiteley) to continue as licensee of WHEY. An Initial Decision of July 15, 1963, would deny both the WHEY and WKBL renewal applications. Exceptions and requests for oral argument have been filed by Tipton County and Shelby County.[1] Since release of the Initial Decision, Shelby County has been declared bankrupt by a Federal District Court, and Station WHEY is being operated by Fred E. Jones as Trustee in bankruptcy.[2]

3. Now before the Commission are the following pleadings: (1) a motion (filed August 27, 1963) by Fred E. Jones, Trustee, requesting that he be substituted as a party for Shelby County; (2)

[1] The applications for renewal were designated for hearing after August 31, 1961, and therefore holding oral argument herein is within the Commission's discretion. It is our opinion that under the circumstances of this case, oral argument should be held.

[2] On August 27, 1963, Fred E. Jones, acting as Trustee in bankruptcy, filed an application for involuntary assignment of the WHEY license to himself. On December 30, 1963, Tipton County filed an application for assignment of the WKBL license to a third party not here involved. Both of these applications are still pending. We do not intend to pass on these applications in this Memorandum Opinion and Order.

the Trustee's exceptions and supporting brief, and a motion (filed October 11, 1963) seeking the acceptance for filing of such documents; and (3) a petition by Tipton County for immediate termination of the renewal proceedings with respect to WKBL, grant of the WKBL renewal application, and grant of an application for assignment of the WKBL license to a third party (filed January 27, 1963). In addition, separate exceptions and request for oral argument have been filed by Katharine Whiteley in her own right and as a partner of WKBL. The Bureau has moved that these exceptions be stricken.

4. The above-described pleadings present the following questions relating to WHEY:

(a) whether the Trustee should be "substituted" as a party herein, and,

(b) if not, whether the Trustee should nevertheless be permitted to file exceptions.

Relative to WKBL, the questions are:

(a) whether Katharine Whiteley should be permitted to file exceptions and participate herein as a party separate from the WKBL partnership; and

(b) whether the WKBL renewal application should be severed from this proceeding and granted, and the WKBL assignment application granted.

Since the problems relating to WKBL have no direct bearing on those relating to WHEY, we shall dispose of them separately.

*WHEY*

5. In seeking to be substituted as a party, the Trustee relies wholly on his authority under the Court's mandate that he operate WHEY for the benefit of its creditors. His exceptions, tendered for filing, incorporate the exceptions of Shelby County, and, in addition, he requests that a determination on the financial issue be deferred to enable him to find a qualified purchaser to buy the station.

6. It is our opinion that the motion should be denied both with respect to (a) substitution of the Trustee for Shelby County and (b) permitting the Trustee to become a party. Shelby County remains the licensee of WHEY and as such is accountable to this Commission. Substituting the Trustee for the licensee without the latter's consent [3] would, in effect, deny the licensee's statutory right to participate in this proceeding. Including the Trustee as a party in addition to Shelby County would create the cumbersome and inexpedient situation of two parties representing a single licensee. However, because of the exceptional circumstances of this case, and the Trustee's obligation under the Court's order, we deem it both appropriate and advisable to permit him limited standing to file exceptions. Accordingly, his exceptions are accepted for filing [4] and, in the event, the Trustee desires to participate in the oral argument in this proceeding, he will be accorded an opportunity to do so.

[3] Shelby County has not indicated its position on the Trustee's motion for substitution.

[4] We are aware that under Section 1.153 of our Rules only a "party" may file exceptions and that we have permitted the Trustee here to file exceptions without granting him party status. Needless to say, we may waive Section 1.153 to permit limited participation by an interested person that can aid in our determination of the public interest factors involved.

*WKBL*

7. Katharine Whiteley concurs in the exceptions of Tipton County, but supplements them with her own exceptions (filed through separate counsel). Mrs. Whiteley's exceptions were tendered for filing without an accompanying motion seeking leave to file that document. In support of her right to file separate exceptions and participate in oral argument thereon, she states that (1) she is an active partner in WKBL and as such has a substantial and direct interest to protect; (2) she is completely innocent of any machinations relating to WHEY; (3) that the Rules do not limit a party to one attorney or one set of exceptions; and (4) since separate interests, stations, communities, and people are involved, equity and fairness entitle her to be heard in her own behalf.

8. We do not regard Mrs. Whiteley's effort at separate participation in this proceeding on the same plane as the request of WHEY's Trustee to file exceptions. In the first place, she seeks, in effect, to step out of the partnership entity to avoid adverse repercussions from her partner's alleged implication in improper acts with respect to another station, whereas, the Trustee seeks to carry out the duty imposed upon him by a Federal Court, to conserve the assets of a bankrupt corporation. Secondly, Mr. Jones became Trustee of WHEY after conclusion of the hearing on the renewal application, and he, therefore, had no opportunity or right to seek participation in the hearing. In contrast Mrs. Whiteley participated fully in the renewal hearing through the entity of Tipton County, and her views, therefore, have been expressed and her interests represented. In *WCHS–TV–Inc.*, 14 RR 496 (1956), the Commission refused permission to a stockholder of a corporate licensee to separately participate in a hearing on the grounds that he had no individual standing. We believe this holding is equally applicable to Mrs. Whiteley even though a partnership, rather than a corporation, is here involved. Further, we do not find exceptional circumstances to justify dual participation by Mrs. Whiteley—once in the entity of Tipton County, and once in her own behalf.

9. In support of its petition to terminate the proceeding and renew and assign its license, Tipton County argues that (1) this would save the time and expense of the Commission and the parties in the further prosecution of the renewal application; (2) public policy favors termination of a controversy at any phase of litigation; (3) since WKBL is not directly implicated in the issues, the usual policy against assignment of license pending renewal should not be a bar; and (4) this would resolve WKBL's consequential involvement.

10. In light of our past consistent policy refusing to consider transfer or assignment applications during the pendency of a proceeding relating to the conduct of an owner, we find no justification here for any departure from our policy. We will, however, make every effort to expedite to early conclusion our decision herein so that we may then determine whether the assignment application should be dismissed or considered on its merit.

Accordingly, IT IS ORDERED, This 25th day of March, 1964, That (1) the motion of Fred E. Jones, Trustee in bankruptcy, that

he be substituted for Shelby County Broadcaster's as a party herein IS DENIED; (2) the motion of Fred E. Jones, for leave to file exceptions IS GRANTED, and his exceptions tendered herein for filing ARE ACCEPTED; (3) the petition of Tipton County Broadcasters for grant of renewal and assignment applications of WKBL and for severance and termination of this proceeding with respect to WKBL IS DENIED; (4) the Broadcast Bureau's motion to strike supplemental exceptions of Katharine Whiteley, IS GRANTED; (5) the supplemental exceptions, request for oral argument, and brief, filed on October 11, 1963, by Katharine Whiteley ARE NOT ACCEPTED FOR FILING; and

IT IS FURTHER ORDERED, That (a) Oral Argument before the Commission *en banc* on exceptions of Shelby County Broadcasters's, Tipton County Broadcasters, and Fred E. Jones, Trustee in bankruptcy of WHEY, IS SCHEDULED herein for April 27, 1964, at 2:00 p.m.; and (b) the parties that within five days of the release of this Memorandum Opinion and Order which file notices of intention to participate in oral argument shall each have twenty (20) minutes for the presentation of argument, and (c) Fred E. Jones, Trustee, shall have limited standing to participate in oral argument and shall have ten (10) minutes for the presentation of his argument.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R-175

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of<br>COMMUNITY BROADCASTING SERVICE, INC.,<br>VINELAND, N. J. | Docket No. 15265<br>File No. BPH-3949 |
| MORTIMER HENDRICKSON AND VIVIAN ELIZA<br>HENDRICKSON, VINELAND, N. J.<br>For Construction Permits | Docket No. 15266<br>File No. BPH-4165 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON DISSENTS.

1. The petitioner, Community Broadcasting Service, Inc., requests that the Review Board enlarge the issues in this proceeding to inquire into the financial qualifications of Mortimer and Vivian Eliza Hendrickson (Hendricksons).[1]

2. Petitioner and the Hendricksons each own existing AM broadcast facilities in Vineland, New Jersey. In this proceeding, each seeks a new FM broadcast station in Vineland. Their applications were designated for hearing in a consolidated proceeding in an Order released January 21, 1964 (Mimeo No. 46004) and published in the Federal Register on January 24, 1964 (29 FR 623). Petitioner alleges that the order of designation erroneously found the Hendricksons to be financially qualified to construct, own, and operate the proposed FM facility in Vineland, New Jersey. Petitioner claims that the Hendricksons, on the face of their application, failed to show total available resources sufficient to meet the total cost of construction and estimated cash expenditures for operation for the first year.

3. Specifically, petitioner points to the financial section of the Hendricksons' application wherein estimated costs of construction of $15,623.75 and estimated operating expenses for the first year of $25,000 are balanced against $4,000 cash deposits, a $5,000 proposed bank loan, a $13,373.75 deferred payment credit from RCA, and available personal income. Petitioner contends that the proposed loan of $5,000 cannot be considered as an available resource because of a unilateral determination to be made in the future by the bank of the acceptability of Hendricksons' financial statement. The amount of deferred credit available shown by Hendricksons

[1] The Review Board has before it for consideration the following pleadings: (1) Petition to enlarge issues, filed February 10, 1964, by Community Broadcasting Service, Inc.; (2) Opposition, filed February 24, 1964, by Mortimer and Vivian Eliza Hendrickson; (3) Support of Petition, filed February 25, 1964, by the Broadcast Bureau; and (4) Reply by petitioner, filed March 3, 1964. The Broadcast Bureau has also filed a petition for acceptance of late filing on February 25, 1964. The petition will be granted for good cause shown and the Bureau's pleading in support of the petition to enlarge issues will be accepted as filed on February 25, 1964.

is also attacked by petitioner since a total of 25% of stated amount must be paid before construction, leaving an available credit of only $10,030. The petitioner further contends that the unspecified item of "personal income" in the application cannot be considered because of uncertainty in its determination as a financial resource and because the purported balance sheet of the Hendricksons is incomplete in that it fails to show liabilities. As a result, petitioner alleges that a deficiency exists between total costs of construction of $15,623.75 and total available resources of $14,030 ($4,000 cash deposits and $10,030 deferred credit); that, even on a cash expenditure basis, total expenditures of $36,217 [2] exceed total revenues ($5,000 cash deposits plus $30,000 anticipated revenues for first year); and that the assumed expenses of $25,000 for combined AM–FM operation for the first year are "highly doubtful" in light of average broadcast expenses published by the Commission and of affidavits attached by petitioner from its general manager and a radio engineer dealing with the estimated costs of power, maintenance, and operation for such a proposed FM station.

4. The Hendricksons oppose the petitioner's request to add a financial qualifications issue. The Hendricksons maintain that any bank commitment to make a loan at an indefinite time in the future is conditioned on possible changes and that the Commission has consistently recognized such practice and approved commitments, despite such reservations, as sufficient indication of the availability of loan funds. Without taking account of personal income, and accepting the corrected figure for deferred credit, the Hendricksons allege that they will have available resources of $19,030 ($4,000 cash deposits, $5,000 loan, and $10,030 deferred credit) with which to offset anticipated expenditures of $18,048,[3] and that they can also meet a test of financial qualification on a cash expenditure basis. The Hendricksons contend that allegations of average operating costs are meaningless without a specific showing of costs in the Vineland, New Jersey, area and that the affidavits submitted by petitioner with respect to such costs fail to provide supporting information and are based merely on the opinion of petitioner's general manager, an interested party. The Hendricksons supply an affidavit of Mortimer Hendrickson indicating the basis upon which the estimated expense of operation of $25,000 is constructed.[4]

5. The Broadcast Bureau supports the petition to enlarge issues in the proceeding. The Bureau states that the Hendricksons' ap-

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[2] Total cash expenditures, as alleged in the petition to enlarge issues, include the following:

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|---|---|
| Professional services | $ 2,250 |
| RCA downpayment | 3,343 |
| Principal payments to RCA | 5,434 |
| Interest payments to RCA | 190 |
| Cost of operation (estimated) | 25,000 |
| Total expenditures, end of first year | 36,217 |

[3] The Hendricksons' opposition claims total expenditures for construction and the first three months of operation in the following amounts:

| | |
|---|---|
| Professional services | $ 2,250 |
| RCA downpayment | 3,343 |
| RCA principal | 5,015 |
| RCA interest | 190 |
| Bank loan principal | 1,000 |
| 3 months' operating expense (¼ of $25,000) | 6,250 |
| Total | 18,048 |

[4] The affidavit submitted by Mortimer Hendrickson estimates first year operational costs for combined AM–FM facilities at $18,815. No account is given of the difference between this figure and the $25,000 estimated costs contained in the Hendricksons' application.

plication reflects estimated construction costs of $15,623.75 and estimated operating expenses of $6,250 for a period of three months or a total cost of construction and operation for three months of $21,873.75. The Bureau points out that available resources total only $19,030 (including $4,000 cash deposits, $5,000 bank loan, and $10,030 deferred credit); therefore, the application, on its face, fails to make a proper financial showing. The Bureau also supports the petitioner in questioning the availability of the bank loan because of the conditional nature of the letter of intent submitted by the bank to the Hendricksons.

6. In its reply pleading, petitioner supports the stated views of the Broadcast Bureau and further questions the adequacy and accuracy of the proposed cost estimates furnished by Mortimer Hendrickson with respect to the staffing of the FM facility.

7. Upon consideration of the petition to enlarge issues and related pleadings and the financial proposals contained in the Hendricksons' application, the Review Board is of the opinion that the addition of a financial qualifications issue is warranted. The Hendricksons' proposal anticipates estimated construction costs of $15,623.75, from which figure $10,030 in deferred credit may be subtracted to arrive at an initial construction cost of $5,593.75. Operating expenses of a combined AM–FM broadcast facility [5] for the first three months would total $6,250; therefore, a total of $11,843.75 would be required to construct and operate the station for the initial three month period without regard to potential revenues. The available resources to finance construction and operation for the first three months include $4,000 cash deposits and a $5,000 bank loan,[6] or a total of $9,000. In the Hendricksons' opposition the deferred credit of $10,030 is listed as an available source of liquid funds with which to finance the construction expenses of the initial three month period. This inclusion is in error since the deferred credit ($10,030) was previously deducted from the estimated construction costs and is not available to reduce the total liquid funds necessary to finance the Hendricksons' proposal. The unspecified item of personal income listed as a source of available funds cannot be considered by the Board. On the face of their application, the Hendricksons have failed to show available funds sufficient to construct and operate the proposed FM station for an initial three month period; therefore, the financial qualifications issue, as requested by the petitioner, will be added to the proceeding.

Accordingly, IT IS ORDERED, This 27th day of March, 1964, That the petition for acceptance of late filing, filed February 25, 1964, by the Broadcast Bureau, and that the petition to enlarge issues, filed February 10, 1964, by Community Broadcasting Service, Inc., ARE GRANTED; and

IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issue:

[5] The Review Board must employ the estimated costs of operation indicated in the Hendricksons' application even though the figure includes expenses attributable to a combined AM–FM operation since there is no assessment of FM operational costs as a separate item.

[6] We do not agree with the petitioner or with the Broadcast Bureau that the bank's commitment is so burdened with a condition of acceptability to the bank that it is unreliable for the Commission's purposes.

To determine whether Mortimer and Vivian Eliza Hendrickson are financially qualified to construct and operate the FM broadcast station as proposed.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–296

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of NEW JERSEY TELEVISION BROADCASTING CORP., LINDEN, N.J. For Modification of Construction Permit | File No. BMPCT–5815 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND BARTLEY ABSENT; COMMISSIONER COX DISSENTING.

1. The Commission has before it for consideration: (a) The above-captioned application of New Jersey Television Broadcasting Corporation, permittee of Television Broadcast Station WNJU–TV, Channel 47, Linden, New Jersey; (b) Petition to Deny filed February 25, 1963, by WPIX, Inc., licensee of Television Broadcast Station WPIX, Channel 11, New York, New York; (c) Opposition to (b), above, filed March 11, 1963, by applicant; (d) Petition to Designate for Hearing and to Consolidate, filed July 9, 1963, by Trans-Tel Corp., applicant in Docket Nos. 15089–15092 for a construction permit for a new television broadcast station to operate on Channel 37, Paterson, New Jersey; (e) Opposition to (d), above, filed July 19, 1963, by applicant; and (f) Supplement to Petition to Designate for Hearing and to Consolidate, filed March 2, 1964, by Trans-Tel Corp.

2. The applicant was granted a construction permit (BPCT–3073) on December 17, 1962, for a new television broadcast station to operate on Channel 47, Linden, New Jersey. Channel 47 is allocated to New Brunswick, New Jersey, but the applicant, pursuant to the provisions of Section 73.607(b) of the Commission's Rules, specified Linden as the principal community to be served. A waiver of Section 73.613 of the Commission's Rules was requested and granted to enable the permittee to locate its main studio in Newark, New Jersey. The applicant is authorized to operate with effective radiated power (visual) of 200kw using an antenna height above average terrain of 580 feet at a transmitter site located at Mount Pleasant and Marcella Avenues, West Orange, New Jersey. By its application, applicant seeks authority to change the site of its transmitter to the Empire State Building in New York City (16.3 miles from Linden), increase effective radiated power to 497kw and increase antenna height above average terrain to 1268 feet and to make other changes in the facilities of Station WNJU–TV.

3. We think that the applicant has clearly demonstrated that, operating as proposed from a site on the Empire State Building, it

can provide an improved signal to a greater number of persons than from its authorized location. The applicant states that, operating from the Empire State Building, it will bring a new television service to 500,000 more people in New Jersey than it could if it operated from its authorized site, and it will place a principal city signal over Linden and New Brunswick, New Jersey (the city to which the channel is allocated). No change is contemplated in the location of the main studio nor has any change been proposed in programming. The fact that applicant's transmitter would be located in New York City rather than in New Jersey does not constitute it a New York station [1], just as the fact that the petitioner's own station places a Grade A signal over substantially all of northern New Jersey and parts of Pennsylvania and Connecticut does not make it a New Jersey, Pennsylvania or Connecticut station. The allegations that the applicant's proposal represents the culmination of a scheme to be a New York station rather than a New Jersey station are unsupported. The applicant's application (BPCT–3073) for a construction permit clearly set forth its intention to serve all of northern New Jersey rather than just the city of Linden. The applicant at that time represented to the Commission that it would not confine itself to serving any particular community, but rather contemplated an area service concept embracing all of northern New Jersey. The Commission considered these representations and determined that a grant would serve the public interest, convenience and necessity. No facts have been alleged to persuade us that our determination in that respect was erroneous.

4. Question has been raised concerning whether the location of applicant's transmitter on the Empire State Building indicates that the station would serve the needs and interests of the New York metropolitan area rather than those of northern New Jersey. An examination of the applicant's programming proposal (upon which the Commission has already passed and determined that such programming would meet the needs and interests of the area to be served) discloses that the applicant proposes a daily four-hour block of time to be devoted exclusively to matters of interest to the people of New Jersey. The applicant conducted a survey of the area proposed to be served and the programming proposal, according to the applicant, was based on the results thereof. Applicant has consulted with public officials and leading citizens of New Jersey and has secured their enthusiastic support. Indeed, the applicant points out that one of its principals participated actively with the Governor of New Jersey in efforts to retain Channel 13 as a New Jersey station. The applicant's interest in New Jersey and its intention to serve the needs of that area have, in our judgment, been amply demonstrated. The petitioner refers to the experience with Channel 13, which was originally allocated to Newark, New Jersey, and alleges that Channel 13 became a New York station after its antenna was located on the Empire State Building. Petitioner concludes that "the same result will follow

[1] See citations, Footnote 2, *infra*.

if the subject application is granted." Such speculative assertions, when placed against the showing made in this case, cannot be the basis for designating an application for hearing. Furthermore, it is generally agreed among engineers that the Empire State Building represents the best location for an antenna system to provide coverage to northern New Jersey. We are not persuaded that the applicant has been less than candid with the Commission in any respect nor that it has, in any manner, attempted to defeat the purposes of the Commission's Rules or the Communications Act.

5. With reference to the objections of Trans-Tel Corp., the objector challenges the financial qualifications of the applicant, the programming proposals, the feasibility of locating applicant's antenna on the Empire State Building, and, finally, suggests that applicant's construction permit be cancelled, its call letters deleted, submission of a new application required, and that Channel 47 be opened for application by the present applicants for Channel 37, Paterson, New Jersey. The applicant states that its total construction costs will be approximately $450,000. To meet these costs, the applicant has shown the availability of deferred credit in the amount of approximately $337,500, a bank loan of approximately $100,000, and cash in the amount of approximately $140,000. The applicant shows total current liabilities of approximately $6,000. Further, loan commitments from stockholders, aggregating $150,000, are on file, but the applicant has chosen not to rely upon this capital in computing its available funds. The applicant has estimated its expenses for the first year of operation to be approximately $326,000 and its estimated revenues for the first year to be somewhat in excess of that figure, due principally to the expanded coverage which may be expected from the proposed operation. Under these circumstances, we find that the applicant is financially qualified. As we have already said, applicant's programming proposals have been shown to be the results of studious inquiry in the area which it proposes to serve. We are satisfied that the programming proposal is a reasonable result of the applicant's efforts to determine the needs and interests of the area it proposes to serve. With respect to the questions raised as to the applicant's programming proposal, we are, in essence, being asked to reconsider the determination which we made when we granted the original application with full knowledge thereof. We are not persuaded that such action is warranted. With respect to the feasibility of locating the antenna on the Empire State Building, this has been clearly established as a result of a study conducted by RCA under contract with the Empire State Building. Finally, the request of Trans-Tel Corp. to cancel the construction permit, delete call letters, require resubmission of the application and open the channel for new applications will be denied. No basis has been provided for granting such relief.[2]

[2] The Commission has consistently ruled that the grant of an application to move the site of a transmitter to a city other than that which is specified as the principal community to be served does not constitute a reassignment of the channel nor open the channel for new applications (*KTEV Television, Inc.*, FCC 62-852 and FCC 62-879; affirmed *sub nom Rhode Island Television Corporation et al*, 320 F. 2d 762, D.C. Cir., *Community Telecasting, Inc.* (WKST) v. *Federal Communications Commission*, FCC 57-946: 2ff F 2d 891; *Houston Consolidated Television Co.* v. *Federal Communications Commission*, 14 RR 2069; 99 U.S. App. D.C. 378; 240 F 2d 409).

6. Having carefully considered the matters raised by the petition filed by WPIX, Inc. and the objections filed by Trans-Tel, we conclude that WPIX and Trans-Tel have failed to present substantial and material questions of fact sufficient to warrant an evidentiary hearing. The Commission finds that the applicant is legally, financially, technically and otherwise qualified to construct and operate as proposed and that a grant of the application would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the Petition to Deny filed by WPIX, Inc. IS DENIED; and the Petition to Designate for Hearing and to Consolidate and the supplement thereto, filed by Trans-Tel Corp., ARE DENIED; and

IT IS FURTHER ORDERED, That the application (BMPCT–5815) of New Jersey Television Broadcasting Corporation IS GRANTED, subject to specifications to be issued.

Adopted April 1, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–191

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of<br>REVOCATION OF LICENSE OF RADIO STATION WTIF, INC.<br>For Standard Broadcast Station WTIF, Tifton, Ga. | Docket No. 15176 |
| In Re Applications of<br>WDMG, INC.<br>For Renewal of License of Standard Broadcast Station WDMG, Douglas, Ga. | Docket No. 15177<br>File No. BR–1709 |
| WMEN, INC.<br>For Renewal of License of Standard Broadcast Station WMEN, Tallahassee, Fla. | Docket No. 15274<br>File No. BR–3030 |
| B. F. J. TIMM, JACKSONVILLE, FLA.<br>For Construction Permit | Docket No. 15275<br>File No. BP–13649 |

### ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

The Review Board having under consideration the petition filed on March 16, 1964, by WMEN, Inc., and B. F. J. Timm, requesting waiver of Section 1.594 of the Rules insofar as that section requires publication and broadcast of local notice within the two weeks immediately following the designation of their applications for hearing;

IT APPEARING, That the notice afforded by petitioner fulfills the objectives of the Commission's Rules, and that no objection to the request for waiver has been received;

IT IS ORDERED, This 3rd day of April, 1964, That the petition for waiver of Section 1.594 of the Rules IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–196

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>VERNE M. MILLER, CRYSTAL BAY, NEV.<br>For Construction Permit | Docket No. 14841<br>File No. BP–14706 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. B.B.C. Inc., (KCBN), Reno, Nevada, a party respondent in the above-entitled proceeding, requests an enlargement of issues to determine whether the proposal of Verne M. Miller would serve primarily a particular city, town, political subdivision, or community as contemplated by Section 73.30(a) of the Commission's Rules.[1]

2. In support of its request, KCBN contends that it learned of the nature of the community from the petition to intervene filed by Robert Sherman (KHOE), Truckee, California; that it has made an independent study; and that an applicant for a new station must establish that the location it has applied for is a particular city, town, political subdivision, or community and is not permitted to rely on areas which are identified with other locations, citing *Seven Locks Broadcasting Co.*, FCC 62–140, 22 RR 967 (1962); *Denbigh Broadcasting Co.*, 28 FCC 393, 18 RR 449 (1960). KCBN states that its investigation reveals that Crystal Bay has no local government, churches, schools, fraternal or civic organizations, banks, hospital, or newspapers, that it has only 144 resident telephone listings, that Crystal Bay "settlement" is principally one of motels and summer homes, and that the few permanent residents look to other locations for education, religion, shopping, and other facets of ordinary community life. It further states that the applicant admits in its opposition to a motion to enlarge issues filed February 17, 1964, that Crystal Bay is not a city but a residential resort community having neither a business nor factory area. As good cause for filing its petition at this time, KCBN contends that the need for the issue did not become apparent until KHOE filed its petition to intervene on January 24, 1964.

3. The Broadcast Bureau supports the motion, stating that the cumulative effect of the allegations contained in these pleadings raises serious doubts as to whether Crystal Bay is in fact a "community" within the purview of Section 73.30(a) of the Rules. It cites *Mercer Broadcasting Co.*, 22 FCC 1009, 13 RR 891 (1957);

[1] The Review Board has before it for consideration (a) a motion to enlarge issues filed February 25, 1964 by B.B.C. Inc., (KCBN); (b) a response of Broadcast Bureau filed March 10, 1964; (c) an opposition to motion to enlarge issues, filed March 11, 1964, by Verne M. Miller; and (d) a reply to opposition to motion to enlarge issues filed March 18, 1964, by B.B.C. Inc.

*North Atlanta Broadcasting Company*, FCC 63R–450, 1 RR 2d 275 (1963).

4. In opposition, Miller argues that KCBN has not shown good cause for filing its petition late; that, the fact that KCBN admits that it made no study of Crystal Bay until prompted by the allegation of another party is reason enough to deny its petition; and that no explanation was given why the alleged facts were not independently ascertained at an earlier date. Miller contends that the Commission has consistently held that the excuse of a petitioner that certain facts only recently came to its attention, when it had not made an independent search of its own where the facts alleged have existed for any length of time, is not reason enough to enlarge issues pursuant to an untimely request, citing *Alkima Broadcasting Co.*, FCC 59–926, 18 RR 993 (1959); *Florida Gulfcoast Broadcasters, Inc.*, FCC 59–573, 18 RR 631 (1959). Miller urges that there is no basis for questioning the ability of applicant's proposal to meet the rule; that Crystal Bay is in fact the hub of the North Lake Tahoe area; that two similar unincorporated communities in the same area have licensed radio stations; that year round population of Crystal Bay is 500 and it increases to 2500 during tourist season; that Crystal Bay has its own telephone exchange and a post office; and that these facts establish the compliance of applicant's proposal with Section 73.30(a).

5. The Review Board is not persuaded that KCBN had good cause for the late filing of its petition. However, the petitioner's allegations raise a sufficiently serious problem to warrant enlargement of the issues on the Board's own motion. The objective facts alleged by petitioner tend to show that Crystal Bay does not have the usual indicia of a community. While Miller has alleged facts which tend to support a contrary conclusion, it is the judgment of the Review Board that the question of whether Crystal Bay is a community should be determined on the basis of an evidentiary record rather than on the basis of allegations in interlocutory pleadings.

Accordingly, IT IS ORDERED, This 7th day of April, 1964, That the motion to enlarge issues filed by B.B.C. Inc., Reno, Nevada, February 25, 1964, IS DENIED; and

IT IS FURTHER ORDERED, On the Board's own motion, That the Commission's Order (FCC 62–1165), released November 13, 1962, IS AMENDED by the addition of the following issue:

> To determine whether the proposal of Verne M. Miller would serve primarily a particular city, town, political subdivision, or community as contemplated by Section 73.30(a) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–192

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>FLORIAN R. BURCZYNSKI, STANLEY J. JASINSKI, AND ROGER K. LUND D.B.A. ULTRAVISION BROADCASTING CO., BUFFALO, N.Y. | Docket No. 15254<br>File No.<br>BPCT–3200 |
| WEBR, INC., BUFFALO, N.Y.<br>For Construction Permits for New Television Broadcast Stations | Docket No. 15255<br>File No.<br>BPCT–3211 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has before it a motion to modify and enlarge issues in the above-captioned proceeding, filed by WEBR, Inc.[1] The motion seeks to modify the order designating this matter for hearing by deleting certain language from the second "It Appearing" clause which was designed to limit the scope of the financial qualifications issue to matters described therein. It would also have the Board add issue 3 "to determine whether Ultravision Broadcasting Company's estimate of its first year's operating revenues is reasonable and, if not, whether there is a reasonable assurance of effectuation of the program proposal contained in the Ultravision application", and a comparative coverage issue.

2. The Commission in its order designating this matter for hearing found each of the applicants to be legally, technically and otherwise qualified to construct and operate its proposed television station. However, it had some questions as to the availability to Ultravision of a proposed bank loan in the amount of $150,000. Therefore, it was unable to find Ultravision financially qualified but specified that evidence to be adduced with respect to the financial issue would be restricted to this particular deficiency or to an alternative showing of financial qualifications. WEBR, Inc. urges that there are also questions as to whether Mr. Florian R. Burczynski can make available a $60,000 loan to the partnership and still provide the security which the bank will require for the $150,000 loan which it will make to the partnership. In this connection, it is noted that the letter from the Manufacturers and Traders Trust Co. of Buffalo, New York is addressed to Ultravision Broadcasting Company and does not in any way indicate that Mr. Burczynski will be required to personally secure the proposed loan. Ultravision submitted a revised balance sheet for Mr.

[1] Motion to Modify and Enlarge The Issues, filed 1/22/64 by WEBR, Inc.; Opposition to WEBR's Motion to Modify and Enlarge Issues, filed 2/28/64 by Ultravision Broadcasting Company; Broadcast Bureau's Response to Motion to Modify and Enlarge The Issues, filed 2/28/64; and Reply to Responses to Motion to Modify and Enlarge the Issues, filed 3/11/64 by WEBR, Inc.

Burczynski as of January 31, 1964, with its opposition to this petition, which shows that Mr. Burczynski has assets which are liquid or readily convertible as follows:

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| Cash on hand | $52,355.69 |
| Cash value of insurance | 14,749.75 |
| Securities listed on major exchanges | 7,537.77 |
| Securities sold over the counter in Buffalo | 20,606.05 |
| Total | $95,249.26 [2] |

Moreover, Mr. Burczynski's balance sheet indicated substantial other assets consisting of notes receivable to him and proprietary interest in several businesses in Buffalo which, together with his assets described above, establish his net worth at $383,738.40. In view of these circumstances, it is clear that Mr. Burczynski can meet his $60,000 loan commitment to Ultravision Broadcasting.

3. Petitioner also urged that there is a serious question as to whether Mr. Lund can meet his commitment to lend $35,000 to Ultravision. However, the applicant submitted an affidavit of Robert F. Meyer, Vice President of the Marine Trust Company of Western New York, Buffalo, N.Y., advising the Commission that a $35,000 loan would be made available to Mr. Lund if and when he requests it, and that such loan would be repayable in equal semi-annual installments over a period of from 5 to 10 years, with exact duration of the time to be fixed at the time the loan is made. This affidavit effectively removes any doubt as to the availability of the $35,000 which Mr. Lund is committed to lend Ultravision. In these circumstances, it is clear, with the exception of the outstanding question concerning the $150,000 loan to be made to Ultravision Broadcasting Company by the Manufacturers and Traders Trust Co. of Buffalo, the funds relied upon by the applicant will be available to it.

4. The petitioner has urged that the applicant substantially underestimated its cost of construction in its pre-operational expenses. This argument runs to the sufficiency of the funds to accomplish the proposal and should be raised with the Hearing Examiner. *South Central Broadcasting Corp.*, 9 RR 1035 (1953); *Triangle Publications Inc. (WNHC)* FCC 61–99, 21 RR 187 (1961); and *Rhinelander Television Cable Corp.*, 25 RR 476 (1963). The petitioner's request to delete the limiting language from the Appearing clause will therefore be denied and the limitation imposed on the issue by the Commission will remain.

5. It is agreed by all parties that a comparative coverage issue must be added. WEBR requests an issue which would permit a comparison of the city grade, grade A, and grade B contours, and a comparison of population and services available in the area which are proposed to be served by one applicant and not the other. Ultravision suggests that the issue should be framed to permit it to show that because of the location of its antenna, it will provide a stronger signal to the population in the central Buffalo area than would be available from the WEBR proposal. The Bureau urges that the comparative consideration should be restricted to a showing concerning the respective grade B service contours. Petitioner

[2] The value of the listed securities was market value as of the date of the balance sheet.

has established that there are sufficient differences between the areas and populations encompassed within the applicants' proposed Grade A and Grade B contours to warrant the addition of issues to permit the determination of these differences. *Publix Television Corporation*, 18 RR 771 (1959); *Wabash Valley Broadcasting Corporation*, 18 RR 1021 (1959). However, petitioner has not established that the addition of an issue concerning differences in the coverage attained by the proposed City Grade contours is warranted. Section 73.685 of the Rules specifies the minimum field intensity to be attained over the principal city to be served (principal city signal). WEBR's exhibits depict that both applicants provide the required signal over Buffalo, New York, the principal community to be served. Since both applicants meet the requirement of the Rule, the requested issue is not warranted. *Cleveland Broadcasting, Inc.*, 1 RR 2d, 949 (1964).

6. With respect to the proposed new issue 3, the petitioner urges that Ultravision's proposal is for a fourth station in a community with three VHF stations, that there are few, if any, modern UHF receivers in Buffalo, that network programming will not be available to the applicant, and thus that it is highly unrealistic to anticipate operating revenues of $250,000 for the first year, and that in view of these facts, the Commission's usual procedure for determining financial qualifications is inappropriate in this case. The Bureau agrees that the circumstances surrounding the operation of a UHF station which is the fourth station in an all VHF market are different than those normally encountered by VHF applicants. It points out, however, that such an inquiry as that requested by the petitioner is contrary to the Commission's present policy with respect to the financial showing required of applicants. However, the Bureau observes that at this stage of the development of UHF television, it is extremely important for the service to succeed and that some financial requirements beyond the minimal showing of ability to construct and to operate for 3 months without revenues might well be considered. In view of this, the Bureau urges the Board to certify this particular question to the Commission for its consideration. The Review Board agrees that the issue sought here goes far beyond the Commission's established policy with respect to financial showings. Moreover, the Board is impressed with the petitioner's and the Bureau's argument that the circumstances which confront a UHF television applicant in a 3 VHF station market are substantially different than those normally encountered by a VHF television applicant. The Board will therefore certify this question to the Commission.

Accordingly, IT IS ORDERED, This 3rd day of April, 1964, That the Motion to Modify and Enlarge Issues IS GRANTED in part and DENIED in part; and

IT IS FURTHER ORDERED, That the request to delete certain language from the hearing order IS DENIED; the issues are enlarged to include the following issues:

(3) To determine the location of the proposed Grade A and Grade B contours of the applicants in this proceeding.

(4) To determine, on a comparative basis, the areas and

populations of the respective Grade A and Grade B contours which may reasonably be expected to receive actual service from the applicants' proposed operations.

(5) In the event the proof under issues (3) and (4) above shall establish that either applicant will bring actual service to areas and populations not served by its competitor, to determine the number of services, if any, presently available to such areas and populations;

and Issue 3 requested by the petitioner IS HEREBY CERTIFIED to the Commission for its determination.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64M–306

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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| In Re Applications of | |
| COMMUNITY BROADCASTING SERVICE, INC., VINELAND, N. J. | Docket No. 15265<br>File No. BPH–3949 |
| MORTIMER HENDRICKSON AND VIVIAN ELIZA HENDRICKSON, VINELAND, N. J. | Docket No. 15266<br>File No. BPH–4165 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY JAMES D. CUNNINGHAM, CHIEF HEARING EXAMINER.

1. The Chief Hearing Examiner has under consideration a motion in behalf of Community Broadcasting Service, Inc., filed April 6, 1964, for field hearing in the above-entitled proceeding.

2. The applications herein specify the same FM broadcast facilities for use in the city of Vineland, New Jersey; hence, in accordance with established practice and policy in such cases, an order was released January 22, 1964, which provided that hearings in the matter would be held in the Offices of the Commission, Washington, D.C.

3. Petitioner's plan is to commence the presentation of its direct case in Washington on April 14, 1964, and proceed to its completion, except that a number of public witnesses would be called in Vineland, New Jersey, in the event hearings there should be permitted. It is alleged that among these witnesses are the leaders of the community proposed to be served, and that it would be an imposition upon them and their community to require that they present themselves in Washington to testify only briefly. Petitioner contends that the process of taking their depositions is less satisfactory than the appearance in person of each one before the Examiner, "who can observe demeanor and can inquire personally into those matters in which the Commission may be specially interested."

4. The showing thus made by petitioner is not sufficient to warrant a departure from the Commission's established policy and practice of holding comparative broadcast hearing proceedings in Washington, D.C. While the Commission is particularly concerned that the records made in its hearings shall reflect fully the testimony of public witnesses who may be in a position to shed light upon the public interest aspects of competing proposals, its processes provide competitors with adequate methods and means whereby, in circumstances similar to those here present, such testimony may be obtained and introduced into the record, viz., depositions, interrogatories, etc. Moreover, it is extremely doubtful that anything significant is gained by the hearing process merely because the

presiding officer is in a position to observe public witnesses at the time they are presenting testimony. The claim of convenience to witnesses as a basis for field hearing has repeatedly been held to be without merit.

5. In view of the foregoing, the determination is compelling that good and sufficient cause has not been shown to exist which would warrant a grant of authorization to hold portions of the hearings in this proceeding in the city of Vineland, New Jersey.

IT IS ORDERED, this 10th day of April, 1964, that the motion is denied.

FEDERAL COMMUNICATIONS COMMISSION,
JAMES D. CUNNINGHAM, *Chief Hearing Examiner.*
BEN F. WAPLE, *Secretary.*

F.C.C. 64R–207

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| CHARLES COUNTY BROADCASTING CO., INC., LA PLATA, MD. | Docket No. 14748<br>File No. BP–14748 |
| DORLEN BROADCASTERS, INC., WALDORF, MD. For Construction Permit | Docket No. 14749<br>File No. BP–15287 |
| DORLEN BROADCASTERS, INC., WALDORF, MD. For Renewal of License of Station WSMD (FM) | Docket No. 15202<br>File No. BRH–1209 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration a petition to enlarge issues, filed February 4, 1964, by the Broadcast Bureau, and related pleadings.[1] The Bureau requests the addition of a contingent standard comparative issue as between the two standard broadcast applications.

2. In support of its request, the Bureau states that neither of the communities involved in this proceeding has its own standard broadcast station; that the population of the two communities is substantially the same; that although Dorlen's proposal would serve more persons than would Charles' proposal, these additional persons already receive a minimum of seven services; and that the presence of an FM station in Dorlen's community does not eliminate the need for a first standard broadcast station. These basic facts, the Bureau maintains, do not permit a meaningful choice to be made on the basis of Section 307(b) considerations alone. As good cause for the late filing of its request, the Bureau states that a determination that Section 307(b) considerations would not be decisional could not be made until all the evidence was carefully evaluated.

3. Both Charles and Dorlen, the applicants in this proceeding, oppose the Bureau's petition. First, they allege that the Bureau is asking the Review Board to decide that Section 307(b) considerations would not be decisive. This, they maintain, would be a usurpation of the Examiner's function. Second, both maintain that a choice can be made on the basis of Section 307(b) considerations. Charles offers no explanation in support of its position, and Dorlen argues that the 307(b) choice can be rested upon the

[1] Also before the Board are: opposition, filed February 17, 1964, by Charles County Broadcasting Co., Inc. (Charles); opposition, filed February 18, 1964, by Dorlen Broadcasters, Inc. (Dorlen); statement in support of Broadcast Bureau's petition, filed February 17, 1964, by WPGC, Inc.; opposition to supporting statement, filed February 28, 1964, by Charles; and reply, filed February 28, 1964, by the Broadcast Bureau.

fact that its proposal will serve more people. Third, they state that if the requested issue is added, there will necessarily be a long delay in the proceeding to gather and adduce evidence. Fourth, they assert that the Bureau's petition is untimely and that no good cause has been shown.

4. The Bureau, in its reply, asserts that it is asking for a contingent issue and thus that the Review Board will not be deciding the Section 307(b) issue but only concluding that there is a possibility that a Section 307(b) choice cannot be made. Further, the Bureau alleges that a delay will not necessarily occur because the requested issue is contingent and so it will be up to the Examiner whether or not to adduce evidence on it.

5. The applicants' contention that the Bureau is in legal effect requesting the Review Board to decide that 307(b) considerations alone will not permit a choice to be made between the two applicants discloses a basic misunderstanding of the scope and purpose of the contingent standard comparative issue. Its basic purpose is to avoid the very prejudgment of the 307 (b) issue that the applicants complain is inherent in the Bureau's request. See *Rockland Broadcasting Co.*, FCC 62–577, 23 RR 789 (1962). Instead, as is pointed out in *Rockland*, it "leaves to the Hearing Examiner the responsibility of determining, after the evidence under the 307(b) issue has been adduced, whether a determination may be made solely on the basis of 307(b) considerations or whether it would be appropriate to adduce evidence under the contingent standard comparative issue." As is further pointed out in *Rockland*, the Examiner may request briefs and hold oral argument before deciding whether to hear evidence under the contingent standard comparative issue; should there be a substantial doubt as to whether 307(b) considerations alone would be determinative, evidence under the contingent standard comparative issue should be adduced.

6. It is thus clear from the *Rockland* case that the inclusion of the contingent standard comparative issue does not constitute a prejudgment by the Commission that 307(b) considerations alone will not be determinative. It is likewise clear that in adding the contingent standard comparative issue in *Rockland*, the Commission did not intend to prejudge the 307(b) issue. For these reasons, the applicants' contention that the Bureau is in effect requesting a prejudgment of the 307(b) issue is rejected. As we understand the petition, all that the Bureau is saying is that, on the basis of the facts alleged by it, 307(b) considerations alone may not be determinative, and that the contingent standard comparative issue should be added as an additional tool which the Hearing Examiner may use in the event he should agree with the Bureau.

7. The question presented to the Board by the Bureau's petition is whether in the light of 307(b) facts alleged in the pleadings before us the contingent standard comparative issue should be added; resolution of this question turns upon whether there is a sufficient possibility of a need to resort to the contingent standard comparative issue as to warrant its addition. The Bureau's 307(b) allegations, summarized in paragraph 2 above, support its view that 307(b) considerations alone may not be determinative and that

resort to the contingent standard comparative issue may become necessary. Dorlen's contrary view, based upon the argument that it will be preferred under the 307(b) issue, is not sufficiently persuasive to conclude that the need for the contingent issue is so remote that its addition is not warranted.

8. One final matter remains, viz., the untimeliness of the Bureau's petition. The Review Board shares the view of Charles and Dorlen as to the desirability of the early filing of petitions to enlarge. On the other hand, the Review Board cannot dismiss as without substance the Bureau's plea that not until proposed findings and conclusions were being prepared did it become evident that 307(b) considerations alone would not be determinative; in many instances, tentative determinations based upon an overview of the entire record undergo substantial modifications in the writing of the decision. Unlike other issues, the addition of the contingent standard comparative issue at this time will not necessarily cause an additional delay in the ultimate conclusion of this proceeding. Thus, if the Hearing Examiner determines that he can decide this case on 307(b) considerations alone, a grant of the Bureau's petition, notwithstanding its untimeliness, will not result in any substantial delay in the proceeding. If, on the other hand, this case cannot be decided on 307(b) considerations alone, the addition of the issue at the present time would avoid the possibility of a remand, with its attendant delay, for further hearing on the standard comparative issue. Only if the contingent issue is added, and the Hearing Examiner erroneously determines that evidence under this issue must be adduced, would the addition of the issue unnecessarily prolong the hearing. However, this is a matter which the Commission has, in *Rockland Broadcasting, supra,* entrusted to the discretion of the Examiner.

Accordingly, IT IS ORDERED, This 13th day of April, 1964, That the petition to enlarge issues, filed February 4, 1964, by the Broadcast Bureau, IS GRANTED, and the issues in this proceeding ARE ENLARGED by the addition of the following issue:

> To determine, in the event it is concluded that a choice between the instant applications cannot be made upon considerations relating to Section 307(b), which of the operations proposed in the above-captioned standard broadcast applications would better serve the public interest in the light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:
>
> (i) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed station;
>
> (ii) The proposals of each of the instant applicants with respect to the management and operation of the proposed station;
>
> (iii) The programming service proposed in each of the instant applications.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–210

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| WHDH, INC. (WHDH–TV), BOSTON, MASS. | Docket No. 15204 |
| For Renewal of License | File No. BRCT–530 |
| CHARLES RIVER CIVIC TELEVISION, INC., BOSTON, MASS. | Docket No. 15205 |
| | File No. BPCT–3164 |
| BOSTON BROADCASTERS, INC., BOSTON, MASS. | Docket No. 15206 |
| | File No. BPCT–3170 |
| GREATER BOSTON TV CO., INC., BOSTON, MASS. | Docket No. 15207 |
| For Construction Permits for New VHF Television Broadcast Stations | File No. BPCT–3171 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it for consideration a petition to enlarge issues, filed February 26, 1964, by Boston Broadcasters, Inc. (Boston), and related pleadings.[1] Boston requests the addition of the following issue as to WHDH, Inc. (WHDH):[2]

To determine whether a grant of the application of WHDH, Inc., would be consistent with the provisions of Section 310(a) (5) of the Communications Act of 1934, as amended.

2. In support of its request for the foregoing issue, petitioner reports that Commission ownership files reveal that 21% of the stock of the Boston Herald-Traveler Corp. (WHDH's parent organization) is held by nominal owners for persons unknown, that 47.31% is held by small stockholders about whom nothing is known, and that WHDH has never revealed the citizenship of this group (68.31%) of stockholders. Citing the provisions of Section 310 (a) (5) of the Communications Act of 1934, as amended, that a station license shall not be granted to any corporation controlled by another corporation of which more than one-fourth of the capital stock is owned by aliens if the Commission finds that the public interest will be served by the refusal or revocation of such license,

[1] Also before the Board are: comments in support of the petition to enlarge issues, filed March 3, 1964; by Charles River Civic Television, Inc., motion to strike the latter, filed March 11, 1964 by WHDH, Inc.; opposition, filed March 11, 1964, by WHDH, Inc.; and Broadcast Bureau's comments, filed March 11, 1964.

[2] Boston also requests the addition of an issue to determine whether a grant of WHDH's application would be consistent with Section 73.636 of the Rules. This request will be dismissed, since an identical issue was added as to WHDH by Review Board Memorandum Opinion and Order FCC 64R–128, released March 12, 1964.

petitioner contends that the aforementioned uncertainty as to stock ownership makes the situation here sufficiently similar to that in proceedings where a Section 310(a)(5) issue was added [3] to warrant the addition of such an issue here.

3. In a brief opposition, WHDH urges first that the petition is untimely filed with no showing of good cause for such untimeliness. In addition, WHDH would distinguish *TVUE Associates, Inc., supra,* on the ground that there the Review Board rejected the accuracy of a sampling procedure, whereas The Boston Herald-Travel Corp. has used a procedure since 1956 which surveys every stockholder of the company. Finally, WHDH urges that petitioner has raised no matter which the Review Board need pursue on its own motion. The opposition of the Broadcast Bureau is based on substantially similar grounds.[4]
similar grounds.[4]

4. In *Integrated Communications Systems Inc., of Massachusetts, supra,* the Commission designated a Section 310(a)(5) issue as to United Artists Broadcasting, Inc., because the sampling method used was not shown to be statistically valid. The same issue was added as to United Artists in *TVUE Associates, Inc., supra.* Here, the Broadcast Bureau points out that 85% of the stockholders responded in 1946 and that all but a fraction of one percent of these were United States citizens. But WHDH has not come forward with the results of its most recent alleged survey—made before the October, 1962, renewal application, although it has had the opportunity to do so in its response to the subject petition. Thus, due to the lack of up-to-date information on a possibly disqualifying matter, addition of a specific issue to develop that information is warranted.

Accordingly, IT IS ORDERED, This 14th day of April, 1964, That the motion to strike, filed March 11, 1964, by WHDH, Inc., IS DISMISSED; and

IT IS FURTHER ORDERED, That the petition to enlarge issues, filed February 26, 1964, by Boston Broadcasters, Inc., IS GRANTED to the extent of enlarging the issues as indicated below, and IS DISMISSED in all other respects; and

IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issue:

> To determine whether a grant of the application of WHDH, Inc., would be consistent with the provisions of Section 310(a)(5) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

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[3] *Integrated Communications Systems, Inc., of Massachusetts,* FCC 64-96, released February 12, 1964; *TVue Associates, Inc.,* FCC 64R-89, released February 18, 1964.

[4] Charles River Civic Television, Inc., filed comments in support of Boston's petition. WHDH has filed a motion to strike these comments on the ground that it is an unauthorized pleading. In light of the fact that the information supplied in the comments is not necessary to the result reached herein, the motion to strike will be dismissed as moot.

F.C.C. 64–324

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of<br>RADIO CHIPPEWA, INC. (WAXX), CHIPPEWA FALLS, WIS.<br>For Construction Permit To Change Transmitter Site and Ground System | File No. BP–15980 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX ABSTAINING FROM VOTING.

1. The Commission has before it for consideration (a) the above-captioned application; (b) "Petition to Deny" the above-captioned application filed by Broadcaster Services, Inc. (Services) on September 13, 1963; (c) "Opposition to Petition to Deny" filed October 4, 1963 by Radio Chippewa, Inc. (WAXX or Chippewa); (d) "Reply to Opposition to Petition to Deny" filed by Services on October 8, 1963; (e) "Motion to Strike or in the Alternative to Accept Comments on Reply" filed October 16, 1963 by Chippewa; (f) "Comments to Reply of Broadcaster Services, Inc.," also filed by Chippewa on October 16, 1963; (g) "Petition to Deny" the above-captioned application filed by WECL, Inc. (WECL) on October 16, 1963; (h) "Opposition to [WECL's] Petition to Deny" filed by Chippewa on October 29, 1963; (i) "Reply" to Chippewa's Opposition filed on November 4, 1963 by WECL; (j) "Supplement to Petition to Deny" filed by WECL on December 27, 1963.

2. Radio Chippewa (WAXX) is a daytime only broadcast station assigned to the community of Chippewa Falls, Wisconsin (1150 kc/s, 5 kilowatts). On July 29, 1963, Chippewa filed the above-captioned application to change its transmitter site from a point approximately 2 miles north of Chippewa Falls to a point approximately 5 miles south of Chippewa Falls. This site (since changed by amendment) lay about half-way between Chippewa Falls and Eau Claire. On September 13, 1963 Services (licensee of station WEAQ in Eau Claire) filed its petition to deny the above-captioned application, alleging standing on the basis of increased competition flowing from WAXX's substantially improved coverage of Eau Claire. On the merits, Services argued that this application was only the first step in attempt by Chippewa to change station location to Eau Claire, a city three times the size of Chippewa Falls (11,708 v. 37,263; 1960 Census). Specifically, while only about 2700 more people would have been served from this site, the population receiving a 25 mv/m signal from WAXX would have almost trebled. These facts, coupled with Chippewa's

alleged intention to originate just under half its programming from its Eau Claire TV studios, convinced Services that the application could have no purpose other than to bring about a *de facto* change in station location, thereby transferring Chippewa Falls' only standard broadcast station to Eau Claire—a community which already has three standard broadcast stations. Additionally, Services' petition to deny alleged that a Chippewa employee had threatened Services with economic injury if it did not sell the station to Chippewa's parent, Post Broadcasting Corp. In Services' view not only was such behavior reprehensible in itself, but it also indicated Post's insistence on having a standard broadcast outlet in Eau Claire. In addition, Services quotes the Chippewa employee as stating that Chippewa is contemplating a change in call letters to WEAU, presumably to identify the station with Eau Claire. Finally, Services questions the propriety of any proposal which would reduce the level of WAXX's signal in Chippewa Falls.

3. Chippewa in its Opposition contends that Services' petition is improper, since neither the Act nor the Rules provides for petitions to deny minor change applications (citing 47 USC 309 subsections (b), (c), and (d) and 47 CFR 1.580.) Chippewa also contends that the petition, in any event, fails to show that grant of the application would be *prima facie* contrary to the public interest. WAXX insists that the application does not involve a change in station location and that any presumption of such a change is at best premature. Chippewa's basic argument is that this application and any related changes involving studios, personnel and programming involved nothing more than effectuation of plans which were outlined in its application for assignment of WAXX to Chippewa—BAL–4704 granted July 17, 1963. WAXX insists that improved coverage of a sizeable community already served is consistent with its responsibilities to its entire service area. Finally, it asserts that the allegations of coercion are neither substantial nor relevant to this application.

4. Services' reply [1] raises additional considerations which it believes establish the true nature of the proposed changes; among them, that WAXX and its affiliated TV station in Eau Claire engage in cross promotions and that a new program format—Metro Radio—which puts substantial emphasis on Eau Claire, has been initiated. Services concludes that the interests of Chippewa Falls would be compromised in the process.

5. On October 16, 1963, Chippewa moved to strike Services' reply or, in the alternative, to permit acceptance of responsive comments. Chippewa's motion is based on two arguments:—first, that the Reply is not supported by the affidavit required by Section 1.580(j) of the Rules and, second, that the pleading improperly raises issues not raised in the opposition, thus violating Section 1.45(b) of the Rules. In its comments submitted simultaneously with the motion, Chippewa states that since it already provides a 5 mv/m signal to Eau Claire, it is not merely permitted but is

[1] To the extent that this reply brief deals with the Post Broadcasting Corporation's pending application to establish a new FM broadcast station at Eau Claire (File No. BPH–4118), it will be considered later in conjunction with Services' co-pending petition to deny that application.

obliged to serve the needs of that city. Chippewa urges that the Commission has in effect approved the manner in which it proposed to program for Chippewa Falls, when its assignment application was granted. Chippewa objects to what it sees as a third review of programming in the middle of the 18-month period between the grant of the assignment and the renewal date. But if such review is made, it is Chippewa's contention that it has not slighted Chippewa Falls interests, but in fact, has endeavored to better serve the needs of its entire service area.

6. WECL, Inc., licensee of another standard broadcast station in Eau Claire, has also filed a petition to deny which, like Services, predicates standing on the prospect of increased competition resulting from grant of the above-captioned application. WECL's argument generally parallels that advanced by Services, claiming further that WAXX identifies itself as if it had a dual-city designation. More importantly, WECL raises two new issues— the engineering adequacy of the proposal and programming losses to the public within the meaning of *Carroll Broadcasting Company* v. *FCC* 258 F 2d 440 (1958). As to the former, WECL alleges that measurements made by it show soil conductivity is in the order of 1.5 mmhos/m instead of the 4 mmhos/m shown on the Commission's M–3 conductivity map. Thus, it says, WAJX's 25 mv/m contour would not cover any part of Chippewa Falls. This, it is urged, not only violates the Commission's Rules, but would reduce service to the principal city and environs to an extent inconsistent with the public interest—citing *Hall* v. *FCC* 237 F 2d 567 (1956).

7. In response, Chippewa states that it has no knowledge of the alleged misidentification, and in fact had pre-taped these announcements and had taken other measures to insure proper identification. Chippewa insists that in any event, this matter is not relevant to consideration of the above-captioned application. Chippewa disputes the validity of WECL's measurements, alleging that they were made in the wrong direction on radials which did not traverse any of the area involved in the question of 25 mv/m coverage. Chippewa further contends that it will provide the requisite signal strengths to the business and residential areas of Chippewa Falls, and hence that *Hall* is inapplicable. In fact, WAXX argues, the public is served by the improved signal strength provided to significant areas and populations already served. Chippewa disputes the relevancy of the *Carroll* case on two grounds: first, that its rationale is not applicable to site change or other minor change applications, and second, that since WAXX already provides primary service to Eau Claire, no new competition is involved.

8. In its reply, WECL insists that the rationale of the *Carroll* case applies to any application, which if granted would, because of financial injury, force a station to curtail its public interest programming. In any event, WECL argues the Commission should not allow the designation "minor change" to obscure the probative facts of the case. Further, WECL insists that it cannot be charged with laches for failure to oppose the assignment application, because any site change required the prosecution of an application which it then could oppose. Any objection to the assignment

application based on prospective changes would, WECL argues, have been labeled premature.

9. Although WECL acknowledges that its engineering statement did not conclusively prove the conductivity to be 1.5 mmhos/m, it insists that it has sufficiently questioned the validity of the M–3 map value of 4 mmhos/m to require a hearing, especially in view of the support provided by WEAQ's proof of performance measurements made in the specific area in question.

10. On November 13, 1963, after the above pleadings had been filed, Chippewa amended its application to propose a substitute site only 2½ miles south of Chippewa Falls. In a memorandum accompanying the amendment, Chippewa alleges that even if the conductivity is as high 4 mmhos/m it will still not provide a 25 mv/m signal to the business area of Eau Claire; conversely, that even if the conductivity is as low as 1.5 mmhos/m, it will still provide the requisite coverage to Chippewa Falls. This, in WAXX's opinion not only answers the engineering objections posed by WECL, but it also demonstrates that a *de facto* move to Eau Claire is not involved.

11. In a supplement to its petition to deny [2], WECL urges that the amendment fails to resolve the questions which have been raised. WECL continues to insist that, even as amended, the signal provided to Eau Claire would be increased sufficiently to establish that WAXX's intention is to make a *de facto* move to Eau Claire, and to raise a *Carroll* issue. Finally, WECL contends that in the absence of measurement data, it is impossible to determine whether the conductivity is more or less than 1.5 mmhos/m. Thus, it says, a question remains whether WAXX will provide the required signal to Chippewa Falls.

12. Inasmuch as petitions to deny do not lie against an application for site change in the standard broadcast service, they will be treated on their merits as informal objections under Section 1.587 of the Rules. Certain of the allegations concern matters not affected by the amendment; these we will treat first. WAXX is alleged to have identified itself as if it were licensed to both Eau Claire and Chippewa Falls. Commission monitoring of WAXX indicates that the station properly identifies itself on the hour and half hour as required by Section 73.117 of the Commission's Rules. Although reference is made to serving Eau Claire, this is neither deceptive, nor improper, in view of WAXX's primary service to that community. We turn now to the matter of the alleged threats and coercion. Even assuming that such threats were in fact made, we have no basis for finding that the one employee involved was acting under the direction of Chippewa or its principals. This employee is not a stockholder or director of Chippewa, and we find that Chippewa has offered satisfactory assurance that such threats, if made, were without its authority, express or implied. Under there circumstances, we do not find that action against Chippewa on this score is warranted.

13. WECL's attempt to raise a *Carroll* issue must fail even if we

[2] Services has not filed a similar response to the amendment, nor has Chippewa filed an opposition to WECL's supplement.

assume *arguendo* that the proposed move comes within the purview of that case[3]. This result follows of necessity from WECL's failure to offer any support for its conclusion that Eau Claire could not support another station or even that a reduction in its revenues would require curtailment of its public service programming. Thus, WECL has failed to make the specific allegations of fact the Commission has held to be necessary to raise a *Carroll* issue[4].

14. On the engineering, WECL first argued that WAXX could not provide 25 mv/m coverage to the Chippewa Falls business area because the soil conductivity was 1.5 mmhos/m, not the 4 mmhos/m depicted by M–3. Chippewa, however, pointed out that the measurements WECL used to arrive at this lower value were not made along pertinent radials nor in the proper direction. The application has now been amended to insure 25 mv/m coverage of Chippewa Falls, irrespective of which value is used. In view of the absence of any substantial evidence to indicate that the conductivity is below 1.5 mmhos/m, we conclude that WECL has failed to raise a substantial question concerning WAXX's 25 mv/m coverage of Chippewa Falls.

15. Petitioner WECL relies on *Hall* v. *FCC, supra,* in support of its argument that grant of the above-captioned application would, because of lessened coverage of Chippewa Falls and environs, be contrary to the public interest. *Hall* involved a television station's request not only to change site but also to substantially reduce both power and height, and thus is clearly distinguishable. Moreover, unlike *Hall,* this proposal will not cause an overall diminution in service but, on the contrary, will enable WAXX to continue to provide the required coverage to Chippewa Falls and in addition to improve its signal to a sizable population already served.

16. Admittedly, Chippewa's recent activities, including the filing of the above-captioned application for change of transmitter site, reveal a clear intention to entrench WAXX more firmly in the Eau Claire market. However, from the information submitted, we have no basis for inferring a *de facto* change in station location. As already indicated, WAXX properly identifies as a Chippewa Falls station, and we cannot properly speculate as to possible future violations in this regard. Whatever might have been the situation had WAXX adhered to its initial proposal, the question has been largely resolved by its selection of another transmitter site only 2½ miles south of Chippewa Falls and by its announced intention to maintain its main studio in, and originate a majority of its programs from, that community. We therefore conclude that Chippewa's ability to fulfill its obligation to Chippewa Falls would not be compromised by granting the above-captioned application. In this connection, the small area and population losing service from WAXX will continue to receive an abundance of other services.

In view of the foregoing, IT IS ORDERED, That Chippewa's motion filed October 16, 1963 IS GRANTED to permit acceptance

[3] See *Tri-Cities Broadcasting Company,* 24 R.R. 691 (1962) and *KTBS, Inc.,* 25 R.R. 301 (1963).
[4] *Missouri-Illinois Broadcasting Co.,* (KZIM) FCC 63–650, 1 RR 2d. 1 (1963); *Tree Broadcasting Co.,* FCC 63–673 1 RR 2d. 15 (1963).

of its reply comments tendered the same date, and in all other respects IS DENIED.

IT IS FURTHER ORDERED, That the above-described petitions to deny filed by Broadcaster Services, Inc. and WECL, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That the above-captioned application IS GRANTED.

Adopted April 15, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–354

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of<br>AMERICAN COLONIAL BROADCASTING CORP.,<br>PONCE, P.R.<br>For Construction Permit To Change Transmitter Site and Antenna Height Above Average Terrain of Station WSUR–TV, Channel 9, Ponce, P.R. | Docket No. 15271<br>File No.<br>BPCT–3104 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND LEE ABSENT.

1. The Commission has before it for consideration: (a) a petition for reconsideration in whole or in part and/or for stay of proceedings and for other relief; (b) a petition to change issues; (c) a petition for leave to amend; (d) a petition for interim stay of evidentiary hearing, all of which were filed by American Colonial Broadcasting Corporation (hereinafter ACBC) on February 12, 1964; and (e) pleadings filed ancillary to the above.[1]

2. ACBC seeks authority to change the site of the transmitter of Station WSUR–TV, Channel 9, Ponce, Puerto Rico, from Cerro Maravilla, a mountain site over 4,500 feet above sea level, approximately 11 miles North Northeast of Ponce, to a point within the city limits of Ponce, and to change the height of its antenna above average terrain from 2,500 feet to minus 43 feet. No change in the effective radiated power is proposed. Operating as proposed, Station WSUR–TV's predicted Grade B contour, which now encompasses almost the entire island of Puerto Rico with the exception of the extreme eastern tip, including the whole of San Juan and 15 miles beyond, would suffer substantial shrinkage. ACBC is also the licensee of Station WKBM–TV, Channel 11, Caguas, Puerto Rico, which is permitted to identify itself as "Caguas-San Juan". There is presently substantial overlap of the Grade A contours of the applicant's two stations.

3. By Memorandum Opinion and Order (FCC 64–12) released January 13, 1964, the Commission designated this application for hearing on the following issues:

[1] Oppositions to the above petitions were filed by El Mundo, party respondent, on the following dates: to (a) on March 5, 1964; to (b) on March 5, 1964; to (c) on February 24, 1964; and to (d) on February 25, 1964. El Mundo, licensee of Station WKAQ–TV, Channel 2, San Juan, Puerto Rico, filed an "informal objection" to a grant of ACBC's application. The Commission, relying on facts brought to its attention by such pleading, designated this matter for hearing and, on its own motion, made El Mundo a party. The Broadcast Bureau filed Comments to (a) on March 5, 1964; to (b) on March 5, 1964; to (c) on February 24, 1964; and to (d) on February 25, 1964. ACBC filed a Reply to Opposition to (c) on March 2, 1964, and to (d) on March 3, 1964.

(1) To determine the areas and populations which may be expected to gain or lose television service from the proposed operation of Television Broadcast Station WSUR–TV and the availability of other television service to such areas and populations.

(2) To determine the nature of the conditions which exist with respect to the accessibility of the present site of the Station WSUR–TV transmitter and the extent, if any, to which such conditions may impair the ability of Station WSUR–TV to maintain and operate its equipment.

(3) To determine the facts and circumstances surrounding the preparation and filing of the instant application.

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

In the preamble clauses of this Order, the Commission indicated a need for further information concerning (1) the contemplated loss of service and any factors tending to offset that loss; (2) the inaccessability of the WSUR–TV transmitter site; and (3) the motives of the applicant in filing its application, i.e. was this application filed in whole, or in part, as the first step in a two-step plan designed to facilitate the enlargement of the coverage area of Station WKBM–TV, Caguas-San Juan, by reducing WSUR–TV's service area, thereby lessening the overlap between the two stations.

4. Each of ACBC's requests will be discussed separately below:

*Petition for Reconsideration*

5. In its petition for reconsideration, ACBC requests (a) reconsideration and grant without hearing of the instant application or, in the alternative, (b) a ruling in regard to whether the Commission will admit certain types of evidence to show the actual coverage and strength of the signal of WSUR–TV such as the results of a door-to-door canvass, or a survey of opinions of repairmen as opposed to standard engineering measurements, and (c) a consolidation into this hearing of petitioner's pending application to increase power and directionalize WKBM–TV, Caguas-San Juan, Puerto Rico (File No. BPCT–3300), filed February 12, 1964. This latter request will be acted upon by separate Order. The relief requested in (a) and (b) will be discussed below.

(*a*) *Reconsideration and grant without hearing*

6. As set forth in our prior Memorandum Opinion and Order (FCC 64–12) designating this application for hearing, a grant of an application to change transmitter sites which would result in a substantial curtailment of the station's coverage area cannot be found to be in the public interest unless the loss is offset by gain or other advantages to the public. *Hall, et al.* v. *Federal Communications Commission*, 99 U.S. App. D.C. 86, 237 F.2d 567. This is particularly the case where, as here, the question of the presence or absence of other serviceable signals in the proposed "loss of coverage" area is presented. Such a public interest consideration can only be determined after full exploration and scrutiny in the hearing process. Therefore, the request for a grant without hearing must be denied.

(*b*) *Admissibility of evidence*

7. ACBC requests that the Commission now rule on the type of evidence that will be deemed admissible to prove the true service area of WSUR–TV. Additionally, it seeks to place the burden of proof on this issue upon El Mundo, Inc., upon whose "informal objection" to this application the Commission relied when it designated this matter for hearing. Although the Commission is not bound by the strict rules of evidence which govern court proceedings, it would be disruptive of the adjudicatory process to inform a party prior to the time of the hearing as to what type of evidence it should submit to best prove its case. This judgment must remain with the applicant, and the responsibility of ruling in the first instance upon admissibility lies within the power and discretion of the Hearing Examiner. As to the burden of proof, the applicant who seeks relief from this Commission is charged with the duty of coming forward with the proof that the public will benefit from a grant of his request. For the foregoing reasons, we deny ACBC's request for a preliminary ruling on the evidence, as well as its request to place the burden of proof upon El Mundo.

*Petition to Change Issues*

8. In its petition to change issues, ACBC requests (a) the deletion of issue number 3 as designated by the Commission (paragraph 3, *supra*) and (b) the addition of the following issue in its place:

> To determine the nature and extent of the changes that will result in the WSUR–TV signal within the city limits of Ponce from the proposed operation of Broadcast Television Station WSUR–TV.

Initially, this request must be denied as untimely. Section 1.229(b) of the Rules requires that motions to enlarge, change, or delete issues must be filed not later than 15 days after publication of such issues in the *Federal Register*. In the instant case, the issues were so published on January 16, 1964 (29 F.R. 415). Filing was, therefore, required not later than January 31, 1964. ACBC's petition, filed on February 12th and lacking a showing of good cause for the delay, must be dismissed as untimely. However, even upon the merits of ACBC's petition, a denial would be warranted. The Commission designated issue 3 in order to ascertain all the facts underlying the filing of this application. This issue was purposely framed in the broadest language so as to elicit all information available on the subject and to permit the applicant the greatest freedom in proving its case. Although the pleadings herein bring to light much additional information which was heretofore only speculative, the Commission does not look favorably upon petitions to delete issues "which are in effect an attempt to prove an issue on the basis of pleadings rather than evidence." *L. B. Wilson, Inc.*, 24 Pike and Fischer, R.R. 1018, 1020. The request to delete under Section 1.229 of the Rules is not meant to be applied in circumstances where the request therefore is based upon a showing made in response to the hearing issue. *Grand Broadcasting Co.*, 22 Pike and Fischer, R.R. 1097, 1098. As for the addition of the requested issue, the showing petitioner seeks

to make under its proposed issue can presently be made under issue 3 since the proposed issue would merely deal with one of the reasons advanced by the applicant for filing the instant application.

*Petition for Leave to Amend*

9. In its petition for leave to amend, ACBC seeks authority to amend its application to show the current accessibility of its present transmitter site due to completion of a new road. Section 1.522(b) of the Rules provides that: "requests to amend an application after it has been designated for hearing will be . . . granted only for good cause shown." Since the amendment seeks to show a current change of facts, is not prejudicial to the intervenor, and is actually a statement against interest,[2] it is in the public interest for the Commission to have the latest available information before it in disposing of matters now pending. Therefore, good cause having been shown, the petition for leave to amend will be granted.

*Petition for Interim Stay of Evidentiary Hearing*

10. Lastly, ACBC requests an interim stay of evidentiary hearing pending Commission action on all of the above petitions for relief. By Order (FCC 64M–239), released March 19, 1964, Hearing Examiner H. Gifford Irion rescheduled the hearing in this matter from April 21, 1964 to June 23, 1964. In view of our present rulings on these matters, we hold ACBC's petition for interim stay to be moot.

Accordingly, IT IS ORDERED, This 22nd day of April, 1964, That Petitioner's request for reconsideration and grant without hearing and other relief IS DENIED in its entirety; that the petition to change issues IS DENIED; that the petition for leave to amend IS GRANTED, and that the petition for interim stay IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] One of the reasons given by ACBC in support of a grant of its application to change the present transmitter site of television station WSUR–TV was the great difficulty experienced by its personnel and by the power company in obtaining access to such site. The proffered amendment shows that a new road has been completed which will provide the necessary accessibility.

F.C.C. 64–330

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Application of ST. ANTHONY TELEVISION CORP., HOUMA, LA. For Modification of Construction Permit for Television Broadcast Station KHMA, Channel 11, Houma, La. | File No. BMPCT–5400 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LEE DISSENTING; COMMISSIONER COX DISSENTING AND ISSUING A STATEMENT.

1. The Commission has before it for consideration the application of St. Anthony Television Corporation for modification of the construction permit for Television Broadcast Station KHMA, Channel 11, Houma, Louisiana, and various pleadings [1] filed in connection therewith. The long and involved history of this matter is too well-known to require extensive review, but, in order to place our decision in proper perspective, a brief resume appears appropriate.

2. On November 25, 1958, the Commission granted to St. Anthony Television Corporation a construction permit, after comparative hearing, for Television Broadcast Station KHMA, Channel 11, Houma, Louisiana. This construction permit specified a transmitter location nine miles northwest of Houma, an effective radiated power of 16 kw, and antenna height above average terrain of 700 feet. The permit also specified July 25, 1959, as the date on which the permittee was required to complete construction. On July 1, 1959, St. Anthony filed an application (BMPCT–5343) for

[1] The following pleadings have been filed in this proceeding: (a) Petition to Dismiss, filed November 25, 1959, by The Association of Maximum Service Telecasters, Inc. (MST); (b) Opposition to (a), above, filed December 17, 1959, by applicant; (c) Reply to (b), above, filed December 30, 1959, by MST; (d) Petition to Dismiss or in the Alternative to Deny, filed January 25, 1961, by Louisiana Television Corporation; (e) Opposition to (d), above, filed February 20, 1961, by applicant; (f) Reply to (e), above, filed March 1, 1961, by Louisiana Television; (g) Petition for Immediate Grant, filed November 28, 1961, by applicant; (h) Opposition to (g), above, filed by Louisiana Television; (i) Petition to Grant BMPCT–5400 and Reconsider Docket 14233, filed September 11, 1963, by applicant; (j) Opposition to (i), above, filed September 23, by MST; (k) Opposition to (i), above, filed September 24, 1963, by Louisiana Television; (m) Opposition to (i), above, filed September 24, 1963, by Baton Rouge Television, Inc.; (n) Reply to (j) and (k), above, filed October 3, 1963, by applicant; (o) Supplement to Petition to Grant, filed January 21, 1964, by applicant; (p) Opposition, filed April 13, 1964, by Guaranty Broadcasting Corporation, licensee of Television Broadcast Station WAFB–TV, Channel 9, Baton Rouge, Louisiana, against (i), above; and, finally, (q) Further Objections, filed April 14, 1964, by MST. In addition to the foregoing, a Statement in Support of Application was filed March 13, 1961, by the American Broadcasting Company, to which Louisiana Television replied on March 22, 1961. Since neither of these is of any decisional significance, they are not here considered. The opposition of Baton Rouge Television, directed against the petition of applicant seeking to participate in oral argument in Docket No. 14233, is moot by reason of the Commission's denial of so much of the St. Anthony petition as sought participation in the oral argument (FCC 63–884, released September 27, 1963).

extension of time within which to complete construction of Station KHMA. In that application, St. Anthony advised that it had been unable to construct because its site was immediately adjacent to a site proposed for a new FAA VORTAC station, and that, therefore, it was seeking a new site. In the meantime, on June 3, 1959, the Commission issued a Report and Order in Docket No. 12281, FCC 59–509, 18 R.R. 1666, deleting Channel 9 from Hattiesburg, Mississippi, and reassigning it to Baton Rouge. St. Anthony, in response to the Notice of Proposed Rule Making, had filed a counter-proposal, wherein it requested that Channel 11 be assigned to the hyphenated area of Houma-Baton Rouge. With respect to this counter-proposal, the Commission stated,

> We defer decision on the hyphenation of Houma and Baton Rouge. This proposal merits consideration as an initial step toward making Channel 11, now assigned to Houma alone, available for a third competitive service in the VHF band at Baton Rouge. As such it conforms with our announced interim objective of making at least three competitive services available to the public, particularly in the Major markets such as Baton Rouge. However, before a transmitter on Channel 11 could be located sufficiently close to Baton Rouge to provide a principal city signal and furnish a reasonably competitive VFH service there, solutions would have to be found to mileage separation problems with Channel 11 at Meridian, Mississippi, and Channel 10 at Lafayette, Louisiana. We therefore defer acting on the hyphenation of Houma and Baton Rouge until it is determined, in other proceedings, whether the present obstacles to the use of Channel 11 at Baton Rouge can be removed.

3. It is clear from the above-quoted paragraph that final resolution with respect to St. Anthony's counter-proposal was dependent on the Commission's disposition of other proceedings. As St. Anthony pointed out in its second application for an extension of completion date, filed in December, 1959, it was for the purpose of complying with the Commission's above-quoted language that it commenced negotiations with Station WTOK–TV in an effort to reach an agreement wherein WTOK–TV would not oppose St. Anthony's request for a short mileage separation. On September 16, 1959, it filed the above-captioned application. In August, 1960, airspace approval was obtained for this proposal at a height 100 feet less than that specified by the applicant, and in October, 1960, the applicant amended to specify this lower height. By this time, however, the proposal to reassign Channel 11 to Baton Rouge was already under active consideration, and in July, 1961, the Commission instituted a rule making proceeding in Docket No. 14233 which proposed the deletion of Channel 11 from Houma, and its reallocation to Baton Rouge. This proceeding was finally terminated December 23, 1963, see Par. 8, *infra*. It is apparent from the foregoing that St. Anthony, since its construction permit was granted, has been prevented from constructing its proposed station by causes beyond its control.

4. The proposed move would be near Geismar, Louisiana, 47 miles northwest of Houma (38 miles north of the site specified in the construction permit) and 18 miles from Baton Rouge, Louisiana. Operating as proposed, the applicant would provide a 77 dbu signal over all but a recently annexed portion of Houma and would provide a signal intensity of more than 95 dbu over the City of Baton Rouge. The applicant has requested a waiver of Section

73.685 of the Commission's Rules, alleging that a 76 dbu signal (77 dbu is required) will be provided over the whole of Houma and the portion which will not receive a 77 dbu signal is a small area to the south, bordering on marsh-land, containing approximately 16% of the population of Houma. The applicant states that expansion of the city, if any, in the future, can be expected northward.

5. A grant of the application would involve a co-channel separation shortage of twenty miles to Station WTOK–TV, Meridian, Mississippi. Section 73.610 of the Commission's Rules requires a separation of 220 miles between co-channel assignments in Zone III in which both stations are located. In an effort to overcome this problem, applicant and the licensee of Station WTOK–TV have entered into an agreement (on file with the Commission) by which Station WTOK–TV has consented to the short separation in return for applicant's agreement to provide "equivalent protection". The applicant has requested a waiver of Section 73.610 of the Commission's Rules.

6. The Petitioner, Louisiana Television Corporation, licensee of Television Broadcast Station WBRZ, Channel 2, Baton Rouge, Louisiana, claims standing as a party in interest in this proceeding on the basis of the economic injury which it alleges that it will suffer in the event of a grant of the application. We will concede petitioner standing as a party in interest under the doctrine of *Federal Communications Commission* v. *Sanders Brothers Radio Station* (309 U.S. 470). The Association of Maximum Service Telecasters, Inc. (MST) does not claim standing as a party in interest, but only claims status as an objector pursuant to the provisions of Section 1.587 of the Commission's Rules and, as such, its participation will be limited to the consideration herewith given.

7. Petitioner's objections to a grant of the St. Anthony application relate principally to the co-channel shortage to Meridian, Mississippi, the applicant's inability to provide the required 77 dbu signal over the entire City of Houma from the proposed site, the inability of the applicant to serve as a local outlet because of the distance (47 miles) of the proposed site from Houma, the alleged violation of Section 73.685(e) of the Commission's Rules pertaining to the use of a directional antenna array to reduce minimum mileage separations, and the alleged violation of Section 73.606 of the Commission's Rules and Section 307(b) of the Communications Act. The applicant, however, states that, operating as proposed, it would provide a 77 dbu signal to 84% of Houma and all of Baton Rouge, provide a third competitive VHF service to Baton Rouge, and serve a substantially greater number of persons than from the presently authorized site.

8. In July, 1961, a Rule Making proceeding was instituted (Docket No. 14233) which proposed to delete Channel 11 from Houma and reallocate it to Baton Rouge as part of the so-called "drop-in" proceedings. In a Report and Order released May 31, 1963 (FCC 63–501, Mimeo No. 35816), the Commission determined not to make the additional VHF "drop-in" assignments. From this Order of the Commission, Petitions for Reconsideration were filed. Subsequently, in a Report and Order released Decem-

ber 23, 1963 (Docket Nos. 14232–14238, FCC 63–1168), the Commission denied the Petitions for Reconsideration. In that opinion, the Commission made a specific reference to the Baton Rouge proposal, saying: ". . . this proposal is closer to the situations presented in the Enid, Oklahoma; New Orleans, Louisiana, and New Bedford, Massachusetts, cases"[2] than to the rest of the proposed "drop-ins", in the sense that while the "drop-in" proposals involved the creation of wholly new short-spaced VHF assignments, the Channel 11 proposal constitutes a "move-in" of an authorized VHF station to operate as the third competitive VHF facilitiy to serve Baton Rouge. Additionally, the Commission there found that such a "move-in" would " . . . have little significant effect upon UHF development in the area" and that any station " . . . operating in the small community of Houma (1960) population 22,260) would have to compete against the service reaching that community from New Orleans and Baton Rouge." Under those circumstances, the Commission found that, while the question presented by the proposal was a close one, it was nevertheless moved to reject the proposal " . . . at present in large part because we are not convinced that the possibility of using Channel 11 at standard spacings so as to serve both Houma and Baton Rouge has been sufficiently explored." The Commission also stated that a site which would meet the spacing requirements of the Commission's Rules and from which principal city signals would be provided to both Houma and Baton Rouge was theoretically possible. The Commission also recognized that air space and terrain considerations might pose problems as they have in the past.

9. The applicant, on January 21, 1964, filed a "Supplement to Petition to Grant BMPCT–5400" which shows the efforts which the applicant has made to secure a site which would meet the requirements enunciated by the Commission in its decision terminating the "drop-in" proceedings (FCC 63–1168, *supra*). The applicant shows that two sites were possible within the area indicated by the Commission (approximately 35 miles south southeast of Baton Rouge), within which it would be theoretically possible to meet all spacing requirements to New Orleans and Lafayette, Louisiana, and Meridian, Mississippi. The applicant contends, and there is support for such contention by the F.A.A., that the tower which would have to be erected at either site in order to provide city grade coverage to both Houma and Baton Rouge would have to be so high that neither would meet air safety criteria. Additionally, one of the sites would be located in an inaccessible swamp area which is designated as a floodway for the Mississippi River. As a consequence, the applicant concluded that the site which it has proposed, while involving a short-spacing problem to Meridian, Mississippi, is the only one from which principal city coverage could be provided to most of Houma and to all of Baton Rouge without involving an adjacent channel separation

[2] *Assignment of Additional VHF Channel to Oklahoma City*, Docket No. 14231, FCC 63–739, 25 R.R. 1780; *New Orleans Television Corp.*, FCC 62–853, 23 R.R. 1113; affirmed *sub nom Capitol Broadcasting Company v. Federal Communications Commission*, 324 F. 2d 402 (D.C. Cir); *WTEV Television, Inc.*, New Bedford Massachusetts, FCC 62–852 and FCC 62–879; affirmed *sub nom Rhode Island Television Corporation et al. v. Federal Communications Commission*, 320 F. 2d 762 (D.C. Cir).

problem to Lafayette, Louisiana, and at the same time meet all air safety requirements. Furthermore, the applicant insists that, operating from a site 35 miles from Baton Rouge, it could not be competitive with the other two Baton Rouge VHF stations [3].

10. We are faced, essentially, with two questions: whether we should authorize a third VHF service to Baton Rouge at substandard spacing and, if so, whether the present application is an appropriate vehicle to accomplish that purpose. As we have noted, our order denying reconsideration in Docket No. 14233 found the first question "a close one." There is no operating UHF station in Louisiana at present; VHF signals from New Orleans and Baton Rouge cover the market area of any potential Houma station and the Grade B contours of VHF stations in New Orleans and Lafayette fall only a few miles short of Baton Rouge; and Baton Rouge is, on almost all criteria, appreciably smaller than any of the other markets in which VHF "drop-ins" have been proposed. These circumstances, in our view, substantially reduce the significance of a potential third Baton Rouge station as an opportunity for the successful development of UHF television on an intermixed basis [4]. In addition, we are dealing here with an existing allocation and an existing station permit, the Commission having long since found that the public interest would be served by an additional VHF operation in southern Louisiana. Finally, the showing before us demonstrates convincingly that a waiver of Section 73.610 of the Rules is necessary and appropriate, if we are to bring a third VHF operation to Baton Rouge. In this regard, the applicant correctly points out that there is ample precedent for such a waiver; the separation shortage involved here is approximately 20 miles, whereas in the *New Orleans* case, *supra*, the shortage was 28 miles. In all of these circumstances, we think it reasonable to let the immediate needs of Baton Rouge for a third competitive service and the equally immediate need to improve the opportunities for nationwide competitive service by the three major commercial networks tilt the balance in favor of a waiver of the spacings rule to permit a third VHF service for Baton Rouge.

11. This brings us to the second question as set forth above, *viz.*, whether the St. Anthony proposal is an appropriate means to bring a third VHF service to Baton Rouge. We believe that it is. In the first place, the applicant will provide more than service to Baton Rouge. It will continue to maintain its studio in Houma, will provide city grade service to most of Houma and will provide a means of local self-expression for the people of Houma.[5] No other available means of bringing a third VHF service to Baton Rouge would accomplish this end.

12. It is urged that the station's identification with Houma will be illusory—in view of the much larger size of Baton Rouge and the location of the station's transmitter so as to provide maximum

[3] Citing the Commission's decision in the *New Orleans* case, *supra*.

[4] Outside VFH signals do reach the heart of several of the other markets in which VHF "drop-ins" have been proposed. However, the substantially smaller size of the Baton Rouge market makes such penetration by outside VHF signals considerably more significant as a factor reducing the potentiality of a third station as an opportunity for the development of UHF television on an intermixed basis.

[5] In view of these circumstances, we reject the argument that the proposal conflicts with Section 73.606 of the Rules and Section 307(b) of the Communications Act.

service to Baton Rouge. It is also urged that, to the extent the station is identified with Houma, it will suffer a handicap in its competition with the two existing Baton Rouge stations. We do not believe, however, that the public interest is always served by an insistence upon "black or white" solutions to complicated practical problems. The application before us offers a chance to obtain competitive service for Baton Rouge while maintaining local service to Houma. We have approved in the past a number of analogous applications, presenting facts which differ only in degree [6]. We think the risks involved for the public interest are reasonable, and well worth taking.

13. Secondly, we have found that the applicant before us has prosecuted its application with diligence, and has acted in good faith with respect to the construction permit granted to it in late November, 1958. The equities accruing to it in the process would not bar adverse action on its application if the public interest so dictated. Its equities are certainly comparable, however, to those of the applicant in *WTEV Television, Inc., supra,* which had obtained a permit for a station in New Bedford, but had not constructed prior to its application for permission to move its transmitter so as to provide a third competitive service to Providence, while maintaining local service to New Bedford. As such, we believe they are entitled to our consideration.

14. Finally, we have considered the proposal with respect to the areas and populations which may be expected to gain or lose television service as a result of the modification which the applicant seeks (*Hall et al.* v. *Federal Communications Commission,* 99 U.S. App. D.C. 86; 237 F. 2d 567). The proposed move northward would result in a theoretical loss of television service to an area consisting chiefly of swampland and the waters of the Gulf of Mexico. In all but a practically uninhabited portion of swampland in the southern tip of Louisiana, those areas which will lose television service will continue to receive the Grade B signals or better of the three New Orleans VHF stations. The proposal would provide principal city coverage to an additional 2320 square miles and 333,100 persons, Grade A coverage to an additional 2840 square miles and 428,700 persons, and Grade B coverage to an additional 5380 square miles and 520,000 persons. The proposal will provide a third competitive VHF service to Baton Rouge and its surrounding area, and will also provide the means for bringing a third network service to that area. On the whole, we find that the proposal before us falls well within the rationale of the *WTEV Television, Inc.* and *Enid-Oklahoma City* decisions, *supra.* Here, as in those cases, a move of an authorized VHF transmitter would have little adverse effect on the potential development of UHF, in view of the multiple VHF signals already in the market. Here, as in those cases, there will be an improvement in the local competitive situation and the nation-wide competitive structure. Here, as in those cases, the countervailing detriment to the public interest is mini-

[6] *WTEV Television, Inc., supra* (New Bedford-Providence); *WKST, Inc.,* 15 Pike & Fischer, R.R. 919, *aff'd; Community Telecasting, Inc.* v. *FCC,* 17 Pike & Fischer, R.R. 2029 (C.A.D.C.) (New Castle-Youngstown); *Gulf Television Co.,* 12 Pike & Fischer, R.R. 447, *aff'd; Houston Consolidated Television Co.* v. *FCC,* 14 Pike & Fischer, R.R. 2069 (C.A.D.C.) (Galveston-Houston).

mal. In view of the foregoing, we conclude that a grant of the application would serve the public interest, convenience and necessity. We find, therefore, that the petition filed by Louisiana Television Corporation, the opposition filed by Guaranty Broadcasting Corporation, and the objections of The Association of Maximum Service Telecasters must be denied for failure to present substantial and material questions of fact.

15. In order to guarantee the applicant's performance in accordance with its undertaking to provide "equivalent protection" to Station WTOK–TV by limiting radiation in that direction, the Commission will so condition the grant as to assure the applicant's compliance therewith.

Accordingly, IT IS ORDERED, That the Petition to Dismiss or in the Alternative to Deny Application, filed by Louisiana Television Corporation, IS DENIED; and that the Opposition to Petition to Grant, filed by Guaranty Broadcasting Corporation, IS DENIED; and that the Objections of The Association of Maximum Service Telecasters, Inc., ARE DENIED; and

IT IS FURTHER ORDERED, That Sections 73.610 and 73.685 of the Commission's Rules ARE HEREBY WAIVED.

IT IS FURTHER ORDERED, That the application (BMPCT–5400) of St. Anthony Television Corporation IS GRANTED, subject to specifications and conditions to be issued.

Adopted April 15, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX

I dissent. I do not object to providing a third VHF service for Baton Rouge—in fact, I voted in Docket No. 14233 to assign Channel 11 to Baton Rouge at short spacing. I do object, however, to the manner in which this objective is here accomplished. I object even more strongly to the inconsistency of those of the majority (excluding Commissioners Hyde and Ford) who are really voting for a drop-in for Baton Rouge for the very reasons which I believe also support drop-ins for Johnstown, Dayton, Jacksonville, Birmingham, Knoxville, and Charlotte—yet they will not grant similar relief to these communities, though no sound basis for this distinction is offered.

On June 26, 1956, in Docket No. 11752 the Commission proposed to delete Channel 4 from New Orleans and to assign it to Mobile. This would have given the latter city a third VHF service, and would have left New Orleans with one commercial VHF station, one commercial UHF station, an educational VHF allocation (the station went on the air the following year) and four additional UHF allocations. A comparative hearing was then in progress with respect to Channel 4 in New Orleans, but a UHF channel could have been made available to the prevailing party. There then existed a substantial degree of UHF conversion in New Orleans, so that there was good reason to believe that two commercial UHF stations could compete with the pre-freeze VHF

station operating there,[1] thus providing three network service to the area. However, despite the Commission's expressed interest in promoting UHF broadcasting—and its indication in its Report and Order in Docket No. 11532 that the only allocations proposal meriting further study was the suggestion that all television in the United States, or in a substantial portion of the country, be shifted to the UHF portion of the spectrum—it adopted a Memorandum Opinion and Order in Docket No. 11752 on March 7, 1957, in which it not only added Channel 12 to New Orleans, but also allocated Channel 11 to Houma, Channel 3 to Lafayette-Lake Charles, and Channel 12 to Beaumont-Port Arthur. The allocation of Channel 12 to New Orleans was supposed to be at standard spacing. However, this would have required a transmitter location at such a distance from the city that it would have put a station operating on the channel at a competitive disadvantage. Consequently, a station was first allowed to operate on Channel 12 in New Orleans as an experiment. When this was held to violate the rights of a co-channel station, the New Orleans station was permitted to operate on Channel 13 pending construction of a station on that Channel at Biloxi. Finally the Commission authorized operation on Channel 12 at a site close to that of the other New Orleans stations, even though this was short spaced to the Channel 12 station at Jackson, Mississippi. The New Orleans station was required to directionalize so as to provide equivalent protection to the Jackson station—and the Court of Appeals held that this was permissible and not a modification of the license of the latter. Thus, what was begun as a proposal to make New Orleans primarily, or completely, a UHF market ended up with the drop-in of a third VHF channel at short spacing.

Meanwhile, what of Baton Rouge? In June of 1956 it also had two operating commercial stations, one VHF and one UHF. This UHF beach-head was also wiped out on June 3, 1959, when the Commission, in Docket No. 12281, decided to shift Channel 9 from Hattiesburg, Mississippi to Baton Rouge.

As the majority points out, the applicant herein was granted a construction permit on Channel 11 at Houma on November 25, 1958. There had originally been another competing applicant, but after a series of prehearing conferences the latter petitioned for leave to dismiss. This was eventually granted, clearing the way for grant of Saint Anthony's application after a brief evidentiary hearing with respect to issues as to air hazard and financial qualification. The air hazard problem was resolved, presumably, by reducing the proposed antenna height to 700 feet above average terrain, yet seven months later, in order to justify an extension of time within which to "complete" construction (there being no evidence it has ever been begun), the applicant advised that its site was no longer usable because it was adjacent to a new proposed VORTAC site.

In the meantime, on January 3, 1958, the Commission had proposed the shift of Channel 9 to Baton Rouge referred to above. On

[1] During the course of the proceeding, the Commission agreed also to consider the possibility of deleting Channel 6, on which this station operated, which would have made New Orleans the largest all-UHF market in the country.

February 7, 1958, Saint Anthony filed a counter-proposal to assign Channel 9 to Natchez instead. Ten days later it filed reply comments directed toward counter-proposals by the two applicants for Channel 12 in New Orleans, who had suggested that the Commission should not only assign Channel 9 to Baton Rouge, but should also make Channel 11 a hyphenated assignment to serve Baton Rouge-Houma. This proposal was made in order to give Baton Rouge a third VHF service, and because of concern that the existing Channel 11 allocation to Houma would be used to attempt a "backdoor" entry into the New Orleans market. Saint Anthony opposed this counter-proposal as designed to serve only the private interest of the New Orleans applicants, and charged that there had been no showing that the public interest would be served.

It would seem not improbable that Saint Anthony was interested, at this stage, in maintaining maximum flexibility in its use of Channel 11. Despite anything it may have said in urging the allocation of the channel to Houma, a community of some 11,500 at that time, it seems likely that its plans to construct a high powered station were geared to achieve as high a degree of coverage of one or another of the nearby major markets as possible. On May 29, 1959, after the Commission had granted special temporary authority for operation on Channel 13 in New Orleans, Saint Anthony withdrew its counter proposal and reply comments and indicated that in light of "changed circumstances", it was willing to accept the hyphenated assignment of Channel 11 as a Baton Rouge-Houma assignment, provided its construction permit on the channel would not be adversely affected and that the assignment would not be thrown open to new applicants. Two days later the Commission adopted its Report and Order in Docket No. 12281 assigning Channel 9 to Baton Rouge and deferring decision on the hyphenated assignment of Channel 11.

About a year later, on June 8, 1960, Saint Anthony requested the Commission to finalize the proposal to hyphenate Channel 11 as a Houma-Baton Rouge assignment and to modify its construction permit to specify this revised assignment. It referred to an agreement with the co-channel station in Meridian, Mississippi whereby the latter waived objection to the location of Saint Anthony's transmitter at a point 201 miles, rather than 220 miles, from Meridian.

On July 27, 1961, the Commission proposed, in Docket No. 14233, to delete Channel 11 from Houma and assign it to Baton Rouge at less than standard spacing. On November 28, 1961, Saint Anthony filed a petition for immediate grant under the double caption of a then pending application for modification of its construction permit and under the title of Docket No. 14233. In this pleading it recited the history of its efforts to move its assignment including at least two items not referred to above, to-wit: a petition to place Meridian in Zone 2 rather than Zone 3, to make a lower separation applicable, and its application, filed in September 1959, to move its transmitter site to within 17 miles of Baton Rouge. It set out the additional area to be served by a move northward and said it had been encouraged by the Commission's deferral of decision as to a

hyphenated assignment when it was concluding the Channel 9 proceeding. It then referred to the proposal in Docket 14233, pointed out that it was not recognized that Saint Anthony already held a construction permit on the channel, and requested immediate grant of its pending application to move toward Baton Rouge and dismissal of the rule making as moot. In the alternative, if the rule making were not dismissed, it requested that it be amended to provide for issuance of a show cause order directed to Saint Anthony for the removal of the channel to Baton Rouge.

Saint Anthony then refiled this pleading as its comment in Docket No. 14233, and later filed reply comments to the same end. Thus for well over five years it has been engaged in strenuous efforts, not to build a station to serve the community to which it had persuaded the Commission to assign Channel 11 in 1957, but rather to convert its authorization to serve that small community —obtained without serious competition—into a more valuable franchise to give primary attention to a larger community nearby. I realize, of course, that it has always proposed to provide the required signal over *most,* but not all, of Houma, but I regard this merely as the price it is willing to pay to avoid opening up the channel for further applications. Its main thrust has clearly been to become a Baton Rouge station.

As indicated above, I believe Channel 11 should be allocated to Baton Rouge—but without any strings tying it to Houma. The allocation to that community in 1957 was not very realistic—witness Saint Anthony's reluctance to build a station there. While I think the best thing which could have been done then was to make all of southern Louisiana a UHF area, since the Commission took the contrary course, it seems to me that it should have allocated Channel 12 to New Orleans and Channel 11 to Baton Rouge. However, it was then not yet ready to accept short spaced assignments, so required the use of these channels at points which were deemed infeasible by their ultimate grantees.

If Saint Anthony had built and operated the station authorized to it in 1958, I believe it could in good conscience now seek assignment of its channel to Baton Rouge and assert its equities as a going station to seek to move into this larger market with its channel—as we permitted KOCO–TV to move from Enid when we dropped its channel into Oklahoma City. But I think Saint Anthony has been speculating with the public interest rather than serving it. I think we should regard its channel as available for free assignment where it can best serve the public—and this, I believe, means its assignment to Baton Rouge itself. I think that the applicant's reliance upon—and the majority's citation of—the Enid, New Orleans, and New Bedford cases is unsound. The Enid station had been operating for years and enjoyed fully licensed status. It had served the public in Enid—and, to the extent possible, that in Oklahoma City as well. It had substantial equities not present here. The New Orleans grantee did not build at the site specified in its construction permit, it is true, but it had built and operated stations which served the area on both Channels 12 and 13 and therefore had similar equities.

The construction permit for the New Bedford station was granted on July 10, 1961, and on November 14, 1961, it was assigned to a new entity created to accommodate certain of the parties who had been contending for the channel. Construction was commenced on the studio site in New Bedford and on the transmitter site on Martha's Vineyard. However, the construction permit was so conditioned that the grantee would not proceed too far with construction of its transmitter until it could be determined with certainty that its operation would not adversely affect the Coast Guard's nearby LORAN–C station. Furthermore, within a month after the permit was issued, the Commission had issued its Memorandum Opinion and Order in Docket No. 13340 in which it stated that it would consider the use of VHF drop-ins at short spacing in certain specified communities, one of which was Providence. It expressly noted that added service could be provided to that market by a station operating on New Bedford's Channel 6, as well as the fact that it was considering the possible reassignment of Channel 3 from Hartford to Providence. Numerous petitions for reconsideration were filed and disposed of on December 6, 1961. On January 18, 1962, the permittee of the New Bedford station requested modification of its permit to allow the moving of its transmitter site to the mainland, bringing it closer to Providence and New Bedford and putting it at short spacing with respect to three existing stations. That application was granted on July 25, 1962, the Commission noting that the station would continue to be a New Bedford station, would maintain its main studio in New Bedford, and would place a principal city signal over that community. Actually, this new site is 21 miles from Providence and only 11 from New Bedford. On the other hand, Saint Anthony's proposed site is 18 miles from Baton Rouge and 47 miles from Houma, and from that point a principal city signal could be provided to all of Baton Rouge but to only 84% of Houma. While Providence has a population of 659,542 and New Bedford has only 126,657, the disproportion is even greater between Baton Rouge with 193,485 and Houma with 22,561. It would seem more reasonable to expect WTEV to serve New Bedford primarily than to look to KHMA to provide a really local service to Houma 47 miles away and so much smaller than nearby Baton Rouge. Yet the effort to maintain the fiction that it is a Houma station could impair in some degree its service to Baton Rouge, where the majority expects it to provide a third service.

I think Baton Rouge needs a third station, but I see no reason for not simply allocating Channel 11 to that community and abandoning the pretense of making it a Houma assignment, since that allocation was made solely to preserve minimum spacings and that effort has now been abandoned. Commissioners Hyde and Ford are being consistent—they wanted to drop Channel 11 into Baton Rouge and are apparently accepting this step as the next best alternative. But I think the rest of the majority are being totally inconsistent. They now use the arguments which I made in favor of the drop-ins and abandon the fears for UHF which apparently led them to reject those proposals—yet they offer no real explana-

tion for their reversal of position in just this one of the seven drop-in cities.

They refer to their statements about Baton Rouge in the Memorandum Opinion and Order denying the petitions for reconsideration in the drop-in proceedings. They point to language in that order analogizing this situation to Enid, New Orleans and New Bedford, saying that "while the 'drop-in' proposals involved the creation of wholly new short-spaced VHF assignments, the Channel 11 proposal constitutes a 'move-in' of an authorized VHF *station*" (emphasis supplied). I submit that there has never been a Channel 11 "station" in this area, and that this short-spaced version of its assignment is as "wholly new" as are the proposals of Channels 8 for Johnstown, 11 for Dayton, 10 for Jacksonville, 3 for Birmingham, and 8 for Knoxville, all of which were made by the American Broadcasting Company as early as July 1956.

They then say that the Commission found, in its order on reconsideration of the drop-ins, that this "move-in" would "have little significant effect upon UHF development in the area." I simply don't understand this. The provision of a third VHF service to Baton Rouge, by whatever means, will block the development of a UHF station there just as surely as the drop-in of a VHF channel into Birmingham would—these gentlemen feared—deter the building of a UHF station in that community. There is one difference —I proposed that VHF channels be dropped in for seven years, while the authorization made here is presumably permanent. If I understood the majority in the drop-ins proceedings they feared national, not local, impact on UHF—and the action they take here will have the same kind, though only one-seventh the quantum, of impact that the full list of drop-ins would have had—except for the fact, again, that my proposed assignments would have been temporary. If it is now believed that set manufacturers and prospective station applicants will not panic over the loss of Baton Rouge—as apparently they did not over the drop-in for Oklahoma City—then perhaps something can still be done for Birmingham, or any one of the other six on the list.

The majority point out that in disposing of the petitions for reconsideration they had found the Baton Rouge proposal "a close one" but were constrained to reject it because they were not convinced that the possibility of using Channel 11 at standard spacings so as to serve both Houma and Baton Rouge had been sufficiently explored. This is self-contradictory because the proposal said to be so close was one to allocate Channel 11 to Baton Rouge *alone*, but at *short* spacing. The majority rejected this to permit further consideration of a *hyphenated* assignment at *standard* spacing. But what the majority here approves is neither of these, but rather a *hyphenated* assignment at *short* spacing. Having accepted the principal of short spacing and forgotten their fears for UHF, I think they should have accepted the proposal they regarded as "close" last December and simply assigned Channel 11 to Baton Rouge.

The principal difficulty I have with the majority—excepting Commissioners Hyde and Ford who have consistently supported

the drop-ins—arises out of their sudden shift in emphasis. All of a sudden they are concerned about the considerations which have led me to favor the carefully thought-out proposals for a limited number of drop-ins which were made in July, 1961. In Paragraph 14 they point out that Saint Anthony's proposal will provide a third competitive VHF service to Baton Rouge. This was the policy objective sought in Docket Numbers 13340 and 14233, both of which have been rejected by the majority. In Paragraph 11 they say that the issue is whether St. Anthony's proposal "is an appropriate means to bring a third VHF service to Baton Rouge." It may be one way to do it, but it is certainly not the best way, either in terms of the quality of service to be provided to Baton Rouge, the competitive posture of a station operating under such circumstances, or fairness to others who might be interested in serving Baton Rouge. The only thing which heretofore blocked proposals to provide a more competitive third VHF service for Baton Rouge was the majority's fear of impact on the overall development of UHF. This fear has apparently abated—a development which I welcome since I think it was without substantial basis in the first place. But if this is the case, why stop with Baton Rouge?

My colleagues say that the applicant has diligently prosecuted its application. It is clear, however, that it has *not* diligently prosecuted its construction permit, granted in November 1958, to build a station to serve Houma, nor is there anything in the filings to indicate that causes beyond its control have prevented it from finding a site from which it could do so—assuming for the sake of argument that the site specified in its permit is no longer available. The application it has been diligently pursuing since September 16, 1959, is to move Channel 11 as near to Baton Rouge as it can without losing the last semblance of basis for claiming that it should be automatically entitled to operate a Baton Rouge station on that channel without opening it up for competing applications—at least one of which we are advised would be filed.

Some late revisions of the majority opinion require comment—and to avoid further delay in disposing of this matter, I shall simply add my views here, though they may be out of logical order.

In Paragraph 10 the majority point out that there is no operating UHF station in Louisiana, that the grade B contours of the UHF stations in New Orleans and Lafayette fall only a few miles short of Baton Rouge, and that these facts "substantially reduce the significance of a potential third Baton Rouge station as an opportunity for the successful development of UHF television on an intermixed basis." My own feeling is that in a distinct and substantial market the competitive factor which controls is the local one. That is, the problems of UHF broadcasters have arisen primarily because they were faced with dominant VHF competition in their immediate area, and not because of outside VHF penetration, though that can compound the situation. In these terms, of course, Baton Rouge is just like the other six proposed drop-in markets. If a UHF station would have trouble surviving in Baton Rouge because the all-channel law has not yet had a chance to

achieve its goal, then the same thing will be true in Birmingham, Dayton, etc. But even on the majority's terms, at least two of these other communities are in the same category as Baton Rouge as far as outside VHF signals are concerned. Charlotte, North Carolina, is within the grade B contours of a station in Greensboro-High Point-Winston Salem and of a station in Spartanburg, and just outside the contours of another station in Greensboro-Winston Salem and of a station in Greenville and one in Columbia. And as for Dayton, Ohio, it is either within or just outside the grade B contours of the three stations in Columbus, and in addition is *totally within* the grade B contours of the three stations in Cincinnati. What would the majority now say as to "opportunity for the successful development of UHF television on an intermixed basis" in these communities?

Further in the same paragraph the majority agrees with the applicant that there is ample precedent for waiving Section 73.610 of the Rules (specifying minimum separations) inasmuch as the shortage here is 20 miles, while a shortage of 28 miles was approved in New Orleans. I agree—though I believe that in the communities with which we have been concerned, even greater shortages should be permitted—and I would point out that assignment of Channel 11 to Baton Rouge would make it only 24 miles short to Meridian, also within the New Orleans precedent.

But what really surprises me in Paragraph 10 is the statement that the majority gives decisive weight to "the *immediate needs* of Baton Rouge for a third competitive service and the *equally immediate need* to improve the opportunities for nationwide competitive service by the three major commercial networks." I agree, of course, that these needs exist—and that they have been urgent, or "immediate", for a number of years— but the majority (excepting Commissioners Ford and Hyde) have been singularly unimpressed. I know of no basis for assuming that the needs of Baton Rouge are any more "immediate" than those of Birmingham and the other five communities, nor does the majority give any reason for taking extraordinary steps in Baton Rouge to try to equalize network competition and yet continuing to ignore the more significant improvements which could be made in the other areas. I like the majority's conclusion—I just don't see why it should be confined to Baton Rouge.

The majority finally concludes, in Paragraph 14, that applicant's proposal falls well within the rationale of the New Bedford and Enid decisions. For the reasons already stated, I think the equities of the parties there were far stronger than they are here. Similarly, I think the modifications made there were more logical and workable. In the Enid case, Channel 5 was simply reassigned to Oklahoma City and the license of KOCO-TV was modified to specify the latter as its city of assignment, subject only to the condition that adequate auxiliary studios be maintained in Enid. The Commission recognized, however, that it was withdrawing Enid's only service—and justified it on grounds which apply with equal force here. In the New Bedford case, WTEV was charged with a continuing responsibility for serving New Bedford. But that

community is nearly six times as large as Houma, and is provided a principal city signal from a transmitter only 11 miles away (and 21 miles from Providence). But Houma is to be given principal city service over only 84% of its area—and this from a transmitter 47 miles away (but only 18 miles from Baton Rouge). It may be that the majority can accomplish both of its objectives—a third service for Baton Rouge and local service for Houma. However, I will not be surprised if we are eventually asked to make Channel 11 a Baton Rouge station completely—thus permitting St. Anthony to accomplish in two steps what we would not permit it to do in one.

I agree that we can seldom find "black or white" solutions to complicated problems such as we face in television allocations—in fact, I think much of the Commission's difficulty in this area stems from its search for such sweeping absolutes. However, I think my proposal for limited term dual UHF-VHF operation in a carefully selected group of markets was not a simple all-or-nothing approach to the matter. I do not urge "black or white" solutions here. I simply believe that if the majority wishes to provide a third VHF service for Baton Rouge it should do so by assigning Channel 11 to that city, and that its expressed reasons advanced for improving service to Baton Rouge apply with equal persuasiveness to the other six communities involved in our drop-in proceeding.

F.C.C. 64–350

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>RADIO AMERICANA, INC., BALTIMORE, MD.<br>For Construction Permit | Docket No. 13245<br>File No. BP–12962 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: CHAIRMAN HENRY DISSENTING AND VOTING FOR RECONSIDERATION; COMMISSIONER LEE ABSENT; COMMISSIONER COX NOT PARTICIPATING.

1. The Commission has before it for consideration a petition and related pleadings [1] wherein Radio Americana, Inc. (Radio Americana) seeks reconsideration of the Commission's Memorandum Opinion and Order released December 16, 1963 (FCC 63–1133) which held the instant proceeding in abeyance until further order, and ordered that interested parties so desiring may, within 60 days of the release date of the order, file applications for 940 kc in Catonsville, Maryland or Lebanon, Pennsylvania, using substantially the same engineering characteristics and proposing to serve substantially the same service areas as were proposed in the dismissed applications of Catonsville Broadcasting Company and Rossmoyne Corporation. As the basic reason for the action taken, the Commission stated that ". . . our statutory responsibility under Section 307(b) requires that we protect the broadcasting needs of particular communities for which broadcast facilities have been proposed, and then withdrawn, for otherwise grant of the remaining application may totally preclude the establishment of facilities in the community which the withdrawing applicant had sought to serve."

2. The procedure adopted in the Memorandum Opinion and Order parallels that set forth in Section 1.525(b)(1) of the Commission's Rules. Radio Americana submits that "assuming, *arguendo,* that Section 1.525(b)(1) and the policy underlying it may properly be applied to this case, that section and policy do not support the action which the Commission has taken."[2] In this connection, Radio Americana points to the language of Section 1.525(b)(1) which states, in essence, that before opportunity is

[1] Before the Commission are (a) petition for reconsideration filed January 16, 1964 by Radio Americana, Inc.; (b) Broadcast Bureau's opposition to the petition filed January 29, 1964; and (c) reply to the Opposition filed February 10, 1964 by Radio Americana, Inc.

[2] Radio Americana maintains its position that the Commission may not properly apply to it a procedural rule which was not in existence at the time its proposal was put forward or at the time it was first considered by the Commission. As Radio Americana recognizes, its position was known to the Commission when it issued the order now the subject of the petition for reconsideration. However, as stated in the order, the Commission believes the public interest requires the action there outlined.

afforded for other persons to apply for the facilities proposed to be withdrawn, the Commission must find that withdrawal of one of the applications would unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several states and communities. Radio Americana asserts that (a) the existing record in this proceeding establishes that the withdrawal of the Catonsville application did not unduly impede achievement of a fair, efficient and equitable distribution of radio service, and (b) new evidence demonstrates that dismissal of the Lebanon application likewise did not impede achievement of a fair, efficient and equitable distribution of radio service.

3. Regarding the Catonsville withdrawal, although issues were specified in the original consolidated proceeding inquiring whether Catonsville is a community, and, if so, whether it is a separate community from Baltimore, these issues were never resolved inasmuch as the Catonsville applicant was permitted to withdraw from the consolidated proceeding. Until the community status of Catonsville and the question of whether it is a separate community from Baltimore are determined, it cannot be stated whether withdrawal of the Catonsville application unduly impedes achievement of a fair, efficient and equitable distribution of radio service.

4. The new evidence offered by Radio Americana, allegedly demonstrating that dismissal of the Lebanon application did not unduly impede achievement of a fair, efficient and equitable distribution of radio service, consists of measurements purporting to show that Station WHYL, Carlisle, Pennsylvania (960 kc, 5 kw, DA–D) would place a 2 mv/m signal over Lebanon. Since any proposal for Lebanon is required to place a signal of at least 25 mv/m over the business or factory areas of Lebanon, Radio Americana asserts that any Lebanon proposal (on 940 kc) would conflict with Section 73.37 of the Commission's Rules.[3] Because of this, Radio Americana submits that any Lebanon 940 kc proposal would be denied, and that it follows that dismissal of the Lebanon application did not unduly impede achievement of a fair, efficient and equitable distribution of radio service.

5. It does not follow from Radio Americana's argument that outright rejection of any Lebanon proposal is called for because of a possible conflict with Section 73.37 of the Commission's Rules. It is more appropriate to specify an issue in this connection so that evidence may be adduced which will permit determination whether violation of Section 73.37 would occur. If, after the issue is explored, it develops that a violation may exist, the matter does not end there, for, depending upon the circumstances presented, waiver by the Commission of Section 73.37 is permissible. Indeed, it has been the Commission's practice in connection with specification of a Section 73.37 issue to indicate that if contravention of that section is shown, then determination should be made whether circumstances exist which would warrant waiver of the section.

6. In response to our order herein inviting expressions of de-

[3] Section 73.37 provides, in pertinent part, that a license will not be granted for the operation of a station on a frequency ± 20 kc or ± 10 kc from the frequency of another station if the area enclosed by the 25 mv/m groundwave contour of either one overlaps the area enclosed by the 2 mv/m groundwave contour of the other.

mand for service on 940 kc in Lebanon or Catonsville, a total of eight applications have been filed for those communities. We stated that if new applications are filed provision would be made for a brief additional period within which the three original applicants in this proceeding (Rossmoyne, BP–13110; Catonsville, BP–13150; and Caba, BP–12962), or Radio Americana, shall indicate their intentions either to continue the prosecution of their applications or to remove themselves from further participation. Accordingly, the three original applicants herein, or Radio Americana, are directed to submit, within 20 days of the date of release of this order, statements of their intentions either to continue the prosecution of their applications or to remove themselves from further participation in this proceeding. Failure of any of these applicants to file such statements will be considered as a relinquishment by them of any rights granted hereunder, and the dismissed status of the applications of Catonsville Broadcasting Company and Rossmoyne Corporation will continue in effect. Upon expiration of the 20-day period, the Commission will then give consideration to consolidation of the various applications for hearing upon appropriate issues.

7. In view of the foregoing, IT IS ORDERED, This 22nd day of April, 1964, That the above-described petition for reconsideration filed January 16, 1964, by Radio Americana, Inc. IS DENIED; and

IT IS FURTHER ORDERED, That the three original applicants herein, Catonsville Broadcasting Company, Caba Broadcasting Corporation, and Rossmoyne Corporation, or Radio Americana, Inc., ARE DIRECTED to submit within 20 days of the release date of this order statements of their intentions either to continue the prosecution of their applications or to remove themselves from further participation in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–238

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| FELIX JOYNT AND JAMES JOYNT, D.B.A. KWEN BROADCASTING CO., PORT ARTHUR, TEX. | Docket No. 14597<br>File No. BP–13627 |
| WOODLAND BROADCASTING CO., VIDOR, TEX. | Docket No. 15203 |
| For Construction Permits | File No. BP–15973 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The petitioner, KWEN Broadcasting Company (KWEN), requests that the Review Board enlarge the issues in this proceeding to permit determination of the character qualifications of Woodland Broadcasting Company (Woodland), its officers, directors and stockholders.[1]

2. In its petition, KWEN seeks the addition of the following issue:

To determine whether Woodland Broadcasting Company or any of its officers, directors, or principal stockholders made any false representations, misstatements, omitted any material facts, or were lacking in candor in the application, pleadings, or testimony in this proceeding.

Petitioner points out that the Woodland application was filed for the same facilities previously requested by Vidor Broadcasting Company (Vidor) in Docket No. 14599 following the grant of a joint request for approval of an agreement whereby Vidor was dismissed and was reimbursed by KWEN.[2] According to petitioner, the engineering portion of the Woodland application, signed by Gerald R. Proctor, President, General Manager, and Chief Engineer of Woodland, so resembled that prepared by J. G. Rountree, consulting radio engineer for Vidor, that Rountree, by letter directed to the Commission, accused Proctor of plagiarizing certain engineering exhibits. KWEN contends that, as a result, the Commission included an issue pertinent to this charge in the designation order to determine the manner, accuracy and methods employed in the application's preparation and any resultant effects on Woodland's qualifications.[3] If this designated issue is construed

[1] The pleadings before the Review Board include: (1) Petition for enlargement of issues, filed March 20, 1964, by Felix Joynt and James Joynt d/b as KWEN Broadcasting Company; (2) Opposition, filed March 23, 1964, by Woodland Broadcasting Company; (3) Opposition, filed April 2, 1964, by the Broadcast Bureau; and (4) Reply, filed April 7, 1964, by petitioner.

[2] Memorandum Opinion and Order, released August 30, 1963, (FCC 63R–403).

[3] In the Designation Order, released October 29, 1963, (FCC 63–985), the Commission included the following issue:

"3. To determine the manner in which the application of the Woodland Broadcasting Company was prepared, whether information and exhibits therein are accurate and whether the method employed in the preparation of the application reflects adversely on the qualifications of the Woodland Broadcasting Company or any of its principals."

strictly, petitioner urges that the hearing examiner would be limited to passing on the qualifications of Woodland and its principals only as affected by the "method employed in the preparation of the application" and would be unable to determine whether the character qualifications of Woodland and its principals are undermined by the conflicting testimony of Proctor.

3. As examples of directly conflicting testimony, KWEN points to assertions in the Woodland engineering exhibits and to alleged inconsistent statements made by Proctor at the hearing concerning preparation of the application and the claimed loss of working papers. KWEN contends that this direct conflict in testimony raises serious doubts as to Proctor's character qualifications and that the hearing examiner should be permitted to determine whether Proctor has prejured himself. KWEN also submits that good cause exists for the late filing of the instant petition since it was filed as soon after conflicting testimony became available as practicable and since the requested issue does not require a reopening of the record for further testimony.

4. In opposition, Woodland asserts that KWEN was charged with notice of the inclusion of an issue relevant to the preparation of the Woodland application and therefore had ample time between October 29, 1963, the release date of the designation order, and February 25, 1964, the date of commencement of the hearing, to devote to preparation on that issue. Since KWEN's counsel was present during the hearing, examined exhibits, and had opportunity to study the evidence during a hearing recess from March 6 to March 12, 1964, Woodland asserts that the filing of the KWEN petition one week after the closing of the record cannot be deemed timely or for good cause. KWEN's allegations concerning conflicting testimony are denied by Woodland as improper and false and without foundation. In any event, Woodland urges that the matters raised in the KWEN petition are already included in the designated issues and that, therefore, the request to enlarge issues should be denied by the Review Board. The Broadcast Bureau supports the Woodland assertion that matters raised by the instant petition concerning the manner in which the application was prepared, its accuracy and Proctor's testimony relative thereto can be considered under the designated issues in the proceeding.

5. In its reply pleading, KWEN concedes that enlargement would not seem to be required if the Board agrees with the construction given designated Issue No. 3 by Woodland and the Bureau. However, if the Board disagrees with such construction, then KWEN asserts that public interest considerations require addition of the requested issue. Since it has made a threshold showing of conflicts in the sworn statements and testimony of Proctor, KWEN requests an evaluation of said conflicts and a determination of the ultimate reliance to be placed on Woodland by the Commission. KWEN further asserts that the time to question Proctor's veracity arose only after the hearing sessions had closed and that filing of the petition prior to Proctor's uncorroborated denials at the hearing would have been premature.

6. It is apparent that a purely technical problem is presented by

the pleadings before us. All of the parties are willing to rely on the present record, and their fundamental difference relates to the adequacy of Issue No. 3. The Bureau and Woodland are willing to have the matters alleged in the petition considered under Issue No. 3, and petitioner is agreeable to this solution if the Review Board determines that this designated issue encompasses the matters alleged in its petition. Since all of the parties are willing to have the matters raised in the petition evaluated on the basis of the present record, no practical value attaches to a determination of which set of contentions is correct. Moreover, it does not follow, as petitioner seems to believe, that if the Bureau and Woodland interpret Issue No. 3 too broadly, a new issue must be added. All of the parties appear to be agreed that the matters raised in the petition need not be further litigated at the evidentiary hearing, and under these circumstances the absence of a specific issue would not preclude consideration of the matters raised in the petition.[4]

Accordingly, IT IS ORDERED, This 27th day of April, 1964, That the petition for enlargement of issues, filed March 20, 1964, by KWEN Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[4] In Davis, *Administrative Law Treatise*, Section 8.04, it is stated that a party cannot subsequently challenge an issue which is actually litigated if he has had actual notice and opportunity to defend. See also, *Kuhn* v. *Civil Aeronautics Board*, 87 U.S. App. D.C. 130, 183 F.2d 839 (1950), in which it was stated that:

"If it is clear that parties understand exactly what the issues are when the proceedings are had, they cannot thereafter complain surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern."

F.C.C. 64R–239

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>SPANISH INTERNATIONAL TELEVISION CO., INC., PATERSON, N.J. | Docket No. 15089<br>File No. BPCT–3032 |
| BARTELL BROADCASTERS, INC., PATERSON, N.J. | Docket No. 15091<br>File No. BPCT–3103 |
| TRANS-TEL CORP., PATERSON, N.J.<br>For Construction Permits for New Television Broadcast Stations | Docket No. 15092<br>File No. BPCT–3114 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it three requests to modify or enlarge issues in this comparative television proceeding and pleadings filed in response thereto.[1] Trans-Tel Corp. (Trans-Tel), on June 14, 1963, filed a motion to modify the Order of designation as to Bartell Broadcasters, Inc. (Bartell), and a petition to add character qualifications issues as to Bartell and Progress Broadcasting Corporation (Progress).[2] Spanish International Television Company, Inc. (Spanish), on June 14, 1963, filed a petition to enlarge issues to include character qualifications issues as to Progress, Trans-Tel and Bartell, and an issue as to whether Bartell's staffing proposal is adequate. Action on these pleadings was held in abeyance pursuant to a Commission Order staying this proceeding (FCC 63–694, released July 26, 1963). An Order to resume action on all pending motions was released on February 27, 1964 (FCC 64–155).

2. Trans-Tel's motion to modify the Order of designation seeks to have a provision inserted in the Order[3] to the effect that any

[1] The Review Board has under consideration the following: (1) Motion to modify Order of designation, filed June 14, 1963, by Trans-Tel Corp.; (2) Petition to enlarge issues, filed June 14, 1963, by Trans-Tel; (3) Petition to enlarge issues, filed June 14, 1963, by Spanish International Television Company, Inc.; (4) Opposition to (2), filed June 24, 1963, by Bartell Broadcasters, Inc.; (5) Opposition to (3), filed June 24, 1963, by Bartell; (6) Reply to (4), filed June 27, 1963, by Trans-Tel; (7) Opposition to (2) and (3), filed June 27, 1963, by Progress Broadcasting Corporation; (8) Partial opposition to (3), filed June 27, 1963, by Trans-Tel; (9) Reply to (7), filed July 5, 1963, by Trans-Tel; (10) Opposition to (2), filed July 8, 1963, by the Broadcast Bureau; (11) Opposition to (3), filed July 8, 1963, by the Broadcast Bureau; (12) Broadcast Bureau's comments re (1), filed July 8, 1963; (13) Reply to (10), filed July 16, 1963, by Trans-Tel; (14) Reply to (5), (7), (8) and (11), filed July 18, 1963, by Spanish; (15) Supplement to petition to enlarge issues, filed February 10, 1964, by Spanish; (16) Broadcast Bureau opposition to (15), filed March 5, 1964; and (17) Statement with regard to (15), filed March 5, 1964, by Progress.

[2] Progress was a fourth applicant in this proceeding until recently when its request for dismissal was granted (FCC 64M–193, released March 9, 1964).

[3] Memorandum Opinion and Order, FCC 63–490, released May 27, 1963.

possible grant to Bartell be conditioned to provide that the grant would not preclude any Commission action taken because of the result of a pending New York civil suit against Bartell. Trans-Tel asserts that the omission of this condition was merely an oversight on the part of the Commission. This motion is unopposed and the Broadcast Bureau supports it. The subject matter of the civil suit alleged fraud in the sale of two radio stations, and the requested condition will therefore be added.[4]

3. Trans-Tel and Spanish request a character qualifications issue against Bartell.[5] The substance of this request is the same as that which underlay Trans-Tel's motion to modify the Order of designation, *i.e.*, the civil suit pending against Bartell. The complaint in the suit is that Bartell's principals made fraudulent representations to the buyers of two radio stations in order to obtain a particular price, and that there was malfeasance in the operation of these two stations. Trans-Tel and Spanish assert that these allegations, if true, raise questions about Bartell's qualifications. They further assert that evaluation of the facts involved in the suit should not be deferred in this proceeding until the civil suit is resolved, but that an issue should be added herein.

4. Bartell opposes the inclusion of a character qualifications issue and states that the above-mentioned condition to a possible grant is sufficient; that the existence of a civil complaint is not enough to warrant addition of an issue; that the facts relating to the sale of the two stations can be adduced under the standard comparative issue; and that if the requested issue is added, the burdens of proceeding and proof should not be on Bartell. The Broadcast Bureau also opposes the addition of the subject issue, urging that the Commission has already had the facts before it and has decided not to designate such an issue.,

5. The Board does not deem it necessary to add the requested issue. The entire substance of the petitioners' request is the fact that there is a pending civil suit against Bartell. The mere existence of a civil suit, standing alone, is not sufficient to warrant the addition of a character issue. With regard to matters such as this, the Commission stated, in the *Report on Uniform Policy as to Violations by Applicants of Laws of the United States*, 1 RR 91:495 (1951), at page 91:499, "Even though no suit alleging illegal conduct has been filed, *or if one has been filed, but has not been heard or finally adjudicated*, the Commission may consider and evaluate the conduct of an applicant insofar as it may relate to matters entrusted to the Commission." (Underscoring supplied.) In *Westinghouse Radio Stations, Inc.*, 10 RR 878 (1955), the Commission quoted the above language and then stated, at page 966, "This is not to say, however, that we entertain and consider mere allegations in complaints filed against an applicant." In other words, the relevant matter is not the suit itself, but the con-

[4] A similar condition was specified in the designation Order as to Progress Broadcasting Corporation. Other Bartell grants have been conditioned in the manner requested. See renewal of Station WADO, New York (May 29, 1963).

[5] Both Trans-Tel and Spanish request a character qualifications issue as to Progress. However, in view of the fact that Progress's application has been dismissed from this proceeding, the request of Trans-Tel and Spanish must be dismissed as moot. (See footnote 2, *supra*).

duct underlying the suit. In the absence of specific allegations of fact concerning this conduct, there is no basis for an issue. In *Rockland Broadcasting Company*, FCC 62R-152, 24 RR 739 (1962), the Review Board added a specific character issue on the basis of allegations of misconduct, but in that case there was a criminal indictment pending against the applicant and the Board specifically recognized this distinction. Although a specific character issue is not warranted, the facts which form the basis for the civil suit can be explored under the standard comparative issue.

6. Spanish's next request is for a character qualifications issue against Trans-Tel. The basis for this request is the conduct of Edward Joseph Roth, a 5% shareholder in Trans-Tel. From facts given in Trans-Tel's application, it appears that Roth, who at present represents the Irish Government on radio and television matters, has worked outside of the United States for some time; that he worked in Peru for awhile; that the company he worked for in Peru went bankrupt after he left for Mexico; and that the circumstances behind the latter occurrence are "extremely complicated". Spanish recognizes its indulgence in "logical speculation" when it states that the untold story of Roth's activities may be relevant to Roth's character, but urges that such "speculation" must be resorted to in light of the fact that the factual situation is the exclusive province of Trans-Tel.

7. Both Trans-Tel and the Broadcast Bureau oppose Spanish's petition, alleging that Spanish's speculation is not the factual basis needed for the addition of an issue. Section 1.229(c) of the Commission's Rules requires "specific allegations of fact sufficient to support the action requested." Where, as here, these "specific allegations of fact" are not forthcoming, an issue will not be added.

8. Spanish requests an adequacy of staff issue as to Bartell. Spanish points out that Bartell proposes a staff of ten persons for its television operation plus reliance on the staff of Station WADO, its affiliate. Spanish alleges that no showing of the size of WADO's staff is made; that no provision for cameramen appears to have been made; and that the proposed staff appears too small in comparison with the other applicants.

9. Bartell, in its opposition, asserts that adequacy of staff can be inquired into under the standard comparative issue; that the WADO staff is large and will be used in the television operation; and that cameramen are provided for. The Broadcast Bureau, in its opposition, recognizes that Bartell's staff proposal is vague in that no showing is made of the extent to which WADO's staff will be used, but concludes that this can be clarified under the existing issues, and that adequacy of funds allocated to staff can be investigated under the designated financial qualifications issue. Because of the vagueness of Bartell's staff proposals, a specific issue must be added.[6]

Accordingly, IT IS ORDERED, This 27th day of April, 1964, That the motion to modify the Order of designation, filed June 14, 1963, by Trans-Tel Corp., IS GRANTED; and in the event of a

[6] In *TVue Associatce, Inc.*, FCC 64R-56, released February 5, 1964, a staff adequacy issue was added because "adequate information has not been submitted as to full-time personnel. . . ."

grant of the application of Bartell Broadcasters, Inc., the construction permit shall contain the following condition:

> This action is without prejudice to whatever action, if any, the Commission may deem warranted as a result of any final determination reached in the action entitled *WYDE, Inc. and WAKE, Inc., Plaintiffs,* v. *Bartell Broadcasting Corp., WAKE Broadcasters, Inc., Bartell Broadcasters, Inc., Gerald Bartell, Lee Bartell, David Bartell and Melvin Bartell, Defendants,* now pending.

IT IS FURTHER ORDERED, That the petition to enlarge issues, filed June 14, 1963, by Trans-Tel Corp., IS DISMISSED to the extent indicated herein, and DENIED in all other respects; and

IT IS FURTHER ORDERED That the petition to enlarge issues, filed June 14, 1963, by Spanish International Television Company, Inc., IS DISMISSED to the extent indicated herein, GRANTED to the extent indicated herein, and DENIED in all other respects; and the issues in this proceeding ARE ENLARGED by the addition of the following issue:

> To determine whether the staff proposed by Bartell Broadcasters, Inc. is adequate to operate its proposed television broadcast station.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–368

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of<br>EDWARD C. SMITH D.B.A. ANSWERITE PROFESSIONAL TELEPHONE SERVICE<br>For a Construction Permit for Station KIY581 in the Domestic Public Land Mobile Radio Service at Orlando, Fla. | File No.<br>2966–C2–P–64 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS LEE AND FORD ABSENT.

1. The Commission has before it (1) an application filed October 24, 1963 by Edward C. Smith, d/b as Answerite Professional Telephone Service (Answerite) for a construction permit to change the location of the base station facilities of station KIY581 and to increase the height of the authorized antenna of said station, now operating on a base station frequency of 152.21 Mc/s and a mobile station frequency of 158.67 Mc/s, pursuant to special authority (to operate as proposed in the application) granted for the period from October 31, 1963 to April 28, 1964; (2) A Petition to Deny Application of Answerite, filed January 29, 1964 by Mobile Phone, Inc. (Mobile), licensee of station KIR203 in the Domestic Public Land Mobile Radio Service near Ocala, Florida; (3) an Opposition To Petition To Deny Application, filed by Answerite on February 6, 1964; and (4) a Reply To Opposition To Petition To Deny Application, filed by Mobile on February 14, 1964.

2. On May 7, 1962, Answerite filed an application for a construction permit proposing the facilities which are now licensed as station KIY581 in the Domestic Public Land Mobile Radio Service. That application was protested by the licensee of station KIB384, but not by Mobile (licensee of station KIR203). After that application was designated for hearing, a final decision, effective May 31, 1963, reported in 34 FCC 1212, was rendered in favor of Answerite. Facilities were constructed and licensed in accordance with the construction permit (File No. 3958–C2–P–62) issued after said decision. However, Answerite was effectively dispossessed from the premises where its base station was located, which action formed the basis for issuance of a special temporary authorization to operate at the location and with the equipment proposed in the subject application. During the short period of operation at the original location, little or no service was rendered to public subscribers. At the new location, Answerite has acquired several subscribers who apparently depend on the service in their business and professional activities.

*Petition To Deny Application*

3. Mobile states that it is the licensee of station KIR203, near Ocala, Florida, operating on a base station frequency of 152.21 Mc/s and a mobile frequency of 158.67 Mc/s. Mobile alleges that experience with the operation of station KIR203 shows that the ground and weather conditions between Ocala and Orlando, because of numerous lakes and marshes, create unusual and abnormal radio wave propagation conditions between such points. Mobile concludes that its experience shows that the proposed modification of station KIY581, using the same base and mobile frequencies used by KIR203, will cause "harmful electrical co-channel interference to the operations of station KIR203 within its existing service area".

*Opposition to Petition To Deny Application*

4. Answerite relates certain facts concerning the history of station KIY581 which are not germane to the instant application. It then states that it is now rendering service at its proposed location under the terms of a special temporary authorization, which expires April 28, 1964.

5. Answerite urges that Mobile has not made specific allegations of fact sufficient to show that it is a party in interest or that a grant of the application would be prima facie inconsistent with Section 21.26(a) of the Rules and Regulations of the Commission. Answerite claims that Mobile has failed to support its "speculative assertion" concerning harmful electrical co-channel interference with an engineering statement and argues as follows:

> Where electrical interference is alleged, the rule would require the verified statement of a qualified engineer based on a competent study of the engineering considerations presented. Even if the bare allegations of a layman in respect to potential electrical progagation factors were sufficient to support the relief afforded by a petition to deny, the speculative allegations in this petition relating to potential interference of an undefined, unspecified, and unmeasured nature, would clearly not satisfy the rule's requirements . . .

6. Answerite contends that Mobile's protest is "not addressed to the merits of the instant application to obtain Commission authority for a move of the station's transmitter about 3 city blocks with a slight change in antenna height, [but], in effect, challenges the location of Station KIY581 in Orlando and its operation in that city as an original proposition [and, as such] is clearly precluded by the action of the Commission in granting Answerite's application for its original construction permit". Answerite goes on to say that Mobile has failed to show that the proposed modification of facilities, and not the original grant of a construction permit and license, produces the alleged potential interference.

7. Further, Answerite alleges that the effective radiated power of the station will be 153.5 watts and the height of the antenna above average terrain will be approximately 175 feet, thereby placing the subject station in a class C category [1] for which the

[1] Section 21,503 of the Rules provides that base stations of miscellaneous common carriers shall normally be separated by certain minimum distances which are tabulated according to certain classifications specified in Section 21.502. However, such distances are not controlling where unusual propagation conditions exist.

requisite mileage separation is 48 miles. Noting that the actual separation between the Ocala and Orlando facilities involved herein is over 62 miles, it is urged that Mobile has failed to allege "any relevant or material fact sufficient to warrant the relief that it seeks."

*Reply to Opposition to Petition To Deny Application*

8. Mobile alleges that Answerite, in its opposition, pleads facts regarding which official notice cannot be taken and that such facts are not supported by an affidavit as required by Section 309(d) of the Act and Section 21.27(c) of the Rules. Therefore, Mobile moves to dismiss or strike such pleading. It follows, Mobile argues, that in the "absence of denial of the facts stated in the Petition to Deny or the assertion of inconsistent facts, supported by the requisite affidavit, the facts stated in such Petition must be taken as true . . ."

9. Mobile attacks Answerite's reliance on Section 21.503 of the Rules which designates Answerite's proposed station as a Class C station for ignoring "the provisions of the rules which require a greater mileage separation between a Class C and Class B station" and ignoring the provision that "in a particular case where unusual wave propagation conditions are involved greater separation than as indicated in the rule may be required". Mobile also disputes Answerite's construction of Section 21.27(c) of the Rules and argues that no engineering statement (or opinion) is required to be submitted with a petition to deny.

*Disposition*

10. In *Gross Telecasting, Inc.*, FCC 56–75, we stated that Congress, in promulgating Section 309 of the Communications Act of 1934, as amended, and thereby permitting protests to be filed on the basis of interference, meant that only such interference as is recognized by the Commission's Rules should be adequate to confer standing as a party in interest. Section 21.504 of the Commission's Rules describes a field strength contour of 37 decibels above one microvolt per meter as the limit of reliable service area for base stations engaged in two-way communications service in the Domestic Public Land Mobile Radio Service. Further, the Commission's Report No. T.R.R. 4.3.8, entitled "A Summary of the Technical Factors Affecting the Allocation of Land Mobile Facilities in the 152 to 158 Megacycle Band", and the procedures set forth therein, has been established as a proper basis for establishing the location of the service and interference contours of the facilities involved in this proceeding. Mobile has alleged that unusual propagation conditions necessitate that the calculation of the interference and service contours involved in this proceeding be based upon considerations other than the propagation charts referred to in the said Commission Report No. T.R.R. 4.3.8.

11. On February 4, 1964, the Commission requested engineering data to substantiate Mobile's claims of harmful interference due to unusual propagation conditions (i.e., radio frequency field strength measurements made of stations KIR203 and KIY581 and instances of harmful interference and other technical difficulties suffered by

station KIR203 and attributable to station KIY581). Mobile submitted no such data. It merely reiterated its conclusory allegation of abnormal propagation conditions. It admits that it has no record of any harmful interference for the short period that Answerite has been operating at the proposed location pursuant to a special temporary authorization. However, it is claimed that transmissions have been few and at a time when the alleged unusual propagation conditions did not exist. Mobile, therefore, relies solely on its experience—its alleged ability to engage in two-way communications with mobile units near Orlando. At this point, we must note that the subject application has been on file since October 24, 1963 (Public Notice—November 4, 1963) and that during all that time Mobile failed to make any measurements concerning its own operation or that of the applicant. Furthermore, there is a complete failure on the part of Mobile to show or allege the differences between the proposed operation and the previously authorized operation and the extent to which those differences will adversely affect the public.

12. Section 309(d)(1) of the Communications Act of 1934, as amended, requires that a petition shall contain specific allegations of fact sufficient to show that the petitioner has standing as a party in interest. The Commission's Report No. T.R.R. 4.3.8, is prima facie evidence of the propagation factors extant and can only be rebutted by the submission of contrary engineering data, as requested. See *Miss Ark B/Casting Co.* (WESY), FCC 57-1298. A conclusory allegation of abnormal propagation conditions is not an allegation of fact sufficiently specific to warrant this Commission to deviate from its own standards (Report No. T.R.R. 4.3.8) based on competent engineering practices. Mobile's claimed status as a party in interest, based upon an allegation not substantiated by engineering data, if sufficient in this case, would make almost any application for a construction permit in the Domestic Public Land Mobile Radio Service protestable by stations on co-channel frequencies serving areas well beyond the recognized reliable service area proposed by the applicant, despite the fact that the two transmitters be, as here, separated by more than the minimum separation specified in our rules [2] or calculated according to our engineering standards. We therefore find and conclude that Mobile does not have standing as a party in interest within the meaning of Section 309 of the Communications Act of 1934, as amended. Additionally, we find that Answerite is presently serving public subscribers and that a grant of the subject application would serve the public interest, convenience and necessity.

13. Accordingly, in view of the foregoing, IT IS ORDERED, That the Petition to Deny Application of Answerite is DENIED, and the above entitled application is GRANTED.

Adopted April 29, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] Section 21.503 of the Rules specifies a minimum mileage separation between a Class B station and a co-channel Class C station of 56 miles. The mileage separation between stations KIR203 (Class B) and proposed KIY581 (Class C), is approximately 62 miles.

F.C.C. 57–552

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of AMENDMENT OF PARTS 7 AND 8 OF THE COMMISSION'S RULES TO PROVIDE FOR PUBLIC SHIP-SHORE TELEPHONY ON 2638 KC. TO SERVE THE SAFETY AND OPERATIONAL COMMUNICATION NEEDS PRIMARILY OF PLEASURE BOATS ON INTERIOR WATERS | Docket No. 11844 |

### REPORT AND ORDER

BY THE COMMISSION: COMMISSIONER MACK NOT PARTICIPATING.

1. On October 8, 1956, the Commission released a Notice of Proposed Rule Making in the above-entitled matter. The Notice was published in the Federal Register on October 11, 1956 (21 F.R. 7775) and the time for filing comments expired on November 12, 1956. The proposed rule-making had for its purpose the amendments of Parts 7 and 8 of the Commission's rules to make the all-area intership frequency 2638 kc available (on a limited basis) additionally for public ship-shore telephony on certain interior waters of the continental United States, primarily for the safety of pleasure boats, where it may be shown that existing coast stations cannot provide the desired communication and that the use of very high frequencies above 156 mc cannot, as a practical matter, provide all of the ship-shore communication required for safety and operational purposes on these waters.

2. Comments completely in support of the proposal were received from W. G. Morgan, Jr. of Atlanta, Georgia in behalf of the local members and the District Communications Officer of "District 17 of the USPS" (United States Power Squadrons), from the Silver Bay Equipment Co. of Seattle, Washington, and from Clyde B. Kirlin of Walnut Creek, California. Comment received from Maclean Kirkwood, Vice Chairman, United States Radio Technical Committee, Power Squadrons, Mountain Lakes, New Jersey, generally favored the proposed rule-making, and informed the Commission that "from the information sent us by our District Communications Officers, the most likely candidates for the proposed service at this time would be the two flood control lakes in Georgia known as Allatoona and Buford Dam.—the 18 foot variation in water levels makes radio communication with land important for the protection of life and property." However, Mr. Kirkwood referred also to the fact that Lake Winnepesaukee in New Hampshire would not, because of its location less than 100 miles from tidewater, be covered by the proposed rule-making and

stated that "we believe that provision for radio communication with shore is important in this case also." However, in support of the Commission's proposal to limit this secondary use of 2638 kc to coast stations located not less than 100 miles from the seacoast, Mr. Kirkwood comments that the District Communications Officer (United States Power Squadrons) in the Washington-Oregon-Idaho area "points out that 2638 kc is overburdened now in that area and feels that the limiting distance of 100 miles from major waterways is not enough."

3. Somewhat in contrast to the opinion of the District Communications Officer in the Washington-Oregon-Idaho area as reported by Mr. Kirkwood concerning relative use and possible interference, the Silver Bay Equipment Co. of Seattle, Washington comments that "we have seen quite a few places in the Pacific Northwest where some form of Marine to land communication was most vitally necessary in the interest of safety, and economical operation of vessels on such waters. In general, this applies to large lakes, generally narrow in width and situated between high mountain ranges. . . . In many cases, the actual need for communications is very important during certain times, but the combined operations on many such remote and isolated areas is actually very small compared to salt water communications. . . . Likewise, nearly all large natural lakes in Washington and Idaho, have a precipitous mountain range between the respective lake and the Washington coast or Puget Sound. The shielding effect and high attenuation across such mountain ranges should therefore keep interference with, or to ocean ports at a minimum from any lake East of the Cascade Mountains."

4. In proposing to restrict the assignment of the frequency 2638 kc to coast stations located not less than 100 miles from the seacoast and certain major inland waterways, the Commission had in mind the existing use of this frequency for intership communication by ship stations of other countries, as well as those of the United States, and pointed out that no action should be taken which would further increase the present congestion. While the Commission would, from the point of view of equality of facilities for all areas, prefer not to exclude availability of 2638 kc under the proposed conditions from such inland bodies of water as are typified by Lake Winnepesaukee, 75 miles from the seacoast, it nevertheless must establish limitations in respect to the use of this frequency which are deemed necessary and reasonable as a compromise between two conflicting elements, (1) a widespread secondary use of 2638 kc that could adversely affect its *primary* use or (2) a somewhat restricted secondary use of this frequency that would not be expected to adversely affect its *primary* use. On the basis of well known propagation characteristics of frequencies of the order of 2638 kc, the Commission believes that the limiting distance of 100 miles, as proposed, is a reasonable and workable compromise between interference prevention, pursuant to section 303(f) of the Communications Act, and encouragement of the more effective use of radio in the public interest, as contemplated under section 303(g) of the Act.

5. Warner & Tamble Radio Service, Inc. (hereinafter referred to as Warner & Tamble) submitted comments taking the position that the proposed rules should not be adopted by the Commission. Further, it recommended that "in the event the Commission should be of the contrary opinion," proposed rule § 7.306(d) (1) (ii) should be expanded to the extent that the Cumberland River and the Tennessee River would be included in the group of designated water areas from which the locations of any coast stations, to be assigned the frequency 2638 kc, would be not less than 100 miles.

6. In expressing its opposition to adoption of the proposed rules, Warner & Tamble set forth certain opinions and conclusions but did not include adequate factual information as a basis therefor. Its first comment in this respect states that "a relaxation of the restrictions presently surrounding the 2638 kc frequency will bring about a situation that will create public coast stations on inland waterways that may not be economically feasible and, in the future, will seek additional relief from the Commission, thus further invading the radio spectrum." Although it is quite possible that additional public coast stations may be established on certain inland waters, the Commission realizes that some of these stations "may not be economically feasible" as a commercial enterprise, i.e. the licensees may find it impossible to operate them as a profit-producing business. As announced in the Notice of Proposed Rule-Making, there is a stated need for ship-shore telephony on some interior waters *primarily for the safety of pleasure boats* where there are no existing facilities to fulfill effectively this need. While the existing and proposed rules of the Commission would not prohibit possible operation of the contemplated type of public coast station as a profitable business enterprise (communication common carrier), there would be no requirement that a charge be made for the public service rendered nor would there be any prohibition against losses from the station operation being absorbed by the station licensee in the interest of providing primarily a needed public safety facility. That part of Warner & Tamble's comment stating ". . . and, in the future, will seek additional relief from the Commission, thus further invading the radio spectrum," appears to be in the nature of a rather vague prediction unsupported in any way by facts.

7. Additionally, Warner & Tamble comments that "There are presently existing VHF facilities which can render the service described in the Commission's Notice of Proposed Rule Making." It does not, however, identify these stations in any way. Although there are numerous existing public coast stations in the continental United States licensed for ship-shore telephony on VHF (very high frequencies), these stations are not sufficient in respect to their number or locations to serve all of the interior waters in question. Warner & Tamble further comments that "there are common carrier services in the Domestic Public Land Mobile Radio Service where authorization to serve vessels is permissible under even less restrictive conditions than are imposed in the proposed amendments to Parts 7 and 8 of the Commission's rules and regulations." Again it fails to identify these stations or to show that they are

capable of providing the required service which the Commission's proposal describes. There is no assurance that such VHF land stations licensed primarily for land-mobile service are, or in the future will be, adequate in number or location to effectively provide a safety communication service to vessels on the several interior lakes and other inland waters of the continental United States which do not now have this service, particularly in view of the limitations imposed on these land stations by the Commission in respect to communication with ship stations on a secondary basis.

8. Further, Warner and Tamble points out that it renders service to vessels which ply waters other than the Mississippi, Illinois and Ohio Rivers and "for example, they render an increasing amount of traffic to vessels which navigate the Cumberland River and the Tennessee River." In this respect, it comments that if "the type of station proposed in the Commission's Notice of Proposed Rule Making came into actual being, the impact of those stations would be certain to have an adverse effect upon Warner & Tamble," and that "This impact would seriously impair its economic existence; and service on the frequency in question on the Cumberland and Tennessee Rivers would of a certainty create mutually destructive interference problems." The comments of Warner & Tamble, however, do not include any factual data to support these general conclusions; also they completely fail to recognize certain relevant factors embodied in the proposed rules, i.e., the comparatively low maximum coast station power, i.e. 100–200 watts as specified in proposed § 7.134(d), the limitation to daytime hours of operation except for safety communication as proposed in § 7.306(d)(2), and the *required affirmative showing by coast station applicants,* pursuant to proposed § 7.306(d)(3)(i) and (ii), that the use of VHF (relatively limited area of service) would not be practical and that the service of *any coast station or station* (public, limited or Government) *already established,* or authorized to be established within an appropriate time, *is not,* or will not be, *adequate to meet all ship-shore safety and operational communication needs of the maritime mobile service in the involved area.* It is the belief of the Commission that the "economic existence" of existing public coast stations is adequately protected by these portions of the proposed rules which would be applicable whenever an application is filed with the Commission for authority to establish a specific station of the type contemplated. At such times, Warner & Tamble as well as other interested persons would have due opportunity to protest a grant of such application and to be heard in accordance with law and the Commission's rules governing practice and procedure. In reference to the alleged creation of "mutually destructive interference problems," the Commission observes that no coast stations licensed for operation by Warner & Tamble are now authorized to transmit, or to receive for their normal service, on the frequency 2638 kc. Hence its comment in this respect apparently concerns anticipated harmful interference to ship stations on the Cumberland and Tennessee Rivers which may be caused by the proposed additional ship-shore service on 2638 kc. Relative to this possibility, the proposed rule

§ 7.306(d)(1)(ii) would not permit any coast station assigned 2638 kc to be located at any point—

(a) on the lower Tennessee River for approximately 200 river miles from its junction with the Ohio River near Paducah, Kentucky to a point near Clifton, Tennessee; or

(b) on the lower Cumberland River for approximately 150 river miles from its junction with the Ohio River near Smithland, Kentucky, to a point near Ashland City, Tennessee.

The Commission realizes that public coast stations assigned 2638 kc might under the proposed rules, be authorized at locations on other portion of the Tennessee and Cumberland Rivers, and that ship-shore communication carried on by these stations conceivably could cause harmful interference to intership communication, especially to such communication occurring more frequently on the lower portions of these rivers. However, in view of the relatively small volume of shipping on these particular inland waters in comparison to that existing on such major waterways as the Mississippi and Ohio Rivers, together with the fact that no data has been submitted to substantiate the allegation of Warner & Tamble that such ship-shore communication on the frequency 2638 kc "would of a certainty create mutually destructive interference problems," and because of the limitation that would be imposed on ship-shore use of 2638 kc by proposed rule § § 7.304(d)(8) and 8.351(d)(7), it does not appear that harmful interference to intership communication on the Tennessee or Cumberland River will result if the proposed rules are adopted without modification.

9. After considering the comments submitted in this docket, as set forth herein the Commission concludes, that adoption of the proposed rule changes would serve the public interest, convenience or necessity. In view of this conclusion, and pursuant to Sections 303(b), (c), (d), (f), (g), (h) and (r) of the Communications Act of 1934, as amended, it is ordered, that, effective July 1, 1957, Parts 7 and 8 of the Commission's Rules are amended as set forth in the Appendix attached hereto.

Adopted May 24, 1957.

FEDERAL COMMUNICATIONS COMMISSION.

F.C.C. 57–459

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

REV. J. RICHARD SNEED, LOS ANGELES, CALIF.

THE COMMISSION ON MAY 8, 1957 ADDRESSED THE FOLLOWING LETTER TO REV. J. RICHARD SNEED, FIRST METHODIST CHURCH OF LOS ANGELES:

DEAR DR. SNEED: This is with reference to your petition, received at the offices of the Commission on March 15, 1957, in which you complain of a proposed termination of a weekly religious program broadcast Sunday mornings over the facilities of Station KFAC, Los Angeles, California. In your petition, you ask this Commission to order a public hearing forthwith, at the City of Los Angeles, California, concerning the discontinuance of your religious program, and that pending the disposition of the hearing, the Commission issue a cease and desist order restraining Station KFAC from terminating said program. In view of the fact that your petition failed to indicate that a copy thereof had been served on the Los Angeles Broadcasting Company, licensee of Station KFAC, a copy of your petition was forwarded by the Commission to said licensee to afford it the opportunity to comment on the matter. On April 16, 1957, the Commission received correspondence from Station KFAC commenting upon your petition.

An examination of your petition discloses that the basic issues upon which you predicate your request for a hearing may be summarized as follows (1) that by letter dated February 15, 1957, Station KFAC notified you that it planned to terminate the broadcasts of your Sunday morning services and that no other time on Station KFAC would be available to the First Methodist Church; (2) that Station KFAC assigned as its alleged reason for this proposed termination of your broadcast time over Station KFAC that, "the broadcasts of the First Methodist Church services on Sunday morning are completely incompatible with other programs submitted. We are gradually eliminating all religious programs and replacing them with musical programs . . ."; and (3) that Station KFAC's announced policy of "gradually eliminating all religious programs" was contrary to the representations which the station made in its 1956 application for renewal of license wherein it had indicated (a) that it had devoted 1.79% of its broadcast hours to religious programs during its past licensed period and (b) that no substantial changes were contemplated in this particular program category with respect to the station's future operations. In its comments on your petition, Station KFAC alleges that the sta-

tion's decision to terminate your religious program was made on or about February 15, 1957; that Station KFAC decided not to sell any other time to the First Methodist Church because, in the responsible opinion of the management of the station, an opportunity for others to have time would be desirable; that the management of Station KFAC has been consulting with the Church Federation of Los Angeles with regard to planning and producing a program to take the place of the program formerly broadcast by the First Methodist Church; that to the extent that you allege that it is the intention of Station KFAC to eliminate entirely its religious programs, this allegation is in error since the station has no such plans; that in spite of the programming proposals made in Station KFAC's 1956 application for renewal of license, the Commission renewal form itself reserves to the station the right make a programming change such as that complained of; that your petition essentially involves "the complaint of one church that it is entitled as a matter of right to broadcast time at a certain hour over a certain station"; that it is the responsibility of Station KFAC to determine what constitutes good programming in the public interest and that it is the Commission's responsibility to review the determinations made by the licensee but not to exercise any censorship over the program content; that it is the considered judgment of Station KFAC that it is acting in the public interest in this matter and thus discharging its responsibility to the Commission and to the people of Los Angeles; and that, therefore, Station KFAC suggests that the Commission dismiss your petition as improper and for want of jurisdiction.

At the outset, it should be noted that the Commission's authority to issue cease and desist orders is based on the provisions of Section 312(b) of the Communications Act of 1934, as amended, which reads as follows:

> (b) Where any person (1) has failed to operate substantially as set forth in a license, or (2) has violated or failed to observe any of the provisions of this Act, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

Thus, the issuance of cease and desist orders by the Commission is limited to the situations specified in Section 312(b). It should be pointed out, however, that Section 312 does not create rights in third parties but ". . . gives to the Commission complete discretion in the exercise of the powers granted thereunder." In Re Gulf Television Company, 11 Pike & Fischer RR 460, 464; In Re Petersburg Television Corporation, 12 Pike & Fischer RR 1395. Further, Section 312(c) provides:

> (c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission in inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the

order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

Accordingly, any order issued by the Commission under Section 312(b) must be based on the hearing procedure specified in Section 312(c).

The scope of the Commission's regulatory authority is prescribed by the provisions of the Communications Act. "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy." FCC v. Sanders, 309 U.S. 470. Section 3(b) of the Act provides that ". . . a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." In McIntire v. Wm. Penn Broadcasting Co., 151 F.(2d) 597, the U. S. Circuit Court of Appeals, Third Circuit, stated, in part, that "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC." That court went on to say that "For a radio station to refuse to sell time in which an individual may broadcast his views may be censorship but we know of no law which prohibits such a course. As we have indicated a radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones."

Your attention is also invited to Section 326 of the Act which provides:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

The limitation which the above-quoted section of the Act imposes on the powers of the Commission over broadcast stations was made clear In the Matter of WBNX Broadcasting Co., Inc., et al, 4 Pike & Fischer RR 242, 248, wherein it is stated:

Section 326 of the Act specifically forbids the Commission to exercise any powers of censorship over radio programs, and thus makes it clear that it is no business of the Commission to say that any particular program should or should not be presented. The licensee itself, however, possesses an extensive discretion to select or reject programs.

With reference to your allegation that Station KFAC stated in its 1956 application for renewal of license that it had devoted during its past license period 1.79% of its broadcast hours (constituting the Commission's composite week) to religious programs, and that it contemplated no substantial changes in this particular category with respect to its future operations, it should be pointed out that Section IV (Statement of Program Service) of FCC Form 303, Application for Renewal of Broadcast Station License, in a "Notice to All Applicants", specifically provides:

The replies to the following questions constitute a representation of pro-

gramming policy upon which the Commission will rely in considering the application. It is not expected that licensee will or can adhere inflexibly in day-to-day operation to the representation here made. However, since such representation will constitute, in part, the basis upon which the Commission acts on the application, time and care should be devoted to the preparation of the replies so that they will reflect accurately applicant's responsible judgment of his proposed programming policy.

The Commission granted the application for renewal of license of Station KFAC on November 28, 1956. Inasmuch as Station KFAC, in its comments in opposition to your petition, states that it "has been consulting with the Church Federation of Los Angeles in regard to planning and producing a program to take the place of the program" formerly broadcast by the First Methodist Church, and that "There are no plans for eliminating all religious programs," the Commission cannot conclude, solely on the basis of the first six months' operation of a three year renewal period, that Station KFAC's decision to substitute one religious program for another constitutes a misrepresentation of the programming proposals made to the Commission in its application for renewal of license.

The Commission has given the most careful consideration to the allegations contained in your petition. In light of the above provisions of the Communications Act and the court decisions, it is believed that, with respect to the matters before us, no basis exists at this time for a finding that Section 312(b) may be invoked and that the Commission should exercise its discretion to initiate cease and desist proceedings. Accordingly, your petition is denied.

THE COMMISSION ON JULY 3, 1957 ADDRESSED THE FOLLOWING LETTER TO REV. J. RICHARD SNEED:

DEAR DR. SNEED: This is with reference to (1) the letter dated May 17, 1957, submitted by your attorney, requesting, in effect, reconsideration of the Commission's action of May 8, 1957, denying your petition for the issuance of a cease and desist order against Station KFAC, Los Angeles, California; (2) a letter dated June 7, 1957, submitted by the attorney for Station KFAC, in response to your request; and (3) a letter dated June 18, 1957, from your attorney, acknowledging receipt of said letter of June 7, 1957. In your original petition, you had requested that Station KFAC be restrained from discontinuing a religious program broadcast by the station and that a hearing be held in the matter.

In its letter to you of May 8, 1957, the Commission pointed out, in substance, that the issuance of cease and desist orders was limited to situations specified in Section 312(b) of the Communications Act; that where such situations existed, the issuance of such orders lay solely within the Commission's discretion; and that Section 312 did not create rights in third parties. With respect to the question whether the Commission could, or should order a broadcast station to continue broadcasting a particular program, your attention was directed to Section 326 of the Communications Act which prohibits the Commission from exercising the power of censorship over broadcast material. Further, the Commission stated as follows:

The scope of the Commission's regulatory authority is prescribed by the provisions of the Communications Act. "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy." FCC v. Sanders, 309 U.S. 470. Section 3(h) of the Act provides that "...a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." In McIntire v. Wm. Penn Broadcasting Co., 151 F. (2d) 597, the U. S. Circuit Court of Appeals, Third Circuit, stated, in part, that "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC". That court went on to say that "For a radio station to refuse to sell time in which an individual may broadcast his views may be censorship but we know of no law which prohibits such a course. As we have indicated a radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones."

Finally, the Commission stated that it would not conclude, on the basis of the station's first six months' operation under its renewed license, that the station's programming proposals contained in its renewal application constituted a misrepresentation.

In your attorney's letters of May 17, 1957 and June 18, 1957, no attempt is made to show that the cited provisions of the Communications Act, or the court cases and Commission decisions cited in the Commission's letter, were not applicable to the matter before the Commission. Said letters raise only one question—whether the procedure followed by the Commission was proper under the circumstances. In short, you complain that although a copy of your petition was sent to Station KFAC, the Commission did not submit a copy of the station's reply letter.

Where formal petitions are filed, § 1.730 of the Commission's Rules provides for the filing of oppositions within ten days and for the filing of replies within five days. Section 1.721 of the Rules provides that "Formal submissions" must be by way of petition "and must comply with the Commission's rules concerning pleadings. All other submittals will be considered as informal in nature." Section 1.767 requires that there be attached to a petition a "Certificate of Service" indicating that a copy of the petition has been served on appropriate parties. Such a "Certificate" was not attached to your petition, nor had you served a copy on Station KFAC. (All of the above-cited sections are contained in Title 47, Code of Federal Regulations.)

Although your petition was subject to return for non-compliance with the Commission's Rules and recognized procedures, in order to expedite a determination in the matter the Commission sent a copy of the petition to Station KFAC. The station's comments were received by the Commission on April 16, 1957. Commission records disclose that by letter dated April 18, 1957, you were informed, among other things, "that Commission procedures provide for the filing of oppositions to petitions and, *when appropriate*, replies to oppositions" (underscoring added); that because of your failure to show that a copy of your petition had been served on Station KFAC, such a copy had been sent to the station by the Commission in order to afford it an opportunity to comment thereon; that the station's comments had been received on April 16, 1957; that as of that date, your petition and the station's response were the subjects of careful consideration by the Commis-

sion; and that a determination in the matter would be forthcoming in the near future. Commission records do not reveal any request by you for a copy of the station's letter, or any indication of a desire on your part to file an additional pleading. The Commission's letter to you of May 8, 1957, was adopted unanimously by the Commission.

In your attorney's letter of June 18, 1957, he states that he has received, indirectly, a copy of the station's letter of April 11, 1957, and that he is "informed that such letter is not correct or accurate as to material facts which are referred to in it." No details are submitted in support of this generalization nor, as indicated above, is there any discussion of the basic question here involved, namely, whether the Commission may require a broadcast licensee to continue to broadcast a particular program.

The Commission has given further careful consideration to your petition and to your letters requesting reconsideration, and has concluded that it adheres to its decision of May 8, 1957 for the reasons set forth in its letter of said date. Accordingly, your request that the Commission set aside its action of May 8, 1957 is denied.

FEDERAL COMMUNICATIONS COMMISSION.

F.C.C. 57-539

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application<br>WBBF, INC. (WBBF), ROCHESTER, N.Y.<br>For Renewal of License | Docket No. 12033<br>File No. BR-1906 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration (a) a "Protest to Grant of Renewal and Request for Hearing" filed on June 18, 1954, pursuant to Section 309(c) of the Communications Act of 1934, as amended, by Federal Broadcasting Company, Inc., licensee of Station WSAY, Rochester, New York, directed against the Commission's action of May 20, 1954, granting without hearing the above-entitled application; (b) an "Opposition to Protest" filed on June 28, 1954, by WBBF, Inc.; (c) the Commission's Memorandum Opinion and Order adopted July 14, 1954 (FCC 54-869) [10 RR 1032a] dismissing the protest on the grounds that the protestant failed to specify with particularity facts, matters and things relied upon which warrant the designation of the above-entitled application for hearing under said Section 309(c) of the Act; (d) a "Petition for Reconsideration" filed on August 5, 1954, pursuant to said Section 309(c) of the Act, by Federal Broadcasting Company, Inc., directed against the Commission's action of July 14, 1954, denying the protest; (e) an "Opposition to Petition for Reconsideration" filed on August 16, 1954, by WBBF, Inc.; (f) the Commission's Order adopted November 3, 1954 (FCC 54-1373) [11 RR 487], denying said petition for reconsideration on the grounds that the protest lacked specificity and that the deficiencies in a protest, which was denied because the protestant had failed to state with the requisite particularity the facts, matters and things relied upon in the protest, cannot be cured after the expiration of the statutory period of protest by filing a petition for reconsideration of the denial; and (g) the decision of the United States Court of Appeals for the District of Columbia Circuit in the case of Federal Broadcasting System, Inc., v. Federal Communications Commission, et al. (Case No. 12494), decided February 23, 1956 [97 U.S. App. D. C. 293, 231 F.(2d) 246, 13 RR 2094].

2. The factual situation involved in the instant protest and the arguments of the parties are set out in full in the Commission's Memorandum Opinion and Order of July 14, 1954, in its Order of November 3, 1954, and need not be repeated herein. In essence, the protest alleged that the renewal of license of Station WBBF would result in economic injury to Federal in the form of lost revenue

and injury to its competitive position. Federal requested that the renewal application be set for hearing on the issue "whether the refusal of Station WBBF to consent to the rebroadcast of its programs by Station WSAY and the combination sales policy of Station WBBF and Station WGVA in Geneva demonstrate that WBBF, Inc., is not qualified to operate Station WBBF in the public interest" and on the conclusory issue as to whether the renewal of license of Station WBBF would serve the public interest. On the basis of the pleadings before it, the Commission determined as to the first element of the requested issue that no requests to rebroadcast programs had been made of the present owner of Station WBBF since August 26, 1953, when the Commission granted an application for transfer of the station to the present owner, and that such deficiency could not be cured after the expiration of the statutory period of protest. As to the second element of the requested issue, the Commission determined that the allegation concerning combination sales rates and that this policy constitutes unfair competition, is insufficient, in the absence of any further facts, to warrant designation of the renewal application for hearing. Accordingly, the Commission dismissed the Petition for Reconsideration. Upon appeal, the Court of Appeals in its decision of February 23, 1956, determined that the protestant had specified facts with sufficient particularity to warrant a hearing on the protest. However, the court went on to state that:

> At the same time, we do not wish to be understood as saying that the Commission may not ultimately—for some good reason—be able to justify a denial of the protest without hearing. We do not pass on that question: we do not decide whether or not the matters alleged by Federal "would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding." Federal Broadcasting Co. v. Federal Communications Commission, supra at p. 563 of 225 F.(2d). We do not understand that the Commission has passed on the substantive issues here involved: at least it has not done so with clarity. True, it advised Federal by letter in an earlier proceeding that WBBF's refusal to allow re-broadcast privileges did not contravene the Commission's Rules or the Communications Act. And it said in its latest order (that of July 16, 1954) that the discount arrangement did not violate any Federal law or public policy. But lack of actual violation of law or regulation is not decisive: the question is whether the alleged conduct is contrary to the public interest, or otherwise demonstrates unfitness of the licensee. Cf. Mansfield Journal v. Federal Communications Commission, supra note 2. The Commission should approach the matter in that light. Only if it is clear from the face of the protest, taking all the protestant's allegations as true, that there is no real merit in protestant's position or substantial possibility that a hearing will reveal merit, should the protest be rejected without a hearing.

3. In light of the above, we find the protestant has specified with particularity the facts, matters and things upon which it relies to show that the Commission's grant was not in the public interest. Federal Broadcasting System, Inc. v. FCC, et al., supra. We find further, as was found in our Memorandum Opinion and Order herein of July 14, 1954, that protestant is a "party in interest" within the meaning of Section 309(c) of the Act. A question is thus presented as to the type of hearing which is required with respect to protestant's issues. In its decision, the Court of Appeals stated:

The foregoing views are based on our interpretation of the statutes as they stood at the time of the Commission's challenged action. After this case was argued here, and while it was under advisement, there was enacted Public Law 391, 84th Congress, 2nd Session, approved January 20, 1956. We do not deem it necessary or appropriate to decide here and now whether the new legislation is to be applied retroactively, or if it is to be so applied, in what manner (if at all) it affects the present case. Those questions have not been presented to us by the parties. If they are raised, they should be dealt with in the first instance by the Commission.

We believe that the 1956 amendments to Section 309(c) are applicable to the case before us. Federal Broadcasting System, Inc. v. FCC, (1956) 239 F.(2d) 941 [14 RR 2039].

4. Section 309(c) of the Communications Act of 1934, as amended, states as follows:

The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for *oral argument*, finds, for reasons set forth in the decision, that, even if the *facts* alleged were to be proven, no grounds for setting aside the grant are presented. (Emphasis supplied.)

The instant protest contains *allegations* of fact, and *conclusions* drawn therefrom by the protestant. The *facts* alleged with respect to the refusal of the previous licensee of Station WBBF to accede to blanket requests by protestant to rebroadcast certain general categories of programs were considered by the Commission in connection with the transfer of license to the present owner, which transfer was opposed by protestant upon this ground, and the Commission found that a grant of the transfer was in the public interest. We have given further consideration to the facts alleged in the protest, including those facts relating to the combination sales rate for Stations WBBF and WGVA and the grants of a discount to advertisers who purchase time on both stations, and upon such consideration, it appears on the basis of the pleadings presently before us, extremely unlike that, even if these facts were proven, grounds would be presented for setting aside our grant. Therefore, we shall afford the parties an opportunity at oral argument to discuss this question.

5. The protest filed by Federal Broadcasting System, Inc., requests, in addition, that the Commission postpone the effective date of its action granting the application for renewal until after hearing and decision. Section 309(c) provides, in part, as follows:

. . . pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, *unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect*, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing. (Emphasis added.)

The case before us clearly comes within the first exception set forth in the above-quoted provisions of the Act, i.e., that the authorization involved (renewal of license) is necessary to the maintenance of an existing service. Accordingly, the effective date of

the protested grant will not be postponed.[1]

6. In view of the foregoing, it is ordered, that pursuant to Section 309(c) of the Communications Act of 1934, as amended, the above-entitled application is designated for oral argument at the offices of the Commission in Washington, D. C., on the question whether, if the facts alleged in the protest were to be proven, grounds have been presented for setting aside the grant of said application.

7. It is further ordered, that the protestant and the Chief, Broadcast Bureau, are hereby made parties to the proceeding herein and that:

(1) The oral argument shall commence at 10 a.m. on June 13, 1957, and shall be held before the Commission en banc;

(2) The parties intending to participate in the oral argument shall file their appearances not later than June 6, 1957;

(3) The parties to the proceeding have until the date of the oral argument to file briefs or memoranda of law.

Adopted May 24, 1957.

FEDERAL COMMUNICATIONS COMMISSION.

[1] Since Section 307(d) of the Communications Act (as well as Section 9(b) of the Administrative Procedure Act) would in any event require that the license remain in effect until completion of agency proceedings on the renewal application, a contrary conclusion here would have no practical effect.

F.C.C. 64–374

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| NED N. BUTLER AND CLAUDE M. GRAY, D.B.A. THE PRATTVILLE BROADCASTING CO., PRATTVILLE, ALA. | Docket No. 14878<br>File No. BP–14571 |
| BILLY WALKER, PRATTVILLE, ALA. | Docket No. 14879<br>File No. BP–14729 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE ABSENT; COMMISSIONER COX NOT PARTICIPATING.

1. The Commission has before it an Application for Review and a Request for Stay, each filed by The Prattville Broadcasting Company (hereinafter, petitioner) on April 13, 1964. An Opposition to the foregoing pleadings was filed by Billy Walker on April 15, 1964, and an Opposition to the Application for Review was filed by the Commission's Broadcast Bureau on April 17, 1964. Petitioner filed a Reply to Walker's Opposition on April 27, 1964.

2. In brief, the situation is this: The proceeding is a comparative one for a new Class III standard broadcast station at Prattville, Alabama. An Initial Decision by Hearing Examiner Basil P. Cooper was released on June 21, 1963 (FCC 63D–70), and it recommended a grant for Walker and a denial for petitioner. Petitioner and the Broadcast Bureau filed exceptions to the Initial Decision, the Bureau, however, not excepting to the ultimate recommendation. By Decision released March 30, 1964 (FCC 64R–173), the Commission's Review Board affirmed the Examiner's result, the Decision stating, among other things, that neither of the excepting parties had requested oral argument. It appears, however, that petitioner *had* requested oral argument, and by Order released April 6, 1964 (FCC 64R–184), the Review Board set aside its Decision on its own motion, and scheduled oral argument on the exceptions to the Initial Decision for April 20, 1964.[1] It is to the Order that the Application for Review is directed, and the Request for Stay seeks a stay of the scheduled oral argument pending Commission consideration of the Application for Review. However, by Order released April 15, 1964 (FCC 64R–209), the Review Board postponed the above oral argument (without date) and the instant Request for Stay is now moot.[2]

[1] Under Sections 0.201(c) and 1.277(c) of the Commission's Rules, the allowance of oral argument is discretionary with the Review Board.

[2] In its Reply, petitioner recognizes the mootness of the Request for Stay. The Reply also points out a procedural defect (under Section 1.44 of the Rules) in the Walker Opposition, and such Opposition has been disregarded by the Commission in considering petitioner's pleadings.

3. The substance of the Application for Review is that the Review Board, by its April 6 Order, (a) exceeded its delegated authority, and (b) committed procedural error prejudicial to petitioner. It is petitioner's apparent theory "that it would be utterly meaningless for oral argument to be held before the Review Board", since that body has already judged the case and can no longer be expected to proceed impartially. Petitioner stresses "the importance of having oral argument on the *whole record* before officers who will not be sitting in judgment on their own reversible errors", and the Commission reads the Application as requesting that the oral argument be heard and the Decision rendered by the Commission itself.

4. Neither of petitioner's points are well taken. As to (a), the Review Board, under Sections 0.201(c) and 1.113(a) of the Commission's Rules, was within permissible bounds in setting aside its Decision on its own motion. As to (b) and the arguments advanced in support thereof, it simply does not follow that because the Board has already passed judgment on petitioner's exceptions, it could not listen with open minds to the matters to be advanced orally by petitioner. In any event, following any Board decision adverse to petitioner, that party would have a right to apply to the Commission for review thereof (see Section 1.115 of the Commission's Rules), and any errors therein can be rectified by the Commission. The Commission sees no prejudice resulting from the actions complained of, and the Application for Review must be denied.

Accordingly, IT IS ORDERED, This 29th day of April, 1964; That the Application for Review, filed by The Prattville Broadcasting Company on April 13, 1964, IS DENIED; and that the Request for Stay of the Review Board's Order Scheduling Oral Argument, filed by the same party on the same day, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–247

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>CHRONICLE PUBLISHING CO. (KRON–TV),<br>SAN FRANCISCO, CALIF. | Docket No. 12865<br>File No.<br>BPCT–2168 |
| AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. (KGO–TV), SAN FRANCISCO, CALIF. | Docket No. 12866<br>File No.<br>BPCT–2401 |
| For Construction Permits To Increase Antenna Height | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration a petition to intervene filed March 11, 1964, by Crocker Land Company (Crocker), and the Broadcast Bureau's comments filed March 25, 1964. The hearing issues as to other applicants involve air hazard problems.

2. Crocker is the owner of the 104-acre site on Mount San Bruno, where Chronicle Publishing Company, licensee of Station KRON–TV, San Francisco, now has its transmitting facilities and proposes to install a higher supporting tower for its antenna system. As the owner of the site, Crocker contends that it has a very substantial interest in the outcome of this proceeding, that it has invested over $225,000 to build a service road to the top of San Bruno Mountain and to erect the necessary facilities to develop its site for broadcasting uses, that over 20 television, radio and private communications broadcasters are presently operating from the seven different towers already constructed on Crocker's site on San Bruno Mountain, and that the rental from those broadcasting towers and related facilities represents the sole source of Crocker's income from its ownership on the site. Among other things, Crocker asserts that if it were permitted to intervene, it is prepared to demonstrate that the proposed Chronicle tower can be erected in full compliance with FAA safety criteria, that the objections heretofore raised by aeronautical interests are completely without merit, and that broadcasting towers present relatively insignificant hazards to civil aviation.

3. The Broadcast Bureau contends that, although Crocker has not established that it has standing as a party in interest as required by Section 1.223 (a) of the Rules, Crocker is in a position to assist the Commission in the determination of the issues in question, and that thus it interposes no objections to allowing the

petitioner to intervene, citing *Maine Radio and Television Co.*, FCC 61–309, 21 RR 366 (1961); *M & M Broadcasting Co.*, FCC 60–971, 20 RR 609 (1960).

4. In view of the circumstances alleged by the petitioner, together with the Bureau's position that petitioner might be of assistance, and in view of the fact that no opposition to the petition has been filed, the petition to intervene will be granted.

Accordingly, IT IS ORDERED, This 1st day of May, 1964, that the petition of Crocker Land Company to intervene filed March 11, 1964, IS GRANTED, and the Crocker Land Company IS MADE A PARTY to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–248

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| INTEGRATED COMMUNICATION SYSTEMS. INC. OF MASSACHUSETTS, BOSTON, MASS. | Docket No. 15323<br>File No. BPCT–3167 |
| UNITED ARTISTS BROADCASTING, INC., BOSTON, MASS. | Docket No. 15324<br>File No. BPCT–3169 |
| WGBH EDUCATIONAL FOUNDATION, BOSTON, MASS. | Docket No. 15325<br>File No. BPCT–3277 |
| For Construction Permits for New Television Broadcast Stations | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. United Artists Broadcasting, Inc. (United Artists) petitions the Review Board to enlarge issues in this proceeding.[1] Petitioner seeks the addition of the following issues with respect to the application of Integrated Communication Systems, Inc. of Massachusetts (Integrated):

(a) To determine whether the applicant, in view of its proposal as to staff, is qualified to operate its station in the manner proposed in its application.

(b) To determine whether the program proposals of the applicant are feasible for a UHF television station without network affiliation in the Boston market; whether there is a reasonable prospect that the program proposals can be effectuated; and, in light of evidence adduced with respect to the foregoing, whether the applicant is qualified to operate its station in the manner proposed in its application.

2. This proceeding involves mutually exclusive applications for a new UHF television broadcast station in Boston, Massachusetts. United Artists challenges the adequacy of the staff proposed by Integrated. To support its contention, petitioner points out that Integrated contemplates a weekly schedule totalling 45-1/2 hours, of which 45%, or more than 20 hours, is to be local live programming. United Artists asserts that Integrated proposes local live programs on each day of the week with six such programs on Mondays through Fridays and also on Sundays, and five live programs on Saturdays. In order to maintain this schedule, petitioner indi-

[1] The pleadings before the Review Board include: (1) Motion to enlarge issues, filed March 2, 1964, by United Artists Broadcasting, Inc; (2) Opposition, filed April 8, 1964, by Integrated Communication Systems, Inc. of Massachusetts; (3) Response, filed April 8, 1964, by the Broadcast Bureau; and (4) Reply to opposition, filed April 20, 1964, by petitioner.

cates that a staff of thirteen employees is designated by Integrated, including five management personnel. According to United Artists, the remaining eight staff members are to work in the engineering, business, commercial and program departments; however, it is noted by petitioner, no allocation of these staff members is provided by Integrated in its application. In light of personnel requirements and viewed most favorably to Integrated, United Artists contends that no more than four staff members can be considered as available for the program department which is primarily responsible for the heavy work load imposed by over 20 hours of local live programming per week. Petitioner notes that none of Integrated's principals have television broadcast experience and that Integrated's proposed percentage of live broadcasts exceeds that shown in the renewal applications of all but one television station out of 491 stations surveyed in *Veterans Broadcasting Company, Inc.*, Docket No. 14367, *et al*, (Six Nations Rebuttal Exhibit No. 1). United Artists also challenges the feasibility of the program proposals advanced by Integrated in light of the following considerations: (1) Integrated has applied for a UHF channel in a market with three VHF network affiliates; (2) Integrated has proposed programming which would be extraordinarily ambitious, even for a profitable VHF station; (3) Integrated's operating budget is based on an inadequate staff proposal; and (4) operating revenues are proposed to cover substantial long-term debt retirement. Petitioner urges that adequate exploration of the feasibility of Integrated's proposals cannot be made under the standard comparative issues or the standard financial qualifications and *Evansville* issues; therefore, the requested issues are necessary to develop an adequate record and to enable the Commission to evaluate the problems inherent in the introduction of a UHF station in an all-VHF market.

3. Integrated, in opposing the motion to enlarge issues, attempts to distinguish its position from that of *TVUE Associates, Inc.*, FCC 64R–56, 1 RR 1013 (1964), where the Review Board added an adequacy of staff issue to the proceeding. Integrated points out that TVue's application proposed a 71-hour telecast week with more than 31 hours, or 44% of total air time, devoted to live programming and with a staff of only nine full-time employees and additional help being provided as needed. In contrast to TVUE Integrated asserts that the demands upon its staff of thirteen full-time employees from approximately 20 hours of local live programming would be substantially less. Integrated also contends that considerations of unusual programming proposals, the extensive use of automation and personnel requirements are not present here as in the TVUE proceeding. After a review of several cases (all of which related to standard broadcast operation), Integrated alleges that the petitioner has failed to produce facts to demonstrate that its staffing proposals are insufficient and has not cited a single decision of the Commission in support of its requested enlargement. In answer to the issue raised concerning the feasibility of its proposals, Integrated argues that the existence or lack of network affiliation has no effect on its ability to effectu-

ate its proposed programming since there is nothing novel about the proposals. Integrated concludes that the question of feasibility seems to resemble a sufficiency of funds issue which should be addressed to the hearing examiner and, in any event, petitioner can explore these matters under the standard comparative and designated issues.

4. The Broadcast Bureau supports the requested addition of an adequacy of staff issue and points to the amount of local live programming and the size of the staff proposed by Integrated. The Bureau also notes that there is no breakdown of staff functions and concludes that an unresolved question exists as to whether staff proposals have been adequately appraised in view of the degree of live programming anticipated by Integrated. In regard to the second issue requested by United Artists, the Bureau asserts that the issue of feasibility is basically the same issue sought by WEBR, Inc. in *Ultravision Broadcasting Company*, FCC 64R–192, released April 10, 1964, wherein the Review Board certified the question whether an issue such as that proposed by United Artists should be added. The views that prompted the Bureau's support of the *Ultravision* certification apply here where another UHF applicant is confronted by a three VHF station market. In its reply to Integrated's opposition, United Artists asserts that Integrated has declined to provide any further information regarding the functions to be performed by staff members and has not shown how a four-man program department can produce substantial live programming. United Artists again denies that it is requesting an *Evansville* issue and asserts that these matters cannot be explored under the designated issues.

5. An applicant is normally required to present the Commission with a program proposal which is reasonably capable of effectuation. *Birney Imes, Jr. (WMOX)*, 27 FCC 225, 17 RR 419 (1959). A proposal to devote 45%, or approximately 20 hours, of weekly broadcast time to local live programming must demonstrate the availability of a staff sufficient to effectuate such programming. While such a question cannot be decided only on the basis of the number of employees and broadcast hours involved, *TVUE Associates, Inc.*, FCC 64R–56, 1 RR 2d 1013 (1964), it is essential to such a determination that the number of personnel be specified and a reasonable allocation of functions and personnel be provided. We cannot determine here on the basis of Integrated's application and opposition the number of full-time employees who will be utilized in the development and presentation of a comprehensive programming proposal. As the Bureau notes, whether or not the petitioner is accurate regarding the number of personnel available for Integrated's program department, an unresolved question does exist concerning the adequacy of the staff proposals when viewed in terms of local live programming. For these reasons, we deem it necessary to require further inquiry into Integrated's staff proposals, and the motion to enlarge issues will be granted to that extent. With respect to petitioner's attempt to question the feasibility of Integrated's program proposals, the Board has had occasion to consider similar requests. See *Ultravision Broadcast-*

*ing Company,* FCC 64R–192, released April 10, 1964; and *Cleveland Telecasting Corp.,* FCC 64R–220, released April 21, 1964. In these cases and in this proceeding, the Board has been asked to determine the feasibility of program proposals advanced by a UHF applicant with regard to its introduction into a three VHF station market. Since the considerations involved in such an issue go beyond present Commission policy with respect to financial qualifications and since the Board was impressed by the potential impact on UHF development, the question was certified to the Commission. The question of feasibility raised by petitioner's second requested issue will therefore be certified also.

Accordingly, IT IS ORDERED, This 1st day of May, 1964, That the Motion to Enlarge Issues, filed March 2, 1964, by United Artists Broadcasting, Inc. IS GRANTED to the extent indicated herein; and

IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issue:

> To determine whether Integrated Communication Systems, Inc. of Massachusetts, in view of its proposal as to staff, is qualified to operate its station in the manner proposed in its application.

and Issue (b) requested by petitioner IS HEREBY CERTIFIED to the Commission for its determination.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–249

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of SPRINGFIELD TELEVISION BROADCASTING CORP., TOLEDO, OHIO | Docket No. 15326 File No. BPCT–3157 |
| D. H. OVERMYER, TOLEDO, OHIO | Docket No. 15327 File No. BPCT–3173 |
| PRODUCERS, INC., TOLEDO, OHIO For Construction Permits for New Television Broadcast Stations | Docket No. 15328 File No. BPCT–3178 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. D. H. Overmyer (Overmyer) requests that the application of Producers, Inc. (Producers) be dismissed; or, alternatively, that Producers be required to elect between prosecuting its application in this proceeding and an application to acquire WTAM–TV, Louisville, Kentucky (BAPCT–332); and, if Producers elects to prosecute the application in this proceeding, that an issue to determine Producers' compliance with Section 73.636 of the Commission's Rules be added to this proceeding.[1]

2. This proceeding involves three applications for a construction permit for a new television broadcast station to operate on Channel 79, Toledo, Ohio. In its designation Order (FCC 64–97) released February 12, 1964, the Commission notes that Polaris Corporation, owner of 100% of the stock of Producers, is presently in violation of the numerical restrictions of the Commission's multiple ownership rules by virtue of the broadcast interests of its subsidiaries and stockholders in seven VHF television broadcast stations. The Order further recites:

> that the Commission, in consenting to the transfer of control of Radio Station KOME, Tulsa, Oklahoma, from Franklin Broadcasting Company to Producers, Inc. (FCC 63–1147, released December 4, 1963), made the grant upon condition that Producers, Inc., demonstrate compliance with the Commission's multiple ownership rules; that the Commission has afforded the applicant reasonable time within which to bring itself into compliance with such rules; that, however, unless Polaris Corporation demonstrates, prior to the closing of the record in this proceeding, that it is in compliance with such rules, it will be disqualified in this proceeding;

[1] The Review Board has under consideration a Petition to Dismiss and to Enlarge Issues, filed March 2, 1964, by Overmyer; and pleadings properly and timely filed in response thereto. Section 73.636 of the Rules provides, in substance, that interests may not be held in more than seven television broadcast stations, no more than five of which may be in the VHF band.

This Order also states that the multiple ownership interests of Producers may be explored under the standard comparative issue (No. 8).

3. In support of its petition, Overmyer alleges that Polaris Corporation, through its wholly-owned subsidiary, Producers, has controlling interests in the licensees of four VHF television stations (KCND–TV, Pembina, North Dakota; KTHI–TV, Fargo, North Dakota; KNOX–TV, Grand Forks, North Dakota; and WTVW, Evansville, Indiana); that Producers has an application (BAPCT–332) pending to acquire WTAM–TV, Louisville, Kentucky; that Roger C. Minahan, Secretary and Director of Polaris Corporation, has a stock interest in the licensees of WEAU–TV, Eau Claire, Wisconsin and KTVO–TV, Kirksville, Missouri; and that Sigler and Co., a significant stockholder (4%) of Polaris Corporation, has a stock interest in at least three other VHF television stations (WRGB–TV, Schenectady, New York; WTIC–TV, Hartford, Connecticut; and WDSM–TV, Superior, Wisconsin). Thus, Overmyer alleges, the Polaris Corporation has interests in nine television stations and is clearly in violation of Section 73.636 of the Commission's Rules.

4. Overmyer contends that Producers has not sought a waiver of Section 73.636, and there is no reason why it should be permitted to prosecute an application which will result in an even greater violation of Section 73.636. Overmyer cites two cases which, it contends, illustrate the Commission practice of refusing to permit an applicant to prosecute two applications which, if granted, will produce a violation of Section 73.636.[2] Finally, Overmyer contends that the meaning of the language in the designation Order concerning the disqualification of Producers is unclear, and, if Producers elects to prosecute this application, a specific issue to determine whether Producers is in compliance with Section 73.636 of the Rules should be added to this proceeding.

5. Producers, in its opposition, contends that the grounds relied upon by Overmyer were fully considered by the Commission in the designation Order and Overmyer has advanced no new facts upon which to predicate the relief requested. Producers concedes that it holds controlling interest in four VHF television broadcast stations (KCND–TV; KTHI–TV; KNOX–TV; and WTVW), and that it has pending before the Commission the present UHF application and an application for the acquisition of UHF television broadcast station WTAM–TV. These interests, Producers contends, are not violative of Section 73.636. Producers contends that it is no longer chargeable with the interests held by Minahan because Minahan has resigned his positions as Secretary and Director of Polaris Corporation.

6. With respect to the interests of Sigler and Co., Producers relates that this company is a partnership comprised of officers of the Personal Trust Department of Manufacturers Hanover Trust Company; that Sigler and Co. is the nominee of the trust company

[2] The cases cited by Overmyer are *WSTV, Inc.*, FCC 53–91, 8 RR 854 (1953), reconsideration denied, FCC 53–383, 9 RR 175 (1953); and *Scripps-Howard Radio, Inc.*, 13 FCC 305, 309, 4 RR 1009, 1014 (1948).

which, as executor or trustee of various estates and trusts, holds a total stock interest of 4% of the stock of Polaris Corporation; and that Producers has attempted to comply with the conditions set down by the Commission in the sale of Radio Station KOME to Producers, by requesting a determination of the acceptability of Bankers Trust Company as a substitute for Manufacturers Hanover Trust Company, but the Commission held that both companies were subject to the same disability. The questions raised by these fiduciary interests, Producers contends, are more properly the subject of rule making,[3] and, in any event, all of these interests were before the Commission when it designated the instant application for hearing.

7. The Commission designated Producers' application for hearing although it was aware of the fact that Producers was then in violation of the numerical restrictions of the multiple ownership rules. Since Minahan has resigned as Secretary and Director of Polaris Corporation, the only interest of Producers not specifically considered in the designation order is the pending transfer application of UHF television broadcast station WTAM–TV.[4] This pending application does not, in our view, require further action at this time. Producers, or its parent corporation, already has interests in seven VHF television stations, two over the maximum prescribed by Section 73.636 of the Rules. If Producers is unable to demonstrate, as required by the designation Order, compliance with the multiple ownership rules, this application would not be granted. If on the other hand, under the procedure specified by the Commission in this case, Producers is able to demonstrate compliance with such rules, there would be no reason for dismissing this application or requiring Producers to elect between applications.

Accordingly, IT IS ORDERED, This 1st day of May, 1964, That the Petition to Dismiss and to Enlarge Issues, filed March 2, 1964, by D. H. Overmyer, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[3] Producers points to the interim relief granted by the Commission to Metromedia in acquiring WCBM AM–FM. By Public Notice-B, December 27, 1963, Report No. 4917, the Commission allowed certain stock assignments on condition that the assignees agree not to vote the stock that places them in violation of the Rules. The Commission indicated that it was contemplating the institution of rule-making in this area.

[4] It is noted, however, that the application for transfer of WTAM–TV was filed on March 19, 1963, and the designation Order in this proceeding was adopted on February 5, 1964.

F.C.C. 64–409

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of<br>RADION BROADCASTING, INC. (ASSIGNOR)<br>and<br>MAJOR MARKET STATIONS, INC. (ASSIGNEE)<br>For Consent to the Assignment of License of Radio Station KREL,[1]<br>Corona, Calif. | File No. BAL–4925 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration (a) the above-captioned application for assignment of license of Station KREL (formerly KBUC); (b) a petition, filed on February 7, 1964, by John Brown Schools of California, Inc. (hereinafter "John Brown"), licensee of Station KGER, Long Beach, California, seeking reconsideration of the action of January 9, 1964, granting the subject application for assignment of license; (c) an opposition to said petition, filed on February 20, 1964, by assignee, Major Market Stations, Inc. (hereinafter "Major Market"); and (d) a reply to opposition, filed on March 4, 1964, by John Brown.[2]

2. The application was filed on October 3, 1963. Local notice was broadcast on October 8, 9, 10 and 11, 1963, and the application was accepted for filing on October 23, 1963. On January 9, 1964, the application was granted.

3. The principal issues presented for decision may be summarized as follows: (a) Has the assignor, Radion Broadcasting, Inc., failed to comply with the provisions of Section 1.580(e) and (f) of the Commission's Rules, relating to notice of the filing of the subject application for assignment, so as to void the Commission's action granting the application? (b) In view of the fact that John Brown failed to file a petition to deny pursuant to Section 1.580(i) of the Commission's Rules, in accordance with the provisions of Section 309(d) of the Communications Act of 1934, as amended, is it now precluded from filing the instant petition by virtue of Section 1.106(b) and (c) of the Commission's Rules?[3] (c) Has

[1] The call letters of the station involved were changed from KBUC to KREL on February 10, 1964, and reference herein will be to KREL, the present call.

[2] On February 7, 1964, John Brown filed a motion to stay the assignment. This motion and associated pleadings were considered by the Commission and the request for stay denied. Memorandum Opinion and Order, FCC 64-230, adopted March 18, 1964, released March 20, 1964.

[3] Sections 1.106(b) and 1.106(c) read as follows:

"(b) Except where the Commission has denied an application for review without specifying reasons therefor, any party to the proceeding, or any other person aggrieved or whose interests

*Continued on next page*

petitioner advanced any matters of substance which require or merit setting aside our grant of January 9, 1964, and designating the assignment application for hearing?

4. In support of its position, John Brown alleges that the assignor, Radion Broadcasting, Inc., failed to announce the names of the assignors at the time notice was broadcast; that the notice given, therefore, was not in strict compliance with the provisions of Section 1.580(e) of the Rules; and that such defect, *per se*, vitiates the grant. We do not find this argument persuasive here, for John Brown admits it knew the identity of the principals of assignor and obviously no prejudice inured to it by virtue of this deficiency. Cf. *Kessler, et al.*, v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 1 RR 2d 2061 (December 20, 1963). It follows that John Brown's pleading must be treated as a "petition for reconsideration" and its disposition governed in accordance with the provisions of Section 1.106(b) and (c) of the Rules.

5. Treated as a petitioner for reconsideration, John Brown must demonstrate "good reason" why it was not possible for it to participate at an earlier time by pursuing its rights under Sections 1.580(i) and 1.587 of the Rules. In support of such "good reason," it states it had no knowledge of the character of the programming proposed by Major Market; the name of the assignee "Major Market" misled it as to the character of assignee's proposed operation; and there was an absence of publicity about the sale in Corona, save for that broadcast by the station. Clearly, such are not sufficient reasons, within the meaning of Section 1.106 to warrant reconsideration of the action granting the subject application. John Brown had an affirmative duty to come forward during the period allowed and examine the application to determine program content. The Commission's notice requirements do not go so far as to require an applicant for assignment of license to broadcast the content of assignee's program proposals. Further, interested parties cannot place reliance in a trade name or commercial identification of a business entity in order to assure itself that the concern will or will not pursue a certain course in its program format. On the basis of the foregoing, the petition for reconsideration filed by John Brown must be dismissed. *Millers River Translators, Inc.*, —— *FCC* ——, 25 RR 516, affirmed, —— U.S. App. D.C. ——, 1 RR 2d 2083 (January 9, 1964).

6. Notwithstanding this dismissal, we will consider the major arguments of John Brown addressed to the merits. It urges that

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are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which he is aggrieved or his interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."

"(c) A petition for reconsideration which relies on facts which have not previously been presented to the Commission or to the designated authority, as the case may be, will be granted only under the following circumstances: (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; (2) The facts relied on were unknown to petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest."

Major Market has failed to ascertain the needs of the community it seeks to serve, Corona, California. However, Major Market counters that its officers made a survey of the area for this purpose and that its president, F. Demcy Mylar, has lived in Corona and nearby San Bernardino, and is familiar with the needs thereof. Based on this response, we conclude that an adequate showing has been made by Major Market. Cf. *Community Telecasting Corp.*, 32 FCC 923, affirmed, —— U.S. App. D.C. ——, 317 F.2d 592 (1963).

7. John Brown further contends that Major Market's proposed programming is defective because 43.5% of its programs by "type" will be religious presentations. Noting that John Brown broadcasts 65.6% religious programming, we observe that Major Market will devote 36.3% of its schedule to entertainment, 2.1% to agricultural, 2.3% to educational, 10.2% to news, 2.3% to discussion, and 3.3% to talks. On the basis of Major Market's overall showing, we conclude that it has made a reasonable effort to ascertain the needs and interests of KREL's service area and to design programs to meet those needs and interests. As we said in our 1960 Programming Statement (FCC 60–970):

> ...The ascertainment of the needed elements of the broadcast matter to be provided by a particular (applicant) for the audience he is obligated to serve remains primarily the function of the (applicant). His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the (applicant).

In the absence of a strong showing to the contrary, we are reluctant to hold that this percentage of religious programming *per se* raises a question sufficient to justify a hearing. No such showing was made by John Brown and we do not see merit in its position in this regard. The remaining arguments made by John Brown have been carefully considered by us but are not considered to require independent discussion in view of the determination reached above.

Accordingly, IT IS ORDERED, this 6th day of May, 1964, that the "Petition for Reconsideration" filed herein by John Brown Schools of California, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–413

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of<br>KCMC, INC., BEVERLY AREA, TEXARKANA, TEX.<br>KCMC, INC., ALLENDALE AREA OF SHREVEPORT, LA.<br>For Construction Permits for New Television Broadcast Translator Stations | File No. BPTTV–1672<br>File No. BPTTV–1673 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE DISSENTING.

1. The Commission has before it for consideration: (a) the above-captioned applications; (Group 1) (b) a "Petition to Deny" filed November 2, 1962, by KTBS, Inc. (KTBS), licensee of Station KTBS–TV, Channel 3, Shreveport, Louisiana, directed against a grant of the above-captioned applications; (c) an "Opposition to Petition to Deny and Request for Immediate Grant" filed November 29, 1962, by KCMC, Inc. (applicant), licensee of Station KTAL–TV, Channel 6, Texarkana, Texas, directed against (b) above; (d) a "Reply to Opposition" filed December 13, 1962, by KTBS, Inc., directed against (c) above [1]; (Group 2) (e) a "Petition of KSLA–TV, Inc. (KSLA–TV) to Deny" and a "Petition of KSLA–TV, Inc. (KSLA) to Accept the Attached Petition to Deny" filed November 21, 1962, by KSLA–TV, Inc. (KSLA–TV), licensee of Station KSLA–TV, Channel 12, Shreveport, Louisiana, directed against a grant of the application (BPTTV–1673) for Shreveport; (f) an "Opposition to Petition to Deny and Request for Immediate Grant" filed December 26, 1962, by the applicant, directed against (e) above; and (g) a "Reply of KSLA–TV, Inc. (KSLA–TV) to 'Opposition to Petition to Deny and Request for Immediate Grant'" filed January 7, 1963, by KSLA–TV, directed against (f) above.

2. On September 21, 1962, the applicant filed the two above-captioned applications for construction permits for new VHF television broadcast translator stations, one to serve the Beverly area of Texarkana, Texas, and the other to serve the Allendale area of Shreveport, Louisiana, both to operate with power of 1 watt on Output Channel 9. Both translator stations will rebroadcast the signal of applicant's Station KTAL–TV, Channel 6, Texarkana, Arkansas. The Allendale application (BPTTV–1673) proposes a site within Station KTAL–TV's predicted principal city contour

[1] On December 18, 1962, the applicant filed a letter referring to the two above-captioned applications, and asking that the Commission take judicial notice of certain facts. On December 20, 1962, KTBS, Inc., filed a "Motion to Strike", directed against this letter. In view of the grounds for the present opinion, it is unnecessary for the Commission to rule on either request.

and the Beverly application (BPTTV–1672) proposes a site just outside Station KTAL–TV's predicted principal city contour.

3. KTBS, Inc., is licensee of Station KTBS–TV, Channel 3, Shreveport, Louisiana. Station KTBS–TV provides a predicted principal city contour to all of Shreveport, and a predicted Grade "B" signal to an area extending beyond Texarkana, Texas. Since the applicant alleges that the operation of the proposed translators will provide new or vastly improved reception of Station KTAL to approximately 30,000 people in Shreveport, and 8,500 persons in Texarkana, petitioner claims that authorization of these translators will cause economic injury to Station KTBS–TV. Accordingly, the Commission finds that KTBS is a "party in interest" within the meaning of Section 309 of the Communications Act of 1934, as amended. *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470. KSLA is opposing only the application (BPTTV–1673) for a translator in Shreveport. Since Station KSLA–TV provides Shreveport with a predicted principal city contour, it is clear that except for the tardy filing of its petition,[2] KSLA would have standing in this case. However, since KSLA's objections are similar to those raised in KTBS's timely-filed Petition to Deny, and since no Commission disposition of KTBS's petition has been made, consideration of KSLA's petition will neither delay action on the application, nor prejudice the applicant. Accordingly, the Commission finds KSLA to be a "party in interest" within the meaning of Section 309 of the Act.

4. The petitioners both claim that authorization of the proposed translators would be inconsistent with the Commission's translator policies since the applicant has not shown either that the proposal would provide a first service to an isolated rural area, or that the signal of applicant's primary station can not be adequately received in the areas to be served. KTBS alleges that operation of the proposed translators will cause it economic injury which will, in turn, force it to curtail its local programming, contrary to the needs of the local population. Finally, KTBS alleges that in view of the applicant's numerous ownership interests in both newspapers and other broadcast stations, a grant of these applications would result in a concentration of control over media of mass communication, contrary to the public interest.

5. The proposed Shreveport translator would serve an area within Station KTAL–TV's present predicted principal city contour. Section 74.732(e) (2) of the Rules contemplates that a station may locate a VHF translator freely within its principal city service contour [3] to improve reception. And since Texarkana is

[2] The KSLA petition and "Petition of KSLA–TV, Inc. (KSLA–TV) to Accept the Attached Petition to Deny" were filed 49 days after notice of acceptance for filing of the application. Section 1.580(i) of the Rules provides, in pertinent part, that, "Any party in interest may file with the Commission a petition to deny any such application . . . no later than 30 days after the issuance of a public notice of the acceptance for filing of any such application . . ."

[3] Section 74.732(e) (2) of the Rules provides that, "The licensee or permittee of a television broadcasting station, an applicant financially supported by such licensee or permittee, or any person associated with the licensee or permittee, either directly or indirectly, will not be authorized to operate a VHF translator under any of the following circumstances: . . . Where the proposed VHF translator is intended to provide reception to all or a part of any community located within the Grade A contour of any other television broadcast station for which a construction permit or license has been granted and the programs rebroadcast by the proposed VHF translator will duplicate all or any part of the programs broadcast by such other television

*Continued on next page*

the principal community of Station KTAL–TV, a grant of the Texarkana translator application would be entirely consistent with the Commission's requirements for VHF translators. Further, the applicant states that it conducted a telephone survey of the Allendale area, that 88% of the population in the area did not receive an optimum picture from KTAL–TV and that 40% of the people received less than a "good" picture. Similarly, in Texarkana, while no formal survey was conducted, the station has received several inquiries about improving service. Petitioner has not contraverted these allegations; therefore, we believe the applicant has made a sufficient showing that the proposed translators are needed to improve reception.

6. KTBS has not by appropriate factual allegations supported its argument that operation of the proposed translators would cause it such economic injury as to force it to curtail its local programing. The only affirmative argument is that there may be areas in which viewers could receive KTAL–TV at either of two places on the television dial, but any such injury would clearly be *de minimis*. In the absence of factual economic allegations, it is not Commission policy to give credence to such claims, E.G., *KSLA–TV, Inc.*, FCC 64–213. Finally, although we have considered the allegation that grant of these applications could give applicant a concentration of control of media of mass communications, we do not believe that a grant of these translator applications, serving such a limited number of people, could have a material effect on the applicant's present mass media position. See *Midwest Television, Inc.*, FCC 62–708, 23 R.R. 941, and Section 74.732(b) of the Rules.

7. In view of the foregoing, we find that the petitioners have failed to raise substantial and material questions of fact. We find, further, that a grant of the applications would serve the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that the "Petitions to Deny" filed by KTBS, Inc., and KSLA–TV, Inc., ARE HEREBY DENIED. IT IS FURTHER ORDERED that the above-captioned applications filed by KCMC, Inc., ARE HEREBY GRANTED in accordance with specifications to be issued.

Adopted May 6, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

*Continued from preceding page*
broadcast station or stations: *Provided, however,* That this will not preclude the authorization of a VHF translator intended to improve reception of the parent station's signal to any community, any part of the corporate limits of which is within the principal city service contour of such station."

F.C.C. 64–412

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Application of KAKE–TV AND RADIO, INC., GARDEN CITY, KANS. For Construction Permit for a New VHF Television Broadcast Station | File No. BPCT–2901 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: CHAIRMAN HENRY ABSENT.

1. The Commission has before it for consideration: a) the above-captioned application, as amended on May 1, 1964; b) a "Petition to Dismiss Application, Designate for Hearing or Other Relief" filed October 6, 1961, by Southwest Kansas Television Company (petitioner), licensee of Station KTVC–TV, Channel 6, Ensign, Kansas, directed against a) above; c) "Opposition to Petition to Dismiss Application, Designate for Hearing or Other Relief" filed October 19, 1961, by KAKE–TV and Radio, Inc. (applicant), directed against b) above; d) a "Reply to 'Opposition to Petition to Dismiss Application, Designate for Hearing or Other Relief' " filed October 27, 1961, by petitioner, directed against c) above; and e) "Reply Comments of KTVC, Ensign, Kansas" filed April 8, 1963, directed against the above-captioned application, as amended on February 18, 1963.

2. The above-captioned application requests a permit to construct a new television broadcast station on Channel 13 at Garden City, Kansas. The applicant is the licensee of Station KAKE–TV (ABC), Channel 10, at Wichita, Kansas, and plans to rebroadcast the network programs of Station KAKE–TV. The petitioner, currently rebroadcasts substantially all of the programs of Wichita-Hutchinson Company, Inc., licensee of Television Broadcast Station KTVH (CBS), Channel 12, Hutchinson, and serves as the CBS outlet in the Garden City area. Petitioner, from 1957 through 1961, rebroadcast the programs of the applicant. Station KGLD, Channel 11, Garden City, is a wholly owned subsidiary and satellite of Wichita Television Corporation, Inc., licensee of Station KARD–TV (NBC), Wichita.

3. Petitioner bases its claim to standing on the fact that it is presently the licensee of Station KTVC–TV, Channel 6, Ensign, Kansas (CBS); that the proposed station, operating as a satellite of KAKE–TV, Wichita, will divert advertising revenue from Station KTVC–TV; and that this will result in economic injury to petitioner. On the basis of the foregoing, the Commission finds that the petitioner's interests would be adversely affected by a

grant of the above-captioned application, and that petitioner is, therefore, a "party-in-interest" within the meaning of Section 309 of the Communications Act of 1934, as amended, *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470.

4. Petitioner contends that the operation of a third VHF television broadcast station in the Garden City area, as proposed by the applicant, will decrease Station KTVC–TV's revenue; that this will force Station KTVC–TV to abandon its local programming and operate as a satellite of Station KTVH (CBS), Wichita-Hutchinson, Kansas; and that since the proposed station will also operate as a satellite (of Station KAKE–TV), the net effect of granting the subject application will be to deprive Garden City and nearby communities of the local programming now carried over Station KTVC–TV, contrary to the public interest. In support of this position, petitioner first cites statistics to show that the earnings of Station KTVC–TV have improved since its separation from Station KAKE–TV and affiliation with Station KTVH (1961: Loss, $22,779.43; 1962: Profit, $23,121.61), but that profit over the past six years has been sporadic (Profit: 1959, 1960, 1962; loss: 1957, 1958, 1961); that the urban population in the area is limited (Garden City—11,811; Dodge City—13,520; Liberal—13,813—1960) and already adequately served by stations and newspapers competing for advertising revenue (TV: KGLD, Garden City; KTVC–TV; AM radio stations—2 in each community; FM radio stations—1 in Garden City; newspapers—1 daily in each community); that Station KTVC–TV's expenses have risen considerably since the termination of the satellite agreement with Station KAKE–TV, and concludes that the operation of a third VHF television broadcast station in Garden City, particularly in the financially advantageous position of a satellite as compared with a television station producing live programming, will substantially lower Station KTVC–TV's revenue. Petitioner next states that Station KTVC-TV was unable, as a satellite of Station KAKE–TV, to schedule local programs; that it now substitutes local news, weather and sports for similar type programs carried by Station KTVH; that it allows substantial time for announcements of local interest; and that it carries those public service programs scheduled by Station KTVH which are oriented to the area served by both stations.

5. The applicant admits that the addition of a third station in the market will increase competition for both local and national advertising revenue, but contends that the petitioner has failed to show with sufficient specificity the amount of additional operating costs which Station KTVC–TV incurred in scheduling local programming, or that Station KTVC–TV and/or other local stations are financially unstable (Southwest Kansas Television Co., Inc. "Statement of Operations"—Year ending Dec. 31, 1960—Net Operating Profit of $10,436.88 after payments of $93,847.18 for wages and a charge of $28,944.51 for depreciation). The applicant further states that during the years in which Station KTVC–TV was a satellite of Station KAKE–TV, it operated as part of the

Golden K Network, an affiliation of Station KAKE–TV and all its satellite stations; that to enhance the value of the Golden K Network to viewers in the area, Station KAKE–TV attempted to gear its programming to the local needs of the viewers of each individual station (e.g., local news and sports coverage—either carried directly by Station KAKE–TV or covered and filmed by Station KAKE–TV personnel and supplied to satellite stations for local release) ; that Station KTVC–TV was permitted to, and did, substitute some local programs for programs carried by Station KAKE–TV; that Station KAKE–TV will continue to orient its programming for the proposed station in Garden City to the needs of the viewers in Garden City; and that the public will not be adversely affected since the grant will enable it to have, for the first time, the choice of a third network service (ABC).

6. On May 1, 1964, the applicant filed an amendment to its application which modified its programming proposal so as to provide for the origination, from the Garden City studios, of local live programs, which will constitute at least 5% of the total broadcast time of the station per week. The programs, presented on a daily, regular basis, would consist of live news, weather, market and farm information, and public service programs, directed specifically to the needs and interests of local viewers, and oriented to the Garden City area. Thus, characterization of the applicant's proposal as one for the operation of a satellite station is no longer valid.

7. Petitioner's argument on the merits, in substance, is that the economic injury which it will receive from a grant of the above-captioned application will require it to curtail or abandon some of its local programs (limited in amount), and that this loss would be inconsistent with the public interest. Conceding that the petitioner will be subject to additional competition, it does not follow that this will require abandonment of petitioner's local programs. Nor has petitioner alleged facts which would either compel or would inferentially support such a conclusion. Petitioner merely states that its expenses have risen since it terminated its affiliation agreement with Station KAKE–TV, but has not shown that the increase is directly attributable to the presentation of local programs. In this connection, we note that the petitioner's local programs consist mainly of news, weather and sports, the presentation of which does not ordinarily require considerable expenditures. Consequently, it does not appear to us that petitioner has made out a *prima facie* case that grant of the application would be inconsistent with the public interest. On the other hand, grant of the above-captioned application will provide the Garden City area, for the first time, with an outlet for a third network and the choice of a third service. Since, as noted above, the applicant's proposed program schedule provides for the presentation of local programs on a regularly scheduled basis, grant of its application would also provide the Garden City area with a second source of local programming.

In view of the foregoing, we find that petitioner has failed to raise substantial and material questions of fact which require that the application be denied or set for hearing. We find, further,

that the applicant is legally, technically, financially, and otherwise qualified to construct the proposed station, and that a grant will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, This 6th day of May, 1964, that the petition filed by Southwest Kansas Television Company IS DENIED; and that the application (BPCT–2901) of KAKE–TV and Radio, Inc., IS GRANTED in accordance with specifications to be issued.

Adopted May 6, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–414

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of TRIANGLE PUBLICATIONS, INC. (RADIO AND TELEVISION DIVISION), JOHNSTOWN, PA. For Construction Permit for New VHF Television Broadcast Translator Station | Docket No. 15457 File No. BPTTV–12 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: (a) The above-captioned application filed by Triangle Publications, Inc. (Triangle), licensee of Station WFBG–TV, Channel 10, Altoona, Pennsylvania; (b) "Comments and Opposition of Rivoli Realty Company" filed on January 26, 1961, by Rivoli Realty Company (Rivoli), permittee of Station WARD–TV, Channel 56, Johnstown, Pennsylvania,[1] directed against a grant of the above-captioned application; (c) a "Reply to Comments and Opposition of Rivoli Realty Company" filed on February 8, 1961, by Triangle; (d) a "Petition to Deny" filed on February 20, 1961, by Rivoli directed against a grant of the above-captioned application; (e) an "Opposition to Petition to Deny" filed on March 6, 1961, by Triangle; (f) a "Petition for Immediate Consideration and Grant" filed on March 25, 1963, by Triangle; (g) an "Opposition to Petition for Immediate Consideration and Grant" filed on April 8, 1963, by Rivoli; and (h) a "Reply to Opposition to Petition for Immediate Consideration and Grant" filed on April 22, 1963, by Triangle.

2. On November 29, 1960, Triangle filed the above-captioned application for a VHF television broadcast translator station to serve Johnstown, Pennsylvania, with a power of 1 watt on Output Channel 12 rebroadcasting its Station WFBG–TV, Channel 10, Altoona, Pennsylvania. Since UHF station WARD–TV is licensed to serve Johnstown, Triangle proposes to operate the translator only while Station WARD–TV is off the air.

3. Rivoli alleges that the addition of the applicant's proposed VHF service to Johnstown would result in economic injury to its UHF station. Accordingly, it is clear that the petitioner has standing as a "party in interest" within the meaning of Section 309(d) of the Communications Act. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470.

[1] Rivoli is operating on Channel 56 pursuant to a special temporary authorization, although it holds a construction permit for Channel 19.

4. Since the above-captioned application is for a VHF translator to serve an area within the Grade A contour of Rivoli's UHF Station WARD–TV, the essential dispute is whether Triangle's application satisfies the requirements of Section 74.732(d) of the Commission's Rules [2]. Rivoli also argues that the application should be denied because it does not satisfy the requirements of Section 74.732(e)(2) of the Commission's Rules [3], since both stations carry the programs of the CBS and ABC networks.

5. Triangle seeks to justify a grant of its application on two grounds, that it would not operate while Station WARD–TV was on the air—and hence could not violate Section 74.732(e)(2) of the Rules—and that Section 74.732(d) of the Rules is not applicable since Johnstown is already an intermixed area having one locally assigned VHF channel. But however plausible Triangle's arguments may appear to be, there still remains the underlying problem that a grant of this application might adversely affect Station WARD–TV's ability to supply its UHF service to Johnstown. The Commission recently terminated the "drop-in" proceeding, in which, among other things, it had proposed the assignment of an additional short-spaced VHF channel at Johnston, partly because of the adverse effect on UHF which such an assignment would have entailed. *VHF Drop-Ins*, 25 R.R. 1687. It would seem entirely unreasonable to deny Johnstown the benefit of a full VHF service in order to protect UHF and then to supply the limited service of a VHF translator in circumstances where there could be injury to the UHF station in the community. The Commission recently considered a similar situation, involving a proposed VHF translator station in Asheville, North Carolina, and determined that it would be necessary to conduct a hearing to determine whether a grant of such an application in an area with an existing UHF station could retard further development of UHF service in the area. *Spartan Radiocasting Company*, FCC 64–95. In view of the circumstances in Johnstown, it appears equally necessary to require a hearing in this proceeding.

6. In view of the foregoing, except as indicated by the issues specified below, the applicant is legally, technically, financially, and otherwise qualified to construct and operate as proposed. However, the Commission is unable to make the statutory finding that a grant of the application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for hearing on the issues set forth below.

Accordingly, IT IS ORDERED, That, pursuant to Section

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[2] Section 74.732(d) of the Rules provides:

"A VHF translator will not be authorized to serve an area which is receiving satisfactory service from one or more UHF television broadcast stations or UHF translators unless, upon consideration of all applicable public interest factors, it is determined that, exceptionally, such intermixture of VHF and UHF service is justified."

[3] Section 74.732(e)(2) of the Rules provides:

"The licensee or permittee of a television broadcasting station . . . will not be authorized to operate a VHF translator . . . Where the proposed VHF translator is intended to provide reception to all or a part of any community located within the Grade A contour of any other television broadcast station for which a construction permit or license has been granted and the programs rebroadcast by the proposed VHF translator will duplicate all or any part of the programs broadcast by such other television broadcast station or stations: *Provided, however*, That this will not preclude the authorization of a VHF translator intended to improve reception of the parent station's signal to any community, any part of the corporate limits of which is within the principal city service contour of such station."

309(e) of the Communications Act of 1934, as amended, the above-captioned application of Triangle Publications, Inc., IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine whether, within the meaning of Section 74.732(d) of our Rules, the area in question is receiving satisfactory service from Station WARD–TV.

2. To determine what public interest benefits, if any, would be derived from a grant of the instant application.

3. To determine whether a grant of the above-captioned application would retard the development of UHF television in and about Johnstown, Pennsylvania.

4. To determine in view of the evidence adduced pursuant to the foregoing issues whether a grant of the above-captioned application would serve the public interest, convenience and necessity.

IT IS FURTHER ORDERED, That Rivoli Realty Company is MADE A PARTY to the proceeding.

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

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

Adopted May 6, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–399

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
REVISION OF DELEGATIONS OF AUTHORITY IN HEARING PROCEEDINGS AND AMENDMENT OF THE RULES OF PRACTICE AND PROCEDURE

### REPORT AND ORDER

BY THE COMMISSION: COMMISSIONER LEE DISSENTING IN PART AND ISSUING A STATEMENT.

1. The delegations of authority in hearing proceedings were revised substantially by the Commission in June of 1962, following enactment of P.L. 87–192. FCC 62–612, 27 F.R. 5671, June 14, 1962. The office of Motions Commissioner was abolished and the Review Board created. Substantial authority to review initial decisions was delegated to the Board, along with many interlocutory functions in hearing proceedings previously performed by the Commission or the Chief Hearing Examiner. In a companion document, substantial related changes were also made in the Rules of Practice and Procedure. FCC 62–613, 27 F.R. 5660, June 14, 1962.

2. The functioning of the Review Board has been a source of satisfaction to the Commission. By virtue of delegations of authority made to the Board in hearing proceedings, the Commission has been enabled to devote a larger portion of its time and energies to major matters of policy and planning and to cases of adjudication involving issues of general communications importance. The members of the Board, on the other hand, have been able to devote greater personal attention to the more routine cases of adjudication, and to dispose of those cases more expeditiously, than would have been possible for the Commission with its many other responsibilities. The Board began operating on August 1, 1962 and, through December 31, 1963, had issued 37 final decisions, remanded seven proceedings to examiners for further hearing and acted upon 827 interlocutory petitions.

3. Upon establishment of the Review Board in 1962, the Commission recognized the need for periodic review and revision of the newly adopted delegations and procedures:

> We recognize that the rules may not be perfect. Indeed, we think it most likely that as experience is gained some revisions will be required. But it is our view that this scheme constitutes the one most likely to achieve the statutory purpose and that with procedural changes of this nature, experience is by far the best guide to future revisions. For that reason, we intend to review the entire subject at periodic intervals. And, in connection with this review, we would especially welcome the suggestions of the Bar and other interested parties,

based on their experience in working with the rules. (FCC 62–612, para. 9; 27 F.R. 5673)

Our experience under the delegations and procedures adopted in 1962 has been under examination over the last several months. During this period, the views of those most directly concerned with the Commission's hearing processes were elicited and appraised. Possible changes were discussed, in particular, with a specially constituted committee of the Federal Communications Bar Association, and the Commission wishes to express its appreciation to the members of that committee for their assistance.

4. On the basis of this appraisal, and of the Review Board's performance during this period, the Commission has determined that the categories of cases normally reviewed by the Board should be enlarged. It should be emphasized, however, that these categories are not binding. The objective is that all cases involving novel or important issues of law or policy be reviewed by the Commission, and that all other cases be reviewed by the Board. Flexible case by case procedures are provided under which cases normally reviewed by the Board can be reviewed by the Commission and those normally reviewed by the Commission can be reviewed by the Board. Experience under these procedures has demonstrated that they are particularly effective in ensuring review of important cases by the Commission rather than the Board. Cases which normally would be reviewed by the Board have been certified to the Commission because of their importance. Our experience indicates that it is not difficult to determine whether a case involves an important issue of law or policy and that, if it does, the parties and the Review Board can be relied upon to raise the question of Commission review, since they would naturally be reluctant to litigate or to hear a case, knowing that there would have to be full review of the Board's decision. Finally, in the unlikely event that these procedural safeguards fail, the parties may obtain full Commission review by calling the major issues involved to the Commission's attention in an application for review of the Board's decision.

5. In view of these facts, the Commission is delegating to the Review Board authority to review initial decisions in all adjudicative proceedings, except for those involving the renewal or revocation of a station license in the Broadcast Radio Services or the Common Carrier Radio Services. The Board is also herein authorized to review initial decisions in mixed proceedings involving both adjudicative and rule making matters. The record in proceedings which involve rule making matters exclusively will be reviewed by the Commission. In our judgment, nearly all Broadcast and Common Carrier renewal and revocation proceedings will require full consideration by the Commission. Rule making proceedings will also require Commission consideration and are conducted under procedures different from those followed by the Board.

6. Our review of the hearing delegations also indicates that most of the interlocutory matters now acted upon by the Review Board, and some of those now acted upon by the Chief Hearing

Examiner, could more effectively be acted upon by presiding examiners. Action by the Board and the Chief Examiner on these matters in the past has provided a uniform body of precedent upon which examiners may base their rulings; and continued review of examiners' rulings by the Board affords a satisfactory degree of assurance as to the consistency of future rulings. Although the record of the Board and the Chief Examiner on these matters has been good, the presiding officer is more familiar with the proceeding and should be able to dispose more expeditiously of those matters which arise. In addition, it is believed that the Board will be able to function even more effectively if its duties are limited to the appellate functions which its name implies. The two exceptions in this area involve petitions to amend the issues upon which the hearing was ordered and joint requests for approval of agreements filed by applicants pursuant to the requirements of section 1.525 of the Rules and Regulations. It is believed that these matters should (as in the past) be acted upon by the Review Board. In these areas in particular, the uniform rulings which can be fully obtained only through action by a single body are important. The Commission believes, moreover, that direct Commission review of such rulings (which Board action entails) should be preserved. Petitions to amend the issues in proceedings which involve rule making matters exclusively will be acted upon by the Commission. In connection with its action on joint requests, the Review Board is authorized, in its discretion, to hold informal conferences with counsel for parties to the proceeding. The new hearing delegations are set forth in the attached Appendix as sections 0.341, 0.351, and 0.365. The changes in delegations and procedures which appear to warrant specific comment are discussed in the following paragraphs.

7. New section 0.341(b) provides that any question which would be acted upon by the hearing examiner if it were raised by a party to the proceeding may be raised and acted upon by the examiner on his own motion. Section 0.341(c) provides that any question which would be acted on by persons other than the hearing examiner may be certified by the examiner, on his own motion, to that person. The examiner should not be compelled to rely on the initiative of parties to the proceeding. See *Laramie Community TV Co.*, FCC 63R–40, 24 R.R. 941.

8. Under existing procedures, the Chief Hearing Examiner is authorized to act on petitions of applicants to file late written appearances (§ 0.351(e) and (f)), and on petitions of applicants requesting that their application or the proceedings thereon be dismissed (§ 0.351(g)). These delegations of authority are being deleted, and these matters will hereafter be acted on by the presiding examiner. Section 1.568(c) has been amended to specify a more precise standard for the guidance of examiners in matters involving dismissal without prejudice in broadcast hearing proceedings.

9. Under new section 0.351(f), the Chief Hearing Examiner is authorized to act on those matters ordinarily acted on by the presiding examiner which arise during the period between designa-

tion of a proceeding for hearing and designation of a presiding examiner. In the ordinary hearing case, this period is quite brief, and few (if any) matters requiring action by the Chief Examiner are likely to arise. In cease and desist and/or revocation proceedings, however, the proceeding is designated for hearing upon issuance of the order to show cause, and an extended period may pass before a presiding examiner is designated. The Chief Examiner is responsible for interlocutory matters which arise during this period, including those now acted upon by the Review Board under Section 0.365(b)(8)–(b)(10). After the designation of a presiding examiner, these functions will be performed by the examiner. See new section 1.92(c).

10. Under section 0.365(b)(6) and (7) of the existing rules, the Review Board is authorized to act on petitions for waiver of rule requirements pertaining to the time, place, and manner in which broadcast applicants give local notice of hearing. This delegation has been deleted, and these matters will hereafter be acted upon by the presiding examiner in accordance with the provisions of new section 1.594(h) of the Rules of Practice and Procedure.

11. In addition to the changes in hearing delegations, the new rules change the pleading procedures in several relatively important respects:

(a) Under the new rules, all requests for action on interlocutory matters in hearing proceedings are governed by sections 1.291–1.298 of the Rules of Practice and Procedure. Section 1.45, which previously governed interlocutory petitions acted upon by the Commission, will have no application to such proceedings.

(b) Under existing procedures, interlocutory pleadings requiring action by the Commission or the Review Board are governed by the 10 and 5 rule, under which 10 days are allowed for the filing of oppositions and 5 days are allowed for the filing of replies. Pleadings to be acted upon by the Chief Hearing Examiner or the presiding officer are governed by the 4 day rule, under which oppositions may be filed within 4 days and replies are precluded. Under the new rules, however, the presiding officer will be responsible for acting upon many of the more difficult and important interlocutory pleadings, as well as the numerous matters of lesser consequence for which he is now responsible. This being the case, the nature of the pleading, rather than the forum to which it is presented, is the decisive factor in determining whether the 5 and 10 rule or the 4 day rule should apply. New section 1.294(c) provides that the 10 and 5 rule shall apply to the following categories of pleadings: (1) petitions to amend the issues; (2) petitions to intervene; (3) petitions by adverse parties requesting dismissal of an application; and (4) joint requests for approval of agreements filed pursuant to section 1.525 of the Rules and Regulations. Section 1.294(b) provides that all other categories of pleadings shall be governed by the 4 day rule. The pleadings to which the 10 and 5 rule

is applied are those in which difficult questions are normally raised. Pleadings to which the 4 day rule is applied do not frequently involve difficult questions and, if such questions are involved, the parties are at liberty to request that additional time or additional pleadings be allowed. Difficult questions are not raised with sufficient frequency in such pleadings, however, to warrant the longer filing period (or replies) as a regular practice.

(c) Section 1.291 of the new rules requires that each interlocutory pleading indicate in its caption whether the pleading is to be acted upon by the Commission, the Review Board, the Chief Hearing Examiner, or the presiding officer. In the case of the presiding officer, he is to be identified by name. The new rules greatly simplify the delegations in hearing proceedings and, under these simplified delegations, we feel that such a requirement will not be burdensome to those filing pleadings in such proceedings. Compliance with the requirement, on the other hand, will materially facilitate and expedite the distribution of pleadings to those who are responsible for acting on them.

(d) Section 1.291(d) of the new rules disposes of a possible ambiguity by providing that no hearing proceeding shall be terminated until all pending interlocutory matters have been disposed of.

12. New section 1.301(a) provides for Commission action on appeals from examiners' rulings in proceedings which involve rule making matters exclusively. The remaining changes, as set forth in the Appendix hereto, are discussed generally in paragraph 6, *supra*, or are editorial in nature and follow from the changes in delegations and procedures discussed above.

13. Authority for the procedural and organizational changes set forth in the attached Appendix is set forth in sections 4(i) and (j), 5 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and (j), 155 and 303. Because of the procedural and organizational nature of these changes, the prior notice and effective date provisions of section 4 of the Administrative Procedure Act do not apply. To furnish those who practice before the Commission with an opportunity to familiarize themselves with the new delegations and procedural requirements, however, the new rules are being made effective June 15, 1964, and will be applicable to any initial decision issued and any interlocutory request filed on or after that date. Initial decisions issued and interlocutory requests filed at an earlier date will be considered under existing delegations and procedures.

14. In view of the foregoing, it is ORDERED, effective June 15, 1964, That Parts 0 and 1 of the Rules and Regulations are amended as set forth in the Appendix hereto.

Adopted May 6, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

NOTE: Rules changes herein will be covered by T.S. I(63)-2.

## APPENDIX

1. Section 0.341 is amended to read as follows:

§ 0.341 *Authority of hearing examiner.*

(a) After a hearing examiner has been designated to preside at a hearing and until he has issued an initial decision or certified the record to the Commission for decision, or the proceeding has been transferred to another hearing examiner, all motions, petitions and other pleadings shall be acted upon by such hearing examiner, except the following:

(1) Those which are to be acted upon by the Commission. See § 1.291(a)(1) of this chapter.

(2) Those which are to be acted upon by the Review Board under § 0.365 (b) and (d) of this chapter.

(3) Those which are to be acted upon by the Chief Hearing Examiner under § 0.351 of this chapter.

(b) Any question which would be acted upon by the hearing examiner if it were raised by the parties to the proceeding may be raised and acted upon by the hearing examiner on his own motion.

(c) Any question which would be acted upon by the Chief Hearing Examiner, the Review Board or the Commission, if it were raised by the parties, may be certified by the hearing examiner, on his own motion, to the Chief Hearing Examiner, the Review Board, or the Commission, as the case may be.

2. Section 0.351 is amended to read as follows:

§ 0.351 *Authority delegated.*

The Chief Hearing Examiner shall act on the following matters in proceedings conducted by hearing examiners:

(a) Initial specifications of the time and place of hearings where not otherwise specified by the Commission and excepting actions under authority delegated by § 0.296 of this chapter.

(b) Designation of the hearing examiner to preside at hearings.

(c) Orders directing the parties or their attorneys to appear at a specified time and place before the hearing examiner for an initial pre-hearing conference in accordance with § 1.251(a) of this chapter. (The hearing examiner named to preside at the hearing may order an initial pre-hearing conference although the Chief Hearing Examiner may not have seen fit to do so and may order supplementary pre-hearing conferences in accordance with § 1.251(b) of this chapter.)

(d) Petitions requesting a change in the place of hearing where the hearing is scheduled to begin in the District of Columbia or where the hearing is scheduled to begin at a field location and all appropriate proceedings at that location have not been completed. (See § 1.253 of this chapter.)

(e) In the absence of the hearing examiner who has been designated to preside in a proceeding, to discharge the hearing examiner's functions.

(f) All pleadings filed, or matters which arise, after a preceeding has been designated for hearing, but before an examiner has been designated, which would otherwise be acted upon by the examiner, including all pleadings filed, or matters which arise, in cease and desist and/or revocation proceedings prior to the designation of a presiding officer.

(g) All pleadings (such as motions for extension of time) which are related to matters to be acted upon by the Chief Hearing Examiner.

3. Section 0.361(b) is amended to read as follows:

§ 0.361 *General authority.*

* * * * * * *

(b) Any matter referred to the Board on a regular basis or otherwise may, on its own motion or upon its consideration of the motion of any party, be certified by the Board to the Commission, with a request that the matter be acted upon by the Commission, if in the Board's judgment the matters at issue are of such a nature as to warrant Commission review of any decision which the Board might otherwise have made. If a majority of the members of the Commission then holding office vote to grant the Board's request, the matter shall be acted upon by the Commission.

4. Section 0.365 is amended to read as follows:

§ 0.365 *Authority delegated to the Review Board on a regular basis.*

(a) *Review of initial decisions.* Unless the Commission specifies to the contrary at the time of designation for hearing or otherwise, the Review Board shall review initial decisions of hearing examiners in all adjudicative proceed-

ings (including mixed adjudicative and rule making proceedings), except for proceedings involving the renewal or revocation of a station license in the Broadcast Radio Services or the Common Carrier Radio Services.

(b) *Original action on interlocutory matters.* In adjudicative proceedings conducted by hearing examiners (including mixed adjudicative and rule making proceedings), the Review Board shall take original action on the following interlocutory matters, and upon any question with respect to such matters which is certified to it by the presiding examiner (see §1.291 of this chapter):

(1) Petitions to amend, modify, enlarge, or delete issues upon which the hearing was ordered.

(2) Joint requests for approval of agreements filed pursuant to § 1.525 of this chapter and, if further hearing is not required on issues other than those arising out of the agreement, to terminate the proceeding and make appropriate disposition of all applications. (In considering such requests, the Review Board may in its discretion, hold informal conferences with counsel for parties to the proceeding.)

(c) *Action on interlocutory appeals from rulings of hearing examiners.* The Review Board shall act on interlocutory appeals from rulings of hearing examiners in adjudicative proceedings (including mixed adjudicative and rule making proceedings). See § 1.301 of this chapter.

(d) *Action on pleadings filed in cases or matters which are before the Board.* The Review Board shall act on all pleadings filed in cases or matters which are before the Board.

5. Section 1.92(c) is amended to read as follows:

§ 1.92 *Revocation and/or cease and desist proceedings; after waiver of hearing.*

* * * * * * *

(c) Whenever a hearing is waived by the occurence of any of the events or circumstances listed in paragraph (a) of this section, the Chief Hearing Examiner (or the presiding officer if one has been designated) shall, at the earliest practicable date, issue an order reciting the events or circumstances constituting a waiver of hearing, terminating the hearing proceeding, and certifying the case to the Commission. Such order shall be served upon the respondent.

6. Section 1.207(a) is amended to read as follows:

§ 1.207 *Interlocutory matters, reconsideration and review; cross references.*

(a) Rules governing interlocutory pleadings in hearing proceedings are set forth in §§ 1.291–1.298 of this chapter.

7. Paragraphs (b) and (d) of section 1.223 are amended to read as follows:

§ 1.223 *Petitions to intervene.*

* * * * * * *

(b) Any other person desiring to participate as a party in any hearing may file a petition for leave to intervene not later than 10 days prior to the date of hearing. The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to particular issues or to a particular stage of the proceeding.

* * * * * * *

(d) Any person desiring to file a petition for leave to intervene later than 10 days prior to the date of hearing shall set forth the interest of petitioner in the proceedings, show how such petitioner's participation will assist the Commission in the determination of the issues in question, and set forth reasons why it was not possible to file a petition within the time prescribed by paragraphs (a) and (b) of this section. Such petition shall be accompanied by the affidavit of a person with knowledge of the facts set forth in the petition, and where petitioner claims that a grant of the application would cause objectionable interference under applicable provisions of this chapter, the petition for leave to intervene must be accompanied by the affidavit of a qualified radio engineer showing the extent of such alleged interference according to the methods prescribed in paragraph (a) of this section. If in the opinion of the presiding officer good cause is shown for the delay in filing, he may in his discretion grant such petition or may permit intervention limited to particular issues or to a particular stage of the proceeding.

8. Section 1.291 is amended to read as follows:

§ 1.291 *General provisions.*

(a) (1) The Commission acts on petitions to amend, modify, enlarge or delete the issues in hearing proceedings which involve rule making matters exclusively. It also acts on interlocutory pleadings filed in matters or proceedings which are before the Commission.

(2) The Review Board acts on petitions to amend, modify, enlarge, or delete the issues in cases of adjudication (including mixed adjudicative and rule making proceedings) and upon joint requests for approval of agreements filed pursuant to § 1.525 of this chapter. It also acts on interlocutory pleadings filed in matters on proceedings which are before the Board.

(3) The Chief Hearing Examiner acts on those interlocutory matters listed in § 0.351 of this chapter.

(4) All other interlocutory matters in hearing proceedings are acted on by the presiding officer. See §§ 0.218 and 0.341 of this chapter.

(5) Each interlocutory pleading shall indicate in its caption whether the pleading is to be acted upon by the Commission, the Review Board, the Chief Hearing Examiner, or the presiding officer. If the pleading is to be acted upon by the presiding officer, he shall be identified by name.

(b) All interlocutory pleadings shall be submitted in accordance with the provisions of §§ 1.4, 1.44, 1.47, 1.48, 1.49, and 1.52 of this chapter.

(c) (1) Procedural rules governing interlocutory pleadings are set forth in §§ 1.292–1.298 of this chapter.

(2) Rules governing appeal from, and reconsideration of, interlocutory rulings made by the presiding officer are set forth in §§ 1.301 and 1.303 of this chapter.

(3) Rules governing the review of interlocutory rulings made by the Review Board or the Chief Hearing Examiner are set forth in §§ 1.101, 1.102(b), 1.115, and 1.117 of this chapter. Petitions requesting reconsideration of an interlocutory ruling made by the Commission, the Review Board, or the Chief Hearing Examiner will not be entertained. See, however, § 1.113 of this chapter.

(d) No hearing proceeding shall be terminated until all pending interlocutory matters have been disposed of.

9. Section 1.292 is amended to read as follows:

§ 1.292 *Number of copies.*

(a) An original and 14 copies of each interlocutory pleading to be acted upon by the Review Board, the Chief Hearing Examiner, or the presiding officer shall be filed.

(b) An original and 19 copies of each interlocutory pleading to be acted upon by the Commission shall be filed.

10. Section 1.294 is amended to read as follows:

§ 1.294 *Oppositions and replies.*

(a) Any party to a hearing may file an opposition to an interlocutory request filed in that proceeding.

(b) Except as provided in paragraph (c) of this section, oppositions shall be filed within 4 days after the original pleading is filed, and replies to oppositions will not be entertained. See, however, § 1.732 of this chapter.

(c) Oppositions to pleadings in the following categories shall be filed within 10 days after the pleading is filed. Replies to such oppositions shall be filed within 5 days after the opposition is filed, and shall be limited to matters raised in the opposition.

(1) Petitions to amend, modify, enlarge, or delete the issues upon which the hearing was ordered.

(2) Petitions to intervene.

(3) Petitions by adverse parties requesting dismissal of an application.

(4) Joint requests for approval of agreements filed pursuant to §1.525 of this chapter.

(d) Additional pleadings may be filed only if specifically requested or authorized by the person(s) who is to make the ruling.

11. Section 1.297 is amended to read as follows:

§ 1.297 *Oral argument.*

Oral argument with respect to any contested interlocutory matter will be held when, in the opinion of the person(s) who is to make the ruling, the ends of justice will be best served thereby. Timely notice will be given of the date, time, and place of any such oral argument.

12. Paragraphs (a) and (b) of section 1.298 are amended to read as follows:

§ 1.298 *Rulings; time for action.*

(a) Unless it is found that irreparable injury would thereby be caused one of the parties, or that the public interest requires otherwise, or unless all parties have consented to the contrary, consideration of interlocutory requests will be withheld until the time for filing oppositions (and replies, if replies are allowed) has expired. As a matter of discretion, however, requests for continuances and extensions of time, requests for permission to file pleadings in excess of the length prescribed in this chapter, and requests for temporary relief may be ruled upon ex parte without waiting for the filing of responsive pleadings.

(b) Interlocutory matters will be disposed of by written order, which will be released promptly. The order upon contested matters shall contain a statement of the reasons for the ruling therein, unless such order is self-explanatory or is merely an affirmance of a prior denial in which reasons have been given.

13. Section 1.301(a) is amended to read as follows:

§ 1.301 *Appeal from the presiding officer's adverse ruling: effective date.*

(a) Any party to a hearing proceeding may file an appeal from an adverse ruling of the presiding officer. If a commissioner or panel of commissioners is presiding, the appeal will be acted upon by the Commission. The Commission also acts on appeals from the rulings of a hearing examiner in proceedings which involve rule making matters exclusively. In all other proceedings in which a hearing examiner is presiding, appeals from his rulings will be acted upon by the Review Board.

14. Section 1.568(c) is amended to read as follows:

§ 1.568 *Dismissal of applications.*

* * * * * * *

(c) Requests to dismiss an application without prejudice after it has been designated for hearing will be considered only upon written petition properly served upon all parties of record and, where applicable, compliance with the provisions of § 1.525 of this chapter. Such requests shall be granted only upon a showing that the request is based on circumstances wholly beyond the applicant's control which preclude further prosecution of his application.

15. Section 1.594(h) is added to read as follows:

§ 1.594 *Local notice of designation for hearing.*

* * * * * * *

(h) The failure to comply with the provisions of this section is cause for dismissal of an application with prejudice. However, upon a finding that applicant has complied (or proposes to comply) with the provisions of section 311 (a) (2) of the Communications Act of 1934, as amended, and that the public interest, convenience and necessity will be served thereby, the presiding officer may authorize an applicant, upon a showing of special circumstances, to publish notice in a manner other than that prescribed by this section; may accept publication of notice which does not conform strictly in all respects with the provisions of this section; or may extend the time for publishing notice.

16. Paragraphs (b) and (c) of section 1.744 are amended to read as follows:

§ 1.744 *Amendments.*

(b) After any application is designated for hearing, requests to amend such application may be granted by the presiding officer upon good cause shown by petition, which petition shall be properly served upon all other parties to the proceeding.

(c) The applicant may at any time be ordered to amend his application so as to make it more definite and certain. Such order may be issued upon motion of the Commission (or the presiding officer, if the application has been designated for hearing) or upon petition of any interested person, which petition shall be properly served upon the applicant and, if the application has been designated for hearing, upon all parties to the hearing.

17. Section 1.745 is amended to read as follows:

§ 1.745 *Additional statements.*

The applicant may be required to submit such additional documents and written statements of fact, signed and verified (or affirmed), as in the judgment of the Commission (or the presiding officer, if the application has been designated for hearing) may be necessary. Any additional documents and written statements of fact required in connection with applications under Title II of the Communications Act need not be verified (or affirmed).

18. That portion of Section 1.748(b) preceding subparagraph (1) is amended to read as follows:

§ 1.748 *Dismissal of applications.*

* * * * * * *

(b) *After designation for hearing.* A request to dismiss an application without prejudice after it has been designated for hearing shall be made by petition properly served upon all parties to the hearing and will be granted only for good cause shown. An application may be dismissed with prejudice after it has been designated for hearing when the applicant:

19. Section 1.918(c) is amended to read as follows:

§ 1.918 *Amendment of applications.*

* * * * * * *

(c) The Commission (or the presiding officer, if the application has been designated for hearing) may, upon its own motion or upon motion of any party to a proceeding, order the applicant to amend his application so as to make the same more definite and certain, and may require an applicant to submit such documents and written statements of fact as in its judgment may be necessary.

## STATEMENT OF COMMISSIONER ROBERT E. LEE, DISSENTING IN PART TO THE DELEGATIONS OF AUTHORITY

I concur generally in the adoption of the Report and Order revising delegations of authority in hearing proceedings, but I dissent to the delegation to the Review Board of authority to review initial decisions in all adjudicative proceedings involving mutually exclusive applications for new television stations.

It is my view that in these multiple party proceedings for new TV stations the complexity and closeness of facts in relation to our so-called comparative decisional criteria have not established adequate guide lines for the review Board and that, as a result of the closeness of our decisions in such cases, the Commission is now, in effect, delegating to the Board policy matters for which the Commission has the sole responsibility. If, and when, the necessary criteria, and the weight to be accorded them is established with sufficient definition, the question of delegation to the Review Board in this area could be properly considered.

F.C.C. 64R–274

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>ABACOA RADIO CORP. (WRAI), RIO PIEDRAS (SAN JUAN), P.R. | Docket No. 14977<br>File No. BP–14070 |
| MID-OCEAN BROADCASTING CORP., SAN JUAN, P.R. | Docket No. 14978<br>File No. BP–14994 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER CONCURRING.

1. The Review Board has before it a Petition to add "Suburban" and Legal Qualifications Issues Against Mid-Ocean Broadcasting Corporation, filed by Abacoa Radio Corporation March 16, 1964, and other related pleadings.[1] In order to evaluate this petition, we must bear in mind certain pertinent facts concerning the Mid-Ocean application.

2. Mid-Ocean Broadcasting Corporation filed its application for a standard broadcast station operating on 1190 kc with 10 kw of power, unlimited time, at San Juan, Puerto Rico, July 17, 1961. The corporate stock was held 80 percent by Leslie Towns Hope (Bob Hope), 10 percent by James L. Saphier, and 10 percent by the law firm, Gang, Tyre, Rudin, and Brown. The application indicated that except for the technical engineering exhibits, all of the data submitted with the application was prepared either by or under the direct supervision of James L. Saphier who is President of the Corporation. Exhibit 4 attached to the application, in response to paragraph 22(d) of Section II of the application, is a statement of an oral understanding between Albert L. Capstaff and Bob Hope. That exhibit indicates that Mr. Capstaff had first been aware of the possibility of establishing a station in San Juan and had caused some preliminary engineering work to be done. However, due to his affiliation with NBC, he was unable to go forward with the proposition and had called the matter to Mr. Hope's attention. It was therefore agreed that if the application were granted, Mr. Capstaff might, if he wished, purchase one-half of Mr. Hope's stock for a price equal to one-half of the costs incurred by Mr. Hope. On October 3, 1962, an amendment to the above-described application was filed, which changed the stock ownership to show that Albert L. Capstaff had acquired 1,000

[1] Petition to Add "Suburban" and Legal Qualifications Issues Against Mid-Ocean Broadcasting Corporation, filed 3/16/64 by Abacoa Radio Corporation; Broadcast Bureau's Comments regarding Petition to Enlarge, filed 4/7/64; Opposition to "Petition to Add 'Suburban' and Legal Qualifications Issues Against Mid-Ocean Broadcasting Corporation", filed 4/7/64 by Mid-Ocean; Reply of Abacoa Radio Corporation to Opposition to Add Suburban and Legal Qualifications Issues, filed 4/17/64; and a Request for Consideration of Supplemental Statement, filed by Mid-Ocean Broadcasting Corporation, April 30, 1964.

shares (half of those held by Bob Hope), 40 percent of the stock of the Corporation, for a consideration of a $1,000 promissory note payable if and when the application was granted. The amendment further noted that Mr. Capstaff would become a vice president and director of the corporation and, should the application be granted, would be its general manager. In response to paragraph 22(d) of Section II of the application concerning documents, instruments, contracts or understandings relating to ownership, management, use or control of the station, the applicant answered, "none other than those already on file".

3. Mid-Ocean's application was subsequently designated for comparative hearing with the application of Abacoa Radio Corporation for Rio Piedras (San Juan), Puerto Rico, by Commission order released February 26, 1963. The order set forth a number of issues to be determined, including issues with respect to the areas and populations to be served, an issue concerning the transmitter site of Abacoa Radio, a coverage issue for Abacoa, a 307(b) issue, and a contingent standard comparative issue. The Examiner proceeded to hearing on the technical issues and after virtually all of the evidence on these issues had been submitted, Albert L. Capstaff died. The Examiner directed Mid-Ocean to file within 30 days an appropriate amendment reflecting the then current ownership of the corporation. The amendment was not filed within 30 days as directed but some four months after the date of the Examiner's order. The amendment filed by Mid-Ocean changed the ownership to add the names of Edward E. Roth and Gaynor Brennan, Jr., executors of the estate of Albert L. Capstaff, deceased, as owners of the 1,000 shares formerly held by Capstaff. In the explanatory memorandum, Mid-Ocean stated that the purpose of the amendment was to substitute the estate of Mr. Capstaff as owner of the 40 percent of stock which he had held and to indicate that Martin Gang had been re-elected as Vice President and Director of the Corporation. The pertinent information concerning the executors was also submitted. Mid-Ocean further stated:

> It has been and continues to be the position of the other stockholders of Mid-Ocean Broadcasting Corporation that Mr. Capstaff's acquisition of 40% of the stock of the corporation was in consideration of his undertaking and performing duties as general manager of Mid-Ocean's proposed station. Since Mr. Capstaff will be unable to undertake or perform these duties, it was, and is, the position of the other stockholders that his Estate is not properly entitled to as much as 40% of the stock of the corporation if, in fact, it is entitled to any of that stock.

4. Abacoa opposed the amendment, arguing that since there was a disagreement among the majority stockholders of Mid-Ocean and the executors of Capstaff's estate as to whether or not the estate was in fact entitled to ownership of the stock, that the amendment did not reflect with sufficient certainty the ultimate ownership of the corporation. The Broadcast Bureau also opposed the amendment, arguing that internal bickering among the corporation owners was not sufficient justification for the prolonged delay in filing the amendment. After considering the pleadings on this subject, Hearing Examiner Walter Guenther in a Memorandum Opinion and Order released March 6, 1964 (FCC 64M–

191) held that the legal title to the stock in question is vested in the executors of the estate, and that under such circumstances the proffered amendment did no more than to apprise the Commission of an involuntary transfer of control.

5. Abacoa did not appeal the Examiner's ruling with respect to the proffered amendment. Instead, it filed the instant petition to add the three issues which follow:

To determine whether Mid-Ocean Broadcasting Corporation is legally qualified to construct and operate the station it proposes.

To determine whether Mid-Ocean Broadcasting Corporation has made a full and complete disclosure in its application and amendments of all arrangements and circumstances involving ownership, operation, or control of its proposed station.

To determine whether the programming proposals of Mid-Ocean Broadcasting Corporation are designed to and would be expected to serve the needs and tastes of its proposed area.

6. Abacoa argues that the amended application presents a most unusual factual situation with the majority stockholders admitting that there is a conflict over the ownership and distribution of the corporate stock, and that until that conflict is resolved and the Capstaff estate settled, it will be impossible to determine the actual stock ownership of the corporation. Because of this uncertainty, the Commission's earlier finding of legal qualifications of the corporation must be set aside and an issue added to determine the legal qualifications of the corporation. Mid-Ocean argues that this petition is in fact a late-filed application for review of the Hearing Examiner's ruling accepting the amendment, that it is procedurally improper, factually inaccurate, and without substance. The Bureau also urges that the request for a legal qualifications issue at this time in this proceeding is inappropriate.

7. The Board must agree with the Bureau and the respondent in these circumstances. It is clear that the executors of Capstaff's estate have legally succeeded to Mr. Capstaff's interest in 40% of the stock of the corporation. Moreover, Abacoa has not challenged the legal qualifications of either of the executors to hold stock in a licensee corporation nor has it challenged the fact that the stock in question is legally held by such executors. Rather it has chosen to rely on the element of uncertainty which is introduced by the dispute over the ownership of the stock. In our present society it is impossible to know the ownership of any commercial corporate entity in futuro. Stocks are bought and sold and the composition of corporations inevitably changes. In those circumstances where the corporation is a licensee of this Commission and a change in control is involved, Commission consent must be obtained in advance. However, there is no question as of now as to the ownership of the stock in question.[2] Accordingly, the issues with respect to legal qualifications will not be added.

8. In support of the second issue requested, Abacoa urges that the original agreement between Hope and Capstaff recited as consideration for Capstaff's acquisition of 40% of the stock, a sum equal to one-half of the cost to Hope. Moreover, it notes that in

[2] Even the majority stockholders in Mid-Ocean agree that Capstaff's estate is the legal owner of the stock in question. They urge, however, that because of equitable considerations, some or all of the stock should be returned to the corporation for re-issue to a new general manager.

the actual amendment reporting Capstaff's acquisition, the consideration was stated to be a $1,000 promissory note payable at the time of the grant. Abacoa further points out that when Mid-Ocean submitted its amendment to substitute Capstaff's estate for Capstaff, the Corporation stated that the consideration for the 1,000 shares of stock was something more than the $1,000 note; that is, an agreement of Capstaff to perform future services as general manager of the station; and that since, because of his untimely death, he was unable to perform such services, questions were raised as to how much, if any, of the stock should properly be retained by the estate. This latter information, Abacoa argues, is a part of the agreement which Mid-Ocean failed to disclose at the time it filed its original application and at the time it amended to show Capstaff's acqusition. Moreover, Abacoa states that on all of the documents field with the Commission, Norman Tyre is listed as Secretary-Treasurer of Mid-Ocean but that in the domestic corporation reports filed with the Puerto Rican Government Joan Crawford Wolfe is listed as Secretary and Director of the Corporation. Accordingly, an issue to determine whether Mid-Ocean had disclosed all of the arrangements and circumstances involving ownership, operation and control of its proposed station is requested.

9. Mid-Ocean argues that all of the facts of Mid-Ocean's agreement with Capstaff were set forth in the application and the amendments to that application. Mid-Ocean concedes that on the basis of these agreements it may be in a weak position for any legal claim to the estate's 40% stock ownership, but that it is not precluded from urging on the executors of the estate that in the interest of fairness and equity, the arrangement should be modified. With respect to the discrepancy concerning officers, Mr. Tyre submitted an affidavit stating that Miss Wolfe was elected Secretary as a matter of convenience and that he overlooked the necessity to report the change to the Commission; that she has now resigned and he is Secretary of the Corporation. The Bureau supports Abacoa's position with respect to this issue, pointing out that if in fact one of the considerations for the stock was service as general manager, then Mid-Ocean did neglect to fully disclose its arrangements with respect to ownership, management and control of its proposed station.

10. The facts before us raise some questions as to the accuracy of Mid-Ocean's original response to paragraph 22(d) of Section II of the application form. However, we fail to perceive any motive whatsoever for withholding any of the terms of the agreement between Hope and Capstaff from the Commission. In the absence of some such motive, we can accept Mid-Ocean's statement that all of the terms of the oral agreement were in fact set forth in Exhibit 4 attached to the application filed July 17, 1961. While we do not condone negligence on the part of applicants or licensees, we see nothing to be gained by inquiring further into Mid-Ocean's failure to amend its application to reflect the change in its officers and directors. The information now on file accurately reflects the present corporate structure. The issue concerning disclosure will, therefore, not be added to this proceeding.

11. With respect to the "Suburban issue," Abacoa argues that since Capstaff from the beginning planned to participate as general manager, he must have been largely responsible for Mid-Ocean's programming proposal, and that with his death the entire proposal is placed in question. Moreover, it points out that all of the present owners of Mid-Ocean live on the mainland of the United States; that "most" of the proposed programming is in English, and that there is a serious question that English language programming would be appropriate for largely Spanish speaking San Juan and its environs. Abacoa urges that its petition with respect to this matter is timely filed since it could not know what the circumstances were until Mid-Ocean filed its amendment. With respect to this latter point, we note that the programming proposal has not been modified in any respect since the day the original application was filed. Abacoa's position that it was unable to properly evaluate the situation until after Mid-Ocean's most recent amendment was filed is untenable.[3] Moreover, the Commission had the programming proposal before it at the time the applications were designated for hearing and did not find it appropriate to add the issue here sought. The petitioner's argument that the program proposal is the product of Capstaff and that in his absence may not be effectuated must fall on two grounds. First, it is clear from the record that Saphier, President of Mid-Ocean, prepared the original program proposal and there is nothing to indicate that Capstaff had anything whatsoever to do with it. Second, even if Mid-Ocean were relying on Capstaff as general manager to effectuate its program proposal, that is appropriate for consideration under the standard comparative issues rather than having any bearing whatsoever on the need for a suburban issue. Therefore this issue will not be added.

12. The "Request for Consideration of Supplemental Statement" filed by Mid-Ocean seeks to have the Board consider a certain affidavit concerning the relationship between the late Albert L. Capstaff and Mid-Ocean Broadcasting Corporation. Mid-Ocean has failed to show why this information could not have been included with its opposition to the petition. The Request will therefore be denied and the Supplemental Statement submitted therewith disregarded.

Accordingly, IT IS ORDERED, This 13th day of May, 1964, That the Request for Consideration of Supplemental Statement, filed April 30, 1964, by Mid-Ocean Broadcasting Corporation, IS HEREBY DENIED; and

IT IS FURTHER ORDERED, That the Petition to Add "Suburban" and Legal Qualifications Issues Against Mid-Ocean Broadcasting Corporation, filed March 16, 1964, by Abacoa Radio Corporation, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[3] Section 1.229(b) of the Commission's Rules states: "Such motions must be filed with the Commission not later than 15 days after the issues in the hearing have first been published in the Federal Register. Any person desiring to file a motion to enlarge, change, or delete the issues after the expiration of such 15 days must set forth the reason why it was not possible to file the petition within the prescribed 15 days. Unless good cause is shown for delay in filing, the motion will not be granted.

F.C.C. 64–458

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| KTIV TELEVISION CO. (KTIV), SIOUX CITY, IOWA | Docket No. 15374 |
| For Construction Permit To Make Changes in the Facilities of Television Broadcast Station KTIV | File No. BPCT–3127 |
| PEOPLES BROADCASTING CORP. (KVTV), SIOUX CITY, IOWA | Docket No. 15375 |
| For Construction Permit To Make Changes in the Facilities of Television Broadcast Station KVTV | File No. BPCT–3128 |
| CENTRAL BROADCASTING CO. (WHO–TV) DES MOINES, IOWA | Docket No. 15376 |
| For Construction Permit To Make Changes in the Facilities of Television Broadcast Station WHO–TV | File No. BPCT–3138 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) a joint petition for clarification, revision, and enlargement of issues filed by KTIV Television Company and Peoples Broadcasting Corporation, licensees of television stations KTIV and KVTV respectively, Sioux City, Iowa; (b) a statement in support of the joint petition filed by Central Broadcasting Company, licensee of television station WHO–TV, Des Moines, Iowa; (c) a response to the joint petition filed by the Broadcast Bureau, and (d) and oppositions filed by Northwest Television Company, licensee of UHF television station KQTV, Fort Dodge, Iowa, a party to this proceeding.

2. By Memorandum Opinion and Order (FCC 64–212), released March 16, 1964, the Commission designated the above-captioned applications for hearing in a consolidated proceeding. KTIV (Channel 4) seeks authority to change its transmitter site from its present location 8 miles north of Sioux City to a site 11 miles northeast of Sioux City, 7 miles in the direction of Fort Dodge, Iowa, where it proposes to share a common tower with station KVTV. The proposal also contemplates a change of antenna height above average terrain from the present 770 feet to 1915 feet. No change in effective radiated power is involved. The KVTV (Channel 9) proposal involves a change of site from 41st and Howard Streets, in Sioux City, an increase of antenna height above average terrain from 720 feet to 2025 feet, and an increase

of visual effective radiated power from 288 kilowatts to 310 kilowatts. WHO–TV (Channel 13) seeks authority to change the site of its transmitter from its present location one mile south of Mitchellville, Iowa, to a site 2 miles northwest of Polk City, Iowa (15.5 miles north northwest of Des Moines, Iowa), a move of 22 miles toward Fort Dodge, Iowa. The proposal also contemplates an increase of antenna height above average terrain from 780 feet to 1545 feet. No change in effective radiated power is proposed.

3. As a result of a petition to deny filed by KQTV, Channel 21, Fort Dodge, Iowa, the only UHF station in Iowa and the only television station in Fort Dodge, objecting to further encroachment by the above applicants into the area presently served by KQTV due to the economic injury it would suffer, coupled with our concern with the plight of UHF stations in a VHF dominated area, we ordered a hearing to be held on the following issues:

1. To determine the areas and populations which may be expected to gain or lose television service in the event of a grant of the above-captioned applications, or any of them, and the availability of other television service to such areas and populations.

2. To determine whether a grant of the above-captioned applications, or any of them, would impair the ability of Television Broadcast Station KQTV to compete effectively, or would jeopardize, in whole or in part, the continuation of its existing service.

3. To determine, if Issue 2, above, is resolved in the affirmative, the areas and populations, if any, which may be expected to lose television service and the availability of other television service to such areas and populations.

4. To determine, in the light of the evidence adduced pursuant to Issues 1, 2, and 3, above, whether a grant of the above-captioned applications, or any of them would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations.

5. To determine, in the light of the evidence adduced pursuant to Issues 1, 2, and 3, above, whether a grant of the above-captioned applications, or any of them, would be consistent with the objective of providing at least one television service to all parts of the United States and each community with at least one television broadcast service.

6. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the above-captioned applications of KTIV Television Company, Peoples Broadcasting Corporation and Central Broadcasting Company, or any of them, would serve the public interest, convenience and necessity.

KQTV was made a party to this hearing and was ordered to carry the burden of proceeding with the introduction of evidence and the burden of proof with respect to issues 2 and 3.

*Request for Clarification and Revision*

4. KTIV and KVTV, supported by WHO–TV, request that

issues 2 and 4 be clarified to read as follows:

> 2. To determine what would be the impact upon UHF television broadcasting in the Fort Dodge area, if any or all of the above-captioned applications are granted.
>
> 4. To determine, in light of (a) the evidence adduced pursuant to Issues 1, 2 and 3 above, and (b) the need for the television service to be gained as a result of a grant of any of the captioned applications in relation to the need for the television service which may be lost, whether a grant of the above-captioned applications, or any of them, would be consistent with the public interest.

5. In support of their request, petitioners allege that casting issues 2 and 4 in terms as vague as "compete effectively", "jeopardize", and "effective competition" not only will lead to extensive and needless argument as to the meaning of these issues, but is contrary to the applicable rule of law on the subject found in *Sanders Brothers* as interpreted in the *Carroll Case*.[1] These decisions, petitioners assert, say nothing about "effective" competition and give the Commission no authority to deny applications in order to perpetuate "effective competition." Petitioners argue that the Commission is required to permit an existing licensee an opportunity to prove that the grant of a pending application will adversely affect the complaining station's service to its audience, with the result that the public interest, not the private interest, of the complainant will suffer. They stress, however, that injury to the public interest is the only legal basis upon which a denial can be predicated.

6. Additionally, petitioners aver that since their stations and KQTV, Fort Dodge, are more than 100 miles apart, and since petitioners have represented that they will not sell local advertising in the KQTV area, an inquiry into the matter of "competition" is irrelevant, and the revision of issues 2 and 4 as requested will permit evidence concerning the possible demise of KQTV, without involving the hearing in opinions as to the meaning or legal propriety of "effective competition". Petitioners further argue that this proceeding, involving Fort Dodge and Sioux City, more than 100 miles apart, resembles the factual situation in *WHAS, Inc.*, 21 Pike and Fischer, R.R. 929, involving Lexington and Louisville, approximately 70 miles apart, wherein an issue in substance similar to requested revised issue 2 was designated. Implicit in the *WHAS* issue, petitioners urge, was the recognition that Louisville and Lexington are separate television markets, as in fact Fort Dodge and Sioux City are separate. According to petitioners, the requested changes will make this proceeding consistent with our action in the *WHAS* case.

7. In answer to petitioners' arguments just outlined, we hold that the use of the words "effective competition" neither substitutes a new standard of private interest in lieu of the public interest standard, nor departs from issues designated in other proceedings. See *Triangle Publications, Inc.* v. *Federal Communications*

[1] *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *Carroll Broadcasting Company* v. *Federal Communications Commission*, 258 F. 2d 440 (1958).

*Commission,* 291 F. 2d 342, 21 Pike and Fischer, R.R. 2039 (1961), where the United States Court of Appeals affirmed the Commission in a case involving issues in substance identical to those which we have here designated as issues 2 and 4. The Court there stated, at page 2042:

> ... while private interests are not the standard by which to judge the matter, nevertheless where the public interest would be adversely affected by injury to private interests, then the Commission is entitled to consider whether the injury attributable to the new competition would adversely affect the public interest. It found such injury likely to occur in this instance because of the probable adverse effect upon existing UHF stations in the Springfield area whose services were of genuine value to the community, the curtailment of which would be a significant loss.

Thus it is clear that the Commission is empowered to inquire into all of the facts which bear upon the possible injury, not only the demise, of its licensees.

8. Petitioners' contention that the 100 miles distance between Fort Dodge and Sioux City obviates the need for any inquiry since there will be no "direct competition" is likewise an oversimplification of the problem. A grant of the Sioux City applications will result in the penetration for the first time of KQTV's service area by the signals of KTIV and KVTV, and the grant of the WHO–TV application will result in a greatly increased penetration of KQTV's service area; therefore, the Commission is duty-bound to inquire as to what effects such grants would have upon the operation of KQTV, irrespective of whether those effects are direct or indirect, to insure that the public interest will be best served by any action the Commission may take. See *Carter Mountain Transmission Corp.* v. *Federal Communications Commission,* 321 F. 2d 359 (D.C. Cir. 1963). In our Order of Designation, we stated at paragraph 8, that "We do not propose to provide a 'protected contour area' for KQTV, but rather we are interested in the effect on the public interest of the possible demise of KQTV in the event of a grant of any or all of these applications." Explicit in this language is the fact that the term "effective competition" was intended as no more than a guide-line for use in evaluating the possible injury to the public interest, the public interest being the ultimate standard and the ultimate issue to be determined (issue 6) in this proceeding. In this light, "effective competition" is neither uncertain nor vague.

9. In addition, as noted in paragraph 3, *supra,* KQTV was ordered to carry the burden of proof with respect to issues 2 and 3. Issue 4 is a conclusionary issue based on the evidence introduced under Issues 1, 2, and 3. In light of this, the Commission again must conclude that these issues are neither vague nor uncertain since the real party affected by issues 2 and 4, i.e. KQTV has sought neither clarification nor revision and, more importantly, since petitioners have in no way established in what regard their proposed "impact issues" are more definite or specific than those presently framed. For these reasons, we will deny the requested clarification and revision of issues 2 and 4.

10. Petitioners also request "limited" clarification of issue 5 as follows:

To determine in light of the evidence adduced pursuant to Issues 1, 2, and 3, above, whether a grant of the above-captioned applications, or any of them, would be consistent with Priority No. 1; "To provide at least one television service to all parts of the United States" and Priority No. 2; "To provide each community with at least one television broadcast station."

Petitioners state that the issue as designated (see paragraph 3, *supra*) lumps two of the priorities found in our Sixth Report and Order into what is described as an "objective" in the singular and that their requested revision will separate these priorities, making them consistent with their wording as found in the Report. In our view, the issue as designated is completely clear and no compelling reason or justification for its change has been advanced by petitioners. Therefore, we deny this request for clarification of issue 5. We do, however, on our own motion and to be consistent with the wording of Priority No. 2, change the last word of issue 5 from "service" to "station."

*Request for Enlargement of Issues*

11. Petitioners request that the following issue be added to the proceeding:

To determine all of the facts and circumstances which led to the proposals of KTIV and KVTV for a joint transmitter site and to seek to improve the facilities of their existing television stations.

Under this issue, petitioners assert that they desire to present evidence concerning their efforts to locate a site suitable to both broadcasting and aviation interests, and revealing the difficulties they encountered in this matter over the six-year period since their efforts began. Also, they wish to demonstrate certain public interest elements which motivated their applications, such as their desire to serve white and grey areas and to serve better the Sioux City retail trading area. WHO–TV supports this request, asking that the proposed additional issue be modified to include a determination with respect to it as well.

12. The background matters upon which petitioners desire to submit evidence, especially the long history of their problems in locating a site for their super-height tower, are irrelevant to a determination of this proceeding. The Commission is only concerned with the effect of a grant of these applications, not the reasons predicating their filing. The only real public interest factor presented in this pleading, i.e. the white and grey areas to be served by the Sioux City proposals, is specifically covered by issue 1 and will permit petitioners to make whatever showing they may desire in this regard. In connection with WHO–TV's request that it also be included in the issue, the additional fact is present that its request was not timely filed under Section 1.229 of our Rules and no showing of good cause for the delay was made. For these reasons, the request for an additional issue is denied.

Accordingly, IT IS ORDERED, This 20th day of May, 1964, That the joint petition for clarification, revision, and enlargement of issues filed by KTIV Television Company and Peoples Broadcasting Corporation IS DENIED in its entirety; that issue

5 IS MODIFIED to the extent indicated above; and that the request for an additional issue made by WHO–TV IS ALSO DENIED.

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

F.C.C. 64–462

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of WGRY, INC. (ASSIGNOR) and NORTHWESTERN INDIANA BROADCASTING CORP. (ASSIGNEE) For Consent to the Voluntary Assignment of License and Construction Permit of Station WGRY, Gary, Ind. | File No. BAPL–310 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HENRY, CHAIRMAN; AND COX DISSENTING.

1. The Commission has before it for consideration (a) the above-captioned application; (b) a joint petition to deny the above-captioned application filed on January 3, 1964, by Lake Broadcasting Company, Inc., as licensee of Station WWCA, Gary, Indiana, and La Porte County Broadcasting Company, Inc., as licensee of Station WLOI and permittee of Station WLOI–FM, La Porte, Indiana; (c) oppositions to the petition to deny, filed on January 23, 1964 by Northwestern Indiana Corporation, the proposed assignee and WGRY, Inc., the assignor; (d) a reply to the oppositions, filed on January 30, 1964, by the petitioners; (e) a motion for leave to file a supplemental pleading filed on February 11, 1964 by Northwestern Indiana Broadcasting Corporation, the proposed assignee; (f) a supplemental pleading filed on February 11, 1964 by the proposed assignee; and (g) a statement in response to the supplemental pleading filed on February 20, 1964 by the petitioners.

2. Petitioners claim standing under Section 309(d) of the Communications Act to file a petition to deny based on the following: Station WWCA and Station WGRY compete directly in Gary and other portions of Lake and Porter Counties, Indiana and when the construction permit for an increase of power from 500 watts to 1000 watts is activated by Station WGRY it will cover more of northwestern Indiana than does WWCA; such construction will extend WGRY's coverage into La Porte County, Indiana which is served by Stations WLOI and WLOI–FM and therefore will result in WGRY and WLOI(AM & FM) being in direct competition for listening audience and advertising revenues; the present licensee of WGRY has not activated the construction permit and the proposed assignee will construct; the proposed assignee is the wholly owned subsidiary of the Gary Printing and Publishing Company,

owner and publisher of the only daily newspaper of general circulation in Gary and thus will enjoy a much better competitive position vis-a-vis WWCA and WLOI than does the present licensee of WGRY; the proposed assignee has greater financial resources than the assignor; the "specialty station" policy of WGRY will be discontinued by the proposed assignee and it will therefore compete more directly with WWCA for a general audience.

3. In order to have standing to petition to deny an application under Section 309(d) of the Communications Act, petitioners must establish that they are parties in interest within the meaning of Section 309(d)(1) thereof. From an economic standpoint, a "party in interest" is one reasonably certain to incur a substantial injury specifically as a result of the potential Commission action to which objection is made. *F.C.C.* v. *Sanders Brothers*, 309 U.S. 470 (1940), *National Broadcasting Company (KOA)* v. *F.C.C.*, 132 F.2d 545 (D.C. Cir. 1942), aff'd 319 U.S. 239 (1943), *James Robert Meachem*, 12 R.R. 1427 (1955). The statutory language found in said section 309(d)(1) requires that the petition to deny "contain specific allegations of fact sufficient to show that the petitioner is a party in interest," and that "such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof."

4. In the subject petition, both the allegations made in an attempt to show standing and the substantive allegations are supported by an affidavit of the president of the petitioner corporations "to the best of [his] knowledge and belief," rather than based on his "personal knowledge thereof." The Commission has previously concluded that an affidavit by an officer of the petitioner, stating that the facts alleged are, to his knowledge or belief, true, does not meet the requirements of Section 309(d)(1) that allegations of fact other than those of which official notice may be taken be supported by an "affidavit of a person or persons with personal knowledge thereof." *NTA Television Broadcasting Corp.*, 22 RR 273 (1962).[1]

5. However, despite the wording of the affidavit, we find that Lake Broadcasting Company, Inc., licensee of Station WWCA, Gary, Indiana, has standing. The specific allegations of WWCA's direct competition with Station WGRY, and the newspaper ownership of the proposed assignee enabling it to enjoy a better competitive position vis-a-vis WWCA than does the present licensee of WGRY, are sufficient to support a finding that Lake Broadcasting Company is a "party in interest", and since we may take official notice of these factors, no affidavit of personal knowledge is necessary. However, we find that La Porte County Broadcasting Company, Inc., licensee of Station WLOI and permittee of Station WLOI–FM, La Porte, Indiana, has not made a sufficient showing under said Section 309(d)(1) to establish standing inasmuch as its petition is not supported by an "affidavit of a person with personal knowledge thereof."

[1] See also *In re Miami Broadcasting Corp.*, 1 RR 2d 48 (1963). *Lippmann* v. *Hydro-Space Technology, Inc.*, 77 N.J. Super 497, 187 A.2d 81 (1962).

6. Substantively, the petitioners raise the following issues: a grant of the instant application would result in an undue concentration of mass media; the applicants have "carefully avoided" any representations as to joint rates, staffing and policies of its newspaper and Station WGRY; the applicants have made questionable representations in their application manifesting a lack of candor; and, it is doubtful that the applicants have taken the necessary steps to ascertain the programming needs of the community and to formulate the proposed program schedule.

7. The language of Section 309(d)(1) also requires that substantive allegations of fact in a petition to deny, other than those of which official notice may be taken, must be supported by an "affidavit of a person or persons with personal knowledge thereof." Therefore, except for the issue of concentration of mass media, the facts supporting which we may take official notice of, all of the substantive issues have been raised by the petitioners in a manner which does not comply with the specific requirements of the statute. However, despite the procedural defects, we have given full consideration to the pleadings of all parties.

8. The charge that a grant of the instant application would result in an undue concentration of mass media is based on the fact that the parent company of the proposed assignee is the owner and publisher of the Gary Post-Tribune, the only daily newspaper of general circulation in Gary, Indiana. However, both the assignment application and the opposition pleadings clearly demonstrate that there is an abundance of radio, television and newspaper service available in the Gary area as a result of its close proximity to the city of Chicago. The combined circulation of the other major newspapers circulated in the Gary area exceeds that of the assignee's newspaper by 37,000 daily and by 63,000 on Sundays. Furthermore, Gary is served by an additional local fulltime AM station, the petitioning WWCA.

9. The Commission in the Miami, Oklahoma case did designate for hearing an application to assign the license of the only AM station in Miami to a company which owned the only daily newspaper published in Miami, *In re Miami Broadcasting Company,* 1 RR 2d 43 (1963). A grant of that assignment application would have concentrated in the hands of one group all of the local media of mass communication. The instant case, however, is distinguishable from the Miami case in that there is an additional AM station in Gary, Indiana and Gary's proximity to Chicago enables its population to receive the Chicago radio and television stations as well as the Chicago newspapers.

10. The Commission has no specific rule concerning ownership of stations by newspapers. Our touchstone in each case is, of course, the public interest. We believe that the facts made available to the Commission do not raise a substantial question as to whether a grant of the present application would create a communications monopoly inconsistent with the public interest.

11. With respect to the second issue, that the proposed assignee "carefully avoided" any representations as to joint rates, staffing and policies of its newspaper and Station WGRY, petitioners are

evidently unaware of an amendment to the instant application filed on December 20, 1963, in which the applicant stated that all rates for WGRY will be completely separate and independent from any and all advertising rates pertaining to the newspaper. The proposed assignee also states that separate staffing is assured by the existing labor contract between the Newspaper Guild and the Gary Printing and Publishing Company, and that their policy is aimed at full editorial autonomy of each of their communication conduits. We must conclude that the petitioners have failed to allege any facts which raise a substantial and material question regarding these issues.

12. The third issue raised is that applicants have made several questionable representations in their application manifesting a lack of candor. We have carefully considered these contentions and must conclude that they neither demonstrate any lack of candor nor raise any questions as to the character qualifications of the proposed licensee.

13. Petitioners then assert that a hearing is needed to determine what steps were taken by the proposed assignee in ascertaining the programming needs of the community and in formulating the proposed program schedule. In particular, they charge that the assignee has scheduled daily educational programs without being assured of the feasibility of their production by the institutions involved. It must be noted that this charge is not supported by an affidavit of personal knowledge. The proposed assignee states that comparable programming had been arranged by the assignor in the past, that administrators of the institutions involved have indicated deep interest in the proposals, and that it "intends to extend all possible cooperation towards achieving such a program series . . ." Petitioners also question the basis for the assignee's decision to reduce specialty ethnic and foreign language programming from fourteen hours to one hour per week. Such programming had already been greatly curtailed by the present licensee, and the decision to reduce it further was initially based on assignee's discussions with the assignor, an audience survey of the Gary area conducted by the assignee in connection with an application filed for an FM construction permit in Valparaiso, Indiana (BPH–4410 filed September 16, 1963), the experience of assignee's Secretary-Treasurer and Director as Chairman of the Gary Chamber of Commerce Human Relations Committee and the Community Welfare Council, and the conclusion of the assignee that the overall public interest no longer is served by large quantities of such programming.[2] Subsequent to filing of the pleadings in this case the assignee conducted an additional programming survey in Gary consisting of interviews with individuals knowledgeable in various phases of community life as well as with members of the "public at large". While slight adjustments in the proposed programming schedule have been made in accordance with the results of this survey, they substantially support the original judgment of the assignee.

[2] In addition all of the principals of the proposed assignee have been residents of Gary, Indiana associated with its local newspaper for several years, and are active in the civic, religious, social, and charitable groups of WGRY's service area.

14. Concerning the proposed programming format of the assignee, we must answer petitioner's complaint by restating our belief that no fixed and inflexible format exists to be used by each and every station. This is an area in which the judgment of the licensee or proposed assignee is to be exercised in good faith. *In re ABW Broadcasters, Inc.*, 1 RR 2d 65 (1963). From the information before us, we conclude that the assignee has met its burden of ascertaining the needs of Gary and adjacent areas.

15. Accordingly, IT IS ORDERED, that the joint petition of Lake Broadcasting Company, Inc., and La Porte County Broadcasting Company, Inc., to deny the assignment of license of Station WGRY, Gary, Indiana, IS DENIED and the above-captioned application IS GRANTED.

Adopted May 20, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R-294

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| SOUTHERN RADIO AND TELEVISION CO., LEHIGH ACRES, FLA. | Docket No. 14909<br>File No. BP-14297 |
| ROBERT HECKSHER (WMYR), FORT MYERS, FLA. | Docket No. 14910<br>File No. BP-14378 |
| For Construction Permit | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Broadcast Bureau requests addition of the following issues as to Southern Radio and Television Co.:[1]

To determine whether the principals of Southern Radio and Television Co. have made misrepresentations of fact or failed to reveal information called for in the application (BP-14297) for Lehigh Acres, Florida.

To determine whether Southern Radio and Television Co. is financially qualified to construct and operate the proposed facility at Lehigh Acres, Florida.

To determine, in the light of the findings pursuant to Issue No. 1, whether Southern Radio and Television Co. possesses the requisite qualifications to be a licensee of broadcast facilities.

2. In an Initial Decision (FCC 63D-131), released November 13, 1963, the Hearing Examiner recommended a grant of both of the applications included herein. Partial exceptions have been filed by all of the parties, but no request was made for oral argument, and the entire matter including the instant petition is now before the Review Board for decision.

3. The Bureau's request for a misrepresentation issue is based upon Southern's failure to list on its application form certain alleged affiliated companies. Southern concedes that one of the companies should have been listed, but maintains that there was no necessity for listing the others. The opposing contentions of the parties can best be resolved on the basis of an evidentiary record, and a misrepresentation and character qualifications issue will therefore be added.

4. The contentions of the parties concerning the Bureau's request for a financial qualification issue need not be resolved inasmuch as such an issue is being added on the Review Board's own motion for the reasons set forth, *infra.*

5. The facts set out in the pleadings before the Review Board give rise to several problems which require exploration at the

[1] The Review Board has before it for consideration the following pleadings: Broadcast Bureau Motion to reopen record and for enlargement of issues, filed January 10, 1964; Opposition, filed February 3, 1964, by Southern Radio and Television Co.; and Reply by petitioner, filed February 13, 1964.

hearing, and several issues are therefore being added on the Board's own motion. It appears that Southern was relying upon Lee County Land and Title Co. to supply it with "up to 10 acres of land for use in the construction of the aforesaid station." Apparently Lee County Land and Title Co. has now become part of a joint venture, and its assets "with certain exceptions" have been transferred to the joint venture. As a consequence, it cannot now be determined whether the original site proposed continues to be available to the applicant, and, if so, whether it will receive it by way of gift or by purchase. The addition of a site availability issue is, therefore, indicated. Moreover, since there is now the prospect that Southern may be required to purchase a site, a financial qualification issue is called for since Southern has available to it only $11,900 over and above construction and operating costs to purchase the required eight acres. On the basis of the record before us, it cannot be said that this sum is sufficient.

6. In its application, Southern stated that $175,000 out of the $176,000 available to it for financing its station would be obtained by way of a loan from Lee County Land and Title Co. The principals of Southern owned 96% of the stock of Lee County Land and Title Co. As indicated above, Lee County Land and Title Co. has now apparently become a part of a joint venture, which has assumed Lee County Land and Title Co.'s commitment to make the $175,000 loan. No information has been supplied as to the principals of this joint venture. Under these circumstances, the addition of a real party in interest issue is in order. See *Massillon Broadcasting Co., Inc.*, FCC 61–1164, 22 RR 218; *Publix Television Corp.*, FCC 59–643, 18 RR 762.

7. A procedural matter remains, namely, Southern's contention that the Bureau did not have good cause for the late filing of its petition. Inasmuch as on the basis of the facts presented, the Board would in any event have added the Bureau's proposed issues on its own motion, no practical purpose is served by resolving Southern's contentions concerning lateness.

ACCORDINGLY, IT IS ORDERED, This 26th day of May, 1964, That the Broadcast Bureau's Motion to reopen record and for enlargement of issues, filed January 10, 1964, IS GRANTED; and

IT IS FURTHER ORDERED, That the proceeding IS REMANDED to the Hearing Examiner for the preparation of a Supplemental Initial Decision on the following issues:

1. To determine whether the principals of Southern Radio and Television Co. have made misrepresentations of fact or failed to reveal information called for in the application (BP–14297) for Lehigh Acres, Florida.

2. To determine, in the light of the findings pursuant to Issue No. 1, whether Southern Radio and Television Co. possesses the requisite qualifications to be a licensee of broadcast facilities.

3. To determine whether there is reasonable assurance of availability of the transmitter and studio site proposed in the Southern Radio and Television Co. application.

4. To determine whether Southern Radio and Television Co. is financially qualified to construct and operate the proposed facility at Lehigh Acres, Florida.

5. To determine the real parties in interest in the above-captioned application (BP–14297) for Lehigh Acres, Florida.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–485

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of: LEE ROY MCCOURRY, TRADING AS NEW HORIZON STUDIOS, EUGENE, OREG. For Construction Permit for New Television Broadcast Station | Docket No. 15493 File No. BPCT–3126 |

ORDER

BY THE COMMISSION: COMMISSIONER LEE DISSENTING; COMMISSIONER FORD CONCURRING AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER HYDE CONCURS.

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 2nd day of June, 1964;

The Commission, having under consideration the above-captioned application requesting a construction permit for a new television broadcast station to operate on Channel 26, Eugene, Oregon; and

IT APPEARING, That, by letter dated October 11, 1963, the Commission requested additional information from the applicant in order to enable a determination to be made as to whether a grant of the application would serve the public interest, convenience and necessity, but the applicant, by letter dated March 31, 1964, declined to furnish the requested information and elected to prosecute his application as it stands; and

IT FURTHER APPEARING, That the following matters are to be considered in connection with the issues specified below:

(a) Based on information contained in the application, it appears that cash in an amount in excess of $72,000 will be required for the construction and initial operation of the proposed station. The exact costs of construction and the exact amount of cash initially necessary cannot be determined because the applicant has failed to make any provision for the costs of freight, legal and engineering fees, studio furnishings, miscellaneous costs and contingencies. The applicant has also failed to furnish information concerning his net income, after Federal taxes, for each of the past two years. Additionally, the applicant relies upon alleged existing capital of approximately $93,000 and loans from banks or others in the amount of approximately $75,000 to finance the costs of construction and initial operation of the proposed station. The alleged existing capital, however, cannot be considered to be available to the applicant because his financial statement does not show the extent of his current liabilities and his current and liquid

assets appear to be less than $2,500. Moreover, the applicant's financial proposal has not been supported by a showing that loans in any amount are available to him from banks or others. It cannot be determined, therefore, that the applicant is financially qualified.

(b) The applicant proposes to devote 10% of his total broadcast time (35 hours per week) to local live programming and proposes a total staff of seven persons. No provision appears to have been made for clerical or administrative personnel, announcers, cameramen, or a sales force. Additionally, the applicant has estimated the cost of operation of the proposed station for the first year to be $25,000, but has not furnished information concerning the basis for this figure. Since this amount appears to be unrealistically low, an issue will be specified to determine the basis for the said estimate and whether, under the circumstances, the estimate is realistic. An issue will also be necessary to determine whether the proposed staff will be adequate to effectuate the type of operation proposed.

(c) The applicant proposes to broadcast a total of 35 hours per week, consisting of five broadcast hours per day. In completing question 2(b) of Section IV of the application form, applicant stated that 70% of total broadcast time would be devoted to entertainment and 30% to educational programming, with no apparent provision for religious, agricultural, news, discussion, talks, or other programming. However, applicant's proposals are not altogether clear, for in Exhibits 3 and 4 to Section IV, the applicant indicates that he plans to present programs which may not be properly classifiable as entertainment or educational programming. Although the applicant thus proposes a specialized programming format, which he explains in part as being "due to the interests of the applicant", he has not set forth the efforts he has made to determine the tastes, needs and desires of the public in his service area, evaluated the information thus obtained and explained how the programming he proposes to provide meets those needs and interests as he has determined them to be. (See Programming Policy Statement of July 27, 1960, FCC 60–970, 20 RR 1901). After two extensions of time within which to respond to questions about the matters covered by this Order, the applicant stated that he preferred to let his application stand as originally filed, without any amendment. Therefore, an issue is specified to determine the efforts made by the applicant to ascertain the needs and interests of Eugene, Oregon, and the manner in which the programming proposed will meet such needs and interests.

(d) It appears that the applicant proposes to locate the main studio at a point outside the corporate limits of Eugene, Oregon, but no waiver of Section 73.613(a) of the Commission's Rules has been requested. An issue will be specified, therefore, to determine whether a grant of the application would be consistent with Section 73.613(a) of the Commis-

sion's Rules and, if not, whether circumstances exist which would warrant a waiver of said rule.

IT FURTHER APPEARING, That, except as indicated by the issues specified below, the applicant is legally, technically and otherwise qualified to construct, own and operate the proposed television broadcast station. However, the Commission is unable to make the statutory finding that a grant of the application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for hearing on the issues set forth below.

Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned application of Lee Roy McCourry, tr/as New Horizon Studios, IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the applicant is financially qualified to construct, own and operate the proposed television broadcast station.
2. To determine the basis for the applicant's estimate of its cost of operation for the first year and whether such estimate is realistic.
3. To determine the efforts made by the applicant to ascertain the programming needs and interests of the area proposed to be served and the manner in which the applicant proposes to meet such needs and interests.
4. To determine whether the staff proposed by the applicant would be adequate to effectuate the type of operation proposed.
5. To determine whether a grant of the application would be consistent with the provisions of Section 73.613(a) of the Commission's Rules with respect to the location of the main studio and, if not, whether circumstances exist which would warrant a waiver of said rule.
6. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

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

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

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER FREDERICK W. FORD

Although in general I agree with the abstract principles contained in the dissenting opinion in common with all of my colleagues (See In re Pacifica Foundation, Pike & Fischer 1 RR. 2d 747 (1964) they have no application to the facts before us in this case. Moreover, they are enunciated under a misconstruction of the Commission's Program Policy Statement of July 26, 1960 and the Commission's action here. In connection with issue 3 and the dissent, cf. Suburban Broadcasters, 20 RR. 951 affirmed *sub nomine Henry* v. *F.C.C.*, 302, F2d 191, cert. denied, 371 U.S. 821. I, therefore, join in the majority opinion.

DISSENTING OPINION OF COMMISSIONER LEE LOEVINGER

I dissent from the order of the Commission in this proceeding because it represents an attempt to require an applicant to conform to the Commission's ideas of programming in order to secure a broadcasting license. This I deem unwarranted and unwise.

It is necessary to present the facts and proceedings in some detail to show how the issue arises. This proceeding involves an application for a construction permit for a UHF television station to operate in Eugene, Oregon. There are no other applicants for the channel sought, which is assigned to this location.

Eugene, Oregon is a city of approximately 50,000 inhabitants in an urbanized area of about 95,000 people. There are two VHF stations operating there at the present time. The instant application was sent to the Commission on November 26th, 1962, and accepted for filing on December 10th, 1962. The applicant is an individual businessman who is a native of the area and has ownership interests in various farms and retail businesses in Eugene and the nearby territory.

Applicant proposed a program schedule for five hours operation each day, from 6:00 to 11:00 p.m. For the five weekdays, from Monday through Friday, the proposed program schedule included three hours of "great motion pictures" each evening and two hours of lectures on biology, astronomy, psychology or current affairs. On Saturdays and Sundays the proposed program schedule contained several network programs, plus great motion pictures. One of the proposed network programs was the CBS show "Twentieth Century." Thus, applicant proposed a total of 35 hours of programming per week, with 10-1/2 hours of public service programs comprising the following: general biology, 3 hours; descriptive astronomy, 3 hours; general psychology, 2 hours; current affairs, 2 hours; Twentieth Century (CBS) 1/2 hour.

In notes to the proposed program schedule applicant said, inter alia:

> This station will carry the educational programs of the Oregon educational television network. No station covers Eugene with these programs... In addition, educational programs will originate live from the station by use of the University of Oregon's faculty members.
>
> * * * * * * *
>
> The possibility of a CBS network affiliation is open in Eugene, but of course the network will not make any commitments until a construction permit is

issued. New Horizon Studios does not believe any national network affiliation is desirable except on weekends for news coverage and a few entertainment shows.

In addition, applicant included a policy statement which reads in full as follows:

Freedom of speech under the United States Constitution will be adhered to. In political matters, equal time will be allowed each party and person. Guest speakers from the University of Oregon will comprise about 75% of all educational and discussion programs. This includes those faculty members broadcasting over the Oregon educational network. Topics will be academic and no rules will discriminate between participants.

In responding to item 2(b) of Section IV of the application form relating to the "types of programs proposed," applicant stated that he classified 70% of the proposed programming as "entertainment" and 30% as "educational."

On October 11th, 1963, a letter was sent to the applicant by the Broadcast Bureau, over the signature of the Commission Secretary, stating that a review of the situation raises questions concerning the following matters:

5. In view of the fact that you propose no religious, agricultural, news, discussion, or talks programming, it is suggested that you furnish the Commission with a detailed explanation of the reasons for such proposed programming.

* * * * * * *

7. It is noted that you plan to program two hours of science, three days per week, and three consecutive hours of motion pictures daily. It is suggested that you furnish a detailed explanation of the basis for your conclusions that such programming would meet the needs and interests of Eugene, Oregon.

Applicant requested an extension of time in which to respond and finally, after some intervening correspondence, replied to the Commission staff on March 31st, 1964. The substance of applicant's reply was this:

Television is a vast wasteland! This is a statement of fact, and it needs to be repeated and repeated until the medium evolves from a desert into an oasis.

I foresee for television the exact opposite of what it presently is, i.e.—a 'flowering landscape.' Because broadcasting deals with the interests of the masses, it is difficult to answer your questions in view of the 'new frontier' in television. We have reached a position where the old questions and answers will not solve the new riddles. There is a great need for specialty broadcasting, like the now common terminology: 'the magazine rack approach'—where varied interests are served.

I wish to let my application stand as originally filed: without amendments, excuses, or explanations. This application was prepared with great faith in the future *flexibility* of television, and I re-affirm that faith now in this letter.

Following receipt of this letter the Broadcast Bureau presented the application to the Commission with a recommendation that it be designated for hearing on several issues, including "a programming issue." As to the latter, the Broadcast Bureau recommended:

In view of the omission of the various program categories, and in the absence of the reasons therefor, an issue [should be] specified to determine the efforts made by the applicant to ascertain the needs and interests of Eugene, Oregon, and the manner in which the proposed programming will meet such needs and interests.

The majority of the Commission have voted to accept this recommendation in substance, although they have rewritten the pro-

gramming issue as set out in paragraph (c) of the order. The order states that "applicant's proposals are not altogether clear, for . . . applicant indicates that he plans to present programs which may not be properly classifiable as entertainment or educational programming." However, in view of the "specialized programming format" the Commission orders that: "an issue is specified to determine the efforts made by the applicant to ascertain the needs and interests of Eugene, Oregon, and the manner in which the programming proposed will meet such needs and interests."

The alleged uncertainty as to the proper classification of applicant's programs apparently is rested upon the casual references in the program notes and policy statement to the fact that a network affiliation might be desirable on weekends for news coverage and that guest speakers from the University of Oregon would participate in educational and "discussion" programs. However, this does not have and is not asserted to have any significance in the case. It is clear that applicant proposes flexibility in future programming, and the proposed program schedule is illustrative. The Commission could not reasonably ask or expect anything more than this, particularly in view of the lapse of time between the filing of such an application and the date of its effectuation. If there is any question as to the proper classification of these proposed programs, it arises out of the ambiguities of the definitions contained in the Commission's form. Insofar as relevant here, the form requires program to be classified as "educational," "talks," or "discussion." The definitions indicate that an educational program is a talk given by someone in a cap and gown; a talk program is a lecture by someone in a business suit; and a discussion program is a round-table or panel on which three or four people talk at the same time. Anyone who isn't confused by these definitions probably doesn't understand them. In any event, applicant's program proposals are plain enough and no amount of evidence could clarify the definitions. No issue is suggested relating to this point and consequently, it is irrelevant to the case.

The significant point is that in cases where there is only one applicant for an available channel and where the program proposals conform to the Commission's favored pattern on such matters the Commission does not order a hearing on program proposals as a general rule. Where an applicant proposes some programming within each of the categories specified in the program form his application is usually accepted without question on this aspect and he is not required to go to a hearing on a programming issue. It is apparent from the proceedings that have been referred to above that this applicant is forced to go to a hearing on a programming issue because he does not propose to conform to the Commission's established pattern of programming.

Although applicant is ostensibly offered the opportunity to satisfy the Commission as to efforts made to ascertain the needs and interests of his community and as to the manner in which the programming proposed will meet such needs and interests, he is in fact being subjected to a sanction for failure to conform to the

Commission's ideas on this subject. In a case such as the present one, the burden of litigation is in itself a sanction, where a small and financially weak applicant for an available frequency which is not sought by any other applicant, is forced to go to hearing and meet the opposition of the experienced, diligent, able and partisan lawyers of the Broadcast Bureau. Such a procedure is clearly a most effective way of imposing the Commission's own notions of proper programming.

Beyond this, it should be apparent that the hearing in a case such as this is merely a necessary procedural preliminary to a denial of the application if the applicant is not so discouraged that he abandons his application without a hearing. It is difficult to conceive of any evidence that might suffice, or even be material, to establish the affirmative of the issue thrust upon applicant here. To be specific, what conceivable evidence could prove that a community does or does not need "talks" or "discussion programs" more than it needs "educational programs"? The only question this conveys to my mind is whether any rational meaning can be ascribed to such an issue. Yet the Commission now proposes to make the applicant bear the burden of proof upon this very issue.

It seems to me that the Commission action in the present case goes far beyond anything that has been done in any previously reported case. It is one thing to strike at a recognized evil by forbidding people to do things which are harmful to others. It is quite another matter to command people to do things that you deem virtuous because you think it desirable or for their own good that they should act so. Indeed, this is the very distinction which is said by Mill to constitute the foundation of the principle of liberty in the dealings between organized society and the individual. John Stuart Mill, "On Liberty," chap. 1.

It is legal and proper for the Commission to deny a license to one who broadcasts or proposes to broadcast, legally objectionable programs, such as lotteries, although even this principle is subject to strict limitations. *American Broadcasting Co.* v. *United States*, 110 FSupp 374 (SD NY, 1953), affirmed 347 US 284 (1954). However, it is quite another thing for the Commission to challenge an applicant merely because he has omitted from his program proposal some categories which the Commission deems desirable. It is immaterial that it does this by requiring him to justify the omission rather than by an inflexible requirement. The applicant's freedom to program and speak as his judgment dictates is no less constrained. As the Supreme Court has said, "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *Little Rock*, 316 US 516, 523 (1960).

An examination of the reported cases fails to reveal either any precedent or any authority for such action by the Commission. The reported cases in which the Commission has been concerned about broadcast programming have involved comparative hearings, applications for a renewal of license, and proceedings to revoke a license. The aspects of programming that the Commission has traditionally considered have been false and fraudulent

broadcasts, excessive commercialization, performance in accordance with prior promises and obscenity. Such cases were In re McGlashan, et al., 2 FCC 145 (1935); *In re Community Broadcasting Company,* 12 FCC 85 (1947); *In re The Walmac Company,* 12 FCC 91 (1947); *In re Eugene J. Roth,* 12 FCC 102 (1947); and the court cases cited below when they were before the Commission. More recently the Commission has attempted to judge the relative adequacy of program proposals in comparative proceedings. *In re Herbert Muschel,* 33 FCC 37 (1962).

The courts have not, so far as I can ascertain, directly considered the issue involved here, although there have been a number of cases in which statements have been made that have been construed to suggest that the Commission has authority over programming. It seems clear from legislative history, as well as judicial construction, that the Commission has some authority to consider some aspects of programming for some purposes. See Joel Rosenbloom, Authority of the Federal Communications Commission, in Freedom and Responsibility in Broadcasting (1961), p. 96 et seq. However, there is no authority suggesting that the Commission has plenary power to consider all aspects of programming for any purpose. So the crucial question is, What aspects of programming may the Commission properly consider and for what purposes? Examination of the cases does not provide a clear answer to this question, but it does indicate that at least to date there is no judicial sanction for Commission action of the character involved in the present case.

In *Great Lakes Broadcasting Co.* v. *F.R.C.,* 59 App DC 197, 37 F2d 993 (1930), cert. dismissed 281 US 706, the Court of Appeals, acting under a prior statute which gave it supervisory authority over the old Radio Commission, affirmed an order limiting the broadcasting time of stations except as to one station, which was held to be unduly limited. The court said that it based its conclusion as to the undue limitation of time of one station "upon a consideration of the excellent service heretofore rendered to the public . . . and its capacity for increased service; also its large expenditures for meritorious programs for public instruction and entertainment, and the popularity of the station . . ." This is one of the earliest judicial considerations of government regulation in the broadcasting field, and arose under a statute quite different in its terms than the Communications Act. It appears to represent the strongest holding in favor of government consideration of program substance of any decision, although the reference to programming is somewhat laconic and, at best, unclear.

In *Chicago Federation of Labor* v. *F.R.C.,* 59 App DC 333, 41 F2d 422 (1930), the court affirmed a Radio Commission order for sharing time between stations. By way of obiter dictum, the court said that the public interest, convenience and necessity requires that "meritorious stations" not be deprived of broadcasting privileges unless clear and sound reasons of public policy demand such action. The court does not discuss what "meritorious stations" are, although it may be inferred that merit has something to do with programming.

In *KFKB Broadcasting Assn.* v. *F.R.C.*, 47 F2d 670 (CA DC 1931), the court affirmed a Radio Commission order denying renewal of a broadcast license where the record showed that the licensee had engaged in broadcasting only in his own personal interest and as an adjunct of his business, which, incidentally, was that of promoting quack medical remedies.

In *Radio Investment Co.* v. *F.R.C.*, 61 App DC 296, 62 F2d 381 (1932), cert. den. 288 US 612, the court affirmed the finding of the Radio Commission that one station should be granted time previously shared with two others on a record containing evidence showing that the grantee had better technical equipment and operation and superior programming. The same result was reached on a similar record, together with evidence relating to an equitable geographical distribution of facilities in the case of *Unity School of Christianity* v. *F.R.C.*, 63 App DC 84, 69 F2d 570 (1934), cert. den. 292 US 646.

In *Trinity Methodist Church* v. *F.R.C.*, 62 F2d 850, 61 App DC 311 (1932), cert. den. 288 US 599, it was held that a license renewal was properly denied to a licensee who had continuously broadcast defamatory, untrue, abusive and scurrilous attacks upon numerous persons and groups in the community.

In *Bay State Beacon* v. *F.C.C.*, 84 App DC 216, 171 F2d 826 (1948), it was held that in a comparative proceeding the Commission may properly inquire into the relative amounts of commercial and sustaining time that the prospective licensee proposes to use.

In *Johnston Broadcasting Co.* v. *F.C.C.*, 85 App DC 40, 175 F2d 351 (1949), the court said by way of dictum, that in a comparative hearing "comparative service to the listening public is the vital element, and programs are the essence of that service. So, *while the Commission cannot prescribe any type of program* (except for prohibitions against obscenity, profanity, etc.), it can make a comparison on the basis of public interest and, therefore, of public service. Such a comparison of proposals is not a form of censorship within the meaning of the statute." (Emphasis added.) The same court in an opinion issued at the same time, also pointed to the difference between comparative hearings and other hearings, saying: "If there be only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements, of the applicant to render service are immaterial. But, if a choice must be made between two qualified applicants, the problem has a different aspect." *Easton Pub. Co.* v. *F.C.C.*, 85 App DC 33, 175 F2d 344 (1949).

In the recent case of *Palmetto Broadcasting Co.* v. *F.C.C.*, (CA DC Mar. 19, 1964) the court sustained the Commission's denial of an application for renewal of a license in a situation in which the Commission had found that vulgar and suggestive programs had been broadcast and that the licensee had misrepresented to the Commission concerning this matter. In sustaining the Commission's order, however, the court significantly based its affirmance on the finding relating to misrepresentation and specifically with-

held any ruling on whether the Commission's order might have been justified solely on the basis of its finding as to the character of material broadcast.

There have also been a number of passing references to program service in opinions involving broadcasting. For example, in *Woodmen of the World Life Insurance Assn.* v. *F.R.C.*, 61 App DC 54, 57 F2d 420 (1932), the court affirmed a Radio Commission decision on time allocation and made a passing reference in the opinion to the fact that the programs of the licensee involved "are of a high character." It is clear by all established canons of judicial interpretation that such casual remarks which are wholly unnecessary to the decision and are not contained in any extended discussion of the subject are to be given no significance. Similarly, in *W. S. Butterfield Theatres* v. *F.C.C.*, 237 F2d 552, 99 App DC 71 (CA DC 1956), the court held that in a comparative hearing in which the Commission is choosing between competing applicants, general conclusions about the character of a program proposal are inadequate and the Commission must make specific findings based upon evidence if it is to place any reliance upon this point.

The decisions of the United States Supreme Court are no more illuminating. In *Radio Commission* v. *Nelson Bros. Co.*, 289 US 266 (1933), the Court affirmed a Commission order licensing an Indiana station to operate on a frequency previously assigned to two Illinois stations and terminating the licenses of the latter. The Court said that the requirement of the public interest, convenience and necessity "is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and where an equitable adjustment between states is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities." Significantly, the Supreme Court reversed the Court of Appeals, which had set aside the Commission order on the basis of its evaluation of the programming of the stations. The principal concern of the Supreme Court in this case clearly was with the matter of geographical distribution of broadcasting facilities.

In *F.C.C.* v. *WOKO*, 329 US 223 (1946), the Court held that the Commission was authorized to deny the renewal of license because of misrepresentation by the licensee to the Commission. In a dictum the Court said that the Commission might in its discretion consider the "public service" rendered by the station as an element affecting the question whether the license should be revoked. A similar expression is found in *Regents* v. *Carroll*, 338 US 586 (1950). This was a breach of contract suit between private parties arising out of repudiation of a contract which had been disapproved by the FCC. By way of dictum the Court noted that: "Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license."

The case on which greatest reliance is usually put for assertion of the Commission's authority over programming is *National Broadcasting Co.* v. *United States*, 319 US 190 (1943). In this case the Court held that the Commission had authority to promul-

gate chain broadcasting regulations in order to avoid monopolistic domination in the broadcasting field. The Court rejected the argument that the Commission's power was limited to engineering and technical aspects of radio communication and said that the Commission is not restricted "merely to supervision of the traffic." It said that the "Commission also had the burden of determining the composition of that traffic." However, the Court here was discussing regulation which was concerned exclusively with the economic structure of the broadcasting industry and which did not attempt to impose any requirements directly upon the programming activities of licensees. The Court held that it was proper for the Commission to concern itself with economic structure in the fashion attempted but also warned that "Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry * * *" (319 US 219).

Finally, in the leading case of *F.C.C.* v. *Sanders Bros.* 309 US 470 (1940), the Court made the most explicit statement, although by way of dictum, that it has made on this subject. The Court said: "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts . . . But the Act does not essay to regulate the business of the licensee. *The Commission is given no supervisory control of the programs,* of business management or of policy." (Emphasis added.)

Thus, from a review of the cases it appears that the Commission has the right, and probably the duty, to consider program proposals as one element in making a choice between competing applicants in a comparative proceeding, to take action against the broadcasting of legally objectionable program material, and to attempt to secure and maintain the free and competitive economic structure of the industry, so that there is the opportunity and the incentive for the broadcasting of diverse, and hopefully worthwhile, programs. However, there is no authority for the proposition that the Commission has the right to require the scheduling or broadcasting of specific kinds of programs or of what it considers to be desirable program material. I doubt that it has such authority. But if it be assumed that the Commission has authority, by one means or another, to require compliance with its prescribed patterns of programming, I believe it is unwise and improper for it to do this.

If, as this applicant and some others have asserted, television so conforms to a pattern of dull mediocrity as to be merely a wasteland, then some of the blame surely lies upon this Commission for demanding, by actions such as this order, conformity to a pedestrian ideal of balanced programming rather than any real attempt to provide intellectual or aesthetic excellence. It is significant that this applicant proposes to devote 30% of its time to public service programs in a small community which has two other television stations now operating. These public service programs will consist principally of lectures by university professors. The amount of time to be devoted to public service is reasonable and

there is no challenge to this aspect of the proposal. However, applicant classifies all of the public service programs as "educational," thus omitting several categories of programming favored by the Commission and its staff. The passion to regulate is not satisfied merely by the dedication of an adequate amount of time to public service unless this time also conforms to just the pattern of public service now favored. Thus, the tastes and ideals of the majority of the Commission become enshrined in official requirements.

The Commission majority surely assumes that official intervention in programming will have an uplifting and beneficent effect. This assumption is shared by many well meaning and sincere people. However the instant case should shed some doubt on that assumption. The program proposal here is excellent, at least by my standards. The thrust of Commission action here is to reduce the high level of proposed programming to the mediocrity of the established mixture (or "balance" as it is called in the official euphemism). This seems to me to be a degradation rather than an improvement. It is conceivable that the establishment of official standards of program quality might have an uplifting effect on programming in the long run—but I doubt it. To me it seems more likely that the setting of program standards by official action will merely insure conformity to a dull and undistinguished mediocrity.

I wish I could feel the assurance of certitude and righteousness which seems to move those of my colleagues who believe they are justified in trying to secure programming which conforms to their own ideas. However, I believe with Holmes, that, "Certitude is not the test of certainty. We have been cocksure of many things that were not so . . . What we most love and revere generally is determined by early associations . . . But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else." O. W. Holmes, Collected Legal Papers, p. 311.

I share the views of my colleagues as to the value of good programming and undoubtedly would agree with them in most cases on an appraisal as to what constitutes good or bad programs. However, I cannot bring myself to believe that we necessarily represent the views of any substantial part of the population, much less of any particular community, or that our views on this matter are wiser or better than those of a particular applicant or licensee, or of the general public. But even if I were convinced that the Commission's views were superior to those of broadcasters or the public with respect to programming, I would still doubt the wisdom of establishing official standards in this field. The area of speech and communications is clearly one of the most basic and sensitive areas with which government is concerned. See *Near* v. *Minnesota,* 283 US 697 (1931); *Grosjean* v. *American Press Co.,* 297 US 233 (1936); *Associated Press* v. *United States,* 326 US 1 (1945). In recognition of this the courts have been diligent to prevent any degree of government intrusion into the area of

liberty in this field. See *Bantam Books* v. *Sullivan*, 372 US 58 (1936); *Staub* v. *Baxley*, 355 US 313 (1958) and Annotation at 2 Fed2d 1706.

Whatever else may be said on this subject, it comes down to this. The Commission is clearly making a choice between competing interests and values. Presumed quality and "balance" of television programming is one choice and preservation of a wider area of freedom of expression for the broadcaster is the other. However, if the community involved here gets an additional television station which devotes only 30% of its time to educational programs and fails to carry agricultural bulletins, local talent, talks or discussion programs, no large injury will be done either to the community or to society in general. On the other hand, if the principle is established that the Commission has the right and power to prescribe, either directly or indirectly, the kind and quality of programs that must be carried by broadcast licensees, then the vital interest of society, the nation, and perhaps the world, in the fullest freedom of communications and the expression of ideas, in whatever form, may be compromised. As between these interests, I do not believe that any clear-sighted man can long hesitate. A lack of satisfying programs on television would be a small price to pay for the maintenance of the fullest freedom of communications and the unimpaired vigor of those private rights which thinkers from Milton, Jefferson, and Mill to the present Supreme Court have declared to be fundamental to the existence and preservation of a free and democratic society.

Commissioner Hyde concurs in the views expressed in the above dissenting statement of Commissioner Loevinger.

F.C.C. 64–514

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Joint Request for Approval of Merger Agreement, Filed by LIVESAY BROADCASTING CO., INC., TERRE HAUTE, IND. | File No. BPCT–3295 |
| and | |
| FORT HARRISON TELECASTING CORP., TERRE HAUTE, IND. | File No. BPCT–3296 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND FORD ABSENT; COMMISSIONER COX NOT PARTICIPATING.

1. The Commission has before it for consideration a Joint Request For Approval of Merger Agreement, filed March 23, 1964, by the above-captioned applicants for a construction permit for a new television broadcast station to operate on Channel 2, Terre Haute, Indiana, and related pleadings [1]. The above-captioned applications represent two of the three mutually exclusive applications which were filed for this facility, the third being that of Illiana Telecasting Corp. (Illiana) (BPCT–3294). These three applications have not yet been designated for comparative hearing.

2. Livesay and Fort Harrison entered into an agreement on March 2, 1964, to merge; on March 23, 1964, the agreement was filed with the Commission together with the request for Commission approval. On April 14, 1964, Livesay and Fort Harrison filed a request for waiver of Section 1.525 of the Commission's Rules which requires that merger agreements be filed with the Commission within five days of the effectuation thereof. The applicants concede that they have not complied with the Rules in this respect, and they have, accordingly, asked for a waiver. In support of their request for a waiver, Livesay and Fort Harrison state that it was not possible for them to prepare a completely revised proposal, secure necessary affidavits from scattered areas, and submit the material to Washington counsel for review and filing within the time limit imposed by the Rules. The failure to request waiver simultaneously was, they allege, an oversight. The Commission is of the opinion that good cause has been shown for granting the requested waiver.

[1] The Commission also has before it for consideration: (a) Opposition, filed April 6, 1964, by Illiana Telecasting Corp. against the "Joint Request for Approval of Merger Agreement"; (b) Request for Waiver of Section 1.525 of the Commission's Rules ("5-day" rule), filed April 14, 1964, by Livesay Broadcasting Co., Inc. and Fort Harrison Telecasting Corporation; (c) Reply, filed April 16, 1964, by Livesay and Fort Harrison against (a), above; (d) Opposition, filed April 24, 1964, by Illiana, against (b), above; and (e) Reply, filed May 4, 1964, by Livesay and Fort Harrison to (d), above.

3. The net effect of the merger agreement would be a withdrawal of the Livesay application (BPCT–3295) and the prosecution of the Fort Harrison application (BPCT–3296), as amended. The Fort Harrison application would be amended to change its by-laws to allow for the issuance of new stock, to make changes in the officers and directors, to include new financing and new programming, and to increase the number of stockholders from 30 to 33. The three additional stockholders will be J. R. Livesay, Mrs. Leffel Livesay, and Kenneth Wooddell, all of whom are stockholders in Livesay Broadcasting Company. These three new stockholders are to receive, in the aggregate, 35% of the stock of Fort Harrison and J. R. Livesay, who was Livesay Broadcasting's principal stockholder, would become the principal stockholder of Fort Harrison (approximately 21%). J. R. Livesay has subscribed to 767 shares of stock ($76,700 value) and Mrs. Livesay and Wooddell have each subscribed to 175 shares at a value of $100 per share. The three new stockholders also would undertake certain other obligations set forth in the agreement. The merger agreement is accompanied by affidavits, as required by Section 1.525 of the Commission's Rules, reciting the history of the merger negotiations, stating that no consideration has been promised or paid other than that set forth in the merger agreement, and otherwise furnishing the information required by the Rules. The agreement also contains a provision whereby J. R. Livesay agrees to "render such services as may reasonably be required" by Fort Harrison in prosecuting its application, and he is to receive for these services 108 shares of stock as compensation, in addition to the stock for which he subscribed. A letter dated May 11, 1964 (filed with the Commission May 13, 1964) describes in detail the services to be rendered by J. R. Livesay for which he is to receive the additional 108 shares of stock. An examination of this document, together with the affidavits attached thereto and to the request for approval of the merger agreement, convinces us that the shares of stock represent legitimate compensation for services to be rendered.

4. Illiana, which opposes approval of the merger agreement, appears to interpret the decision of the United States Court of Appeals for the District of Columbia Circuit (*Fort Harrison Telecasting Corp.* v. *Federal Communications Commission,* 116 U.S. App. D.C. 347; 324 Fed 2d 379; 25 RR 2109) and the Commission's implementing Memorandum Opinion and Order (FCC 63–1117, Released December 6, 1963) as "freezing" the applications filed prior to January 31, 1964, for Channel 2, Terre Haute, to the extent that such applications could not be thereafter amended. In substance, Illiana appears to believe that the Court's decision and the Commission's action pursuant thereto somehow operate to make Section 1.522(a)[2] of the Commission's Rules inapplicable to these applications. We do not believe that the Court intended to deprive the applicants of the right accorded them under the Commission's

[2] Section 1.522(a) of the Commission's Rules provides, in substance, that "any application may be amended as a matter of right prior to the adoption date of an order designating such application for hearing". This is subject to the provisions of Sections 1.525 and 1.580, the latter being concerned with the necessity for public notice.

Rules to amend freely prior to designation for hearing [3] nor do we read that decision and our implementing Memorandum Opinion and Order to require such a result. If, as Illiana alleges, it will be faced with a stronger competitor as a result of the merger, it does not necessarily follow that Illiana will be "injured" thereby since Illiana is equally free to amend its application to meet the alleged stronger competition. If "injury" may be said to result from the strengthening of an application through amendment, it is the type of "injury" clearly contemplated by the Commission's Rules. In the matter before us, it is apparent that the merger of Livesay and Fort Harrison would simplify and expedite the comparative hearing which will be required.

In view of the foregoing, the Commission finds that approval of the merger agreement would be consistent with the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the merger agreement submitted jointly by Livesay Broadcasting Co., Inc. and Fort Harrison Telecasting Corporation IS APPROVED; that the Opposition thereto, filed by Illiana Telecasting Corp. IS DENIED; that so much of Section 1.525 of the Commission's Rules as requires merger agreements to be filed within five days of effectuation thereof IS WAIVED; that the Opposition to such waiver, filed herein by Illiana Telecasting Corp. IS DENIED; and that the amendment to the application (BPCT-3296) of Fort Harrison Telecasting Corporation effectuating the merger IS ACCEPTED.

Adopted June 3, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[3] It is common practice, in analogous situations in the processing of applications for standard radio broadcast stations, for applicants, after the "cut-off" date but prior to designation for hearing, to make substantial amendments in the financing, programming, engineering, and stock ownership proposals. With respect to changes in stock ownership, amendment is permitted between the "cut-off" date and designation for hearing where, as here, the parties to the original application retain, collectively, 50% or more ownership in the amended application (Section 1.571(j) of the Commission's Rules, pertaining to the processing of applications for standard radio broadcast stations).

F.C.C. 64-445

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of AMENDMENT OF SECTIONS 73.35, 73.240, AND 73.636 OF THE COMMISSION'S RULES RELATING TO MULTIPLE OWNERSHIP OF STANDARD, FM AND TELEVISION BROADCAST STATIONS | Docket No. 14711 |

REPORT AND ORDER

BY THE COMMISSION: CHAIRMAN HENRY CONCURRING AND ISSUING A STATEMENT; COMMISSIONERS HYDE AND LEE DISSENTING AND ISSUING A STATEMENT.

1. On July 16, 1962, the Commission released a Notice of Rule Making looking toward amendment of Sections 73.35, 73.240, and 73.636 of the Rules, (then 3.35, 3.240, and 3.636) insofar as these sections deal with overlap of service contours between commonly owned stations in each broadcast service. We proposed to eliminate the present general language of the rules [1] and to substitute more clearly defined standards specifying just what would be considered prohibited overlap. In AM, overlap of the predicted 1 mv/m service contours between commonly owned stations was to be barred. A mileage separation table was proposed for FM, the separations reflecting prohibited 1 mv/m overlap between commonly owned stations—assuming each station to be operated at maximum permissible facilities. A similar table of separations was proposed for television, based upon assumed maximum permissible Grade A service contours. Additional comments were requested concerning the possibility of basing the television table on prohibited overlap of Grade B service contours. The rules we proposed were to be applied to applications for new stations, major changes, and assignments and transfers, but would not require any licensee to dispose of stations presently owned. However, the sale of overlapping station "packages" to the same person or group would not be permitted.

*Basic Considerations*

2. The Commission's multiple ownership rules seek to promote maximum diversification of program and service viewpoints and

[1] The AM rule, Section 73.35(a), bars overlap where "a substantial portion of [the applicant's existing station's] primary service area would receive service from the station in question, except upon a showing that the public interest . . . will be served through such multiple ownership situation." The FM and TV rules, Sections 73.240(a) and 73.636(a), prohibit the licensing of a new station which will serve "substantially the same area" as another station owned or operated by the same licensee. The FM and TV rules do not contain the built-in waiver provision found in the AM section but, in practice, the possibility of a waiver has generally been considered in hearings involving FM or TV applicants.

to prevent undue concentration of economic power contrary to the public interest.[2] The rules adopt two distinct approaches to this end. Sections 73.35(b), 73.240(b), and 73.636(a)(2), generally called the "concentration of control" rules, limit concentrations of ownership in absolute terms. The rules provide that no person or group may operate, control, or hold an interest in more than 7 AM stations, 7 FM stations, and 7 television stations—no more than five of the television stations being VHF. Under some circumstances, common ownership or control of a smaller number of stations than these maximums may be deemed an undue concentration of control contrary to the public interest. The Commission's authority to promulgate rules placing an absolute numerical limitation on the number of stations which can be owned was sustained in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).[3]

3. The portions of the rules now under consideration complement the "concentration of control" sections by focusing upon local and regional problems associated with multiple ownership. The concept embodied in the rules is not complex: When two stations in the same broadcast service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people. This objective flows logically from two basic principles underlying the multiple ownership rules. First, in a system of broadcasting based upon free competition,[4] it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have "an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[5] In this respect, the rules are based upon a view of the First Amendment to the Constitution similar to that of the Supreme Court in the *Associated Press* case—ie., a notion that the Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[6]

4. In our Notice of Rule Making, we placed particular emphasis upon the latter policy aspect underlying the duopoly rules. We noted the steady decline in the number of cities with daily newspapers under competing ownership and the concurrent rise in the number of stations which, with Commission encouragement and approval, have been undertaking editorial functions. We concluded that these facts—coupled with the end of the pioneering era for much of broadcasting and the plentitude of applicants for most available facilities—justified the present effort to recast our rules governing overlap.

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[2] See the Commission's final Report and Order in Docket 8967, adopting the present numerical limits for ownership of AM, FM and VHF television stations, 9 Pike and Fischer RR 1563, 1568 (1953).

[3] On remand, the U.S. Court of Appeals for the District of Columbia held that the rules were not unreasonable, *Storer Broadcasting Co.* v. *U.S.*, 99 U.S. App. D.C. 369, 240 F2d 55 (D.C. Cir. 1956).

[4] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

[5] Notice of Proposed Rulemaking, Docket 14711, FCC 62-747 (July 13, 1962).

[6] *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

5. Numerous comments have been received in response to our notice of rule making. The preponderant majority of these comments have opposed adoption of the proposed rules in whole or in part. There are, however, several significant areas within which no substantial disagreement appears to exist between the Commission and the various respondents. No party has quarrelled with the Commission's general statement of policy favoring diversification of broadcast ownership [7] and no party has contested the Commission's statutory authority to consider the diversification factor in judging the merits of any particular application. See, e.g., *Scripps Howard Radio, Inc.*, v. *F.C.C.*, 89 U.S. App. D.C. 13, 189 F2d 677 (1951). Moreover, no respondent appears to challenge the Commission's authority to deal with multiple ownership problems by way of the rule making process—provided, of course, that the particular rules adopted are reasonably related to legitimate policy goals. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); See also *National Broadcasting Company* v. *United States*, 319 U.S. 190 (1943); *F.C.C. v. American Broadcasting Company*, 347 U.S. 284 (1954); *Logansport Broadcasting Corporation* v. *U.S.*, 93 U.S. App. D.C. 342, 210 F2d 24 (D.C. Cir. 1954).

6. The objections which are urged by the various respondents fall into three general categories. First, it is argued that a rule incorporating any fixed overlap standard is an inappropriate way to deal with problems of duopoly. Second, respondents contend that no justification has been presented for the adoption of rules which are more restrictive in content and more extensive in application than the present standards. Finally, many specific portions of the proposed rules are attacked as unreasonable or unwise. As set forth more fully below, we have considered each of the numerous comments filed and have concluded that fixed overlap rules are appropriate and necessary, but that the rules proposed in our Notice of July 16, 1962 should be modified in certain significant respects.

*Appropriateness of a Fixed Standard*

7. The argument that a fixed rule is an inappropriate way to deal with overlap problems proceeds in much the same way as did the attacks upon the chain broadcasting regulations and the concentration of control rules.[8] It is contended that a great number of factors other than the extent of overlapping service contours can act to minimize the significance of any given overlap situation and that to focus upon the single factor of overlap is, in many cases, so unreasonable as to be arbitrary. Respondents conclude that the nature of the overlap problem is such as to compel use of the *ad hoc* approach; that only by use of such an approach can

[7] Several respondents have argued that the duopoly rules were originally conceived solely as anti-monopoly measures and deny that the rules were intended to bear upon the problem of program source diversification. We believe that this reading views the generating forces behind the present rules too narrowly. And, even if the historical correctness of the particular argument were to be conceded, it would be difficult to see the relevance of the argument as an attack upon our *present* stated policy goal of maximizing diversification of program sources.

[8] See *N.B.C. v. U.S.*, 319 U.S. 190 (1943), and *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), in which the chain broadcasting regulations and the concentration of control rules, respectively, were sustained.

necessary "flexibility" be maintained; and, that to abandon this approach for a fixed rule would be to bring about an "abdication of administrative responsibility."

8. We should note at the start that there is nothing inherent in the subject of multiple ownership that compels adoption of either the *ad hoc* approach or a general rule. The problem is one falling within the wide area of administrative discretion recognized by the Supreme Court in the second *Chenery* case.[9] There the Court noted that some questions are best put to rest by a fixed regulation and that others are "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule," but that the decision as to which method is appropriate in any particular case must be made by the agency involved:

> In performing its important functions ... an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity ... And the choice between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.[10]

With full recognition of the responsibilities that accompany the exercise of our discretion, we have concluded that our present *ad hoc* approach to duopoly problems should be abandoned and that an attempt must be made to "particularize"[11] our conception of the public interest through the adoption of fixed overlap rules.[12]

9. The duopoly rules embody considerations of fundamental policy. See paragraphs 2–4 *supra*. Experience with twenty years of *ad hoc* determination in this area demonstrates that the *ad hoc* method does not permit a fully effective translation of this policy into accomplished fact. Moreover, we believe that this result derives from the very nature of the *ad hoc* process rather than from defects in its application. The fact of undesirable overlap becomes, in case by case adjudication, but one of a large number of evidentiary submissions considered to be of decisional significance. Under these circumstances, any single fact undergoes a process of submergence and comes to be regarded as no more significant than any one of a large number of other facts. The end result is, often, that the importance of an extensive overlap situation is obscured in a welter of competing factors and the principle that adequate separation is to be maintained between commonly owned stations disappears in the process. The question is essentially one of perspective. The existence of overlapping service contours between commonly owned stations simply does not carry the same weight, when viewed in terms of a single case, as it does when viewed as part of a national pattern. A review of all cases decided under the present duopoly rules has convinced us

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[9] *S.E.C. v. Chenery Corporation*, 332 U.S. 194 (1947).
[10] *Id* at 202–203.
[11] *N.B.C. v. U.S.*, *supra*, Note 8, at 218.
[12] Adoption of a fixed rule does not, of course, mean a necessary end to all "flexibility". The Commission's obligation to make the "ultimate judgment whether the grant of a license would serve the public interest, convenience, and necessity," (*N.B.C. v. U.S.*, *supra*, at 225) still continues. A request for waiver of the rule showing, on its face, that application of the rule would be inappropriate would be entitled to a hearing. *U.S. v. Storer Broadcasting*, *supra*, Note 8. Moreover, the fixed standards adopted here would not apply in certain specified situations. See paragraph 27, *infra*, concerning "satellite" television operations.

that the pattern of grants which has developed through piecemeal litigation does not represent a desirable realization of our national multiple ownership policy. We feel, therefore, that the most effective way to implement our policy against duopoly is to emphasize the overriding decisional significance of the problem through adoption of a fixed standard.

10. There is a second reason reinforcing our view. We believe that the results achieved through case by case adjudication do not, in public interest terms, justify the effort expended. We agree with the many respondents who state that no fixed rule can be justified on the ground of administrative convenience, but we also believe that a fixed rule is entirely justified if it is a more efficient way to reach a result no less in the public interest than that achieved through case by case adjudication. We do not believe it to be in the public interest for the Commission to dissipate its limited resources in a manner not required by statute and not defensible in terms of the results achieved. Applying this general principle to the problem at hand, we find that there is no dearth of qualified applicants for most available broadcast facilities. As stated in our Notice of Rule Making, our greater problem is too many qualified applicants seeking too few available frequencies. We do not believe that the elimination of some of these potential applicants through a fixed overlap rule will have a substantial effect upon our ability to bring about the "fair, efficient and equitable distribution" of broadcast facilities required under Section 307(b) of the Act. In short, we do not believe that there is, today, any great *need* for retention of the time-consuming processes involved in the *ad hoc* method.

11. Finally, we must recognize the inherent benefits that flow from a fixed standard.[13] A specific overlap rule defines the Commission's position with respect to duopoly problems as they may occur in all ordinary applications. To this extent, potential applicants are able to plan their proposals with a greater degree of foreknowledge and the Commission's staff is better guided in performing its functions. The necessity for formal rule making to bring about a general change in a fixed standard[14] insures that change, if it should come, will result from informed consideration of only those factors relevant to the problems at hand, and not from individual precedent based on the special facts of some particular case. Conversely, the constant availability of new rule making proceedings provides a ready vehicle for change if the rule does not appear to be producing its desired result, and protects the Commission and public from entanglement in a too firm line of precedents. These factors and others, we believe, weigh strongly toward a decision to proceed by general rule rather than *ad hoc* determination when a relatively equal choice is possible between the two methods.[15]

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[13] See, in this connection, Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 1055, 1263, particularly 878–883, (1962).

[14] Administrative Procedure Act, Section 4, 5 U.S.C. sec. 1003.

[15] Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 LAW & CONTEMP. PROB. 658, 671 (1957).

*Need for the Rule*

12. Numerous respondents have argued that no justification has been presented for a rule which is more restrictive in content and more extensive in application than present regulations.[16] Respondents contend that the great increase in the number of stations in recent years plus the concurrent increase in the number and circulation of printed media justify relaxation of the rule rather than an attempt to impose more rigorous standards. It is argued additionally that the increase in the number of stations using their facilities to editorialize cannot justify the proposed rules since all broadcast editorializing is subject to the limitations of the Commission's "fairness doctrine".[17] Finally, respondents submit that the Commission cannot make a finding that the public interest would be served by the proposed rules without compiling a substantial record of tangible harm to the public attributable to the deficiencies of the present overlap standards.

13. We do not find these arguments persuasive. It is true that there has been an increase in total newspaper circulation in the United States and that there are more magazines, weekly newspapers, and paper-back books published today than ever before. Statistics of this nature, however, are not directly relevant to the point emphasized by the Commission in the July 16, 1962 Notice of Rule Making—i.e., that the number of *local* printed news sources under competing ownership has suffered and is suffering a continuous decline. The number of American cities with daily newspapers under competing ownership is now less than 60. Under these circumstances, we feel that the impact of individual broadcast stations has become significantly greater. The fact that there is an increased amount of broadcast service available today has, for us, a somewhat different import than urged by respondents. We are persuaded that it is no longer necessary to tolerate overlap situations allowed in the pioneering days of the broadcast service as the only means of initiating any service at all. We are seldom faced today with a stark choice between authorizing overlapping service from commonly owned stations or having no service at all in a particular area.[18]

14. Nor do we believe that the existence of the "fairness doctrine" can obviate our concern about diversification of program sources. Application of the "fairness doctrine" has inherent limivoked only in connection with specific complaints alleging that a particular station has not afforded a reasonable opportunity for the expression of opposing viewpoints on controversial issues. We tations, as does any policy which, in enforcement, can only be applied after the fact. The "fairness doctrine" is generally inbelieve that even where there has been no complaint alleging unfair practices, the inevitable control exercised by the licensee over dissemination of news and comment, beyond the boundaries of

[16] The rules as modified in this Report and Order are considerably less restrictive than those originally proposed. Nevertheless, they would in some respects be more restrictive than those rules presently in force.

[17] Report on Editorializing by Broadcast Licensees, 1 Pike & Fischer Radio Reg. 91:201 (1949).

[18] In the limited areas of the country where this does occur in the television service, we do not intend to apply the general overlap rules. See paragraph 27, *infra*.

overt editorializing, must enter into any realistic appraisal of multiple ownership. The principles expressed by the Court of Appeals in the *Scripps-Howard* case, *supra,* are particularly noteworthy here, (89 U.S. App. D.C. 13, 19):

> In *Associated Press v. United States* ... the Supreme Court, in answering the contention that the application of the Sherman Act ... to the Associated Press might interfere with the freedom of the press protected by the First Amendment, said that the Amendment rests on the assumption that "the widest possible dissemination of information from diverse and antagonistic sources" is essential to the public welfare. While uttered in a different context, this thought is the key to the present question. Inherent in the thought is the realization that news communicated to the public is subject to selection, to editing, that in addition there may be diversity in method, manner and emphasis of presentation. Such variations may arise from numerous causes.

15. Finally, we do not believe that it is necessary to compile a substantial record of tangible harm to the public resulting from the present rules, as various respondents have demanded. The effect of competition or its absence, and the effects of various types of programs or the absence of programs, are matters not readily susceptible of quantitative ascertainment. In *F.C.C.* v. *R.C.A.*, 346 U.S. 86, 96–97, the Supreme Court recognized this problem in stating how far the Commission must go in relating the grant of its authorizations to the public interest:

> In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles "by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conference v. United States* ... In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast ...

*Proposals for Specific Changes in the Proposed Rules*

16. Most respondents, whether or not they oppose the basic idea of a new or different overlap standard, have objected to one or more specific portions of the proposed rules. Upon review of the comments, we find certain of the objections persuasive and we have modified our original proposals accordingly. The changes we have made will in all respects relax our original proposals and are entirely encompassed in the original Notice. *Owensboro on the Air, Inc.* v. *U.S.*, 104 U.S. App. D.C. 391, 362 F2d 702 (1958). The major objections to specific portions of our original proposals are discussed in the following paragraphs.

17. *Contours used to define prohibited overlap.* In our notice of rule making, we proposed to bar overlap of the predicted 1 mv/m contours in AM and FM and the Grade A service contours in television. We also requested comments regarding the possibility of utilizing the Grade B service contours for television, in view of the greater impact of stations in that service. Our view, as expressed in the July Notice, was that the contours chosen for each service should be roughly comparable in terms of signal quality—

with the possible exception of a more restrictive policy for television stations.

18. The proposal to utilize the 1 mv/m contour for AM stations and the suggestion that the Grade B contour might be employed for television were subjected to the most vigorous attack. It was strongly urged that use of the Grade B television contour would result in unrealistically wide separations between co-owned stations, the separations having little relation to service actually rendered. The objections to the proposed prohibition of 1 mv/m overlap in AM took a somewhat different form. Major stress was placed upon the argument that a signal of 1 mv/m in AM is not comparable, in terms of reception quality, to a 1 mv/m signal in FM.

19. We have concluded that the signal levels used to define prohibited overlap in AM and FM should be as proposed in our original notice—i.e., 1 mv/m—and that Grade B overlap should be barred in television. Our reasons for choosing these contours are as follows:

(a) Prior to the new rules adopted in Docket 14185, the 1 mv/m contour was generally regarded as the normally protected contour for FM stations. Under the new rules, there is no normally protected signal level as such but, at maximum facilities, new Class A stations and Class C stations would be guaranteed an interference-free service area roughly equivalent to the area within the 1 mv/m contour. New Class B stations at maximum facilities would be protected to a radius approximately seven miles past the 1 mv/m contour, but a large number of existing Class B stations are already limited close to their 1 mv/m contours by interference from other existing stations. For these reasons, we decided it would be unnecessary to bar overlap of contours expressing a signal intensity of less than 1 mv/m. On the other hand, since a 1 mv/m signal does provide good reception in the less populated areas where such overlap is most likely to occur and since few stations receive interference within this contour, we did not deem it advisable to employ a higher signal intensity contour to define prohibited overlap.

(b) In AM, unlike FM, the 0.5 mv/m contour has long been regarded as encompassing a station's "normally protected service area". Nevertheless, over the years, many stations have been assigned which cause or receive a certain degree of interference within their 0.5 mv/m contours. For this reason, we did not propose to bar overlap of any portion of the normally protected service areas of two commonly owned stations but, instead, proposed to prohibit 1 mv/m overlap. After considering respondents' numerous objections to this choice, we have decided to retain the 1 mv/m figure in the final rule. While it is true that a 1 mv/m AM signal is not precisely comparable to a 1 mv/m signal in FM—the quality of FM reception being generally better than AM at all equal signal levels—a 1 mv/m AM signal does provide acceptable service in the less populated areas where overlap between co-

owned stations is most likely to occur. In this sense, we believe that the standards we have chosen for AM and FM are roughly comparable. In each case, we have chosen a signal level which provides an adequate signal for reception in areas where overlap is most likely to occur and, in each case, the chosen signal level contour encompasses an area relatively free from co-channel and adjacent channel interference.

(c) It is beyond dispute that television has a considerably greater impact upon the public today than does either of the aural services. Moreover, there are many fewer television channels available than in the aural services. For these reasons, we have concluded that a more restrictive overlap rule is required for television and we have based the final rule on prohibited overlap of Grade B service contours. We do not believe that the separations to be required by such a rule will be "unrealistically" wide. In many areas of the country today, Grade B television signals provide the only available service or, in any event, a service which many viewers have been willing to put up relatively complex antennas to get. Since the new fixed standard is not to be applied to television "satellites", (see paragraph 27, *infra*) we do not believe that prohibition of Grade B overlap will cause any loss of television service to the public. On the other hand, the more restrictive standard we have chosen for television will have the effect of limiting future ownership to a maximum of two stations in most states and, thus, will act indirectly to curb regional concentrations of ownership as well as overlap itself.

20. It is, of course, impossible to say in any particular case that evil exists or ceases to exist just because a small amount of overlap occurs or fails to occur. We do believe, however, that the fixed standards we have chosen for each broadcast service are reasonably related to the policy goals set forth in paragraphs 2–4, *supra*, and are the most effective means of achieving these goals. We feel that our action here is not unlike numerous other examples of standards established by statute or rule which are fixed in terms of numerical limitations. Consider, for example, minimum-wage and maximum-hour provisions (*United States* v. *Darby*, 312 U.S. 100), provisions establishing maximum weights for trucks using state highways (*Morris* v. *Duby*, 274 U.S. 135), and provisions placing limitations upon the number of liquor licenses which will be issued (*Decie* v. *Brown*, 167 Mass. 290; *Cox* v. *Timm*, 182 Ind. 7).

21. *Assumption of maximum height and power for FM and television.* Our proposed rules for FM and television were to take the form of mileage separation tables based upon prohibited overlap of 1 mv/m and Grade A contours, respectively, at assumed maximum facilities.[19] Most respondents oppose the idea of assumed maximum facilities, contending that the spacings required under such a system would be highly unrealistic over large regions of the country. It was pointed out, for example, that many tele-

[19] The separations for UHF television stations were based upon assumed operations utilizing powers of 1000kw and antenna heights of 1000 feet. Although this is somewhat less than maximum possible facilities, it is a realistic appraisal of the maximum to be expected from most UHF stations for some time to come.

vision stations in Zones II and III will never approach an antenna height of 2000 feet above average terrain—the maximum height possible utilizing maximum power—owing to restrictions imposed by the Federal Aviation Agency, the flatness of surrounding terrain, or the lack of need for the greater coverage obtained with greater height. Respondents also noted that a large number of existing "short-spaced" FM stations may not be able to achieve maximum height and power under the recently adopted table of FM mileage separations.

22. This question is not an easy one to resolve. Our purpose in proposing assumed maximum facilities for FM and television was to preclude the establishment of stations which, because of duopoly problems, would be prevented from improving coverage and service. We now believe that this is a considerably lesser danger than we had thought. Applications for new stations must, increasingly, undergo comparative hearings with other applications seeking mutually exclusive facilities. It is reasonable to assume that in this comparative process there will be a winnowing out of proposals filed by applicants who will never be able to achieve maximum facilities. In addition, we intend to examine uncontested applications for highly restricted facilities with great care to determine whether duopoly considerations may preclude future expansions. Although, inevitably, there will still be a certain number of grants in situations where prohibited overlap would result at maximum facilities, the only way to prevent *all* such situations from arising would be to adopt a rule assuming maximum facilities for FM and television. Upon reflection, however, we are convinced that the drawbacks of such a rule would outweigh its advantages. In FM there are so many "short-spaced" existing stations which may be unable to reach maximum facilities and we are forced to conclude that any assumed set of contours would be unrealistic in many cases. We will, therefore, modify our proposed FM rule so that it will bar overlap of the predicted 1 mv/m contours produced by the actual existing or proposed facilities of the stations involved. Similarly, we have decided to modify the television rule so as to bar overlap of Grade B contours predicted with the actual authorized or proposed facilities of the stations involved. Most existing television stations do not operate substantially below maximum power. Although numerous stations—particularly in Zone II and III—do operate substantially below maximum permissible antenna height, future height increases are often unlikely owing to flat terrain, F.A.A. problems, or a lack of foreseeable need for greater area coverage. For these reasons, we have concluded that there is no great need for a rule barring overlap at assumed maximum facilities.

23. *Application of the rules to proposals for major changes.* Respondents contend that a fixed overlap rule should be applied only to applications for new stations. It is asserted that application of the rule to proposals for major changes would act to "freeze" many existing stations at their present facilities since, in some cases, improvement of facilities would increase existing areas of overlap or would create new areas. We are aware of this

problem but have concluded, nonetheless, that the new rule should be applied to proposals for major changes. Were we not to do so, applicants could easily frustrate the objectives of the overlap rule by applying for stations with intentionally restricted service areas so as not to create prohibited overlap and then, having gotten a grant, applying for a major change which would be exempt from the rule. We recognize, of course, that there will still be a small number of presently existing stations "frozen in" by the rule, but we must conclude, in balance, that effective implementation of our policy restricting new overlap outweighs the problems created in these few cases.

24. *Use of measurement data.* The proposed rules were written in terms of predicted contours. Comments were requested as to the possibility of requiring prediction of AM contours solely through use of the Figure M–3 soil conductivity map. Most respondents took strong exception to this suggestion and, upon reflection, we are inclined to agree that the M–3 map—based as it is on a relatively small number of measurements—would introduce too high a degree of approximation into our prediction method in too many cases. Accordingly, we will allow prediction of AM contours either through use of M–3 or through use of appropriate measurement data. FM and television service contours are to be predicted in accordance with the provisions of Sections 73.313 and 73.684 of the Rules. These sections permit alternative showings as to a typical terrain situations in certain described situations.

25. *Class I Stations.* We have concluded that our proposal to bar overlap of 0.5—50% skywave contours between commonly owned Class I AM stations would not be an appropriate way to deal with multiple ownership problems as they concern these stations. Use of such a standard would effectively limit ownership of Class I stations to two, very nearly at opposite ends of the country. Some further limitation as to ownership of Class I stations may be desirable, but we believe that use of the overlap rule to bring about such limitation would be too indirect an approach to what is, more realistically, a "concentration of control" question under Section 73.35(b) of the Rules. The Commission is currently reviewing Section 73.35(b) with a view toward the early issuance of proposals for its modification.

26. *Application of the rule to assignments and transfers.* As stated in the Notice, the new rules will not require any licensee to divest itself of stations presently owned. However, we reaffirm our original proposal that the new rules must be applied to assignments and transfers. The rule will operate in two way swith respect to these transactions. First, a proposed assignee or transferee will be subject to the rule in the same way as any licensee of an existing station seeking a construction permit for an additional new facility. Second, no assignee or transferee will be permitted to acquire "packages" of more than one station in the same service involving overlapping contours prohibited by the rule.[20]

[20] *Pro-forma* transfers and other transfers coming about by operation of law will be exempted, however. The final rule provides that assignment or transfer applications of the type normally filed on FCC Form 316 are not subject to the rule. The types of applications involved are listed in Section 1.540(b) of the Commission's Rules. Transfer of a television station and one or more "satellite" operations will also be exempt. See paragraph 27, *infra*.

27. *Television "satellite" operations.* Various respondents urge strongly that special provision be made to exempt television "satellite" stations from operation of the rule. These respondents point out that "satellite" operations generally exist at locations where operation of an independent station is economically not feasible and that to prohibit establishment of these stations through duopoly rules would be to destroy television service in the area involved. We believe that there is merit in this argument. Accordingly, our final rules provide that television stations which are "primarily satellite operations" shall be exempt from the fixed overlap prohibitions and shall be considered on a case by case basis.[21] For the purposes of this rule, television stations which do not provide a substantial amount of locally originated programming may be considered satellites. Whether or not a particular station is "primarily" a satellite will, in borderline cases, be determined on an *ad hoc* basis.

28. *Miscellaneous problems.* One respondent has urged that the rules not be applied to Class IV AM stations since these stations serve such restricted areas. As we noted in our original proposal, we do not intend to apply the rule to applications for daytime Class IV power increases. Beyond this limited category of applications, however, we do not find any real distinction between the Class IV's and most other stations. Other respondents have suggested numerous hypothetical situations in which the proposed rule might be unrealistic—e.g., situations in which the area of prohibited overlap occurs entirely over water or in a desert. For the most part, these hypothetical problems are highly speculative and, to the extent that one or more may ever materialize, are subject to individual examination upon requests for waiver of the rule.[22] It is significant to point out, however, that many stations provide good service far beyond the contours we have chosen to define prohibited overlap. The contours were chosen because they were, in our view, the most useful *general* method of achieving a desirable separation between stations.

29. In view of the foregoing, IT IS ORDERED, That Part 73 of the Commission's Rules and Regulations is amended as set forth in the attached Appendix.

IT IS FURTHER ORDERED, That the amended sections shall be effective on July 16, 1964.[23]

Authority for the adoption of the above-amended rules is contained in Sections 4(i) and (j), 303 and 307(b) of the Communications Act of 1934, as amended.

Adopted May 20, 1964.

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

NOTE: Rules changes herein will be covered by T.S. III(64)-1.

[21] In 1954, the Commission released a Public Notice, FCC 54-991, expressing this general policy with regard to UHF satellites.

[22] Section 1.3 of the Commission's Rules provides that any provision of the Commission's Rules may be waived for good cause shown.

[23] The new rules will be effective as to pending applications, including hearing cases, as well as new applications. Pending applications may be amended to achieve compliance with the new rules, if possible, during the period prior to the effective date of the rules. Applications in hearing may be amended, subject to the usual rules concerning removal from hearing status. Non-conforming applications not amended to achieve compliance (including hearing cases) will be dismissed when the new rules become effective.

## APPENDIX

1. Section 73.35 of the Commission's Rules is amended by revising paragraph (a) and adding Note 3 to the section, as follows:

§ 73.35 *Multiple ownership.*

* * * * * * *

(a) Such party directly or indirectly owns, operates, or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations, computed in accordance with § 73.183 or § 73.186.

* * * * * * *

NOTE 3: Paragraph (a) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Paragraph (a) will apply to applicants for new stations, major changes in existing stations, assignments of licenses, and transfers of control (except those applications for assignment of license or transfer of control listed in § 1.540(b) of this chapter). Commonly owned stations with overlapping contours, prohibited by paragraph (a) of this section may not be transferred or assigned to a single person, group, or entity. Paragraph (a) of this section will not be applied to Class IV stations requesting power increases.

2. Section 73.240 of the Commission's Rules is amended by designating the introductory text as paragraph (a), by amending and redesignating present paragraph (a) as paragraph (a)(1), by redesignating existing paragraph (b) as paragraph (a)(2), by adding a new paragraph (b), and by adding a new Note 3, as follows:

§ 73.240 *Multiple ownership.*

(a) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if:

(1) Such party directly or indirectly owns, operates, or controls one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1 mv/m contours of the existing and proposed stations, computed in accordance with § 73.313.

* * * * * * *

(b) Paragraph (a) of this section is not applicable to non-commercial educational FM stations.

* * * * * * *

NOTE 3: Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Paragraph (a)(1) will apply to applicants for new stations, major changes in existing stations, assignments of licenses, and transfers of control (except those applications for assignment of license or transfer of control listed in § 1.540(b) of this chapter). Commonly owned stations with overlapping contours prohibited by paragraph (a)(1) of this section may not be transferred or assigned to a single person, group, or entity.

3. Section 73.636 of the Commission's Rules is amended by revising paragraph (a)(1) and by adding NOTE 3 and NOTE 4, as follows:

§ 73.636 *Multiple ownership.*

(a) * * *

(1) Such party directly or indirectly owns, operates, or controls one or more television broadcast stations and the grant of such license will result in overlap of the Grade B contours of the existing and proposed stations, computed in accordance with § 73.684.

* * * * * * *

NOTE 3: Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Paragraph (a)(1) will apply to applicants for new stations, major changes in existing stations, assignments of licenses, and transfers of control (except those applications for assignment of license or transfer of control listed in § 1.540(b) of this chapter). Commonly owned stations with overlapping contours prohibited by paragraph (a)(1) of this section may not be transferred or assigned to a single person, group, or entity.

NOTE 4: Paragraph (a)(1) of this section will not be applied to television stations which are primarily "satellite" operations. Television "satellite" operations will be considered on a case by case basis in order to determine whether

such overlap exists with a commonly owned station as to be against the public interest. Whether or not a particular station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case.

### Concurring Opinion of Chairman E. William Henry

While there is a difference between the majority and the minority on the proper administrative approach to the subject of overlap, there is also a more fundamental difference of substance.

Thus, the minority is fundamentally concerned with overlap only to prevent a specific evil; namely, "an untoward limitation on competition." (See Dissenting Opinion, second paragraph). The majority, however, is more concerned with the establishment, through an affirmative licensing policy, of a maximum diversity of program sources. Neither side would wholly exclude consideration of countervailing factors; the issue is one of emphasis.

I share the preference of the majority. The history of this agency's treatment of the overlap question demonstrates that when overlap is considered solely on a case-by-case basis, as one of a long list of differing though relevant items, the overwhelming tendency is to downgrade it—if not to ignore it entirely. Nor has the attempt to approach each case in a wholly flexible manner succeeded in providing fair and equal treatment to applicants who stand in fundamentally equal positions. In brief, "flexible" consideration of the overlap problem has all too often meant no consideration—or unfair and unequal consideration.

The rules here adopted can go a long way toward remedying these defects, without sacrificing public interest considerations which are of enough importance to warrant waiver of a vital policy. I agree that the acid test of any rule is the manner in which it is administered. This is all the more reason to provide a framework of rules for the consideration of individual applications which reflects the basic goals we seek. Accordingly, I concur in the majority's Report and Order.

### Dissenting Opinion of Commissioners Rosel H. Hyde and Robert E. Lee

We dissent to the issuance of the Report and Order approved by the majority of the Commission in Docket No. 14711. In our opinion the majority has relegated the agency's decision-making process in a most critical aspect of its duties to the application of a single theoretical criterion. Restricting decisions to such a narrow basis will conduce to essentially arbitrary results. This, is seems to us, has been brought about by disregarding the comment on the record of the proceeding and making assumptions and arguments having no factual support.

The Decision and Order which has been entered is not related to realities; it assumes that regardless of all other relevant factors such as interference limitations, market conditions and limitations based upon geographical factors, the distribution of population and other matters bearing upon economic conditions, that any overlap of certain specified contours of stations under common control (Grade B area contours in the case of TV stations) results

in an untoward limitation upon competition. Under this theory, stations operating in such widely separated and distinctly different areas as WFIL–TV, Philadelphia, and WRC–TV, Washington, D.C., would have to be considered as competing stations although this would, of course, be an absurd assumption. No analysis has been made which would show to what extent present licensed operations violate the standards adopted in the new regulations. No information is available as to the extent to which the new restrictions may operate to discourage if not preclude extensions and improvements in service. There is no factual basis upon which it can be shown that elimination of contour overlaps far outside and incidental to the service rendered in different markets will conduce to more effective competition. It appears quite possible although definitive information has not been developed that the imposition of the new restrictions by blanket rule on smaller operations may well have the effect of limiting their ability to compete with larger units of the broadcasting industry.

We are particularly concerned regarding the possible impact of the new restrictive regulations upon the further development of UHF television. This is an area where encouragement rather than restrictions would be appropriate if the Commission's licensing policy is to be consistent with its asserted interest in the use of the UHF channels. The new regulations, it seems to us, may tend to inhibit rather than encourage the full development of nationwide competitive television.

We question whether the new regulations will provide the administrative convenience claimed for them. Unrealistic regulations lead to strained interpretations and demands for waivers. In any event the objective of regulation should be to provide service in the public interest not simply administrative convenience. We object to the adoption of regulations which have the effect of limiting the discretion which the agency was designed to exercise.

F.C.C. 64–532

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
LIABILITY OF SEVEN (7) LEAGUE PRODUCTIONS, INC., LICENSEE OF STATION WIII, HOMESTEAD, FLA.

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated April 1, 1964 addressed to Seven (7) League Productions, Inc., licensee of Station WIII (1430 kc/s, 500 w, D), Homestead, Florida, and (2) the response to the Notice of Apparent Liability (with attached exhibits) filed by the licensee on May 6, 1964.

2. The material facts leading to the issuance of the Notice of Apparent Liability are as follows: On December 9, 1963, the Commission received a telegram from Richard Gillaspy, president of the licensee of Station WIII, requesting permission for Station WIII to remain on the air beyond the hours specified on WIII's license in order to broadcast matter pertaining to a local election which was to be held on December 10. (Seven (7) League Productions, Inc., is authorized by express condition of its license to operate WIII from 7:00 a.m. to 5:30 p.m. in December.)

3. Since the circumstances cited by the licensee to justify its proposed overtime operation did not appear to fall within the definition of an emergency as set forth in Section 73.98(a) of the Commission's Rules,[1] at 4:32 p.m. on December 9, the Commission's staff telegraphed the following reply to the licensee:

Retel 9. Commission Rules do not provide for the operation of standard broadcast stations beyond hours specified on Station license. Refer Section 1.542(c) Commission Rules.[2]

On the same day, at 6:15, the licensee sent the following second telegram to the Commission (received December 10) indicating that the licensee had not as yet received the Commission's 4:32 p.m. wire:

Not having received a reply from our earlier telegram we are forced to act without the guidance of the FCC and therefore after considered evaluation feel

[1] Section 73.98(a) of the Rules defines "emergency" in pertinent part as follows: "... For the purposes of this section, an emergency shall mean a situation that would generally and seriously endanger life and property or cause substantial hardship as a result of events such as hurricane or other severe weather conditions, flood, earthquake or wide-area forest fire ..."

[2] Section 1.542(c) is as follows: "No request by a standard broadcast station for temporary authority to extend its hours of operation beyond those authorized by its regular authorization will be accepted or granted by the Commission."

it is in the public interest, convenience and necessity to remain on the air so we may bring information bearing upon Homestead election tomorrow certain facts which are not known to the voters. No one else can do the job. The only other news media in Homestead does not publish daily. Their next edition does not reach the voter until Thursday, two full days after the election. This new information concerns the exposure of a fraudlent (sic) endorsement of more than one-half of the candidates by the Congress of Racial Equality and the National Association Advancement of Colored People (sic).

4. Subsequent investigation by the Commission's Engineer in Charge, Miami, Florida, revealed that Station WIII remained on the air from 5:30 p.m. (the specified hour to leave the air) on December 9, 1963, to 1:35 a.m. December 10, 1963. Richard Gillaspy admitted to the Commission's Engineer in Charge that he (Gillaspy) received the Commission's reply to the licensee's request to remain on the air at 7:28 p.m. December 9, 1963.

5. Thereafter, the Notice of Apparent Liability was issued because it appeared that the operation of Station WIII from 5:30 p.m. to 12:00 midnight, December 9, 1963 and from midnight to 1:35 a.m., December 10, 1963, constituted willful and repeated failure to operate Station WIII substantially as set forth in the station authorization, as well as willful and repeated failure to observe Sections 73.79 (specification of broadcast hours) and 73.98 (emergency operation Rule) of the Commission's Rules. The Notice indicated that for its failure to observe the terms of its license and the Commission's Rules, licensee, pursuant to Sections 503(b)(1)(A) and (B) of the Communications Act of 1934, as amended, incurred a total apparent liability in the amount of five hundred dollars ($500).

6. Licensee contends that WIII's overtime operation was not willful but due to a "misunderstanding" caused by the fact that the Commission's telegram arrived after the licensee's two earlier telegrams to the Commission expressing the licensee's intention to extend its operation and approximately two hours after the station had been in overtime operation. "Coming as it did after the licensee's two earlier cables, the licensee felt the Commission, aware of our action, was neither refusing the extension nor denying it, but was showing disapproval by implication. Since the Commission's telegram contained no notice of violation nor instructions to cease operation, WIII continued on the air."

7. The licensee's argument is without merit. The Commission's telegram was perfectly clear. Inasmuch as no showing was made to justify emergency operation, the telegram informed the licensee without equivocation that the Commission's Rules did not provide for the operation of standard broadcast stations beyond the hours specified in the station license. Thus, at least from the moment the Commission's telegram was received, the only responsible action would have been immediately to cease broadcasting.

8. The licensee's contention that the violations were due to a "misunderstanding" is further vitiated by the information obtained by the Commission's Engineer in Charge, Miami, Florida, in the course of an investigation conducted at WIII the day following the overtime operations. At that time, Mr. Gillaspy readily admitted that he knew he should not have kept WIII on the air.

However, Mr. Gillaspy stated that he felt it was his duty to "inform the public of the misinformation that was being circulated regarding the candidates for public office." Mr. Gillaspy further stated to the Engineer in Charge that he had announced over the air that he was fully aware of the seriousness of his act "and he was willing to take the consequences." When asked why he continued operation until 1:35 a.m., December 10, 1963, after receiving the Commission's wire at 7:28 p.m., December 9, advising him that WIII was not authorized to operate beyond the hours specified in its current station license, Mr. Gillaspy replied that "he was already committed to stay on." Moreover, interviews conducted with station employees confirmed the fact that Mr. Gillaspy was fully aware that WIII's overtime operation was in violation of the Commission's Rules and the station's authorization.

9. Licensee contends in justification for the overtime operation that "a racially tense situation had been created by the injection, prior to the Homestead election of December 10, 1963, of certain spurious endorsements of political candidates" by the NAACP and CORE; that the licensee was convinced life and limb were threatened by possible mob violence and that therefore the overtime operation was in the public interest. Licensee submitted several letters from local community leaders praising its action.[3]

10. While Mr. Gillaspy may have believed that reporting late developments in the pre-election campaign was of great importance and that the cause was meritorious, he has submitted nothing to the Commission which would place the licensee's actions within the context of the emergency operation rule or substantiate the allegation that life and limb were threatened by mob violence because of factors arising from the pre-election campaign. Mr. Gillaspy himself apparently did not cite this danger in justification of his actions when interviewed by two members of the Commission's staff on the day following the election, nor did he mention possible violence in his telegrams to the Commission requesting permission for overtime operation. The evidence strongly indicates that Mr. Gillaspy was well aware that the local circumstances were not such as to justify emergency operation pursuant to the provisions of 73.98 of the Rules. He apparently evaluated the political situation for himself, choosing for reasons of his own to ignore WIII's authorization and the Commission's Rules. We conclude therefore that the overtime operation of Station WIII on December 9 and 10 constituted willful and repeated failure to operate WIII substantially as set forth in its license, as well as willful and repeated failure to observe Sections 73.79 and 73.98 of the Commission's Rules. *Midwest Radio-Television, Inc.*, FCC 63–1024; *Friendly Broadcasting Company*, 23 RR 893.

11. Lastly, licensee contends that a forfeiture of five hundred dollars "would be an extreme financial burden" in view of the financial position of Station WIII. However, we are not inclined to reduce the amount of the forfeiture to an amount less than that set forth in the Notice of Apparent Liability. In arriving at this

[3] It should be noted, however, that the Commission's complaint files reveal that the licensee was both damned and praised by residents of its service area for the unauthorized overtime broadcast.

conclusion, we have considered all mitigatory factors advanced by the licensee as well as the extent and seriousness of the violations and actions of the licensee. As we stated in *Crowell-Collier Broadcasting Corp.*, 21 RR 921:

> Forfeitures were authorized to obtain greater compliance by licensees with the terms of their licenses and the Commission's Rules, and to deter noncompliance. If serious, repeated violations are excused without sanction, the sanction of forfeiture will not be the effective tool it was intended to be. Rather than being deterred, licensees would be encouraged to continue violating Rules and to depend upon their excuses and promises to avoid liability. We intend to use the forfeiture proceeding as we believe it was intended to be used, to impel broadcast licensees to become familiar with the terms of their licenses and the applicable Rules and to adopt procedures, including periodic review of operations, which will ensure that stations will be operated in substantial compliance with their licenses and the Commission's Rules.

12. Accordingly, IT IS ORDERED that Seven (7) League Productions Inc., the licensee of Station WIII, Homestead, Florida, FORFEIT to the United States Government the sum of five hundred dollars ($500). Payment of said forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days from date of receipt of this Memorandum Opinion and Order.

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 Seven (7) League Productions, Inc.

Adopted June 10, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–567

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of SPARTAN RADIOCASTING CO., ASHEVILLE, N.C. For Construction Permit for New Television Broadcast Translator Station | Docket No. 15322 File No. BPTTV–1996 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HENRY, CHAIRMAN; AND HYDE ABSENT; COMMISSIONERS FORD AND COX DISSENTING.

1. The Commission has before it for consideration a "Request For Oral Argument And Disposition Of Proceeding On Basis Thereof", filed by Spartan Radiocasting Company (hereinafter Spartan) on May 22, 1964; an opposition to the above request, filed by the Chief, Broadcast Bureau on May 27, 1964; and a reply to the above opposition, filed by Spartan on June 5, 1964.

2. Spartan Radiocasting Company, licensee of Station WSPA–TV, Channel 7, Spartanburg, South Carolina, seeks in this proceeding a grant of its application for a VHF television broadcast translator station to rebroadcast the signal of WSPA–TV on output Channel 9 to serve Asheville, North Carolina. The Commission designated Spartan's application for hearing because it could not be determined whether a grant thereof would retard the development of UHF television in and about Asheville.[1] Thereafter, the Commission modified its designation order by enlarging the hearing issues to determine whether the area in question was receiving satisfactory service from UHF television broadcast station WISE–TV, Asheville, North Carolina, and to further determine what public interest benefits would be derived from a grant of Spartan's application.[2]

3. By the same order, the Commission denied Spartan's petition for reconsideration and grant without hearing, because the petition did not resolve the question upon which the hearing was originally designated, i.e. whether a grant of Spartan's application would retard the development of UHF service in Asheville, and because there was substantial disagreement as to the factual basis of Spartan's petition, which necessitated a hearing.

4. Spartan now requests that the Commission hear oral argument on its application and the designation order, as modified, and thereafter dispose of the proceeding on the basis of such oral argument. Spartan has filed with the Chief Hearing Examiner a "Con-

[1] *Spartan Radiocasting Company*, FCC 64–95, released February 12, 1964.
[2] *Spartan Radiocasting Company*, FCC 64–403, released May 8, 1964.

tingent Petition for Dismissal" wherein it moves for dismissal of its application if the Commission should deny its request for oral argument, or, if such request is granted, should decline to grant its application without a hearing. Spartan states that it presumes the question for oral argument would be whether a new or existing general policy that VHF translators not be authorized in areas with a heightened potential for the future expansion of UHF can and should be applied to the peculiar Asheville situation. The Broadcast Bureau opposes Spartan's request for oral argument and urges that it be denied.

5. As a procedural basis for its instant pleading, Spartan relies upon Section 1.41 of the Commission's Rules, which provides, *inter alia,* that where formal procedures are not required by the Rules, requests for action may be submitted informally. Section 1.111 of the Commission's Rules does, however, provide a formal procedure whereby, after the Commission has designated an application for hearing, the applicant may file a petition for reconsideration and grant without hearing. This formal procedure set forth in the Rules precludes reliance on Section 1.41. However, the Commission will consider the instant pleading as a further petition for reconsideration and grant without hearing as sanctioned by the ruling in *Columbia Basin Microwave Co.,* 25 Pike & Fischer, RR 367, 369 (1963).

6. By its present pleading, Spartan seeks the same procedural relief as it sought in the alternative in its prior petition, that is, the presentation of its case by means of oral argument. Further, it relies on the same facts presented in its previous petition and requests the same substantive relief requested therein, namely, a grant of its application without hearing. No cogent reason appears as to why its application should not be designated for hearing. Spartan's pleading is premised on the condition that the "basic question" can appropriately be resolved by oral argument and without an evidentiary hearing only if the Commission is of the opinion that the facts are reasonably clear. As manifested by the Commission's denial of Spartan's previous petition for reconsideration, the Commission believes that there is a substantial disagreement on the facts and, therefore, concludes that the instant request for oral argument must be denied.

Accordingly, IT IS ORDERED, This 24th day of June, 1964, That the "Request For Oral Argument And Disposition Of Proceeding On Basis Thereof" filed by Spartan Radiocasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–557

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of<br>AMENDMENT OF SECTIONS 73.21 AND 73.25<br>TO PERMIT A NEW DAYTIME ASSIGNMENT<br>ON 830 KC./S. AT AVALON, CALIF. | RM–336 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE ABSTAINING FROM VOTING.

1. The Commission has before it a petition for rule making filed May 16, 1962, by John Poole Broadcasting Co., Inc., licensee of Station KGLM (formerly KBIG), Avalon, California (740 kc/s, 10kw, DA–D). The change sought would make the frequency 830 kc/s available for a new Class II–D daytime station at Avalon, California (limited to 10kw power), as an exception to the general principle that for the time being—while we study the optimum use of the I–A clear channels—we will make no new daytime assignments thereon. The background is that in the Clear Channel decision in 1961 we assigned the frequency 760 kc/s to San Diego, California, for Station KFMB, which must vacate its present frequency in order to comply with the U.S./Mexican Agreement (FCC 61–1106, par. 78–79; 21 R.R. 1801, 1828). Poole had opposed this assignment, suggesting instead that 830 kc/s be assigned to San Diego; in an untimely pleading filed in July 1961 it raised for the first time the question of possible use of 830 kc/s by it if 760 kc/s were assigned to San Diego. We affirmed our decision as to 760 kc/s in our decision on reconsideration of the Clear Channel proceeding in 1962 (FCC 62–1214, par. 40–41; 24 R.R. 1595, 1604). The stated basis of Poole's opposition to the San Diego 760 kc/s assignment, and of its present request here, is the 2 mv/m and 25 mv/m overlap which will exist between it and KFMB with the latter operating on 760 kc/s, in conflict with Section 73.37 of our rules. We recognized this in our 1961 decision and on reconsideration in 1962, concluding that waiver of this provision of the rules would be appropriate under the circumstances.

2. The Poole petition was opposed by Midwest Radio-Television, Inc., licensee of Station WCCO, Minneapolis, the Class I–A station on 830 kc/s, *inter alia* on the basis of skywave interference which, it was alleged, KGLM on 830 kc/s at Avalon would cause to WCCO during both pre-sunrise hours and hours approaching sunset at Avalon. Poole filed a reply; other parties have filed related pleadings which, in view of our disposition of this matter, need not be detailed.

3. In our 1961 Clear Channel decision (FCC 61–1106, par. 54–56, 21 R.R. 1821) we set forth the reasons why we had decided that, for the present, there should be no new daytime stations on the I–A clear channels, the only portion of the standard spectrum which is at this point available for extensive development of this service along optimum lines. We stated: "Further assignments on the I–A channels should be made in accordance with an over-all plan which will achieve our objectives, including provision of maximum service to underserved areas, provision of local outlets for the maximum number of communities, and others." With reference particularly to the 12 channels which were not "duplicated"—of which 830 kc/s is one—we stated that: "Moreover, new daytime stations on the 12 Class I–A channels now held in status quo could hinder or obstruct whatever further use of the channels—higher power and/or additional unlimited-time assignments—may later be found apropriate in a furtherance of our objective of improved over-all radio service."

4. We adhered to this decision on reconsideration in 1962, and we adhere to it today, both generally (in our actions returning numerous pending applications for new or increased facilities on the I–A channels) and in this particular case. It is true, as Poole urges, that our rules provide prohibition against 2 and 25 mv/m overlap; but we recognized this problem before, and indicated that the circumstances here are appropriate for a waiver. We do not deem it desirable to make the change requested at the cost of possible impairment of optimum use of the I–A channels, on an orderly, planned basis, as mentioned above.

In view of the foregoing, the "Petition for Rule Making" filed on May 16, 1962 by John Poole Broadcasting Co., Inc. (seeking amendment to Sections 73.21 and 73.25 of the Rules) IS DENIED.

Adopted June 22, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–596

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>BLACKHAWK BROADCASTING CO. (WSDR),<br>STERLING, ILL.<br>For Modification of Construction Permit | Docket No. 15395<br>File No.<br>BMP–10504 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HENRY, CHAIRMAN; HYDE AND COX DISSENTING.

1. This matter is before the Commission on a petition seeking reconsideration of the Order designating the above-captioned application for hearing.[1] For the reasons stated below, the Order will be set aside, and the application will be granted without hearing.[2]

2. WSDR is a Class IV station located in Sterling, Illinois, and is that community's only broadcast facility. It was first authorized on 1240 kc in 1949 at 100w, unlimited. At a time when co-channel stations WIBU (Poynette, Wisconsin—109 miles from Sterling), WTAX (Springfield, Illinois—140 miles from Sterling), and WSBC (Chicago, Illinois—109 miles from Sterling)[3] were operating at 250w unlimited, WSDR sought an increase in power to 250w, unlimited. The application was denied because of deficiencies in WSDR's engineering showings, because of daytime interference to be inflicted upon WIBU, WTAX and WSBC (and WEDC and WCRW—see fn. 3), and because WSDR had failed to show a greater comparative need for its increased service.[4] Within their normally-protected daytime (0.5 mv/m) contours, WIBU would have lost 1,825 persons (2.2%), WTAX would have lost 300 (0.1%), and WSBC would have lost 10,000, (0.3%). WSDR would have gained only 22,560 persons daytime in an area already served by eight other stations.[5]

[1] The following pleadings are involved: (a) Petition for Reconsideration and Grant without Hearing, filed by Blackhawk Broadcasting Company (WSDR) on April 20, 1964; (b) Opposition, filed by WTAX, Inc. (WTAX) on May 4, 1964; (c) Opposition, filed by WSBC Broadcasting Company (WSBC) on May 5, 1964; (d) Opposition, filed by William C. Forrest (WIBU) on May 5, 1964; (e) Opposition, filed by the Commission's Broadcast Bureau on May 5, 1964; and (f) Reply to Oppositions, filed by WSDR on May 15, 1964. To the ame effect as the Petition for Reconsideration is WSDR's Petition to Delete Issues, filed on April 20, 1964. With a grant of the Petition for Reconsideration, the Petition to Delete Issues becomes moot, and it will be dismissed as such. The Commission Order involved was released on March 30, 1964 (FCC 64–255).

[2] The Order denied a letter-request to deny by WTAX, and effected partial grants of Pre-Grant Petitions to Deny by WIBU and WSBC. These pleadings and those associated therewith are also before the Commission.

[3] WSBC shares time with WEDC and WCRW, also located in Chicago. During nighttime hours, WSBC operates from 8:00 to 10:00 and from 11:00 to 12:00.

[4] *Blackhawk Broadcasting Co., Inc.*, 23 F.C.C. 477, 15 R.R. 1017 (1957).

[5] Although interference at night was neither shown nor contended for, denial of the daytime phase of the application dictated a similar result as to nighttime operation, since, under Section 73.182(a)(4) of the Rules, "the separation required for the daytime protection shall also determine the nighttime separation."

3. Subsequently, in accordance with the Commission's policy of increasing the power of Class IV stations, WIBU, WTAX and WSBC were permitted to increase their daytime powers to 1000w, a fourfold increase. In order to keep the lines of daytime interference on the channel at their existing levels, WSDR was permitted a fivefold daytime increase at 500w. As Class IV stations seeking increases in power above 250w, each of the above stations (including WSDR) was exempt from the Commission's 10% Rule. See Section 73.28(d)(3) of the Commission's Rules.

4. In the above-captioned application, WSDR seeks an increase in nighttime power to 250w, the same nighttime power authorized to WIBU, WTAX and WSBC. Operating as proposed, WSDR would cause no perceptible nighttime interference to any station, and neither WIBU, WTAX nor WSBC presently contend otherwise.[6] The lack of perceptible nighttime interference, however, is not proof of adequate nighttime separation. Under Section 73.182(a)(4) of the Rules, the determination of whether WSDR, at nighttime power of 250w, would afford protection to the 250w nighttime operations of WIBU, WTAX and WSBC, is dependent upon a hypothetical daytime calculation: whether theoretical interference would be caused the latter three stations by WSDR on the basis of assumed 250w daytime operations by each of the four stations. In an engineering showing not disputed by the above respondents, WSDR indicated the following amounts of interference: to WIBU, 2,978 persons (2.5%); to WTAX, 364 persons (0.15%); to WSBC, 5,162 persons (0.1%). The foregoing theoretical daytime figures confirm that there would be, at most, *de minimis* nighttime interference, and no interference-caused issue was specified by the Commission in the designation order complained of by WSDR.

5. Notwithstanding the low levels of interference, the nighttime proposal does not fully comply with the separation rule, and a grant can be made only if good cause exists for a waiver of such rule. WSDR has shown (a) that with its existing, 100w operation, it covers little more than its home city of Sterling; and (b) that with 250w of power, it would not only cover Sterling with a stronger signal, but would also provide expanded service to the surrounding areas. Thus, where WSDR now renders nighttime primary service to 26,401 persons in 27 square miles, it would, with 250w, serve an additional 7,280 persons in 24 square miles.[7] The gain area is presently served at night by only four stations, and each of them is located 100 miles away in Chicago. From the above, it is clear that a grant would not only permit WSDR to more adequately fulfill its mission as a Class IV station [see Sec-

[6] The engineering affidavit attached to WIBU's pre-grant petition contended that WIBU's nighttime RSS limitation would be raised to 14.48 mv/m from 14.25 mv/m. It did not, however, dispute that the change cannot be differentiated on the appropriate Commission Graph, but acknowledged that the nighttime increase would not produce "unbearable objectionable interference." Although the pre-grant pleadings of WSBC and WTAX intimated that nighttime interference would result, no engineering support was offered, and each merely referred to the 1957 determination. However, as indicated above, nighttime interference was not specifically involved in the earlier proceeding.

[7] No person presently receiving primary service from WSDR would lose it as a result of the proposed increase in power.

tion 73.21(c)(1) of the Rules], but would also help meet the need of the gain area for service from a nearby source.[8]

6. As stated above, no interference-caused issue was specified in the Commission's designation order. However, in one of its engineering showings, WSDR had indicated that, assuming it and all other Class IV stations at 250w of daytime power, it would receive daytime interference in the amount of 16.5% of population. On the basis thereof, the Commission specified for hearing a 10%-Rule issue in the following terms:

> To determine whether interference received from existing stations would affect more than 10 per cent of the population within the normally protected daytime primary service area (250w) in contravention of Section 73.28(d)(3) of the Rules, and, if so, whether circumstances exist which would warrant a waiver of this section to permit the proposed increase in nighttime power.

It was the Commission's belief that the interference which a proposed operation might receive was a factor for appropriate consideration under the Commission's station-separation rule—Section 73.182(a)(4). Although, upon further deliberation, the Commission remains of the view that there is a general relationship between the two types of interference, the question of adequate separation between Class IV stations has consistently been resolved on the basis of interference caused, and not on the basis of interference received. The Commission believes that this should continue to be the procedure, and that to now introduce interference received as a significant factor under the station-separation rule would be to unnecessarily subject WSDR to requirements not previously imposed on other Class IV stations. Of course, both the station-separation rule and the 10%-rule are designed to curb undue objectionable interference among stations; the Commission is persuaded, however, that their common purpose can be adequately achieved by continuing to apply them separately.

7. In view of the above, the interference-received issue may be appropriately deleted from the proceeding. In the foregoing connection, it should be noted that there is no indication that the nighttime proposal would suffer *actual* interference from existing stations to a degree unacceptable under the Rules; and that, insofar as the station receives *actual* interference daytime in excess of 10%,[9] it was exempt from the 10%-Rule at the time its daytime power was increased to 500w. Additionally, to the extent that the existence of theoretical (i.e., on the basis of assumed, 250w operation by all stations) daytime interference can be regarded as forecasting limitations on nighttime coverage, the considerations warranting a waiver of the separation-rule are adequate to preclude this factor from serving as a ground for denial of the application.

8. With WSDR's technical showings undisputed, and with the deletion of the interference-received issue, there is no longer a purpose to be served by a hearing on the application. Accordingly, the designation order will be set aside, the pre-grant

[8] Because of the imperceptible and negligible nature of the interference to be caused, no question arises under Section 73.24(b) of the Commission's Rules.

[9] Actual interference is computed on the basis of all stations at their actual power. See *Crawford County Broadcasting Company*, 33 F.C.C. 13, 23 R.R. 1127.

pleadings of WIBU, WSBC and WTAX will be denied, and the application will be granted without a hearing. Notwithstanding that WSDR will achieve nighttime equality with the foregoing stations, there will be no resultant adverse effect on the latter, the interference which they might respectively be caused being insufficient even to warrant an interference-caused issue in this proceeding.

9. In connection with the lack of prejudice to the respondents by the Commission's instant action, it should be noted that the principal concern of at least one of such respondents has been the apprehension that WSDR might use the nighttime increase as a springboard for requesting operation at 1000w daytime. Thus, in both its pre-grant petition and its opposition to WSDR's petition for reconsideration, WIBU states as follows: "If WSDR were allowed to go to 250 watts at night, there would be nothing to prevent WSDR from then seeking 1000 watts daytime—thus completely nullifying a decision which this Commission reached in 1957." WIBU fears in the foregoing respect appear to be groundless. First, WSDR would have the burden of overcoming the 1957 determination, which was to the effect that interference-caused considerations precluded daytime equality for WSDR on the channel. Second, in permitting WSDR a fivefold increase (to 500w) as against a fourfold increase (to 1000w) for the respondents, WSDR has already received its due under the Commission's policy of increasing the daytime powers of Class IV stations. Although it may be that WSDR will ultimately seek authority to operate at 1000w daytime—and such an application is not hereby prejudged —the known facts make it extremely doubtful that such an application would be granted.

10. For all of the reasons stated above, the Commission believes that a grant of the instant application by WSDR would serve the public interest, convenience and necessity. The Commission is aware, of course, that the grant here made rests, in substantial measure, on engineering showings untested on a hearing record. However, such showings have been available for attack for a substantial period of time,[10] and nothing filed by the respondents during that period has cast doubt on their validity. In any petition by any of the respondents seeking reconsideration of this action, any challenge of the technical data relied upon by the Commission should be supported by appropriate engineering affidavits.

Accordingly, IT IS ORDERED, This 1st day of July, 1964, (a) that the Pre-Grant Petition to Deny, filed by William C. Forrest on September 26, 1962; the Pre-Grant Petition to Deny, filed by WSBC Broadcasting Company on October 9, 1962; and the pre-grant letter-request to deny, filed by WTAX, Inc. on October 18, 1962; ARE DENIED; (b) that the Petition for Reconsideration of the Commission's designation order in this proceeding (FCC 64–255, released March 30, 1964), filed by Blackhawk Broadcasting Company on April 20, 1964, IS GRANTED; (c) that the said designation order IS SET ASIDE; (d) that the Petition to Delete

[10] WSDR's application was filed on July 20, 1962.

Issues, filed by Blackhawk Broadcasting Company on April 20, 1964, IS DISMISSED AS MOOT; and (e) that the application of Blackhawk Broadcasting Company for modification of construction permit, to authorize an increase in the nighttime power of Standard Broadcast Station WSDR, Sterling, Illinois, from 100 watts to 250 watts, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–597

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of<br>NORTHERN INDIANA BROADCASTERS, INC.,<br>MISHAWAKA, IND.<br>For Construction Permit | Docket No. 14855<br>File No. BP–14771 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER FORD ABSENT; COMMISSIONER COX NOT PARTICIPATING.

1. The Commission has before it for consideration its Order, FCC 64–520, released June 5, 1964, which certified to the Commission for its decision those portions of a motion to enlarge issues in this proceeding pending before the Review Board and bearing upon William N. Udell's qualifications to be a licensee of this Commission, filed by Clarence C. Moore on February 7, 1964, and those portions of the pleadings bearing on this question filed ancillary thereto.[1]

2. This proceeding involves the application of Northern Indiana Broadcasters, Inc. (hereinafter Northern) for a permit to construct a new standard broadcast station at Mishawaka, Indiana.[2] William N. Udell is president, treasurer, director, and 93.6% stockholder of Northern, the licensee of existing station WIMS, Michigan City, Indiana, and an applicant in his own capacity for a new standard broadcast station at Wabash, Indiana (File No. BP–15455) to operate on the frequency 1090 kilocycles. Clarence C. Moore, who filed the motion to enlarge under consideration herein, is the licensee of station WCMR and WCMR–FM, Elkhart, Indiana, and an applicant for a new standard broadcast station to operate on 1090 kilocycles at Fort Wayne, Indiana (File No. BP–14797). Since Fort Wayne and Wabash are only 42 air miles apart, the Moore and Udell co-channel proposals for these cities involve mutually destructive interference. In addition to the foregoing, Northern owns 100% of the stock of the Kosciusko Broadcasting Corporation, licensee of station WKAM in Goshen, Indiana. Kosciusko has applied for a permit to change that station's facilities from daytime only operation on 1460 kilocycles with 1 kilowatt of power to unlimited hours of operation on 1460 kilocycles with 500 watts power, 1 kilowatt-local sunset.

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[1] Namely, opposition filed by Northern Indiana Broadcasters, Inc. on February 27, 1964; Broadcast Bureau's comments filed on February 27, 1964; opposition to the Broadcast Bureau's comments filed by Northern Indiana on March 16, 1964; and a reply to Northern Indiana's opposition, filed by Clarence C. Moore on March 16, 1964.

[2] Following a hearing on the Mishawaka application held in April 1963, the Hearing Examiner issued an Initial Decision on December 2, 1963, granting the application (FCC 63D–138). Exceptions are presently pending before the Review Board.

3. On February 14, 1964, Clarence C. Moore filed a petition for reconsideration directed against our action of January 14, 1964, granting without hearing the above-discussed WKAM, Goshen, application. This petition included the identical allegations concerning Udell's character qualifications which are set out in the motion to enlarge filed herein. In light of Udell's majority interest in Northern and the fact that Northern is the sole stockholder of the licensee of WKAM, Goshen, the Commission by Order, FCC 64–431, released May 14, 1964, set aside the WKAM construction permit and held final action on such application in abeyance until dispositive action might be taken with respect to the matters raised in the motion to enlarge filed by Moore in this Mishawaka, Indiana, proceeding. As indicated above, by Order, FCC 64–520, released June 5, 1964, we certified to ourselves for determination those portions of the Moore motion pending before the Review Board having to do with Udell's character qualifications.

4. In his motion to enlarge, Moore alleges that Udell's application for a new station at Wabash, Indiana, which is mutually exclusive with Moore's application for a new station at Fort Wayne, Indiana, both specifying 1090 kilocycles, may have been filed (1) to protect the economic position of Udell's station at Michigan City Indiana (WIMS), presently the only standard broadcast station licensed in that community, by blocking any possible future use of 1090 kilocycles by a competitor at Michigan City, or (2) in an attempt to block Moore's obtaining a grant of his Fort Wayne application. In support of his allegations charging Udell with these improper motives, Moore has submitted affidavits prepared by himself and by E. Harold Munn, his consulting radio engineer, reciting statements [3] alleged to have been made by Udell to Moore, to Munn, and to others employed by Moore, at meetings held on two separate occasions between Moore and Udell. The first meeting referred to took place at Moore's offices in Elkhart, Indiana, on April 18, 1962. The second occurred at Udell's offices in Michigan City, Indiana, on June 1, 1962. The first meeting at which Udell visited Moore was not pre-arranged; the second meeting was arranged by Munn. The statements alleged to have been made by Udell and recited in the affidavits were prepared on the basis of written memoranda which had been made by Moore and Munn immediately following the second meeting with Udell, almost 2 years ago. Although Udell does not deny that he may have made the statements attributed to him, he points out that he does not believe he stated them at the first meeting wherein Udell, having received a telephone call from Moore concerning his Wabash application, decided to and did leave a copy of his application at Moore's office in the hope that Moore's engineers might find a way of eliminating the mutual exclusivity between the Wabash and Fort Wayne proposals. Udell states that at the second meet-

[3] Udell allegedly stated to Moore: (a) "I didn't want a station in Wabash. I only did it to protect myself;" (b) "My wife heard in a lodge meeting that someone from WBBM is in on an application for 1090 kilocycles in Michigan City and I had to protect myself;" (c) "I wouldn't advise anybody to put a station in Wabash because the Newspaper, Bank and several business places are all owned by one interest;" (d) "I think that $100 per month for two years is buying me pretty good protection;" (e) "If you can prove that I'm protected on 1090 in Michigan City, I'll drop my case in Wabash;" (f) "I have no intention of putting or following through with the station in Wabash."

ing, which lasted about an hour, he might have made the statements attributed to him but that Moore quoted them out of context and failed to recount the other matters which transpired at such meeting. Udell avers that, in attempting to keep Moore from prying into his affairs, he may have made unwise statements in anger or as a result of the pressures he felt were being exerted upon him to terminate the prosecution of his Wabash application.

5. In our view, aside from the statements alleged to have been made by Udell, Moore has failed to demonstrate any action on the part of Udell which evidences anything other than the good faith prosecution by Udell of his applications before this Commission. In regard to the allegation that Udell seeks to block any future authorization on 1090 kilocycles in Michigan City, and that his Wabash application was filed for this sole purpose, we conclude that the facts presented to us do not warrant an enlargement of issues to permit further exploration of this matter. It appears that Udell had been advised by means of an engineering survey prepared for him prior to the filing of his Wabash application that 1090 kilocycles could not be used in Michigan City (1) because of a pending 1080 kilocycles application at Valparaiso, Indiana, only sixteen miles from Michigan City, for a first station which would undoubtedly prevail in a 307(b) comparative hearing against any applicant for a second station at Michigan City, (2) because of the interference any 1090 proposal at Michigan City would receive from Station WMUS, Muskegon, Michigan, and (3) because a grant of Moore's Fort Wayne application would in itself preclude use of 1090 at Michigan City. In addition to his opinion, based upon the foregoing, that his Wabash application was, therefore, not necessary to preclude any possible establishment of a second station at Michigan City, it also appears that Udell's Wabash application was the only one on file with us at the "cut-off" date for filing applications which would conflict with Moore's Fort Wayne application. Udell not only failed to withdraw his Wabash application for 1090 kilocycles in the Michigan City area, but he actually proceeded twice to amend such application, the first time to specify expensive directional antenna equipment in order to eliminate interference problems, the second time to submit another engineering survey showing a further reduction of interference problems with other stations. We also note that on March 22, 1962, Udell executed a lease for his proposed transmitter site, with an option to purchase the land at $17,500, calling for a monthly rental of $100. This rental has been paid regularly up to the present time. These facts indicate to us a careful and diligent prosecution by Udell of his Wabash application, as well as his intention to build and construct that station.

6. With respect to Moore's second allegation that Udell's Wabash application was filed for the purpose of blocking Moore's Fort Wayne application, all of the above facts negate such a finding. In addition, although Moore's Fort Wayne application had been on file since 1961, more than a year before Udell filed his Wabash application, it appears that Udell had been interested in a Wabash station as early as 1959. The Commission's Report and Order in

the Daytime Skywave Proceeding, Docket No. 833, 27 F.C.C. 587, effective October 20, 1959, made 1520 kilocycles available for application in Wabash. Udell at that time had a frequency search prepared and visited Wabash in March, July, and August of 1960. He ultimately decided against filing such application, however, due to adverse pressure from his father who had assisted him in his broadcasting endeavors and who expressed great doubts as to the wisdom of constructing a station at Wabash. His father subsequently died. In February of 1962, 1090 kilocycles became available for use at Wabash by virtue of the Commission's having lifted its freeze on consideration of certain applications for Class I–B Channels, Docket No. 6741, 31 F.C.C. 565. After another survey was made, Udell filed his application for Wabash on April 5, 1962, only two months after 1090 kilocycles actually became available for grant.[4] Here, again, we conclude that, since Udell demonstrated a desire a construct a station in Wabash prior to the filing of an application for Fort Wayne by Moore, and since Udell has prosecuted his application with diligence, further inquiry into this matter is unwarranted.

7. We must assume, in the absence of a statement to the contrary, that Udell did, in fact, make the statements attributed to him. However, after a careful study of all the matters presented by the pleadings herein, we are unable to ascertain any action on the part of Udell to show that these statements constituted true evidences of Udell's intent, rather than, as he explains, merely being the product of a desire on Udell's part to discourage Moore from further preparing for hearing and the result of anger at what Udell believed was unfair pressure being exerted upon him by Messrs. Moore and Munn. We also advert to the fact that Moore has had in his possession since June 1962 the memoranda of the meetings at which Udell's statements were allegedly made which form the basis of the motion to enlarge now before us, but that Moore withheld this information from us approximately 1½ years until station WKAM had received its nighttime authorization and until he had, by means of amendments, refined his Fort Wayne application to the point where the only impediment to its grant appeared to be its unfavorable 307(b) position with respect to Udell's mutually exclusive Wabash application, Moore's Fort Wayne proposal being for a fifth station, Udell's Wabash proposal being for a first. We are of the view that Moore was under a duty as soon as he and Munn prepared their memoranda to come forward and advise us of what Moore believed to be questionable conduct on the part of Udell. To assume that the significance of Udell's statements did not become apparent to Moore until almost two years later has a hollow ring. See *Ouachita Valley Radio Corp.*, 24 Pike & Fischer, R.R. 828 (Review Board, December 1962). We are also not unmindful of the fact that since Udell's Mishawaka proposal will provide primary service to Elkhart, Indiana, only ten miles away and the site of Moore's stations

[4] At the time that Moore amended his application to specify 1090 kilocycles on April 21, 1961, that frequency was frozen pending the outcome of the clear channel proceedings. Applications were, however, accepted at the time, although not processed. In February, 1962, the frequency actually became available for licensing, and applications were then processed.

WCMR–AM and FM, any delay or the ultimate defeat of this Mishawaka application will inure to Moore's economic benefit. In light of these factors, we conclude that no purpose would be served by enlargement of the issues in this proceeding.

Accordingly, IT IS ORDERED, This 1st day of July, 1964, that those portions of the motion to enlarge issues filed by Clarence C. Moore bearing on William N. Udell's qualifications to be a licensee of this Commission ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–604

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of WHAS, INC. (WHAS–TV), LOUISVILLE, KY. KY. For Construction Permit | Docket No. 15544 File No. BPCT–3187 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER FORD ABSENT.

1. The Commission has before it for consideration: (a) the above-captioned application for construction permit to change transmitter site filed by WHAS, Inc. (applicant), licensee of Station WHAS–TV, Channel 11, Louisville, Kentucky, on May 3, 1963, and amended on January 22, 1964; (b) a "Petition to Deny" filed June 13, 1963, by WLEX–TV, Inc. (petitioner), licensee of Station WLEX–TV, Channel 18, Lexington, Kentucky, directed against a grant of (a) above; (c) a "Supplement to Petition to Deny" filed by petitioner on July 12, 1963; (d) an "Opposition of WHAS, Inc., to Petitions of WLEX–TV, Inc., and Taft Broadcasting Company"[1] filed July 22, 1963, by the applicant; (e) a "Reply to Opposition of WHAS, Inc." filed July 31, 1963, by petitioner; (f) a "Further Supplement to Petition to Deny" filed February 20, 1964, by petitioner; and (g) an "Opposition to Further Supplement to Petition to Deny" filed March 13, 1964, by the applicant.

2. The applicant seeks a construction permit to allow it to relocate its present licensed facilities and make other changes, as follows: Relocate its transmitter from its present site in downtown Louisville to a site approximately 3.6 miles north of New Albany, Indiana; increase antenna height from 490 feet to 1,290 feet above average terrain; and reduce visual effective radiated power from 316 kw to 133.5 kw. As a result of the proposed move, the area enclosed by Station WHAS–TV's predicted Grade B contour will be increased from 8,560 square miles to 13,225 square miles, and the estimated population within the predicted Grade B contour will be increased from 1,126,103 persons to 1,356,585 persons.

3. Since a grant of the present application will result in increasing the applicant's coverage in an area already served by the petitioner (see paragraph 5 below), it is clear that the petitioner has

[1] The reference to Taft Broadcasting Company is a result of the filing of a "Petition for Imposition of Condition or for Alternative Relief" by Taft Broadcasting Company, licensee of Station WKYT–TV, Channel 27, Lexington, Kentucky, on June 13, 1963. However, on March 13, 1964, Taft notified the Commission that it did not object to this application as amended January 22, 1964. Accordingly, Taft's former objections are not considered in this opinion.

standing as a "party in interest" within the meaning of Section 309(d) of the Communications Act. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470.

4. Petitioner has proposed three issues in its "Petition to Deny", which may be summarized as follows: To determine the impact of the applicant's proposed operation upon UHF television broadcasting in Lexington, Kentucky; to determine whether a grant of the present application would result in a fair, efficient and equitable distribution of television service within the meaning of Section 307(b) of the Communications Act; and to determine what steps the applicant has taken to ascertain program needs in the additional area to be served, particularly within the area served by the Lexington stations, and to determine what steps have been taken by the applicant to meet such needs. In support of its petition, petitioner relies on a statement prepared by the Station Manager of Station WLEX–TV, and on the Commission's decision in *WHAS, Inc.*, FCC 61–937, 21 R.R. 929. In that proceeding, the applicant proposed to furnish Lexington, Fayette County, and the majority of the areas and populations within the Grade B contours of the Lexington UHF stations with a vastly improved television signal which would have permitted many persons formerly receiving no more than a marginal signal from WHAS–TV to receive a predicted Grade A or Grade B VHF signal from it. Because of the highly improved signal it would furnish to Lexington, the Commission feared a grant of WHAS–TV's application would cause immediate and permanent economic losses to the Lexington UHF stations. In turn, the Commission was concerned that these losses would almost inevitably be quickly translated into loss by the public of locally-oriented programming, and of an outlet for self-expression and local advertising. And it was on this basis that the Commission indicated the applicant had neither satisfied Section 307(b) of the Act nor showed a replacement for the loss of local program service in Lexington.

5. Petitioner claims basically that the Commission is here confronted with a repetition of the earlier *WHAS* case. Applicant's position is that its proposal would have so much less impact on petitioner, compared with the impact involved in the earlier proceeding, that the Commission should grant its application without hearing [2]. The record, as it relates to the applicant, shows that it must quit its present transmitter site to make way for an urban renewal project in downtown Louisville; that its proposed new site will be approximately 1.5 miles from the existing site of Station WAVE–TV, Channel 3, the other Louisville VHF station; that Station WHAS–TV's predicted contour from its proposed site will be entirely within the present predicted contour of Station WAVE–TV at its existing site; that Station WHAS–TV will not, as a result of a grant of this application, provide a predicted signal of Grade B or better to any area or population not now receiving VHF service from at least one station; that Station WHAS–TV's

[2] It is appropriate at this point to note both that the applicant's initial proposal filed May 3, 1963, differed from the proposal as it now stands after the amendment of January 22, 1964, and that most of the petitioner's factual allegations were made before the filing of the amendment.

proposed predicted Grade B contour will not include any part of Fayette County, which contains Lexington; that at present the predicted Grade B contours of Stations WLEX–TV and WHAS–TV overlap in an area of 1,152 square miles containing 61,400 people, and that with Station WHAS–TV operating as proposed the overlap of predicted Grade B contours will involve an area of 1,861 square miles containing 86,838 persons [an increase of 25,438 persons]; and that there are 429,280 persons within Station WLEX–TV's predicted Grade B contour. Finally, it appears that of nineteen counties claimed by petitioner to comprise the Lexington UHF market, fifteen will be outside the predicted Grade B contour of Station WHAS–TV and none of the other four will be wholly within Station WHAS–TV's predicted Grade B contour [3].

6. As indicated in the preceding paragraphs, the petitioner has relied in large measure on the earlier *WHAS* decision as the basis for its request for a hearing. However, as the Commission's earlier findings make clear, the present application clearly will not have as substantial an effect on the basically UHF area of Lexington as would the previous proposal. This fact poses a serious problem since although it appears the impact on the petitioner would be substantially lessened under the present proposal, we cannot tell, upon the basis of the pleadings before us, whether a grant of the present application would not have an adverse effect on petitioner's further operations, and, if so, to an extent inconsistent with the public interest. In view of the interest in permitting the applicant to move, and indeed, the necessity for such a move in light of the urban renewal project in Louisville, and at the same time the desirability of avoiding any action which might significantly adversely affect petitioner's UHF operation, the Commission is confronted with a difficult decision which cannot be completely satisfied by ordering the present application into evidentiary hearing. However, it appears that there is a solution. Petitioner has pointed out that by a reduction of radiated power in the direction of Lexington, the applicant could maintain approximately its present contour in that direction. Thus, by directing the applicant to suppress radiation in the direction of Lexington, it would be possible to avoid the chance of injury to the petitioner. Accordingly, in order to permit the applicant to move immediately, and yet not risk adversely affecting the UHF operation in Lexington, the Commission has determined to make a partial grant of the present application, pursuant to Section 1.110 of the Commission's

[3] In its earlier decision, *WHAS, Inc., supra*, the Commission found that a grant of the applicant's earlier application would have resulted in WHAS–TV's predicted Grade A contour encompassing Lexington, Kentucky, and two-fifths of Fayette County, while its predicted Grade B contour would have extended to approximately 21 miles east of Lexington. 62% of the population within WLEX–TV's Grade B predicted contour does not receive VHF service of predicted quality of Grade B or better. Had the earlier WHAS–TV application been granted, only 13% of the population within WLEX–TV's predicted Grade B contour would not have received predicted VHF service of Grade B or better. On the other hand, under the present proposal, WHAS–TV's Predicted Grade B contour will remain west of Lexington and will not even reach Fayette County. WHAS–TV presently serves approximately 14.3% of the population within WLEX–TV's predicted Grade B contour and this figure will increase to approximately 20% of the population within the WLEX–TV Grade B contour. However, the additional overlapping of the two services will occur entirely within an area which is already receiving at least one VHF service.

Rules [4]. The present application will be granted subject to an appropriate limitation on WHAS–TV's effective radiated power in the direction of Lexington. At the same time, the proposal will be ordered into hearing to determine and evaluate all the considerations in the public interest judgment to be made, including of course the economic effect on the petitioner's operations in Lexington. If at the conclusion of this hearing the Commission determines that the full operation proposed by the applicant would not significantly affect petitioner's operation, it will order the condition removed. On the other hand, if the Commission is satisfied that the proposed operation could adversely affect petitioner's operation and that this adverse consideration is not outweighed by other factors, it will order the directionalization made a permanent part of the applicant's license. The Commission believes that this procedure will best satisfy the needs of the public in the area affected. Since the Commission is undertaking to make sure that a grant of the present application could not impair petitioner's ability to operate in the public interest, it is apparent that no Section 307(b) issue is raised.

7. The final issue proposed by petitioner is directed to the efforts made by the applicant to determine the needs and interests of the additional area to be served by its station and the steps it has taken to meet such needs. The petitioner has not attempted in any way to support the specification of this issue with any allegations of fact. Consequently, were the Commission to consider this solely as a matter of formal pleading, the question raised could be dismissed without further consideration since the requirements of Section 309 of the Act have not been satisfied. However, since the applicant did not respond to this contention [directing its pleadings only to the economic contention advanced by petitioner] the Commission believes it appropriate independently of the pleadings to consider the matter thus raised. We have reviewed the application and find that the applicant has proposed changes in its present programing, that it has stated a variety of steps it has taken to furnish all of its viewers with improved programing and the steps that it has taken to respond to the particular events in its service area which seem to it to warrant special attention. Similarly, the Commission has examined the applicant's pending renewal application (BRCT–72) and finds that it also reflects the applicant's continued responsiveness to the needs and interests of its service area. Upon consideration of the information available to it, the Commission concludes that the applicant has adequately demonstrated its responsiveness to changing needs and has made clear its recognition of its continued responsibility to serve the needs and interests of its viewing public. The demonstrated attitude of the applicant is, therefore, completely consistent with the Com-

[4] Section 1.110 of the Commission's Rules provides that, "Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, or subject to any interference that may result to a station if designated application or applications are subsequently granted, the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing."

mission's concept of a broadcast licensee's role in continually striving to ascertain and serve the needs and interests of its service area. *Report and Statement of Policy re: Commission En Banc Programming Inquiry,* 20 R.R. 1901, 1912.

8. In view of the foregoing, we find that the petitioner has raised substantial and material questions of fact. We find further that a partial grant of the application will serve the public interest, convenience and necessity. Accordingly, IT IS ORDERED, That the "Petition to Deny" filed by WLEX–TV, Inc., IS HEREBY GRANTED to the extent indicated, AND IS OTHERWISE DENIED. IT IS FURTHER ORDERED, That the above-captioned application filed by WHAS, Inc., IS HEREBY PARTIALLY GRANTED, in accordance with specifications to be issued and subject to the following conditions:

(1) Station WHAS–TV's visual effective radiated power in the direction of Lexington, Kentucky, shall be limited so that the portion of the WHAS–TV predicted Grade B contour located within the predicted Grade B contour of WLEX–TV shall not exceed the predicted Grade B contour provided by the presently licensed operation of WHAS–TV.

(2) WHAS, Inc., shall, within 30 days, furnish to the Commission the necessary technical information required for the preparation of a construction permit which will reflect the conditions of the grant made herein. Such information shall include an antenna horizontal field radiation pattern, which will provide the required attenuation in the direction of Lexington, Kentucky, together with new exhibits portraying the predicted City, Grade A and Grade B contours.

IT IS FURTHER ORDERED that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application IS DESIGNATED FOR A HEARING at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine the impact upon Station WLEX–TV which would result from operation of Station WHAS–TV without directionalization.

2. To determine in view of the evidence adduced pursuant to the foregoing issue whether removal of the directionalization condition would serve the public interest, convenience and necessity.

IT IS FURTHER ORDERED, That WLEX–TV and the Chief of the Broadcast Bureau are made parties to this proceeding.

IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to Issue 1 are hereby placed on WLEX–TV.

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

IT IS FURTHER ORDERED, That the applicant herein shall,

pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 (a) of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 1.594(g) of the Rules.

Adopted July 1, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–609

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES, REGARDING AM STATION ASSIGNMENT STANDARDS AND THE RELATIONSHIP BETWEEN THE AM AND FM BROADCAST SERVICES | Docket No. 15084 |

### REPORT AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND FORD DISSENTING AND ISSUING STATEMENTS; COMMISSIONER BARTLEY CONCURRING AND ISSUING A STATEMENT.

1. The Commission's Notice of Proposed Rule Making in the above-entitled matter was released on May 17, 1963.[1] Although the Notice marked the formal beginning of this proceeding, it was itself the outgrowth of several prior events reflecting the Commission's intent to bring about a revision of the rules governing standard broadcast station assignments. The first of these events was the so-called "AM freeze" which was put into effect on May 10, 1962, so that existing AM problems would not be further compounded by new assignments while the Commission considered proposals for changes in the rules.[2] The second major event preceding the notice of rule making was a two day public conference concerning AM growth problems held on January 7 and 8, 1963. At this conference—the transcript of which has been incorporated into the present Docket—the National Association of Broadcasters and various other interested parties appeared before the Commission to present their views regarding AM problems.

2. In the Notice, we proposed new rules reflecting the preliminary results of our own study of station assignment problems in AM as well as certain suggestions brought forth in the AM conference. We also stated at that time:

> Upon considerable reflection and after review of all relevant material now at our disposal, we have found it necessary to broaden the scope of matters under consideration to include not only the question of AM station assignments but also, more basic problems concerning the future development of the aural service as a whole. Specifically, we believe it is impossible to produce meaningful proposals for rules governing AM allocations without giving substantial thought to the relationship between that service and the FM service.

[1] FCC 63–468, 25 Pike and Fischer, R.R. 1615, May 17, 1963. Sometimes referred to herein as "the Notice".

[2] The "freeze" order (FCC 62–516) is reprinted at 23 Pike and Fischer, R.R. 1545. The general validity of the "freeze" was upheld in *Kessler* v. *Federal Communications Commission* 326 F. 2d 673 (1 RR 2d 2061), decided December 20, 1963.

*The Commission's Proposals*

3. The proposals in our Notice of May 17 concerned only those matters which we regarded as basic to the questions of AM station assignment principles and the relationship between the AM and FM services. Briefly summarized, our proposals were as follows:

(a) A "go-no go" prohibited overlap system was proposed to govern future grants of new daytime AM facilities and changes in existing stations. Under the Commission's proposal, no authorization would be granted for a new AM station or a change in frequency if the proposal involved overlap of specified signal strength contours with any other station or proposal on the same channel, or on 1st, 2nd, or third adjacent channels. An application for any other change in existing facilities would not be granted if prohibited overlap would occur with any other station in any areas not already subject to prohibited overlap from the station applying to change facilities. The standards used to define prohibited overlap were those used under the old rules to determine interference between co-channel or first adjacent channel stations, and to define station separation requirements for second and third adjacent channel stations. The existing 1:30 second adjacent channel interference ratio would not be employed in determining prohibited overlap and this ratio would, therefore, be eliminated in effect. The new standards were not to be applied to Class IV power increases. Expressed in tabular form, the signal strength contours used to define prohibited overlap for new stations in the Commission's proposal are as follows:

| Frequency separation | Contour of proposed new station (Class II-B, II-D, III and IV) | Contour of any other station |
|---|---|---|
| Co-channel ..... | 0.005 mv./m.<br>0.025 mv./m.<br>0.5 mv./m. | 0.1 mv./m. (Class I)<br>0.5 mv./m. (Cl. II, III, IV)<br>0.025 mv./m. (All Classes) |
| 10 kc ..... | 0.5 mv./m. | 0.5 mv./m. (All Classes) |
| 20 kc ..... | 2 mv./m.<br>25 mv./m. | 25 mv./m. (All Classes)<br>2 mv./m. (All Classes) |
| 30 kc ..... | 25 mv./m. | 25 mv./m. (All Classes) |

(b) It was proposed that new daytime AM assignments would be further limited by additional rules designed to insure an efficient distribution of available facilities. Proposals for new stations would have been required to comply with the engineering rules and, also, to comply with one of two alternative requirements (a) the new station would provide a first or second primary daytime service to at least 25% of the area within the proposed normally protected service contour; or (b) the new station would not cause the total number of AM stations in a particular city, or other community to exceed the "Maximum Permissible Number of AM Assignments" given in a table to be incorporated in the rules. The permissible number of AM assignments would vary according to the popu-

lation of the city involved and, to some extent, for communities over 10,000 population, according to the number of FM assignments for that community in the FM Table. A further proposal would have barred a new AM station in a community under 50,000 population if the proposed operation would place a signal of 2 mv/m or greater over more than 25% of the area within any other community of 50,000 or more persons.

(c) Comments were requested as to the feasibility of a proposal by which measurement data would be eliminated eventually as a means of predicting ground-wave signal intensity contours, total reliancé being placed, instead, on an updated version of the M–3 conductivity map (47 CFR 73.190).

(d) It was proposed that no new nighttime facilities would be granted unless the new station would not raise the RSS limitation of any existing station (predicted under the 50% exclusion rule) and would provide a first primary AM service to at least 25% of the area within the proposed interference-free service contour. No quantitative limit would be placed upon interference received by the new proposal if the foregoing requirements were met and the city signal requirements of Section 73.188 of the Commission's Rules were also met. Existing nighttime stations would be permitted to make major changes in their facilities upon a showing that no new interference would be caused to any existing station.

(e) It was proposed that in cities over 100,000 population in which no vacant FM channels remain in the FM Table of Assignments FM stations be required to devote no more than 50% of the average broadcast week to programs duplicated from any AM station in the same local area. The rule would become effective one year following its adoption. Comments were also requested as to the possibility of applying such a rule to Standard Metropolitan Statistical Area over 100,000, rather than to cities of that size. This proposal was derived from the Commission's tentative view that unrestricted AM–FM program duplication was no longer a factor promoting the grouping of FM but represented, instead, a waste of valuable frequency space for the aural services.

(f) Although the Notice stated that separate ownership of AM and FM stations in the same community was a desirable long-term goal, no rules were proposed which would affect dual ownership at the present stage of FM development. It was observed, however, that as FM frequencies become more and more scarce, some dual owners might become vulnerable to competing applications at renewal time, particularly if the dual operator regarded his obligations to the public in FM as secondary to those in AM.

(g) Finally, proposals were advanced under which two or more AM stations or FM stations in communities with many other stations could merge, with Commission approval, and be assured that the deleted frequency or frequencies would not be reassigned in the same locality.

4. Approximately 100 comments were filed in response to one or more of the proposals set out above. Many of these respondents also advanced other ideas and proposals regarding the aural services. In the paragraphs to follow, we set forth our conclusions based upon a thorough consideration of our proposals and the various comments. Since our conclusions regarding daytime AM engineering questions are central to this proceeding and form the underlying basis for our actions in each of the other areas, we turn first to a consideration of the changes to be adopted in the rules governing daytime AM assignments.

*Engineering Rules—General Considerations and Daytime Rules*

5. The Commission's proposals for "go-no go" engineering rules received support, in whole or in part, from significant segments of the industry.[4] A greater number of respondents objected to the proposed prohibited overlap rules, however. These objections fell into three major categories and may be summarized briefly as follows:

(a) *Need for "flexibility"*: Parties raising this general line of argument contend that because of the many variables involved in AM assignments, it is essential that the Commission retain maximum flexibility to grant or deny on an *ad hoc* basis. These parties claim that problems which may have developed under the present rules represent defects in application of the rules and not inherent defects in the *ad hoc* process in this area. A "go-no go" system is characterized as an abdication of administrative responsibility on the part of the Commission.

(b) *New rules are unnecessary*: Two groups of respondents question the necessity of new rules. The first group states that the present rules have worked well, have produced an excellent pattern of AM assignments, and will continue to do so in the future. The second group argues that the present pattern of AM assignments has almost completely matured, in any event, and that new rules can make little difference one way or another.

(c) *Objections to specific proposals*: Even assuming that some sort of "go-no go" rules will be adopted, a number of respondents suggest that the rules proposed by the Commission should be modified in certain specific areas. Some parties object, for example, to the Commission's proposal to drop, in effect, the 1:30 ratio for defining second adjacent channel interference. Examples of other suggested changes in the proposed rules include: the substitution of less restrictive standards than those presently contained in Section 73.37 of the Commission's Rules to define prohibited overlap between second and third adjacent channel facilities; modification of the proposed rules to permit some degree of received interference, either for all new facilities or for stations which

[4] For example, two of the major networks, N.B.C. and C.B.S., favored the basic principle of a "go-no go" system. The NAB also favored such a system in principle, with certain reservations pertaining to the methods by which signal strength contour location is determined.

would provide first local services in their communities; and, modification of the proposals so as to disregard otherwise prohibited overlap which would occur entirely in areas already receiving interference from existing sources. Finally, some parties contend that more information concerning AM engineering problems is needed before any new rules can be adopted.

6. Upon consideration of all the comments, we have concluded that our original proposals should be adopted with *one* significant modification, discussed in paragraph 19 *infra,* concerning stations which are, or will be, the only local outlet in their communities or will serve "white area". Our reasons for this conclusion are set forth in the paragraphs that follow.

7. *Introduction: "Primary Service Areas" and "Interference Areas"*: It is essential to understand at the onset that the concepts of "service" and "interference" in the AM broadcast band are based on many variable factors, some of which are subjective in nature. Some of these factors, such as propagation considerations, especially where skywave transmissions are involved, vary from minute to minute, hour to hour, day to day, and year to year. Any results depicting "service" and "interference," therefore, are determined in part upon the basis of statistical probabilities which are useful as tools for developing and evaluating an overall station assignment plan. However, as more and more assignments have been made, increased reliance has been placed upon very detailed calculations and evaluations of "service" and "interference" in individual cases to a degree unwarranted with the methods available.

8. The normally protected contour of a typical non-directional daytime station is usually depicted as a circle or other closed curve drawn on a map. For all but Class I stations, the normally protected contour is the 0.5 mv/m signal strength contour. This pictorial representation is a useful tool for station assignment purposes. Its usefulness, however, should not be permitted to obscure the fact that the pictorial representation is at best an approximation of the extent to which a particular station may actually be providing satisfactory service. A radio signal does not stop at a specified contour, nor does it suddenly change from rendering a satisfactory signal to an unsatisfactory signal. Rather, the quality of service decreases by continuous gradations from "excellent," in areas very close to the transmitter site where the signal is strong enough to override practically all background noise and "interference" from other stations, through "good," "fair," and "poor," ultimately to "unusable." Whether or not the reception of a particular station is satisfactory out to its normally protected contour (and perhaps a considerable distance beyond) depends on numerous variables, including time, precise location, and the presence of other interfering signals. What should be clear is that the selection of a particular signal strength contour as the normally protected contour is not determined strictly on the basis of engineering considerations, but also contains policy considerations. It is not a question for which purely engineering

considerations provide only one rational answer. To the contrary, engineering considerations serve to delineate an area of discretion within which a number of rational choices exist. Thus, the definition of the normally protected contour for a particular class of AM station means, in effect, that the Commission has balanced all conflicting allocation goals and has decided to "protect" a station within an area circumscribed within a specified signal value.

9. The depiction of "interference" areas on a map is a useful practice but, again, a practice based upon concepts which are useful as allocation tools, but not as an exact depiction of "interference" in a specific case. Consider, for example, the pictorial representation of interference caused by one daytime station to another daytime station on the same channel. The Commission's Rules provide that "interference" exists between co-channel stations within an area where the signal of the "desired" station is less than twenty times as strong as a concurrently present signal from an "undesired" station.[5] Thus, at the 0.5 mv/m contour of a particular station, an undesired co-channel signal of greater than 0.025 mv/m will be regarded as causing objectionable interference. Closer to the transmitter site of the desired station, the desired signal will, of course, be much stronger and a proportionally stronger undesired signal is required to cause interference. While this pictorial representation of interference is useful as an allocation tool, it is not an exact tool for depicting "interference" in a specific case.

10. Even if it were to be assumed that an area of "interference" shown on the map is a precise representation of the exact area in which the undesired to desired signal ratios is exceeded at all times, it is still impossible to say with certainty that a particular listener within the area will receive "interference" when he attempts to listen to the desired station. The sensitivity or selectivity of the listener's receiver, the directivity of its antenna system, and the exact location of the listener's home are additional factors which would affect the interference picture. Finally, the concept of "objectionable" interference will vary from listener to listener and will vary with the same listener for different types of programming material.

11. *Preliminary comments regarding a "go-no go" system*: On the basis of the foregoing discussion, it is appropriate to make several preliminary comments which are relevant to objections raised in this proceeding:

(a) First, if the normally protected contour is a fairly arbitrary concept derived from policy decisions as well as from engineering factors, the question of "saturation" becomes less an objective determination of fact than a policy determination which the Commission is obliged to make. It cannot be said that the standard broadcast band is, or is not, approaching saturation unless it is first made clear to what

[5] The 20:1 co-channel interference ratio is contained in present Section 73.182 of the Commission's Rules. With the exception of the 1:30 ratio for determining 2nd adjacent channel interference, we have not questioned the general validity of the present ratios and have based our prohibited overlap rules upon them. No respondent has questioned the general validity of the co-channel and first-adjacent channel ratios.

extent the Commission expects each licensed station of a particular class to provide service. If a determination were made that the public interest would be served by making the bulk of present regional channels available for Class IV assignments, or if the normally protected contour were changed from 0.5 mv/m to 1 mv/m or 2 mv/m, it would be possible to license a very large number of new stations. The fundamental question at all times must be: Would actions of this nature produce benefits for the public which would outweigh the very serious losses such radical moves would entail? This is, in essence, the basic problem continuously posed to the Commission by Section 307(b) of the Communications Act.

(b) Second, once it is decided that stations should, on the whole, provide service to some specified contour (located and depicted schematically according to best available methods), it becomes almost meaningless to weigh the effects of slight amounts of interference other stations would cause within that contour in any one case. The balancing of conflicting goals in attempting to maximize both the number of assignments possible and the protection to be afforded each station is the essence of the process by which these *standards* are developed. On the other hand, an attempt to count the persons affected by interference in an individual case has little real meaning.

(c) Third, if a significant number of persons *within* a nominal "area of interference" depicted on a map continue to receive satisfactory reception of a particular station a significan percentage of the time, and if some listeners *outside* the nominal interference area do experience some degree of actual interference, the addition of a second interfering signal within the existing "area of interference" becomes highly meaningful. The addition of a second interfering signal—a second undesired "signal" in the background—will increase the probability of unsatisfactory reception of a desired station on both a time and location basis, both within and outside the depicted "area of interference".

12. Taken together, the facts set out above support these general observations concerning a protected contour station assignment system: All stations, especially during nighttime hours, cause and receive some degree of interference some percentage of the time which is unrecognized by definitions in the rules. Whether this unrecognized interference can be tolerated depends primarily on its cumulative effect which, in turn, is related to the number of stations assigned on a particular channel. The number of stations assigned on a channel of a particular class is determined by the signal strength contour which is to be protected from "interference" as defined by the rules. Another way of stating this is to say that the rules for predicting "interference" and the rules defining the "protected contour" are interrelated and must be read together. The practical validity of the "interference" rules depends to a large degree upon the maintenance of the protected con-

tour. If continued small invasions of the protected contour are permitted, the number of stations on a channel which can have a deleterious effect upon any existing station will increase to the point where the degradation attributable to cumulative "unrecognized" interference from these stations is quite serious. As pointed out in the Report and Order adopting the 10% rule in 1954, "the sum total of a large number of operations which individually cause a negligible amount of interference is not negligible."[6]

13. *Conclusions concerning a "go-no go" prohibited overlap system*: In our "freeze" order and in the notice of proposed rule making in this proceeding, we noted that the percentage of applications and of grants which either cause or receive "objectionable interference" had been increasing steadily prior to the "freeze." A study of a large representative sample of AM applications granted in 1952 and a similar group granted in 1962 indicated that the percentage of new stations which neither caused nor received objectionable interference declined markedly during the decade.[7] As the AM band becomes more and more crowded, it may be expected that the requests for new stations which would cause or receive objectionable interference will continue to grow rapidly.

14. As we have observed, *supra*, the degradation of existing service which may result from increasingly small increments of interference may be quite large. As we have also indicated, the balancing of gains against losses in any one case is not usually a very meaningful process. Insofar as concentration on the facts of each individual case must inevitably distort our sense of perspective in viewing the AM allocation picture as a whole, the *ad hoc* process may, (except in very extraordinary cases), work at cross-purposes to our basic station assignment goals. The real question that must be faced in this proceeding is not whether our new rules should be "flexible" enough to allow grant of a large number of sub-standard applications, but, rather whether our overall standards of protection for each class of station should be changed so as to allow the assignment of a greater total number of stations.[8]

15. In this proceeding, we have proposed to bar overlap of defined signal strength contours between existing stations and new proposals. In effect, the proposed system is similar to the mileage separation rules currently employed in FM and in television. In FM and in television, the rules provide specific minimum separations between stations of specified types in specified regions of the country. These separations are based upon a certain average level of protection for each station when all stations are assumed to operate with maximum facilities. Although the rules proposed for AM do not assume operation with maximum facilities, and do not

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[6] *In the Matter of Amendment of Section 1 of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations*, 10 Pike and Fischer, R.R. 1555.

[7] The number of new stations causing more than 1% of "objectionable interference" rose from 2% in 1952 to 21% in 1962. The percentage receiving more than 1% interference rose from 18% to 36% in the same period. A further study of 60 consecutive "pre-freeze" applications for new Stations granted from April, 1962, to April 1963, showed that 42% either caused or received some degree of "objectionable interference."

[8] With regard to general considerations involved in—Dept please supply missing copy . . . . . .

provide fixed separations between all stations of a particular class, they are similar to the FM and television rules. The prohibited overlap rules suggested for AM propose, in essence, the following: Two AM stations on the same channel or on adjacent channels must be separated by a certain required distance. Because of the wide variation in facilities, ground conductivity, etc. in AM, it would not be practical to require the same separation between all stations of the same class. Therefore, we have proposed to take account of these variables to the greatest possible degree by providing that minimum separations between stations are determined by the location of specified signal strength contours, depicted according to the *best available methods.* We do not purport to say that the overlap or non-overlap of contours precisely defines the presence or absence of interference—or the extent of interference —in each individual case. We do say that the use of contours predicted according to the best methods available is a reasonable and statistically accurate basis for determining separation requirements. We believe that an assignment system developed on the basis of these fixed separation requirements will achieve results in terms of service to the public which are at least as good as the results achieved through a case by case study of service gained or lost by reason of interference.

16. It is clear that the proposed rules would not mean an end to new AM grants. Although the percentage of grants involving some degree of interference has been increasing, the majority of applications for *new* stations being granted, even during the past few years, did not cause *or* receive interference. Under the new rules, a further moderate increase in the number of daytime AM stations may be expected for some years to come, particularly in areas with relatively few facilities today. It is also clear, however, that the rate of increase in the number of stations would be lower than during the past few years and, of course, far lower than the rate during the years immediately following World War II. In order to provide for any dramatic increase in the opportunities for establishing new daytime AM stations, some other fairly radical action would be necessary, such as changing of the normally protected contour, or the changing of some Class III channels to Class IV.

17. The Commission's present standards concerning the normally protected service contour and the allocation of frequencies to the four classes of stations represent an attempt to balance out the two extreme conflicting potentialities of any station assignment system—i.e., a relatively small number of high powered stations with extensive interference-free service areas, as opposed to a very large number of lower powered stations with service areas highly restricted by interference. Given the present highly developed state of AM, it would not be practical to *increase* the normally protected service area for any class of station without substantial dislocations of existing facilities, and no one has suggested that such a course of action should be attempted. It is only necessary, therefore, to consider whether present standards of protection should be *decreased,* either by rule or through a con-

tinuous process of *ad hoc* erosion. It is clear that protection standards should be relaxed only if it appears that the number of stations possible under strict enforcement of present standards is insufficient to meet the immediately foreseeable needs of the country.

18. There are, today, more than 4,000 authorized AM stations in addition to some 1,300 authorized commercial FM stations, 250 non-commercial FM stations, and more than 700 authorized commercial and non-commercial television stations. Outside metropolitan statistical areas, almost all communities in excess of 10,000 population have at least one local AM station and, indeed, approximately 1,150 communities of less than 10,000 population have one or two local stations. Most counties have a choice of multiple daytime AM signals. Moreover, the rapid development of an independent FM service will provide a large additional source of aural service for many communities. In these circumstances, we do not see the necessity for any radical solutions to expand greatly the potential number of AM stations. Given the present abundance and distribution of AM facilities, we conclude that the benefits which could be obtained through a very substantial increase in the number of stations would be too slight to outweigh the serious losses of existing service which would necessarily result. Accordingly, we are adopting the prohibited overlap rules proposed in the Notice, with one exception. See paragraph 3(a) *supra.*

19. The exception concerns: (1) proposals to build a first local station in a particular community or to change the facilities of a sole existing station in a community; or (2) where the new or changed facilities would provide a first primary service to 25% or more of the area within the proposed 0.5 mv/m contour. Although, it is impossible to devise a system under which every local community, no matter how small, can have its own local station, the benefits of at least one local station in as many communities as possible are obvious. Similarly apparent are the benefits for providing a first primary service to substantial areas. Therefore, consistent with our *ad hoc* practice over the years, we are adopting somewhat less stringent standards concerning *received* co-channel overlap for proposals in these categories.[9] As to them, instead of prohibiting overlap between the 0.5 mv/m contour of the new proposal and the 0.025 mv/m contour of any other co-channel existing station or proposal, the new rules bar *overlap of the new 1 mv/m contour and the existing 0.05 mv/m* contour. In effect, this means that we would permit co-channel interference up to the 1 mv/m contour of first service or first local service proposals at the time the assignment is made. Thereafter, the station's normally protected service area will be considered as the area encompassed within its 0.5 mv/m contour, and all other

[9] Our rules regarding prohibited overlap to other existing stations are the same for these proposals as for all other stations. And, although our rules for first service or first local service are less stringent with regard to received prohibited overlap, the less stringent rules will be applied in the same "go-no go" fashion as the other prohibited overlap rules. As mentioned, Class IV power increases are exempt.

future proposals will be required to afford protection to this degree.[10]

20. Two other matters require brief comment. Comments were sharply divided concerning our proposal to drop the 1:30 second adjacent channel interference ratio. In this connection, we have also considered the comments filed in Docket No. 14037, a separate rule making instituted in 1961 which proposed elimination of the 1:30 ratio. We conclude that the ratio should be eliminated and the new prohibited overlap rules should be based only on prohibited overlap of 2 mv/m and 25 mv/ contours for second adjacent channel stations. We note that such second adjacent channel interference as does occur is limited to an area immediately adjacent to the transmitter site of the undesired station—i.e., interference to station A falls in an area adjacent to the transmitter of station B. The population within the area of interference does not suffer a reduction in the number of services available but, rather, receives a newly substituted service. Moreover, second adjacent channel interference usually falls in an area where the signal strength of the station suffering interference is less than the minimum required to provide a primary service to communities having populations in excess of 2500 people. Taking all factors together, we do not feel that elimination of the 1:30 ratio will result in any substantial loss of service to the public.

21. Finally, some respondents contended that the 2 and 25 mv/m prohibited overlap standards for second adjacent channel facilities and the 25 and 25 mv/m standard for third adjacent channel stations be relaxed. One respondent, for example, recommended that the second adjacent channel standard be changed to prohibit 5 and 25 mv/m overlap and that the third adjacent channel standard be changed to bar 25 and 50 mv/m overlap. We do not feel that the comments received have been supported by sufficient evidence to justify a change in the second and third adjacent channel standards at this time. Although we leave the standards unchanged for the present, we do not foreclose our consideration of further rule making regarding this subject.

### *Use of Measurement Data—Daytime*

22. In the Notice, we requested comments as to the desirability of updating and refining the M–3 ground conductivity map.[11] We also asked for comments as to the possibility of utilizing an updated map exclusively, eliminating the present permissive use of measurement data. We did not propose to abolish the permissive use of measurement data at this time. Many parties favored an effort by the Commission to revise and update the M–3 map, but almost all respondents opposed doing away with measurement data even if the map should be revised. Several parties recommended changes in the rules governing the taking of measure-

[10] Any "community" outside an urbanized area (as defined by the latest U.S. Census) will qualify for the first local service exception. Only communities in excess of 25,000 population will qualify if located all or partly *within* urbanized areas. In our view, relaxation of the general standards is not warranted for relatively small communities largely of a suburban character, located relatively close to large communities and served by—dept. please supply missing copy...

[11] Figure M–3 is an enlarged version of Figure R–3, contained in present Section 73.190 of the Commission's Rules, 47 CFR 73,190.

ments, however, with a view toward imposing more rigorous requirements. Recommended changes included: the compulsory use of a test transmitter from the proposed site of a new station; required measurements along a greater number of radials; required joint measurement data to be submitted by adverse parties, with Commission engineers to act as arbiters; and, a more rigorously defined procedure setting forth the time when measurements should be taken, the conditions under which they should be taken, and the method of taking.

23. We recognize a continuing need to re-study the M–3 map, with a view toward improving it in certain areas where deficiencies presently exist. We do not feel that the parties suggesting other changes in the rules governing measurements have submitted sufficient supporting material to justify institution of the recommended changes at this time. It is our intention to continue study of this problem, however, in connection with our efforts to improve the present map. If our further study indicates that additional changes in the rules concerning measurements are desirable, we will set forth the proposed changes in a separate notice of rule making.

*Engineering Rules—Nighttime*

24. In the Notice, we proposed to bar grant of all applications for new nighttime facilities except those which would cause no objectionable interference to other stations or proposals and which would, at the same time, provide a first or second primary AM service to at least 25% of the area within the proposed interference-free service contour. Changes in existing nighttime facilities without a frequency change would be permitted only upon a showing that no objectionable interference would be caused to any other station. The principal objections to these proposals were quite similar to the attacks upon our daytime proposals—i.e., that the proposed rules are arbitrary and inflexible, that they fail to recognize the need for first or multiple nighttime *local* services, and that the rules are "wasteful" in that they would bar some new stations which would cause no objectionable interference to any other station as computed under our rules. These objections will be discussed more fully in the paragraphs to follow. Other comments were concerned more particularly with strictly nighttime AM problems. There was general agreement, for example, that new rules are necessary to govern computation of maximum expected operating values (MEOV's) for directional antennas and several parties submitted proposals in this regard. We agree that new MEOV rules are necessary but, as stated in the Notice, prefer to deal with this subject in a separate proceeding. Other parties suggested the possibility of basic changes in our method of computing nighttime interference, such as use of a 25% exclusion rule rather than the present 50% exclusion requirement. In view of our overall conclusions concerning future nighttime AM potential, we do not feel that the recommended basic changes in methods of computation are necessary. Finally, a number of parties noted that many nighttime interference problems are caused by direc-

tional antennas allowed to operate out of adjustment, and suggested that more rigorous rules be imposed to require licensees of directional systems to file frequent measurements showing proper operation. These suggestions are currently under study by the Commission.

25. Two basic facts must underlie our consideration of nighttime AM problems. The first fact is that the establishment of a new nighttime operation which will not have its service area restricted to a very high degree by interference is now virtually impossible.[12] The second fact is similar to a key principle we have discussed previously with regard to daytime AM, but which is of considerably greater significance when applied to nighttime operations. The principle may be summarized as follows: Our tools for computing nighttime interference are based on statistical considerations. Objectionable interference is deemed to exist when an unwanted relationship between a desired and an undesired signal is found to be sufficiently high at a particular location. Each new signal added on a particular channel increases the probability of interference at a particular location to some degree, whether or not any "objectionable interference" is recognized under our rules. The net effect of the increased probabilities of interference resulting from numerous technically non-interfering grants is not negligible.

26. From the postulates above, it follows that little significant "white area" can be served by the addition of more nighttime AM stations (other than stations on clear channels), and that the addition of such new stations will cause additional degradation to existing nighttime services. The only substantial benefit resulting from a substantial increase in nighttime AM facilities would be the assignment of first, or multiple, *local* AM services to some communities. The basic question which must be answered, therefore, is whether this benefit is enough to justify the sacrifices to existing service that would be involved. We have concluded that the gain in number of stations would not justify the losses in service.

27. Two major factors support our conclusion that the need for new local AM outlets is not pressing enough to justify any substantial sacrifice of service in the areas between communities. First, standard broadcasting is no longer a dominant medium at night.[13] It is indisputable that the great majority of the nighttime broadcasting audience watches television. A substantial portion of the night standard broadcast audience is in automobiles. The addition of a substantial number of new stations with extremely limited service areas will not materially improve the position of these listeners but may, instead, make it more difficult to obtain any satisfactory reception as they drive away from the downtown areas in their communities.

28. The second factor supporting our conclusion is the fact that

[12] As stated in the Notice, a new nighttime station established on any channel (other than Class I–A Clear Channels) at almost any location will be limited to a very high degree by interference from other existing stations.

[13] By nighttime AM service, we refer to continued service throughout the evening and not to service during the hours immediately before sunrise. The pre-sunrise problem is the subject of a separate rule making in Docket 14419 and will not be discussed in this Report and Order.

such needs for nighttime aural service as do exist may be met far more efficiently by FM stations and by the Commission's clear channel decision. As noted previously, there are now approximately 1300 authorized commercial FM stations (as well as 250 non-commercial facilities) providing nighttime service and applications for additional FM stations have been filed at a very rapid rate since the FM "freeze" was lifted in July 1963. Within the next year, it is reasonable to assume, stations will have been authorized on more than half of the commercial assignments contained in the FM Table of Assignments [14]. Use of all FM assignments would leave very little white area except in areas of extremely sparse population. The potentialities of FM for nighttime service are easily illustrated. For example, an exhibit submitted by one respondent contending for less restrictive nighttime AM rules depicts a large area in the State of Illinois in which thirty-three separate communities of over 2500 population do not receive any primary AM service (2 mv/m) at night. It is clear, however, that local AM nighttime assignments could not be made to more than a small number of these communities under any rational system and that such assignments as could be made would have extremely restricted service areas. On the other hand, *twenty-three* of the thirty-three communities in question have *local* assignments in the FM table. Full utilization of the available FM channels would result in multiple aural signals to most of the thirty-three communities.

29. These factors persuade us that there is no reason to continue licensing nighttime AM facilities which will not, at the least, serve some significant amount of "white" area. Several parties have objected to the proposed rule, however, on the ground that it may tend to promote inefficient operations in some cases. These parties argue that a deliberately restricted operation on a channel with a very high RSS limitation might be sought, keeping the total service area so small so that a very small amount of service to "white" area would amount to 25% of the total. We believe that in most cases this type of operation would prove uneconomic and would not be sought. Our final rule, therefore, provides that no applications will be accepted for new nighttime facilities (including the addition of nighttime facilities to an existing daytime station) unless accompanied by a showing that (a) no interference would be caused to any other station, (b) a first primary AM service would be provided to at least 25% of the proposed interference-free service area, and (c) all principal city coverage requirements are met. Class IV stations would not have to meet requirements (a) and (b) with respect to nighttime operations. With respect to applications for changes in facilities (other than changes in frequency), these need only meet the standard of affording protection to any existing stations.

30. We wish to emphasize that applications for unlimited time stations must meet both the criteria for daytime assignments and those for nighttime assignments. If they fail to comply with both, they will not be accepted.

[14] Section 73.202 of the Commission's Rules, 47 CFR 73.202.

31. *Class II–A stations*: In our 1961 decision in the Clear Channel proceeding (Docket 6741), we emphasized the importance of making new Class II–A assignments on certain I–A clear channels in the underserved West. In line with that policy determination, we are exempting applications for these assignments from the new rules—with one exception. The primary purpose of those assignments is to improve *nighttime* service. With respect to daytime operation, we are of the view that the traditional interference rules should apply where it is a question of getting the needed station into operation; but that thereafter applications for changes in *daytime* facilities should meet the same standards applying to other classes of stations. The new rules so provide.

32. We stated in our original AM "freeze" order, (reprinted at 23 Pike and Fischer, R.R. 1545), that applications pending at the time of the "freeze" would continue to be processed under existing rules. We believe that the continued processing under the old rules of those applications still pending now will not materially impair the overall allocation structure. Since these applications were filed and processed, and in some cases have been through hearing, under the former rules, considerations of equity and the public interest indicate that the new rules should not be applied to applications now pending. Accordingly, applications *accepted* for filing prior to the date this Report and Order is published in the Federal Register will be processed under the old rules, (as will timely filed applications mutually exclusive with such accepted applications).[15] The current AM "freeze" will be lifted upon publication of the new Rules in the Federal Register. Applications *which are consistent with the rules adopted today* will be accepted for filing thereafter. No application accepted for filing after the publication of the new rules in the Federal Register will be granted or designated for hearing before the effective date of the new rules, thirty days after they are published. The amendment to Section 1.571 adopted herein, lifting the "freeze" and setting forth the conditions under which applications will be accepted, is procedural and therefore may be made effective as quickly as possible. It will become effective July 13.

*Additional Rules to Control Assignments*

33. In addition to new rules, we proposed in the notice to place certain other limitations on grants of new AM stations. The limitations we suggested would have permitted new stations only where a first or second primary service would be provided to 25% of the area within the proposed normally protected service contour, *or*, where a grant would not have caused the number of local AM stations in a community to exceed a specified number. The specified number of AM stations to be permitted varied according to the population of the community and, in some cases, according to the number of FM assignments for the community in the FM Table.

[15] To be accepted on the basis of mutual exclusivity with an application accepted under the AM "Freeze" (the earlier Note to § 1.571), a later application must meet the "Freeze" exception criteria set forth in that Note. See 27 FR 4626, 4628.

34. A number of parties objected to these proposals on the ground that they would constitute undesirable or unlawful "economic regulation" and on the ground that the proposals were impractical in view of the great differences between communities in a single population grouping. We do not find it necessary to consider these objections, however, because we have come to the conclusion that the proposed additional assignment rules are unnecessary. As we observed in the Notice, a table of maximum permissible AM assignments would have little meaning for most very large cities, since these communities generally have about as many AM assignments as even the present engineering rules will permit. Moreover, the table would have had relatively little effect upon applications for new stations in smaller communities: a review of a representative sample of pre-freeze applications for new AM stations has indicated that almost two-thirds proposed a first or a second local station for some community and that the actual percentage which would have complied with the proposed table would have been considerably higher.[16] Under these circumstances, we feel that the proposed table would introduce an unnecessary element of complexity into the rules.[17]

35. A "note" to the table proposed in the Notice would have barred a new suburban station placing a 2 mv/m signal over more than 25% of the area of a city in excess of 50,000 population. Upon consideration of the comments regarding this "note," we have concluded that the proposal would produce undesired results in too many cases to justify its adoption. (In areas of high ground conductivity, for example, new stations assigned on low frequencies would have had to be located an unreasonably large distance from metropolitan centers.) We shall continue to examine suburban applications closely, on a case-by-case basis, to determine whether they should be regarded as proposing a new service for their nominal community or whether, instead, the proposal should be regarded as an application for the central city. See *Huntington Broadcasting Company* v. *F.C.C.*, 89 U.S. App. D.C. 222, 192 F. 2d 33, and *Denver Broadcasting Company*, 28 FCC 1060, 19 Pike and Fischer, R.R. 1205.

### *AM–FM Program Duplication*

36. In paragraphs 11–22 of the Notice, (25 Pike and Fischer R.R. 1615, 1620 ff), we reviewed the history of the relationship between the AM and FM services at some length. We focused particularly on the practice of AM–FM program duplication, noting that duplication had never been seriously regarded as an efficient use of the FM frequency but, at best, as a temporary expedient to help establish the FM service. We tentatively concluded that AM–FM program duplication had served whatever

[16] And, of course, the number of applications that would fail to comply with the proposed table but which would comply with the new engineering rules would be still smaller.

[17] The table would have permitted a first or a second local AM station in any community under 10,000 population. As of the end of 1962, 1096 communities under 10,000 had one AM station and 54 had two stations. No community under 10,000 had three stations, however, indicating that natural economic checks are a substantial enough restraining factor to render the proposed table unnecessary.

purpose it could in most cases, and that the time had arrived to begin a gradual change in our policy regarding duplicated AM–FM programming in the same community. We expressed our particular concern over the continuation of program duplication in many large metropolitan areas where all available AM and FM channels are occupied. In these large cities, where multiple applications would certainly be received for any AM or FM frequency that should become vacant, the use of two channels to broadcast a single program appeared to us to represent a gross inefficiency. We proposed, therefore, to impose a 50% non-duplication requirement upon FM stations in cities over 100,000 population where no unoccupied FM assignments remain in the FM Table.

37. More generally, our proposals were based upon the view that the time had come to move significantly toward the day when AM and FM stations should be regarded as component parts of a total "aural" service for assignment purposes. We stated (25 Pike and Fischer, R.R. 1615, 1622):

> We believe that the ultimate role of FM broadcasting is to supplement the aural service provided by AM stations and that, eventually, there must be an elimination of FM stations which are no more than adjuncts to AM facilities in the same community. Owing to the differing technical characteristics of AM and FM and to the separate historical development of the two services, each is able to accomplish certain tasks better than the other. It is our hope that each of the services can be developed to its maximum potential within an integrated system, and that such an integrated system will represent the best possible utilization of the frequencies allotted for aural broadcast stations.

38. The comments regarding our non-duplication proposals disclosed a basic split within the broadcasting industry. The National Association of FM Broadcasters (NAFMB) strongly supported the principle of non-duplication and, in fact, recommended rules considerably more extensive in application than those proposed by the Commission. One counter-proposal of the NAFMB was that the anti-duplication rules be applied to stations in all large metropolitan areas—whether or not any vacant FM channels remained in the area. The NAFMB's basic position was that the development of FM to a point of economic viability will be accomplished primarily by stations presenting independent programming and that duplicating stations do little to create a unique FM audience and to increase advertiser acceptance of FM.

39. Most other parties opposed any non-duplication rules. The objections were of three general types. First, it was argued that whatever merits separate AM and FM programming may have, compulsory program separation is not economically feasible at this time. Parties challenging the rule on economic grounds contend that the cost of presenting separate FM programming will be prohibitive for many dual licensees and, also, that the addition of a number of new programming sources will so fragment the large markets that the advertising revenues of all stations will suffer. Second, a number of respondents claimed that AM–FM program duplication had many positive values. These parties noted that many AM licensees use FM to serve areas not reached by their AM signal or to continue at night after the AM station goes off the air. Parties claiming positive value for duplication also argued that

program separation would make many valuable AM programs unavailable to FM audiences which have come to depend upon them. Finally, some respondents asserted that non-duplication lacks positive value of its own—that set sales would not increase as a result of programming separation, that advertiser support would remain unaffected, and that program "diversity" would not increase just because the number of different programs increases.

40. The NAFMB has attempted to answer each of these contentions. It asserts there is no evidence that per station revenues in a market will be reduced with the advent of non-duplication but that, to the contrary, the total revenues flowing to aural stations will be increased when FM is sold separately. Some of the increased revenues will be derived from new or increased advertising previously obtained by no broadcast media but the greater portion, states the NAFMB, will be drawn from present television revenues since FM listening is presently greatest in homes doing the least TV viewing. Moreover, the NAFMB contends, the economic effect of non-duplication will not be staggering since a substantial proportion of existing dual-owned stations have already begun some degree of non-duplication since the Commission first suggested the possibility of rules in this area in the overall FM rule making (Docket 14185) in 1961. The NAFMB responds to the argument concerning different coverage areas of some AM and FM stations by noting that the FM area is, in most cases, far greater than the AM area and should, therefore, be treated as the primary service. Where the FM coverage is substantially greater, it is said, the marginal AM facility should be deleted and reassigned where it will do more good. Finally, the NAFMB states that FM has the potential for providing many worthwhile types of programming not now found on AM facilities or on duplicating AM–FM stations.

41. Upon consideration of all the comments we conclude that rules should be adopted which would begin a gradual process by which AM–FM program duplication in the same community is ended. The final rules are substantially identical to those proposed with one exception: we have adopted the NAFMB counterproposal that application of the rules in cities over 100,000 population not be made to depend upon whether or not vacant FM channels are still available. On the whole, there are few vacant FM channels in the 130 cities of over 100,000 population listed in the 1960 census reports. In most cities where vacant channels do remain, applications are rapidly being received which will fill up the vacancies. Therefore, we believe that the new non-duplication rules may be administered more fairly and more efficiently if made applicable to stations in all cities of over 100,000. Our recent experience has demonstrated that the number of applicants willing to propose independent FM operation in cities of this size is greater than the number of channels available. In these circumstances—with a surfeit of potential applicants and a growing scarcity of opportunities to enter the field of broadcasting—it appears unreasonable to allow one licensee to continue to use two channels in the same community for one program.

42. We recognize that individual licensees may suffer some short

term economic detriment by reason of our non-duplication rule, but we are convinced that there will be no net loss of FM service available to the public. In this connection, it is pertinent to note that the new rule—which does not become effective for one year—requires only that a dual licensee reduce his program duplication to no more than 50% of the average FM broadcast week. This means that duplication of most news, sports, and public affairs programs could be continued without violation of the rule. The 50% requirement also means that many licensees of fulltime FM stations who operate daytime-only AM stations in the same community will not be required to bring about a substantial increase in non-duplicated programming. Moreover, inasmuch as a substantial number of dual licensees have already begun a certain amount of separate programming during the past several years, the new rule will only serve to add impetus to a trend already begun.[18]

43. Finally, it is our hope that the non-duplication rules will provide new impetus to FM set sales, although the comments did not furnish sufficient evidence to permit a firm prediction in this regard.

44. The final rule requires FM licensees in cities over 100,000 to devote no more than 50% of the average FM broadcast week to programs duplicated from a co-owned AM station in the same local area.[19] The rule prohibits not only simultaneous duplication but also (above the 50% allowable), programs broadcast over any co-owned AM station in the same local area one day before or after the FM broadcast. What constitutes the "same local area" for the purposes of the rule will be developed on a case-by-case basis. The term would always encompass AM and FM stations in the same community and may also include AM–FM combinations in nearby communities.

45. In determining whether 50% of an FM station's average broadcast week has been devoted to non-duplicated programming, the Commission will not consider simultaneous broadcasts of special events of national or regional importance to have been duplicated programming proscribed by the rule. Thus, extended simultaneous broadcasts of events such as space launchings, presidential inaugurations, or election returns will be treated as non-duplicated programming for the purposes of the rule.

46. The rule also provides that individual licensees may request that application of the rule be postponed as to them for their current license period. Such requests must be submitted at least six months prior to the time the non-duplication requirement is to go into effect and must contain a substantial showing that the public interest—as opposed to the private interest of the licensee—would be served by allowing unlimited program duplication for an addi-

[18] In 1961, 405 FM stations operated by AM licensees in the same community reported no FM revenues and 284 reported some FM revenues. In 1962, the figures were almost reversed: 408 dual owned stations reported some FM revenues and 306 reported none. (Final AM–FM Broadcast Financial Data—1962.) Since there was no dramatic increase in SCA authorizations from 1961 to 1962, it is reasonable to assume that most of the increase is attributable to separate programming.

[19] Evidence of compliance with this requirement will be required of licensees at renewal time; the exact character of the showing to be made will be covered in a later notice.

tional period of time. It would be necessary for the licensee to renew his request for continued temporary exemption from the non-duplication rule at the end of each license period.

47. In the Notice, we proposed no rules which would affect the problem of AM–FM dual ownership, or duopoly, in the same community, although we did express the view that separate ownership of AM and FM stations in the same community is a desirable long-range goal. All parties commenting on this expression of views expressed strong opposition, most often on the grounds that future separation of ownership would be unfair to many FM "pioneers" and would discourage present investment in FM stations. The subject of possible general revisions of the multiple ownership rules is currently under study by the Commission. Therefore, we do not believe that further discussion of the problem is warranted at this time.

*Mergers*

48. In paragraph 46 of the Notice (25 Pike and Fischer, R.R. 1615, 1638), we suggested a procedure whereby two or more existing stations in cities with an abundance of facilities might merge and be guaranteed that there would be no reassignment of the deleted frequency in the same area. Few parties expressed great interest in this proposal, and those that did recommended that any mergers be handled on an *ad hoc* basis. We tend to agree with the commenting parties and, therefore, have not adopted our proposals in this area. The Commission will consider requests for merger on a case-by-case basis, however, should any licensees feel mergers to be advantageous to themselves and to the public. We will examine any such requests closely and will grant mergers with channel deletion only where there has been a clear and compelling showing of public benefit.

*Miscellaneous Comments*

49. A number of comments were received dealing with matters either outside the scope of this proceeding or beyond the scope of the proposals advanced in the Notice and considered here. Comments in the latter category included recommendations for higher authorized power for all existing stations so that higher background electrical interference levels present today may be overcome; a request that the "normally protected service area" be replaced with a "defined service area" of fixed size for AM stations of a particular class; requests for higher power for regional stations and for protection against daytime skywave interference for regionals; and, various other changes which would require mass dislocations of existing assignments. To the extent that these suggestions are inconsistent with the rules adopted here, they are rejected as far as the present proceeding is concerned. We should also note at this point that other proposals suggested at the January, 1963 Radio Conference—such as revisions in the showing as to financial qualifications required of applicants—are currently under active study by the Commission.

## CONCLUSION

50. In view of the foregoing, and pursuant to authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED, That effective July 13, 1964, Part 1 of the Commission's Rules IS AMENDED, and effective August 13, 1964, Part 73 of the Commission's Rules IS AMENDED, as set forth in the attached Appendix.

Adopted July 1, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

NOTE: Rules changes herein will be covered by T.S. I(63)-2 and T.S. III(64)-2.

## APPENDIX

I. Effective July 13, 1964, Subpart D of Part 1 of the Commission's Rules is amended by deleting the Note at the end of § 1.571 and adding the following new Note:

§ 1.571 *Processing of standard broadcast applications.*

* * * * * * *

NOTE: No application tendered for filing after July 13, 1964, will be accepted for filing unless it complies fully with the provisions of new §73.24(b) and new § 73.37 of this chapter, contained in the Commission's Report and Order, FCC 64–609 in Docket 15084, adopted July 1, 1964. No application accepted for filing after July 13, 1964, will be granted prior to August 13, 1964.

II. Effective August 13, 1964, Subparts A and B of Part 73 of the Commission's Rules are amended as set forth below:

1. Section 73.24(b) is revised to read:

§ 73.24 *Broadcast facilities; showing required.*

* * * * * * *

(b) (1) That a proposed new daytime station (or change in frequency of an existing daytime station) complies with the standards of station separation set forth in § 73.37.

(2) That a proposed change in daytime facilities (other than a change in frequency or a Class IV station increasing daytime power) does not involve overlap of contours prohibited by § 73.37 with any other station in any area where there is not already such overlap between the two stations.

(3) That a proposed new nighttime operation or change in frequency of any existing nighttime operation (except Class IV stations) would (i) not cause objectionable interference to any existing station (see § 73.182(o)); and (ii) provide a first primary AM service to at least 25 percent of the area within the proposed interference free nighttime service area.

(4) That a proposed change in nighttime facilities (other than a change in frequency) would not cause objectionable interference to any other station (see § 73.182(o)).

NOTE: The preceding provisions of this paragraph (b) shall not be applied to applications for new Class II-A stations or to applications accepted for filing before July 13, 1964. With respect to such applications, a showing must be made that:

(a) Objectionable interference will not be caused to existing stations or that, if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. (For special provisions concerning interference from Class II-A stations to stations of other classes authorized after October 30, 1961, see Note 2 to § 73.21 and § 73.22(d)). (For determining objectionable interference, see §§ 73.182 and 73.186).

(b) The proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree.

* * * * * * *

2. Section 73.28 is amended by revising paragraphs (a) and (d) to read as follows:

§ 73.28 *Assignment of stations to channels.*

(a) With respect to applications for new Class II-A stations, and other applications accepted for filing before July 13, 1964, the individual assignments of stations to channels which may cause interference to other United States stations only shall be made in accordance with the provisions of this part for the respective classes of stations involved. (For determining objectionable interference, see §§ 73.22, and 73.182 through 73.186.)

* * * * * * *

(d) With respect to applications for new Class II-A stations, and other applications accepted for filing before July 13, 1964, the following shall apply: Upon showing that a need exists, a Class II, III, or IV station may be assigned to a channel available for such class, even though interference will be received within its normally protected contour, subject to the following conditions: (1) No objectionable interference will be caused by the proposed station to existing stations or that if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference; (2) Primary service will be provided to the community in which the proposed station is to be located; (3) The interference received does not affect more than 10 percent of the population in the proposed station's normally protected primary service area; however, in the event that the nighttime interference received by a proposed Class II or III station would exceed this amount, then an assignment may be made if the proposed station would provide either a standard broadcast nighttime facility to a community not having such a facility or if 25 percent or more of the nighttime primary service area of the proposed station is without primary nighttime service. This subparagraph (3) shall not apply to existing Class IV stations on local channels applying for an increase in power above 250 watss, nor to new Class IV stations proposing power in excess of 250 watts with respect to population in the primary service area outside the equivalent 250 watt, 0.5 mv/m contour.

3. Section 73.37 is revised to read as follows:

§ 73.37 *Minimum separation between stations; prohibited overlap.*

(a) Except as indicated in other paragraphs of this section, and except for Class II-A stations, no application will be accepted for a new station (or change in frequency) if the proposed operation would involve overlap of signal strength contours with any other station as set forth below in this paragraph; and no application will be accepted for a change (other than a change in frequency) of the facilities of an existing station (including the daytime facilities of an existing Class II-A station) if the proposed change would involve such overlap in any area where there is not already such overlap between the stations involved:

| Frequency separation | Contour of proposed new station (Class II-B, II-D, III and IV) | Contour of any other station |
|---|---|---|
| Co-channel ..... | 0.005 mv./m.<br>0.025 mv./m.<br>0.5 mv./m. | 0.1 mv./m. (Class I)<br>0.5 mv./m. (Other Classes)<br>0.25 mv./m. (All Classes) |
| 10 kc./s. ..... | 0.5 mv./m. | 0.5 mv./m. (All Classes) |
| 20 kc./s. ..... | 2 mv./m.<br>25 mv./m. | 2 mv./m. (All Classes)<br>25 mv./m. (All Classes) |
| 30 kc./s. ..... | 25 mv./m. | 25 mv./m. (All Classes) |

(b) An application for a new daytime station or a change in the daytime facilities of an existing station may be granted notwithstanding overlap of the proposed 0.5 mv/m contour and the 0.025 mv/m contour of another co-channel station, where the applicant station is or would be the first standard broadcast facility in a community of any size wholly outside of an urbanized area (as defined by the latest U.S. Census), or the first standard broadcast facility in a community of 25,000 or more population wholly or partly within an urbanized area, or when the facilities proposed would provide a first primary service to at least 25 percent of the interference-free area within the proposed 0.5 mv/m contour: *Provided, That:*

(1) The proposal complies with paragraph (a) of this section in all other respects and is consistent with all other provisions of this part; and

(2) No overlap would occur between the 1 mv/m contour of the proposed facilities and the 0.05 mv/m contour of any co-channel station.

(c) In determining overlap received, an application for a new Class IV station with daytime power of 250 watts, or greater, shall be considered on the assumption that both the proposed operation and all existing Class IV stations operate with 250 watts and utilize non-directional antennas. With respect to applications for new Class IV facilities, the provisions of paragraph (b) of this section shall be applied using the assumption mentioned in this paragraph for determining overlap received.

(d) If otherwise consistent with the public interest and subject to Section 316 of the Communications Act, an application requesting an increase in the daytime power of an existing Class IV station on a local channel from 250 watts to a maximum of one kilowatt, or from 100 watts to a maximum of 500 watts, may be granted notwithstanding overlap prohibited by paragraph (a) of this section. In the case of a 100 watt Class IV station increasing daytime power, the provisions of this paragraph shall not be construed to permit an increase in power to more than 500 watts, if prohibited overlap would be involved, even if successive applications should be tendered.

NOTE: The foregoing provisions of this section shall not be applied to applications for new Class II-A stations or to applications accepted for filing before July 1, 1964. With respect to such applications, the following shall apply: An authorization will not be granted for a station on a frequency of ±30 kc/s from that of another station if the area enclosed by the 25 mv/m groundwave contours of the two stations overlap, nor will an authorization be granted for the operation of a station on a frequency ±20 kc/ or ± 10 kc/s from the frequency of another station if the area enclosed by the 25 mv/m groundwave contour of either one overlaps the area enclosed by the 2 mv/m groundwave contour of the other. (As to overlap with Class II-A stations, see § 73.21, Note 2.)

§ 73.182 [Amendment]

4. Section 73.182(w) is amended by deleting the last entry from the table therein.

5. A new section 73.242 is added as follows:

§ 73.242 *Duplication of AM and FM programming.*

(a) After August 1, 1965, licensees of FM stations in cities of over 100,000 population (as listed in the latest U.S. Census Reports) shall operate so as to devote no more than 50 percent of the average FM broadcast week to programs duplicated from an AM station owned by the same licensee in the same local area. For the purposes of this paragraph, duplication is defined to mean simultaneous broadcasting of a particular program over both the AM and the FM station or the broadcast of a particular FM program within 24 hours before or after the identical program is broadcast over the AM station.

(b) Compliance with the non-duplication requirement shall be evidenced by such showing in connection with renewal applications as the Commission may require.

(c) Upon a substantial showing that continued program duplication over a particular station would better serve the public interest than immediate non-duplication, a licensee may be granted a temporary exemption for the requirements of paragraph (a) of this section. Requests for such exemption must be submitted to the Commission, accompanied by supporting data, at least 6 months prior to the time the non-duplication requirement of paragraph (a) of this section is to become effective as to a particular station. Such exemption, if granted, will ordinarily run to the end of the station's current license period, or if granted near the end of the license period, for some other reasonable period not to exceed 3 years.

## DISSENTING STATEMENT OF COMMISSIONER ROSEL H. HYDE

I dissent to the issuance of the Report and Order in Docket No. 15034.

The Commission in this proceeding has renounced its discretion to consider the merits of individual cases by adopting broad sweeping regulations which, subject to certain limited exceptions, freeze

the present allocation of AM broadcast facilities. I believe that this approach to the administration of the Communications Act is wrong in principle; it limits the Commission's ability to encourage the larger and more effective use of radio. I am especially concerned regarding the restriction it places upon possible improvement in the operating assignments of many daytime-only stations.

I do not think the Commission must give up its power to consider individual cases in order to deal with the interference problem. More attention could be given to this factor on a case-to-case basis. In fact, it appears from the following sentence from paragraph 16 of the Report and Order that the number of instances where this would be required is not great. Certainly, there is not an emergency situation warranting a freeze to prevent electrical interference.

Paragraph 16:

> Although the percentage of grants involving some degree of interference has been increasing, the majority of applications for *new* stations being granted, even during the past few years, did not cause *or* receive interference.

CONCURRING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I concur except for adoption of Section 73.242 concerning 50% non-duplication (within 24 hours) of AM programming on commonly-owned FM stations in cities over 100,000.

I opposed inclusion of FM matters in the Notice Of Proposed Rule Making in this proceeding, which was initially for the purpose of making our AM rules more "efficient" and removing the AM "freeze."

This proceeding is not, in my opinion, the proper forum for determination of matters vitally affecting FM. Moreover, this proceeding has produced no reliable data to support a finding that the public interest would be served by such an across-the-board prohibition against duplication, regardless of the economic viability of the individual station or market. Certainly, nothing has been submitted to indicate that the prohibition is good in cities over 100,000 and not good in cities under 100,000.

The overall matter of duplication has not, in my opinion, been adequately explored.

DISSENTING STATEMENT OF COMMISSIONER FREDERICK W. FORD

In concurring in the Notice of Proposed Rule Making issued in this proceeding I noted certain reservations, among them the "go-no go" interference standard and the proposal to restrict AM and FM program duplication. On the basis of the comments received, I am satisfied that my doubts were well founded. I therefore dissent to the Report and Order implementing these proposals.

From the standpoint of administrative convenience the "go-no go" concept is admirable. It may also be applauded by the broadcaster who now operates with close to maximum facilities or who otherwise enjoys a favorable competitive position. But as a means of carrying out our statutory mandate to "provide a fair, efficient and equitable distribution" of radio facilities, I think it is completely unrealistic. With approximately 4000 standard broadcast stations now on the air, it is becoming more difficult to engineer

a proposal that will neither cause nor receive any interference at all. Informed judgment exercised on a case to case basis is thus more important now than ever if applications are to receive due consideration. By removing the element of judgment and depriving the Commission of flexibility, the new rules will make the task of achieving an improved distribution of broadcast service more difficult, rather than less.

It seems to me that a much more sensible resolution of the problem could be achieved within the existing allocations framework simply by requiring a stricter adherence to the present rules. Truly substandard proposals should be consistently denied. But where the interference is small and a hearing discloses a *really substantial* need for the service—not merely a *pro forma* showing of the kind that has sometimes been accepted in the past—I see no reason why such an application should not be granted. At the very least they should be closely and carefully considered, not dismissed out of hand as the new rules provide.

In the long run, the inequities and anomalies which an arbitrary standard of this kind is sure to produce will probably lead to a succession of waivers or hearings on the question of whether a waiver should be granted. Ultimately, unless they are amended, I suspect the rules may be honored more in the breach than in the observance thereof. In this connection I would urge that the Commission consider authorizing power at intermediate levels between the presently recognized steps, 1 kw, 5 kw, 10 kw, etc. Where, for example, an application specifying a power of 5 kw would not be acceptable, but one using 4 kw would meet our interference standards, I believe it would be appropriate to consider such a proposal. In this way some degree of flexibility would be restored to our processes without any increase in objectionable interference.

With respect to the rules on AM–FM program duplication, it has been my view that this should have been the subject of a separate proceeding dealing with the non-technical aspects of aural broadcasting. It has no place in a docket concerned essentially with revising AM assignment principles. My feeling is that as a result of this procedure, the implications of the new rules have not been fully explored.

A great majority of the comments raised very serious objections to the proposal on economic grounds, and the Commission concedes that some stations may be harmed financially. The bare assertion that there will be no net loss of FM service strikes me as a less than adequate disposition of this matter. In a similar vein, the "hope" that the rules will provide an impetus to FM set sales, coupled with an admission that the evidence on this point was insufficient, is hardly reassuring. In my view the Commission has simply not come to grips with the economic issues posed by the new rules.

It is by no means clear, moreover, that non-duplication will achieve anything significant in the way of program diversity. It may well be that stations coerced against their judgment into dual programming will simply play the same recordings in a different order or on a different day. In this connection, the Report and Order notes with approval that an increasing number of dual li-

censees are voluntarily programming separately for AM and FM; the new rules, it is contended, will simply accelerate the present trend. But this fact, it seems to me, provides all the more reason for not adopting the rules. If the shift to separate programming is to result in meaningful program diversity, a viable economic base must exist. Since the evidence apparently shows that broadcasters are tending to introduce separate programming as circumstances warrant, the imposition of a mandatory requirement at this time in the face of admitted economic uncertainties, seems to me both unnecessary and unwise.

I share the desire of the majority to see FM reach its full potential as part of an integrated aural broadcast system. On the present record, however, I am not persuaded that the new rules represent a step in that direction. This entire subject warrants far more consideration than it has received in this proceeding.

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES, REGARDING AM STATION ASSIGNMENT STANDARDS AND THE RELATIONSHIP BETWEEN THE AM AND FM BROADCAST SERVICES. | Docket No. 15084 |

### ERRATUM

1. On page 3 of the Appendix to the Report and Order in Docket No. 15084, adopted July 1, 1964 (FCC 64–609), the table contained in § 73.37(a) is corrected to read as follows (the correction relates to the entries in the last column for 20 kc/s separation):

| Frequency separation | Contour of proposed new station (Class II-B, II-D, III and IV) | Contour of any other station |
|---|---|---|
| Co-channel ..... | 0.005 mv./m.<br>0.025 mv./m.<br>0.5 mv./m. | 0.1 mv./m. (Class I)<br>0.5 mv./m (Cl. II, III, IV)<br>0.025 mv/m. (All Classes) |
| 10 kc./s. ..... | 0.5 mv./m. | 0.5 mv./m. (All Classes) |
| 20 kc./s. ..... | 2 mv./m.<br>25 mv./m. | 25 mv./m. (All Classes)<br>2 mv./m. (All Classes) |
| 30 kc./s. ..... | 25 mv./m. | 25 mv./m. (All Classes) |

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

F.C.C. 64–631

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>NAUGATUCK VALLEY SERVICE, INC. (WOWW)<br>NAUGATUCK, CONN.<br>Has: 860 kc., 250 w., DA–D, Class II<br>Requests: 1380 kc., 500 w., 5 kw.–LS, DA–2, U, Class III–B | File No. BP–14829 |
| QUINNIPIAC VALLEY SERVICE, INC., WALLINGFORD, CONN.<br>Requests: 860 kc., 1 kw., Day (Contingent Upon a Grant of BP–14829) | File No. BP–14832 |
| RADIO WALLINGFORD, INC., WALLINGFORD, CONN.<br>Requests: 1380 kc., 5 kw., DA–2, U, Class III–A<br>For Construction Permits | File No. BP–15341 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER FORD ABSENT.

1. The Commission has under consideration (a) the above-captioned applications and (b) a "Joint Petition for Approval of Agreement" filed January 29, 1964 pursuant to Section 1.525 of the Commission's Rules requesting approval of an agreement between the above applicants.

2. The Naugatuck Valley and Radio Wallingford applications are mutually exclusive in that they involve mutually destructive interference. Under the terms of the agreement the latter application will be dismissed thereby eliminating the greatest single impediment to the Naugatuck Valley proposal. In the event that Naugatuck Valley's proposal is subsequently granted and licensed to operate on 1380kc, the contingency upon which the Quinnipiac Valley application rests will have been satisfied and the 860kc channel made available for use in Wallingford. When and if the Naugatuck Valley application is granted, Radio Wallingford will be entitled to recover one-half of its prudent out-of-pocket expenses not to exceed $3,500. In the event that the Quinnipiac Valley application is granted, Radio Wallingford, at its option, will receive 50 percent of Quinnipiac Valley's stock or an additional $3,500. If neither the Naugatuck Valley nor the Quinnipiac Valley applications are granted, Radio Wallingford will receive no compensation whatsoever. Interference to existing operations, antenna site and local zoning difficulties are assigned by Radio Wallingford as reasons for requesting dismissal.

3. In addition to approval of the agreement itself, the parties also request a finding that approval of the agreement would not "unduly impede" the objectives of Section 307(b) of the Act—that is, the "fair, efficient and equitable distribution of radio service among the several states and communities". The immediate and practical effect of such a finding would be that other parties would not be invited by publication to request the same facilities as those heretofore sought by Radio Wallingford and, as a result, the Naugatuck Valley application would remain as the only 1380kc proposal in New England. In support of the contention that the dismissal of the Radio Wallingford application would not unduly impede the operation of Section 307(b), it is alleged that no "gray" or "white" areas are involved; that if the Naugatuck Valley application is granted, the town will receive its first full-time station; that this grant will free 860kc for daytime use in Wallingford; that if the Radio Wallingford application were granted instead, the possibility of Naugatuck acquiring a fulltime radio station would be foreclosed; that a petition to deny has been filed against the Radio Wallingford application; that another applicant will not be able to duplicate the Radio Wallingford proposal because a large site is required for the six-tower array and none is available and that accordingly, another applicant has little chance of success.

4. The Commission finds that the parties have complied with the requirements of Section 1.525(a) of the Rules, in that the exact nature of the consideration, the background of the negotiations and the reasons why the agreement is in the public interest have been set forth adequately in the petition. Affidavits have been submitted which substantiate the sum of $7446.00 as having been "legitimately and prudently expended" in connection with the prosecution of the application.

5. We are, however, unpersuaded by petitioner's arguments concerning the Section 307(b) question. Petitioner's contentions are based on the assumption that once the contingency is removed, the Quinnipiac Valley application would be in a position to be granted. However, an examination of the application indicates that there are several major obstacles which militate against a grant. The three stockholders of Naugatuck Valley Service, Inc. also own all of the stock of Quinnipiac Valley Service, Inc. The two towns are only 12 miles apart and a grant of the latter application would result in prohibited overlap of the respective 1 mv/m contours. Thus, under our recently adopted amendments to the multiple ownership rules, the Quinnipiac Valley application, in its present form, would be subject to dismissal.[1] The proposed 25 mv/m contour would overlap the 2 mv/m contour of Station WCBS, New York, New York, in violation of the minimum separation requirements for adjacent channel (20kc removed) assignments specified in Section 73.37 of the Commission's Rules. The licensee of the latter station as well as the licensee of Station WSBS, Great Barrington, Massachusetts, have filed petitions to deny in which they allege that the Quinnipiac Valley proposal

[1] See footnote 23, Report and Order, FCC 64-445 in Docket 14711 released June 9, 1964.

would cause them objectionable interference. It is also noted that the proposal would receive 13.5 percent daytime interference in contravention of Section 73.28(d)(3) of the Rules. Assuming, *arguendo*, that all the aforementioned impediments can be overcome, we would still require publication. For if the Radio Wallingford application is dismissed the town will lose its only application for fulltime facilities since the Quinnipiac Valley proposal contemplates only daytime operation.[2] While it is true that, on the other hand, the Naugatuck Valley proposal would bring a first local nighttime facility to Naugatuck (population 19,511), we cannot now presume that Naugatuck's need for a first nighttime service is any greater than that of the town of Wallingford (population 29,920). We accept petitioner's declaration that due to site difficulty nighttime operation in Wallingford on 1380kc may be infeasible but we maintain that other parties should be given the opportunity to make an independent study.

6. In our Report and Order amending Section 1.525 [then Section 1.316] of the Rules, (FCC 61–1021 in Docket 13913 adopted August 1, 1961) we found that ". . . our statutory responsibility under Section 307(b) will be met and the public interest best served by protecting the broadcasting needs of particular communities for which broadcast facilities have been proposed, and then withdrawn, by providing, by Rule, for further opportunity where appropriate for other persons to apply for the facilities sought to be withdrawn." Since the dismissal of the Radio Wallingford application, without more, would presently foreclose the possibility of the town's acquiring a local nighttime facility, we will withhold our approval of the agreement until other parties are given an opportunity to apply for the facilities sought to be withdrawn.

Accordingly, IT IS ORDERED, This 8th day of July, 1964, that the "Joint Petition for Approval of Agreement" filed by Naugatuck Valley Service, Inc., Quinnipiac Valley Service, Inc., and Radio Wallingford, Inc. IS HELD IN ABEYANCE.

IT IS FURTHER ORDERED, That in order to afford other persons the opportunity to apply for the same facilities as those proposed by Radio Wallingford, Inc., the latter applicant will comply with the provisions of Section 1.525(b) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] Nighttime operation on 860 kc is prohibited by NARBA and Section 73.25(c) of the Commission's Rules since Wallingford is within 650 miles of the Canadian border.

F.C.C. 64R–309

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of CHRONICLE PUBLISHING CO. (KRON–TV), SAN FRANCISCO, CALIF. | Docket No. 12865 File No. BPCT–2168 |
| AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. (KGO–TV), SAN FRANCISCO, CALIF. | Docket No. 12866 File No. BPCT–2401 |
| For Construction Permits To Increase Antenna Height | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON CONCURRING IN THE RESULT.

1. The Review Board has before it for consideration three separate petitions for modification of issues, and responsive pleadings.[1] The petitions were filed by applicants Chronicle Publishing Company (KRON–TV) (Chronicle), and American Broadcasting-Paramount Theatres, Inc. (KGO–TV) (KGO), and Westinghouse Broadcasting Company, Inc. (Westinghouse), licensee of Station KPIX in San Francisco and an intervenor in this proceeding. Both applicants wish to construct tall towers on their respective existing antenna sites. The two applications were originally designated for hearing in an Order released May 4, 1959 (FCC 59–407). Issues were designated concerning national defense objections raised by the Department of the Army, existence of an air hazard based on a recommendation of the Washington Airspace Panel of the Air Coordinating Committee, and comparative considerations in light of the evidence on the first two issues. Through the intervention of time and circumstances, the issues as they were originally designated have become outmoded. The national defense issue has become moot because the Army has withdrawn its objections, and the Federal Aviation Agency (FAA) has under consideration the aeronautical conditions in the San Francisco area, and its report on which the air hazard issue was

[1] Pleadings before the Board are: (1) Petition for modification of issues, filed March 27, 1964, by American Broadcasting-Paramount Theatres, Inc. (KGO-TV); (2) Petition for modification of issues, filed April 3, 1964, by Chronicle Publishing Company (KRON-TV); (3) Opposition to (1), filed April 3, 1964, by Chronicle; (4) Petition for modification of issues, filed April 9, 1964, by Westinghouse Broadcasting Company, Inc.; (5) Reply to (1), filed April 9, 1964, by Air Transport Association of America (ATA); (6) Opposition to (1), filed April 9, 1964, by the Broadcast Bureau; (7) Reply to (4), filed April 14, 1964, by ATA; (8) Reply to (3), (5) and (6), and opposition to (2) and (4), filed April 23, 1964, by KGO; (9) Opposition to (2), filed April 23, 1964, by ATA; (10) Broadcast Bureau comments on (2) and (4), filed April 23, 1964; (11) Errata to (10), filed April 24, 1964, by the Broadcast Bureau; (12) Reply to (8), (9) and (10), filed May 5, 1964, by Chronicle; and (13) Reply to (10), filed May 5, 1964, by KGO.

based is no longer current. Therefore, before this proceeding can go to hearing, a modification of issues is necessary to reflect current circumstances. The three petitioners have submitted their own suggestions as to the form which the new issues ought to take, and in addition, the Broadcast Bureau and the Air Transport Association of America (ATA), another intervenor, have made their own proposals in responsive pleadings. Thus, there are five separate formulations, and they conflict in varying degrees with one another.

2. First, it is generally agreed that there should be some sort of disqualifying air hazard issue as to each of the two applicants, and such issues are, therefore, being included. The parties request in addition the inclusion of an issue which would require a comparative consideration of the applicants' proposals in the event that either of the sites, but not both, is acceptable from the air hazard standpoint. While a comparison was called for by the original designation order, the circumstances upon which the inclusion of this issue was based have changed substantially. Thus, as has been indicated, the Department of the Army no longer objects to a grant of either proposal, and the air clearance previously granted Chronicle Publishing Company has been withdrawn. In October, 1961, a preliminary determination was issued by an official of the FAA recommending denial of both applications. This matter is now pending before the Administrator of the FAA. None of the parties in the pleadings before us alleges any facts suggesting the likelihood that either site, but not both sites, would be approved. In the absence of any showing to that effect, the addition of a comparative issue is not warranted.[2] We reject the request that an antenna farm issue be added; a rule-making proceeding is better adapted for consideration of the establishment of an antenna farm than is an adjudicatory proceeding.

3. Lastly, Chronicle alleges that KGO does not have a site for its proposed tall antenna in that the zoning is now against KGO, no effort to get the zoning changed has been made, and thus KGO has not shown the required availability of site. Chronicle therefore requests an availability of site issue. This request is opposed by KGO and the Broadcast Bureau. An applicant is not required to have the approval of the zoning authority, only "reasonable assurance" of approval.[3] And, as the Review Board said in *Eastside Broadcasting Company*, FCC 63R–528, 1 RR 2d 763, "There is an assumption that the local zoning authority will approve the applicant's proposal, *Indianapolis Broadcasting, Inc.*, 10 RR 1010c (1954)." The letters attached to Chronicle's petition do not show that zoning approval is unlikely, only that it must be sought.

Accordingly, IT IS ORDERED, This 3rd day of June, 1964, That the petitions for modification of issues, filed March 27, 1964, by American Broadcasting-Paramount Theatres, Inc. (KGO–TV), April 3, 1964, by Chronicle Publishing Company (KRON–TV), and April 9, 1964, by Westinghouse Broadcasting Company, Inc.,

[2] Our ruling here does not preclude a renewed request for a comparative issue in the event circumstances show the need therefor.
[3] *Massillon Broadcasting Co., Inc.*, FCC 61–1102, 22 RR 95.

ARE GRANTED to the extent indicated herein, and in all other respects DENIED; and the issues in this proceeding ARE MODIFIED to read as follows:

1. To determine whether the antenna system and site proposed by Chronicle Publishing Company (KRON–TV) would constitute a menace to air navigation.

2. To determine whether the antenna system and site proposed by American Broadcasting-Paramount Theatres, Inc. (KGO–TV) would constitute a menace to air navigation.

3. To determine, in the light of the foregoing issues, which of the applications, if either, should be granted.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–315

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of<br>CLEVELAND TELECASTING CORP., CLEVELAND, OHIO | Docket No. 15249<br>File No.<br>BPCT–3191 |
| THE SUPERIOR BROADCASTING CORP., CLEVELAND, OHIO | Docket No. 15250<br>File No. |
| For Construction Permits for New Television Broadcast Stations | BPCT–3243 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Cleveland Telecasting Corp. (Cleveland) appeals to the Review Board under Section 1.301 of the Rules and seeks reversal of the Hearing Examiner's denial in part of its petition for leave to amend.[1] By Memorandum Opinion and Order (FCC 64M–158) released February 25, 1964, the Hearing Examiner denied that portion of the proposed amendment with respect to the deletion and addition of stockholders, officers and directors and with respect to modifications in staffing, cost estimates and financing. The Examiner found that the proposals would work a radical change in the Cleveland application and that the reasons given in justification therefor were not convincing. The Examiner also found that Cleveland did not meet the generally accepted criteria for measuring good cause (required by Rule 1.522(b)) as summarized in *Sands Broadcasting Corp.*, FCC 61M–1218, 22 RR 106 (1961) and concluded that the written and oral arguments appeared to raise an issue on every one of these criteria except for the question of adding new parties.

2. Cleveland and The Superior Broadcasting Corp. (Superior) are applicants in this comparative television proceeding for a construction permit on Channel 65 in Cleveland, Ohio.[2] On January 13, 1964, Cleveland filed a petition for leave to amend its application. In addition to changing the transmitter and station site,

[1] The pleadings before the Review Board include: (1) Appeal to Review Board from ruling of presiding examiner, filed March 16, 1964, by Cleveland Telecasting Corp.; (2) Supplement to appeal, filed April 9, 1964, by Cleveland; (3) Opposition to (1), filed April 9, 1964, by The Superior Broadcasting Corp.; (4) Opposition to (1), filed April 9, 1964, by the Broadcast Bureau; (5) Reply to (3) and (4), filed April 21, 1964, by Cleveland; (6) Opposition to (2), filed April 24, 1964, by Superior; and (7) Reply to (6), filed May 4, 1964, by Cleveland. The Board agrees to consider Cleveland's appeal at this time on the basis that the ruling complained of is "fundamental and affects the conduct of the entire case" pursuant to Rule 1.301 (Note). The Board also agrees to consider a supplement to the Cleveland appeal even though the filing of such a pleading is not provided for under the Rules and is not in compliance with the requirements of Rule 1.301(b). Since the supplement is primarily concerned with the subsequent removal of the application of United Artists Broadcasting, Inc. from this proceeding and its referral to the processing line by Order (FCC 64M–275) of the Hearing Examiner, released April 1, 1964, the Board will consider the supplement on its own motion.

[2] These applications and that of United Artists Broadcasting, Inc. were designated for hearing in an Order (FCC 63–1161) released December 23, 1963.

supplying citizenship data for one of its principals, and making typographical changes in its program schedule,[3] the amendment would: (1) delete three of the seven original stockholders whose stock interest totalled 56.39%;[4] (2) reduce the stockholdings of the four remaining stockholders from 43.61% to 36.34%; (3) add seven new stockholders with a total stock interest of 63.66%; (4) delete four of the eight original directors including the President-General Manager and Program Director of Cleveland;[5] and (5) add eleven new directors including the seven new stockholders. The amendmnet would also revise Cleveland's financial plan to reflect changed capital commitments from new stockholders.

3. In support of its appeal, Cleveland contends that the proposed changes became necessary because of the withdrawal of three stockholders, IMB, Niarhos and West, from the corporation. Cleveland points out that the resignations of Niarhos and West and of Heintz and Rinyu, which were presented at a stockholders' meeting on January 6, 1964, were the result of other communications activities and the press of prior financial commitments. As a result of the resignations, the remaining four stockholders decided to reduce their stockholdings in order to broaden the stock base for further community participation and to insure against large individual holdings. Cleveland asserts that none of its present stockholders knew or expected any stockholder withdrawal prior to designation for hearing although when the probability of such an occurrence arose in December, 1963, steps were taken to substitute new management and ownership.

4. Cleveland argues that a proper application of the accepted criteria—the *Sands* criteria—for measuring good cause and thereby permitting amendment after designation requires grant of its appeal. Prior to designation, it is alleged, neither Cleveland nor its stockholders knew or expected the aforementioned withdrawals. Since notice of resignation was given after designation and Cleveland reacted immediately thereafter in filing its amendment, it is contended that Cleveland cannot be charged with lack of due diligence. Petitioner further asserts that no new parties are involved in the amendment and that there will be no changes in or addition of issues. Asserting that it did not invite the withdrawals in question but did amend where necessary after notice of the resignations was received, Cleveland contends that the reason for the basic changes incorporated in its amendment was involuntary and not willful. Cleveland states that a grant of the requested changes would not prejudice any other party by effecting a competitive advantage. Both before and after the amendment, Cleveland is 100% locally owned and it is intended that each stockholder will participate actively in the operation of the proposed station. Actually, Cleveland asserts, it would lose a comparative advantage as a result of the resignation by being deprived of a local broadcast

[3] The Hearing Examiner granted that portion of the Cleveland amendment which proposed these changes.

[4] Independent Music Broadcasting (IMB) 31.33%; James C. Heintz, Jr. 12.53%; and William L. Rinyu 12.53%.

[5] The four resigning directors are Heintz, Rinyu, Theodore Niarhos and Robert West. Niarhos and West, President and Program Director of IMB respectively, served as President-General Manager and Program Director, as well as directors, of Cleveland and also supervised preparation of the original Cleveland application.

record and significant local broadcast experience (through IMB, Niarhos and West). Finally, Cleveland contends that the amendment should be granted since the default of United Artists in the proceeding deprives its opposing arguments of merit and the weight accorded them by the Examiner and since a denial of the proposed changes would leave Superior as the only viable applicant.

5. The Review Board is of the opinion that Cleveland has not demonstrated good cause within the meaning of Section 1.522(b) of the Commission's Rules to permit amendment of its application with respect to the challenged changes. Even though the Commission attempts to freeze proposals at some point in the proceeding to enable adequate preparation by all parties, it is recognized that unforeseeable circumstances may require amendment of an application. *Kent-Ravenna Broadcasting Co.*, FCC 61–1463, 22 RR 794 (1961). However, an applicant cannot wait until after designation to effect a comprehensive change in its composition without a compelling showing of substantial compliance with the accepted criteria of good cause. *Sands Broadcasting Corp., supra.* In this comparative proceeding, Cleveland attempts to justify its request to amend on the basis that unexpected withdrawals by certain stockholders (also officers and directors) require a reorganized corporate structure. Nevertheless, Cleveland fails to disclose the facts surrounding the withdrawals including the questions of when the press of other commitments occurred to force the withdrawals and when the decisions to withdraw were first communicated to Cleveland.

6. The Board is unable to conclude that there was "good cause" for the late amendment in view of Cleveland's failure to disclose the circumstances of the resignations and subsequent withdrawals. It is to be noted that the facts were within the knowledge of the withdrawing stockholders and directors who constituted 56% ownership of Cleveland and who did not submit affidavits with the Cleveland amendment. Moreover, as the Examiner points out, the amendment admittedly works a radical change in the applicant's structure with the *increase* of local stockholders and directors, the *introduction* of broader-based local ownership, and the *further* integration of local broadcast ownership and management. Whether or not these changes enhance Cleveland's comparative position, acceptance of this disputed portion of the amendment would permit the creation of a new ownership in the applicant that might introduce, at the very least, a new basis for comparison. *Wilson Broadcasting Corp.*, FCC 58–989, 17 RR 404 (1958); *Sands Broadcasting Corp., supra;* and *Cleveland Broadcasting, Inc.*, FCC 64R–278, released May 21, 1964. In light of Cleveland's obvious failure to sustain the required showing of good cause, the Hearing Examiner must be affirmed in his denial of that portion of the proffered amendment which is the subject of this appeal.

Accordingly, IT IS ORDERED, This 4th day of June, 1964, That the Appeal to Review Board from ruling of presiding examiner, filed March 16, 1964, by Cleveland Telecasting Corp. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–319

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| HOLSTON BROADCASTING CORP., ELIZABETHTON, TENN. | Docket No. 15111<br>File No. BP–15012 |
| C. M. TAYLOR, BLOUNTVILLE, TENN. | Docket No. 15112 |
| For Construction Permits | File No. BP–15115 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Board has before it a joint petition, filed by the two applicants on April 30, 1964, requesting approval of an agreement, also filed on April 30, 1964, which provides for the dismissal of the application of C. M. Taylor. Also under consideration is the Broadcast Bureau's statement concerning the petition, filed May 13, 1964.

2. On July 31, 1961, Holston filed an application for a construction permit for a new standard broadcast station, to be the second local outlet, in Elizabethton, Tennessee. On September 28, 1961, Taylor filed an application for a construction permit for the first standard broadcast station in Blountville, Tennessee. The two communities, and the areas within the proposed facilities' contours, already are served by a minimum of ten stations. The applications are mutually exclusive. They were designated for hearing by an Order (FCC 63–555) released June 18, 1963; one of the questions to be resolved was which application would better provide a fair, efficient and equitable distribution of radio service pursuant to Section 307 (b) of the Act. The hearing commenced on April 14, 1964. On April 17 a Memorandum Agreement, which had been executed on the previous day, was read into the record, and a recess was requested in order that the parties be able to work out a formal agreement. The formal agreement, which was executed on April 24, 1964, provides that Taylor shall dismiss his application; that Holston shall continue to prosecute its application; and that after a new corporation has been formed by Holston upon receipt of a grant (the permit being assigned to the new corporation) Taylor shall have an option to purchase 45% of the stock of such corporation.

3. Holston and Taylor state (a) that fewer reception services are available in the area to be served by the Elizabethton proposal than in the area to be served by the Blountville proposal, and (b) that Elizabethton has a considerably larger population than Blountville. Thus they contend that the withdrawal of Taylor's application would not unduly impede achievement of a fair, efficient, and equitable distribution of radio services among the communities and that publication under Rule 1.525 (b) (2) therefore is unnecessary.

We disagree. As the Bureau points out, the proposal to be withdrawn would provide a first station to a community while the remaining proposal would provide its community with a second station. Thus, on the basis of the facts in this case, the Review Board cannot conclude that withdrawal of the Taylor application would not unduly impede achievement of a fair, efficient and equitable distribution of radio service, and C. M. Taylor will be required to comply with the publication provisions of Section 1.525(b) (2) of the Rules.

Accordingly, IT IS ORDERED, This 8th day of June, 1964, That the joint petition for approval of agreement, filed April 30, 1964, by Holston Broadcasting Corporation and C. M. Taylor IS HELD IN ABEYANCE; that opportunity be afforded for persons to apply for the facilities specified in the application of C. M. Taylor (BP-15115); and that C. M. Taylor comply with the publication provisions of Rule 1.525(b) (2).

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–325

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>NORTHWESTERN INDIANA RADIO CO., INC., VALPARAISO, IND. | Docket No. 8218<br>File No. BP–5574 |
| ANTHONY SANTUCCI, ROBERT JONES, KENNETH BERRES, ALBERT GELLER, AND GABRIEL APRATI, D.B.A. VALLEY BROADCASTING, KANKAKEE, ILL. | Docket No. 15359<br>File No. BP–15459 |
| MERLIN J. MEYTHALER, MERTON J. GONSTEAD, REX N. EYLER, AND JAMES B. GOETZ, D.B.A. LIVINGSTON COUNTY BROADCASTING CO., PONTIAC, ILL. | Docket No. 15360<br>File No. BP–15470 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. WIBC, Inc. (WIBC) licensee of Class II standard broadcast Station WIBC (1070 kc, 50 kw–LS, 10 kw, DA–2, U), a respondent in this proceeding in connection with interference which the operation proposed by Valley Broadcasting (Valley) would cause within the WIBC 0.5 mv/m normally protected daytime contour, requests enlargement of existing interference issues to include a determination as to interference within the WIBC 0.1 mv/m contour.[1] The Commission's Broadcast Bureau opposes such enlargement.

2. WIBC asserts that it is a Class II station with a primary service area which "by proven facts" extends to its 0.1 mv/m contour in some areas. In support of this claim, WIBC cites an attached engineering statement which includes a map depicting the location of the WIBC 0.1 mv/m contour;[2] that part of Section 73.11 (a) of the Commission's Rules which defines the primary service area as "The area in which the groundwave is not subject to objectionable interference or fading,"; the provision in Section 73.182 (f) of the Rules that "primary service in rural areas is a signal of 0.1 to 0.5 mv/m"; the provision of Section 73.21 (a) (2) that wherever necessary a Class II station shall use a directional antenna or

[1] Before the Review Board for consideration are: (1) Motion to enlarge issues, filed April 3, 1964, by WIBC; (2) Broadcast Bureau comments, filed April 16, 1964; and (3) Reply to (2), filed April 28, 1964, by WIBC.

[2] The Commission's files reveal that as recently as February 27, 1963, in its application for a construction permit to change its transmitter site (BP–15871, granted by Commission action of March 20, 1963), WIBC made no claim that it is entitled to protection to its 0.1 mv/m contour daytime. In that application, the interference claimed to be caused within WIBC's existing and proposed 0.5 mv/m normally protected daytime contour by Valley's proposal was less than that claimed in the subject petition. The operation authorized by said construction permit has not as yet been licensed. Similarly, in the petition to designate the Valley application for hearing, filed by WIBC on November 7, 1962, and supplemented on April 15, 1963, and February 4, 1964, WIBC made no claim that it is entitled to protection to its 0.1 mv/m contour.

other means to avoid interference with Class I stations or other Class II stations; a portion only of Section 73.24(b) of the Rules; that portion of Section 73.182(a)(2) of the Rules which recommends that Class II stations be so located that interference received from other stations will not limit the service area to greater than the 0.5 mv/m contour daytime; and *Interstate Broadcasting Company, Inc.* v. *Federal Communications Commission*, 109 U.S. App. D.C. 190, 285 F.2d 270, 22 RR 2112 (1960).

3. In its motion to enlarge, WIBC argues only for a showing as to the interference which it alleges that Valley will cause within WIBC's 0.1 mv/m contour, urging only that Issue 4 be modified to determine whether the proposal of Valley would cause objectionable interference to WIBC within its primary service area, including the 0.1 mv/m contour of WIBC. However, in its reply to the Broadcast Bureau's comments, WIBC, referring to the fact that its engineering statement, in addition to depicting the interference allegedly caused by the Valley proposal, also depicts interference allegedly presently received by WIBC from existing stations, introduces for the first time the assertion that its concern is the cumulative effect of the "numerous interference zones." As depicted, only a small portion of the alleged interference occurs within the WIBC normally protected daytime 0.5 mv/m contour. By introducing these new allegations as to "cumulative effect" in a reply pleading to which the other parties cannot under our rules reply, WIBC has violated the provision of Section 1.45(b) of those Rules, which states that the reply shall be limited to matters raised in the oppositions.

4. For clarity, we will treat the deficiencies in WIBC's pleadings essentially in *seriatum*. In citing Sections 73.11(a) and 73.182(f) of the Rules in support of its contention that it provides primary service to and is protected to its 0.1 mv/m contour, WIBC fails to cite the provisions of that rule which, among other things, provide that all values given therein are based on an absence of objectionable fading, either in changing intensity or selective fading, and the usual noise levels in the area. Similarly, WIBC cites only that portion of Section 73.24(b) of the Rules stating "that objectionable interference will not be caused to existing stations. . . ." However, the complete pertinent portion of the rule, which is quoted in footnote 3 below, provides that an authorization for a new standard broadcast station will be issued only after a satisfactory showing has been made that objectionable interference will not be caused to existing stations or that, if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. In citing Section 73.182(a)(2) of the Rules in support of its contention that Class II stations be so located that the service area will be limited to not greater than the 0.5 mv/m contour daytime, WIBC overlooks the fact that the rule itself states that this is a recommendation, and that this recommendation must be read in connection with the provisions of Section 73.182(v) of the Rules which lists the protected service contours and permissible interference signals for broadcast sta-

[3] Section 73.24(b) of the Rules provides in pertinent part: "That objectionable interference will not be caused to existing stations or that, if interference will be caused, the need for the proposed service outweighs the need for the service lost by reason of such interference."

tions. Therein, the normally protected daytime contour of Class II stations is given as the 0.5 mv/m contour. In citing *Interstate, supra*, in support of its contention that "WIBC has shown that the disputed interference area beyond its 0.5 mv/m contour is a part of a larger potential development of interference *within* its 0.5 mv/m contour.", WIBC again cites only a portion of the pertinent paragraph in the Court of Appeals Decision. Necessary to evaluation of the Court's holding is knowledge of the stipulation entered into by counsel for all parties and approved by the Court, which was: "Whether Appellant's allegations of economic injury, which would result solely from adjacent channel interference causing loss of listeners outside the contour within which Appellant's station is normally protected against such interference but within the contour normally protected against co-channel interference were sufficient to establish that, as a matter of law Appellant is a person aggrieved or whose interests are adversely affected. . . ." Thus, disregarding the fact that *Interstate, supra*, involved interference to a Class I station (WIBC is Class II), a distinguishing feature here is that as to the alleged interference between its 0.5 mv/m and 0.1 mv/m contours WIBC has made no allegations of economic injury—nor has it made specific allegations of public injury. WIBC has only alleged that 8,635 persons who under the Commission's Rules are not within its normally protected contour, will not be served by WIBC in the event the Valley proposal is granted.

5. WIBC's new allegations (introduced in its Reply pleading) as to "the cumulative effect . . . of numerous small incursions upon its service area" will not be further considered here, since they are not properly before us, having been improperly introduced in a reply pleading (Section 1.45(b) of the Rules). However, in the interest of clarity, we must note that in failing to more fully cite pertinent portions of the Court of Appeals holdings in *Interstate Broadcasting Company* v. *Federal Communications Commission*, 116 U.S. App. D.C. 327, 323 F.2d 797, 25 RR 2046 (1963), WIBC's Reply inadvertently misinterprets those holdings.[4] In that case, the court held that the Commission's Rules do not give absolute protection to a station's entire primary service area; that such areas are subject to limitation by interference from other stations to the contours set out for each class of station; that the concept of a protected contour implies a legislative judgment by the Commission that new services which destroy an existing service beyond that contour are normally more in the public interest than the service they destroy; that, in effect, the Commission's Rules embody this judgment; and that it is a reasonable one and within the Commission's discretion. The Court further held that unless a party alleges reasons sufficient, if true, to justify a change or waiver of the Rules the Commission may apply its rules without a full hearing. WIBC's motion is devoid of such reasons. The motion simply cites portions of the Commission's Rules and Court Decisions, which portions, as shown above are not completely informative. Attached to the motion is a depiction of the location of WIBC's normally protected daytime 0.5 mv/m contour, the location of the

[4] Movant does not quote from the concurring opinion of Judge Washington.

WIBC 0.1 mv/m contour, and a depiction of the interference which WIBC alleges it receives within those contours. Since, under the Commission's Rules, WIBC is not entitled to protection between its 0.5 mv/m and 0.1 mv/ daytime contours, and WIBC has not alleged that special circumstances justify protecting it beyond the 0.5 mv/m contour, the motion to enlarge will be denied.

Accordingly, IT IS ORDERED, This 11th day of June, 1964, That the Motion to Enlarge Issues, filed April 3, 1964, by WIBC, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–328

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of PROGRESS BROADCASTING CORP. (WHOM), NEW YORK, N.Y. For Construction Permit | Docket No. 14611 File No. BP–13915 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. On May 11, 1964, Chief, Broadcast Bureau filed a petition to dismiss for failure to prosecute the above-captioned application of Progress Broadcasting Corporation (Progress). The application involved seeks authority to change the directional antenna system of standard broadcast Station WHOM, New York, New York. The Bureau's petition is opposed by Progress and will be denied for the reasons set forth herein. The Board believes, however, that a portion of the history of this proceeding must be set out for a full understanding of its denial of the Bureau's petition.

2. The Progress application, which was filed on February 18, 1960, was designated for hearing by Order (FCC 62–444, released April 30, 1962), and the hearing was first scheduled to commence on June 29, 1962. It was subsequently rescheduled by the Examiner for July 5, 1962. Thereafter, on petition of the applicant and without opposition from the Bureau or K & M Publishing Company, Inc., a party respondent, the hearing was again rescheduled to October 9, 1962. Then, in response to the applicant's request for additional time to prepare its case to meet enlarged issues, the Examiner, on September 13, 1962, again extended the hearing, this time from October 9, to October 24, 1962. On September 28, 1962, at the request of the applicant, the Hearing Examiner held another pre-hearing conference. At this conference, Progress disclosed that it had learned of the possible condemnation of its transmitter site by the State of New Jersey for highway purposes and requested postponement of the hearing date to January 7, 1963. Again, the Bureau and the respondent interposed no objection to the relief sought, and Progress' request was granted. Since this time, several more continuances have been requested by Progress as the result of its apparent inability to resolve the condemnation matter with the State of New Jersey. All of these requests have been granted by the Examiner. The Bureau and respondent had objected to the continuance granted by the Examiner on January 17, 1963; the Bureau also appealed this ruling to the Review Board. Its petition for review of the Examiner's ruling was denied by the Board in a Memorandum Opinion and Order (FCC 63R–124, released

March 14, 1963), on the ground that the Examiner had discretion in the matter and that his action did not represent an abuse of that discretion. Several months later on September 25, 1963, following another continuance in June, 1963, Progress again requested a further continuance. Again over the objections of the Bureau and the respondent, the Examiner granted a continuance until May 21, 1964. On May 1, 1964, after another mesne continuance, another request for postponement was filed, the requested date for hearing being October 29, 1964. This petition has not yet been acted upon by the Examiner, but oral argument on the petition has been scheduled by the Examiner for a date he will later specify.

3. In the instant petition the Bureau points out that approximately two years have elapsed since Progress' application was first designated for hearing. The Bureau also states that according to information furnished by Progress, it is unlikely that the hearing could be commenced in the reasonably near future. Conceding that the applicant has been faced with a problem not of its own making, the Bureau nonetheless states that Progress has failed to prosecute its application and that the application should be dismissed in accordance with the provisions of Section 1.568 of the Commission's Rules.[1] The Bureau takes the position that it is essential that applicants be required to prosecute their applications without delay. While it recognizes that good cause may exist in some instances for the retention of an application in hearing despite delays in reaching a determination in the proceeding, the Bureau states that mere convenience cannot be deemed to constitute good cause. It concludes by contending that the hearing process was never intended to be utilized "as a depository for dormant applications".

4. In opposing the Bureau's petition, Progress argues that it has in fact prosecuted its application in this proceeding and will continue to do so. It states that it still desires a grant of its application, but believes that the public interest would better be served by delaying resolution of the issues in the hearing. Progress points out that the site condemnation problem in this case, over which it has no control, may eventually render the entire proceeding moot. In this situation, it is Progress' view that it would be unproductive to proceed with the hearing at this time. It argues that no one is being injured while the application remains in hearing status, and that there is no inconvenience to either the Examiner, the Bureau, or any other party, so long as no hearings are actually taking place. On the other hand, Progress notes, because of the present "freeze" on AM applications and uncertainty about the Commission's new AM rules, there is no assurance that it would be able to refile its application, even were the freeze to be lifted, should the application now be dismissed.

5. In the Board's view, the Bureau's petition presents a purely legal issue: Have Progress' repeated requests for postponement since designation of this application for hearing amounted to a failure to prosecute its application? The Board believes that this question must be answered in the negative. The phrase "failure

[1] Section 1.568(b) "Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. . . ."

to prosecute" in Section 1.568 of the Rules contemplates a situation in which an applicant actually abandons his efforts to obtain a grant of his application.[2] An applicant may also be held to have failed to prosecute his application should he not take required action such as amending his application after due notice.[3] The facts of this case do not establish either situation, and therefore, the Bureau's petition will be denied.

6. As the Board has earlier stated in this proceeding, the matter of granting continuances in any hearing case is within the discretion of the Hearing Examiner. So long as there is no evidence of abuse of this discretion, the Board will not disturb the Examiner's rulings. This is not to say, however, that the Board would foresee an Examiner's granting interminable requests for continuance in any proceeding where no reasonably defined date for termination of the proceeding could be predicted. To this extent, the Board concurs in the Bureau's position that the hearing process is not intended to be a depository for dormant applications. At some point in time an applicant must decide whether he will proceed with the presentation of his case, or whether he will voluntarily dismiss his application. However, the Board is not now prepared to say, in view of the many continuances which were granted without the Bureau's or respondent's objections, that this point in time has been reached in the instant case.

Accordingly, IT IS ORDERED, This 12th day of June, 1964, That the Petition to dismiss for failure to prosecute, filed May 11, 1964, by the Broadcast Bureau IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

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[2] See: *Queen City Radio Station*, FCC 62R-91, 24 RR 430 (1962); *Blue Island Community Broadcasting Corp., Inc.*, FCC 61-126, 21 RR 142 (1961); *Jessie Mae Cain*, 11 RR 1285 (1955); and *Four States Broadcaster, Inc.*, 12 FCC 271, 3 RR 1545 (1947).

[3] *Magic City Broadcasting Corp.*, 35 FCC 251, 25 RR 3935 (1963); *Karl Kegley*, FCC 60-1317, 20 RR 937 (1960).

F.C.C. 64R–335

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| PAUL DEAN FORD AND J. T. WINCHESTER, LONDON, OHIO | Docket No. 15279<br>File No. BPH–3936 |
| CHARLES H. CHAMBERLAIN, URBANA, OHIO | Docket No. 15280<br>File No. BPH–3993 |
| THE BROWN PUBLISHING CO., URBANA, OHIO | Docket No. 15281<br>File No. BPH–4138 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. By joint petition, Charles H. Chamberlain (Chamberlain) and The Brown Publishing Company (Brown) seek approval of an agreement looking toward the dismissal of the Chamberlain application for a new FM broadcast station at Urbana, Ohio.[1] By Order (FCC 64–37) released January 21, 1964, the Commission designated a consolidated proceeding involving the mutually exclusive applications of Paul Dean Ford and J. T. Winchester to operate a new FM station in London, Ohio, and the applications of Chamberlain and of Brown to operate in Urbana, Ohio.[2] The designation order specified a Section 307(b) issue and a contingent comparative issue.

It is asserted in the joint petition that, sometime after designation, Chamberlain determined to avoid further costs in the prosecution of his application. An agreement was thereafter negotiated on April 14, 1964, with Brown for the dismissal of the Chamberlain application in return for Brown's partial reimbursement of the out-of-pocket expenses incurred in the prosecution of the Chamberlain application. The agreement provides for a total cash payment of $2,137 to Chamberlain, of which sum $500 is to be paid upon receipt of Commission approval of the agreement and the balance is to be paid if the pending Brown application is granted by the Commission. In an affidavit attached to the agreement, an itemized accounting of expenses in excess of $2,137 is given by Chamberlain. Supporting affidavits of a communications consultant and of an attorney account for $1,805.30 of said ex-

[1] The pleadings before the Review Board include: (1) Joint petition for approval of agreement and dismissal of application, filed April 16, 1964, by Charles H. Chamberlain and The Brown Publishing Company; (2) Partial opposition, filed April 29, 1964, by the Broadcast Bureau; (3) Reply, filed May 7, 1964, by Chamberlain; and (4) Reply, filed May 11, 1964, by Brown.

[2] The mutually exclusive application of a fourth party, Floyd Byler (Urbana, Ohio), was dismissed with prejudice by the Chief Hearing Examiner by Order (FCC 64M–157) released February 25, 1964.

penses. Brown also submits an affidavit in which the nature of the consideration to be paid, a summary of the history of the negotiations involved, and the inherent considerations of the "public interest" are detailed. Petitioners contend that the dismissal agreement will serve the public interest by (1) avoiding a comparative showing relative to Urbana, Ohio; (2) providing for a narrower resolution of the remaining applications under the limited Section 307(b) issue; and (3) enabling the earlier authorization of additional FM broadcast service.

3. In its partial opposition to the joint petition, the Broadcast Bureau asserts that the petitioners have not adequately set forth the reasons why the dismissal agreement is in the public interest (Section 1.525(a)(4) of the Rules). The Bureau points out that the Commission noted a possible question of concentration of control of the media of mass communication with regard to the Brown application since Brown publishes the only daily newspaper in Urbana and seeks authority to operate the only broadcast station. As a result, the Commission in its designation order provided that facts relative to the question of concentration of control may be considered under the comparative issue. Since a grant of the joint petition might render the comparative issue moot and might prevent inquiry into the facts of undue concentration of control, the Bureau requests the Review Board to delay its consideration of the joint petition until final resolution of the Bureau's petition to enlarge issues (concurrently filed with its partial opposition) is completed.[3] As justification for its request to delay consideration of the joint petition, the Bureau points out that the dismissal agreement is contingent on a grant of the Brown application and that the addition of a concentration of control issue might result in a reappraisal of the relationship between Brown and Chamberlain.

4. It is alleged in the joint petition that, except for those amounts to be paid by Brown, Chamberlain has not been promised or paid any consideration from any source for the dismissal of his application. The Board notes, however, that Chamberlain, in his affidavit, has failed to aver whether or not consideration other than that reflected in the subject agreement has been promised to or received by him, directly or indirectly, in connection with the requested dismissal of his application, as is required by Section 1.525(c) of the Rules. Under this same provision of the Rules, petitioners have also failed to submit an affidavit for inclusion in the record of this proceeding from the other party in the proceeding (Paul Dean Ford and J. T. Winchester) stating whether or not such party has directly or indirectly paid or promised consideration in connection with the removal of any conflict by the dismissal of the Chamberlain application. Since petitioners have not complied with the aforementioned requirements of Section 1.525(c) of the Rules, final action on the dismissal agreement will be with-

[3] In its petition to enlarge issues, the Bureau seeks the addition of an undue concentration of control issue as against Brown. Since the basis for enlargement concerns the potential withdrawal of the comparative issue in this proceeding with the ultimate dismissal of the Chamberlain application, the Review Board will delay consideration of the Bureau's petition pending final consideration of the subject joint petition.

held pending receipt of further supporting affidavits within the period specified.[4]

Accordingly, IT IS ORDERED, This 15th day of June, 1964, That further consideration of the joint petition for approval of agreement and dismissal of the application of Charles H. Chamberlain, filed April 16, 1964, by Charles H. Chamberlain and The Brown Publishing Company, IS HELD IN ABEYANCE pending receipt, within 30 days of the release date of this Order, of affidavits filed in compliance with the requirements of this Opinion and of Section 1.525(c) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[4] The Board is of the opinion that petitioners have adequately demonstrated the considerations of public interest of this dismissal agreement under Section 1.525(a)(4) of the Rules. The Bureau's contention to the contrary is erroneous. Brown does not seek a grant of its application by this petition, and its "failure" to meet an issue proposed by the Bureau has no bearing on the present request. It should also be noted that possible reappraisal of the relationship between Brown and Chamberlain that might result from a delay in the consideration of the joint petition and the addition of a concentration of control issue does not constitute, as the Bureau suggests, sufficient reason to withhold immediate consideration of said joint petition; in their reply pleadings, both Brown and Chamberlain reject the possibility of such a reappraisal.

F.C.C. 64R–337

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of GEORGE DACRE AND HARRY EDELSTEIN, D.B.A. ROCKLAND BROADCASTING CO., BLAUVELT, N. Y. | Docket No. 14510<br>File No. BP–13477 |
| ROCKLAND RADIO CORP., SPRING VALLEY, N.Y. | Docket No. 14512<br>File No. BP–14461 |
| ROCKLAND BROADCASTERS, INC., SPRING VALLEY, N.Y. | Docket No. 14513<br>File No. BP–14462 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. On March 16, 1964, Rockland Radio Corporation (Radio) and Rockland Broadcasters, Inc. (Broadcasters) filed a joint petition for approval of an agreement looking toward the dismissal of Broadcasters' application for a new standard broadcast station at Spring Valley, New York, and the payment of $3,000 by Radio as partial reimbursement of the expenses incurred by Broadcasters in the prosecution of its application. In an Initial Decision (FCC 63D–59) released May 28, 1963, the Hearing Examiner proposed to grant Radio's application and to deny the competing applications of Rockland Broadcasting Company (Blauvelt) and of Broadcasters. The Review Board affirmed the Hearing Examiner's proposal in its Decision (FCC 64R–75) released February 17, 1964, and subsequently, by Memorandum Opinion and Order, denied a petition for reconsideration filed by Blauvelt on March 18, 1964. (FCC 64R–291, released May 26, 1964).

2. Broadcasters initially proposed a merger with Radio, but the offer was rejected in favor of a cash payment to Broadcasters in return for the dismissal of its application. The applicants thereafter negotiated an agreement whereby Radio would reimburse Broadcasters for expenses incurred in the amount of $3,000 upon approval of said agreement by the Commission and dismissal of the Broadcasters' application. Broadcasters also agreed to refrain from seeking further reconsideration or review of the Board's Decision. The agreement, which was executed on March 13, 1964, was subsequently filed with the Commission on March 16, 1964, in compliance with the five-day filing provision of Section 1.525(a) of the Rules.

3. Supporting affidavits submitted with the joint petition indicate engineering expenses of $24,100.36 and legal expenses of

$12,612.14 or total costs of $36,712.50.[1] The Board, therefore, finds that the claimed expenses have been properly verified and represent legitimate and prudent outlays (Section 1.525(a) and (c)) and substantially exceed the reimbursement promised in the dismissal agreement. Further affidavits from officers of Radio and of Broadcasters affirm that the cash payment promised in the agreement represents the sole consideration to be paid to Broadcasters by any and all parties to the proceeding in connection with the dismissal of its application. Blauvelt, through a general partner, submits an affidavit for inclusion in the record of this proceeding wherein Blauvelt denies any payment, promised or paid, directed to Broadcasters in connection with the removal of a conflict by the dismissal of the latter's application. Under these circumstances, the Board finds the agreement to be in the public interest in that its approval could permit the early institution of the first broadcast service for Spring Valley, New York.

Accordingly, IT IS ORDERED, This 16th day of June, 1964, That the joint petition for approval of agreement and dismissal of the application of Rockland Broadcasters, Inc., filed March 16, 1964, by Rockland Radio Corporation and Rockland Broadcasters, Inc., pursuant to Section 1.525 of the Rules, IS GRANTED; that said agreement IS APPROVED; and that the application (BP–14462) of Rockland Broadcasters, Inc. IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[1] By Memorandum Opinion and Order (FCC 64R–270) released May 13, 1964, the Review Board requested further supporting affidavits from petitioners to verify the exact nature and amount of the consideration promised or paid to Broadcasters. The requested affidavits were duly filed by Broadcasters on May 27, 1964, and adequately substantiate the allegations in the joint petition.

F.C.C. 64R–349

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>WILLIAM S. HALPERN AND LOUIS N. SELTZER D.B.A. BURLINGTON BROADCASTING CO., BURLINGTON, N.J. | Docket No. 13931<br>File No. BP–12580 |
| MOUNT HOLLY-BURLINGTON BROADCASTING COMPANY, INC., MOUNT HOLLY, N.J. | Docket No. 13933<br>File No. BP–13952 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. On May 14, 1964, Mount Holly-Burlington Broadcasting Company, Inc. (Mount Holly) filed with the Review Board a petition for review of an adverse ruling of the Hearing Examiner. Oppositions to this petition were filed by Burlington Broadcasting Company (Burlington) on May 21, 1964 and by the Broadcast Bureau on May 22, 1964.

2. On June 14, 1963, the Commission released a Decision, 34 FCC 1135, 25 RR 633, which granted the application of John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Company, for a construction permit for a Class III standard broadcast station, to operate daytime only, on 1460 kc, with power of 5 kw at Mount Holly, New Jersey. Burlington appealed the aforementioned decision to the United States Court of Appeals for the District of Columbia Circuit on July 15, 1963, and on March 19, 1964, the court, retaining jurisdiction, remanded the case to the Commission for further proceedings on a reopened record. *Burlington Broadcasting Company* v. *FCC* (Case No. 17,988). In compliance with the court's opinion, the Commission reopened the record and remanded the case to the Hearing Examiner for an Initial Report and Recommendation based on specified issues. Memorandum Opinion and Order, FCC 64–373, released May 1, 1964.

3. On May 6, 1964 Mount Holly filed a motion for continuance. At a prehearing conference held on May 8, 1964, Mount Holly stated that it proposed to appeal the aforesaid decision of the Court of Appeals to the United States Supreme Court and that it was in the process of preparing a writ of certiorari. Mount Holly argued that its motion for continuance (until such time as the Supreme Court has acted on its petition) should be granted because if the Supreme Court reversed the lower court a great burden in "time, expense, and effort" would be placed on it for naught. However, an Order released by the Hearing Examiner on May 11, 1964 (FCC 64M–398) provided that Mount Holly

tender its exhibits on or before June 12, 1964, and that the hearing commence on July 13, 1964.[1] In a Memorandum Opinion and Order of May 13, 1964, FCC 64M–407, the Hearing Examiner stated that Mount Holly's motion for continuance was without merit, and he denied it. Mount Holly seeks review of this opinion and order.

4. At the time the Hearing Examiner denied the petitioner's request for continuance, a petition for certiorari had not as yet been filed with the Supreme Court; under the circumstances, the request for a continuance clearly was premature. Such petition had not been filed at the time the petition for review of the Examiner's action was filed, and hence it suffers from the same disability as did the original petition with the Examiner. Official notice is taken of the fact that subsequent to the filing of the petition before us, the petitioner, on June 16, 1964, filed a petition for certiorari with the Supreme Court. However, as is indicated in *Magic City Broadcasting Corporation,* FCC 63R–199, released April 19, 1963, the filing of such a petition does not of itself provide a basis for continuance of the hearing. Unless coupled with a showing of irreparable injury to the petitioner or to the public, in the event the hearing is not continued, or unless there is some showing from which it may be concluded that the appeal might be successful, continuance of the hearing is not in the public interest. No such showing was even attempted by the petitioner, and accordingly its petition for review will be denied.

Accordingly, IT IS ORDERED, This 24th day of June, 1964, That the Petition for Review of Adverse Ruling of Hearing Examiner, filed May 14, 1964 by Mount Holly-Burlington Broadcasting Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[1] By Order released on June 5, 1964 (FCC 64M–508), the Hearing Examiner extended the date for the tendering of exhibits to June 22, 1964.

F.C.C. 64–584

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Request of
COMMUNITY RADIO OF SARATOGA SPRINGS, NEW YORK, INC. (WKAJ), SARATOGA SPRINGS, N.Y.
For Extension of Temporary Authorization

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LEE NOT PARTICIPATING.

1. The Commission has before it for consideration a request, filed June 9, 1964, by Community Radio of Saratoga Springs, New York, Inc. (Community Radio), for extension, for a period of 90 days beginning June 18, 1964, of its present temporary authorization (granted March 18, 1964, FCC 64–234) to operate broadcast Station WKAJ at Saratoga Springs, New York, on 900kc. Notice is also taken of a petition by Kenneth H. Freebern for reconsideration of the original grant of temporary authorization to Community Radio; a petition by A.M. Broadcasters (a competing applicant for a construction permit) for denial of Community Radio's request for extension; and related pleadings and correspondence.

2. The Commission's original 90-day grant of temporary authority to Community Radio was made pursuant to Section 309(f) of the Communications Act of 1934, as amended, which provides that when a broadcast application has been filed for an instrument of authorization the Commission may—

> . . . if the grant is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and *upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days* . . . (emphasis added).

3. In its Memorandum Opinion and Order of March 18, 1964 (effective on March 20), the Commission observed that Station WSPN, Saratoga Springs, had gone off the air permanently on February 9, 1964, leaving the community of Saratoga Springs (population approximately 17,000) without any local broadcast service; and that Community Radio had bought the WSPN studio and transmitter site and purchased WSPN's physical facilities,

and could begin broadcast operations without any delay; and, on the basis of these facts, found that "extraordinary circumstances" existed requiring the resumption of local broadcast service through issuance of temporary operating authority and that a delay in the institution of such operations would seriously prejudice the public interest.

4. We find that these same considerations warrant a grant of the requested 90-day extension. However, it is clear that under Section 309(f), once the second 90-day period expires no further extensions of Community Radio's temporary operating authority may be granted. Unless Community Radio and A.M. Broadcasters will have agreed to terms under which the Commission may authorize a jointly operated interim operation pending completion of the consolidated proceeding in which their construction permit applications will be considered, operation of WKAJ will be terminated pending a final decision by the Commission.

5. In our view, Freebern lacks standing as a party in interest with respect to Community Radio's request for a 90-day extension. Specifically, the fact that he (as a stockholder and judgment creditor of Spa Broadcasters, Inc.) has challenged the legality of the surrender and cancellation of the license of Station WSPN is not sufficient to show economic injury of a direct, tangible, and substantial nature. Nonetheless, we take notice of Freebern's allegations concerning the conduct of Community Radio's vice president and principal stockholder (Kent E. Jones) while manager of Station WSPN, and will consider them on the merits at a future date in our comparative consideration of the pending applications of Community Radio and A.M. Broadcasters for permanent authorizations.

6. A.M. Broadcasters contends in its petition: one, that Community Radio's request for extension of its temporary authorization was untimely filed, less than 10 days before the inception of the proposed extension period, in violation of Section 1.542 of the Rules, and hence must be dismissed; two, that a grant of the requested extension would be prejudicial to A.M. Broadcasters, in its capacity as competing applicant for a construction permit, in that (a) the profits obtained by Community Radio through temporary operation of Station WKAJ will enable it "to comfortably finance the litigation of this case", (b) Community Radio's temporary operation of WKAJ gives it a special opportunity, denied to A.M. Broadcasters, to build a record of and reputation for high-quality broadcast performance in advance of the comparative proceeding, and thus gain an unfair advantage in hearing, and (c) Community Radio's financial investment in its temporary operation of WKAJ might be a factor predisposing the Commission to favor Community Radio over A.M. Broadcasters (in support of its assertions (b) and (c) *supra*,, A.M. Broadcasters cites *Community Broadcasting Co., Inc.* v. *F.C.C.*, 247 F.2d 753, 19 R.R. 2047 (U.S. App. D.C., 1960)); three, that the extension must be denied because the grant of temporary authorization was not properly issued in the first place, in that (a) failure to wait 30 days after the Community Radio application was filed violated Section 309(b) of the Act, and

(b) no extraordinary circumstances existed justifying the grant of temporary authorization to Community Radio, particularly in view of the fact that, though Saratoga Springs lost all local broadcast service when WSPN went off the air, it continued to receive broadcast service from stations in other communities; and four, that Section 309(f) "expressly provides" that no extension of temporary authorization may be granted unless a grant of the related construction permit application is "otherwise authorized by law" and, in this connection, that because of A.M. Broadcasters' competing application and Freebern's petition to deny, a grant of Community Radio's construction permit application at this time is not "authorized by law", and consequently that Community Radio may not under the terms of Section 309(f), be granted the extension it requests.

7. In order to effectuate the purpose of Section 309(f) of the Act, the Commission, acting on its own motion pursuant to Section 1.3 of its Rules, will waive the provisions of Section 1.542 of the Rules insofar as they interfere with the acceptance of Community Radio's request for an extension of its March 18, 1964, grant of temporary authorization.

8. With respect to the assertion that if the extension is granted A.M. Broadcasters will be prejudiced in the comparative proceeding by Community Radio's financial investment in the temporary operation and by Community Radio's special opportunity to build a quality image, in advance of the hearing, the Commission—in order to obviate any possibility of hearing inequity arising from its initial and extended grants of temporary authorization—will specify, in the Order designating the two applications for comparative hearing, that no significance shall be given to any past expenditure of funds by Community Radio and that no preference shall redound to Community Radio by virtue of temporary operation at Saratoga Springs.[1]

9. A.M. Broadcasters' third major contention, that the Commission erred initially in granting a temporary authorization, is incorrect. The petition's reference, in this connection, to the 30-day-wait provision in Section 309(b) of the Act is clearly inapposite: Section 309(f) expressly provides that "When an application subject to subsection (b) [of Section 309] has been filed," the Commission may grant a temporary authorization, "*notwithstanding the requirements of such subsection*" (emphasis supplied), provided, of course, that the application satisfies the conditions set forth in Section 309(f). The extraordinary circumstances existing at the time the initial grant of temporary authorization are generally described in paragraph 3 *supra*. At this point, it need only be added that local broadcasting serves community needs not provided for by broadcasts from other cities; that Saratoga Springs had been long accustomed to local broadcast service when WSPN went off the air permanently in February; and that the Commission gave weight to the discommoding effects

[1] A. M. Broadcasters' contention that it would be prejudiced by Community Radio's ability to use the profits from its temporary operation of WKAJ to "finance the litigation of this case" is rejected as *de minimis* in view of the fact that the total period of temporary operation will not exceed 180 days.

of loss of local broadcast service under those particular circumstances, in granting Community Radio a temporary authorization.

10. Finally, Section 309(f) states that the Commission may grant one 90-day extension "upon making *like findings*," i.e., upon a finding that the extraordinary circumstances which initially justified emergency operation still prevail at the end of the first three-month period of temporary operation. As we have indicated, the extraordinary circumstances that warranted a grant of temporary authorization three months ago still exist today.

11. The Petitioner's reliance on *Community Broadcasting, supra,* is misplaced in several respects: First, the temporary operating authority discussed in that case was for an indefinite period. Second, in Community Broadcasting the Court held that the temporary authorization involved a danger that the "temporary" television station operator would suffer great financial loss on a distress market if he were defeated in the comparative proceeding, a danger which the Court feared might influence the outcome of such proceeding. In the present case, no such danger exists. Third, the problem in Community Broadcasting was not one of continuing an existing broadcast service to a community, which justified emergency action, as in the present case.

In view of the foregoing, IT IS ORDERED, That, pursuant to Section 309(f) of the Communications Act of 1934, as amended, the request by Community Radio of Saratoga Springs for extension of temporary operating authority IS GRANTED through September 18, 1964, operation to accord with the terms of the former license of Station WSPN.

IT IS FURTHER ORDERED, That the provisions of Section 1.542 of the Commission's Rules, insofar as they interfere with the acceptance of Community Radio's request for an extension of its March 18, 1964, grant of temporary authorization, ARE WAIVED.

IT IS FURTHER ORDERED, That the petition by Kenneth H. Freebern IS DISMISSED, and that A.M. Broadcasters' petition IS DENIED.

Adopted July 1, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–665

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| OAK KNOLL BROADCASTING CORP., PASADENA, CALIF. | Docket No. 15444<br>File No. BPI–1 |
| GOODSON-TODMAN BROADCASTING, INC., PASADENA, CALIF. | Docket No. 15445<br>File No. BPI–2 |
| CALIFORNIA REGIONAL BROADCASTING CORP., PASADENA, CALIF. | Docket No. 15446<br>File No. BPI–3 |
| CROWN CITY BROADCASTING CO., PASADENA, CALIF. | Docket No. 15447<br>File No. BPI–4 |
| RADIO ELEVEN TEN, INC., PASADENA, CALIF. | Docket No. 15448<br>File No. BPI–5 |
| Requests for Interim Authority To Operate a Standard Broadcast Station Utilizing Facilities of Station KRLA, Pasadena, Calif. | |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER LOEVINGER JOINS; COMMISSIONER FORD DISSENTING AND ISSUING A STATEMENT.

### *I. Preliminary Statement*

1. In this proceeding, five applicants are seeking the interim use of the facilities of standard broadcast Station KRLA, Pasadena, California (1110kc, 50kw, 10kw night, DA–2), pending a determination of which of nineteen applicants for regular authorization shall be granted the regular use of the 1110kc frequency.[1] Eleven Ten Broadcasting Corp., which has been the Commission's licensee on the frequency, was held to be disqualified by the Commission in March, 1962; it has, however, continued to operate the KRLA facility under a series of stays and extensions pending (a) judicial review of the Commission's decision; (b) Commission consideration of a proposal to transfer control of the station (as a gift) to a non-profit California corporation;[2] and (c) Commission consideration of the above-captioned applications. Under the last extension, Eleven Ten must cease operation at 3:00 a.m., local time, August 1, 1964. Accordingly there will be silence on the facility pending a decision in the regular proceeding unless one of the interim applications is granted.[3] KRLA (formerly KXLA and KPAS)

[1] This should not be construed as an indication that all of the nineteen applications will be accepted for filing.

[2] Broadcast Foundation of California, Inc.

[3] Because of the basic conflict presented by the previous determination of disqualification, a further extension to Eleven Ten through completion of the regular proceeding is not regarded by the Commission as an acceptable alternative.

has been operated on 1110kc for over 20 years, and it currently renders primary service to 7,000,000 persons, daytime, and to 5,000,000 at night.

2. Of the nineteen applications potentially involved in the proceeding for regular authorization, twelve seek use of the frequency at Pasadena, and seven seek its use at California locations other than Pasadena. It is clear, therefore, that a significant question in the regular proceeding will be whether the frequency should remain in Pasadena, or whether it would be more "fair, efficient, and equitable" to award it to another community.[4] Although every effort consistent with orderly and due process will be exerted to bring the regular proceeding to a rapid conclusion, it is anticipated that it may still require approximately 2½ to 3 years to complete the processing and hearing of the nineteen applications.

3. Of the five interim applicants, three—Goodson-Todman Broadcasting, Inc., California Regional Broadcasting Corporation, and Crown City Broadcasting Co.—are also applicants for regular authorization at Pasadena; and a fourth—Radio Eleven Ten, Inc. (sometimes hereinafter referred to as RETI)—is comprised of five regular Pasadena applicants[5] and one regular applicant for Fullerton, California.[6] The fifth interim proposal was filed by Oak Knoll Broadcasting Corporation,[7] but this applicant is not among those seeking regular authorization on the frequency. The five proposals for interim authority were designated for oral argument before the Commission *en banc* by Order released May 4, 1964.[8] Argument was originally scheduled for May 15, 1964, but later Orders of the Commission postponed it, first to June 15, 1964, and later to June 19, 1964.[9]

4. The oral argument was held on June 19, 1964. The Commission now has before it the record therein, and the various pleadings filed in support of, in comment on, or in opposition to the respective interim applications.[10] The principal opponents of interim operation have been (a) Topanga Malibu Broadcasting Co., an applicant for regular authorization on 1110kc at Topanga, California; (b) KFOX, Inc., licensee of KFOX (1280kc, 1kw, D, Long Beach, California) and applicant for regular use of 1110kc, at Pasadena; (c) Radio Station KCJH, licensee of KCJH (1280 kc, 500w, D, Arroyo Grande, California) and applicant for regular use of 1110kc at

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[4] See Section 307(b) of the Communications Act.

[5] The RETI proposal originally showed four regular Pasadena applicants. By petition of May 28, 1964, however, RETI requested leave to amend to show a fifth such applicant; the petition is hereby granted. Others, including Goodson-Todman, have evidenced an intention to join the RETI group if it is successful herein, and membership in RETI is represented as open to any of the regular applicants. Several, however, who presently operate AM stations in the area on other frequencies, are precluded from joining the group by the Commission's duopoly rule, Section 73.35(a). *Cf. Wabash Valley Broadcasting Corp.*, FCC 63-1117, 1 R.R. 2d 585 (1963).

[6] The Fullerton application is by Orange Radio, Inc., and it was accompanied by a request for interim operation at Fullerton. In connection with its participation in RETI, Orange has indicated that its own interim proposal may be deemed dismissed with a grant to RETI. Because to have done so would have resulted in Orange Radio having inconsistent applications pending within the meaning of Section 1.518, that applicant's independent request for interim authority was not included in the instant proceeding, and it is hereby dismissed.

[7] Wholly-owned by Broadcast Foundation of California, Inc., to which Eleven Ten had proposed a transfer of control. See Para. 1, *supra*.

[8] FCC 64-386 in this proceeding.

[9] See Orders released May 12, 1964 (FCC 64-420) and May 15, 1964 (FCC 64-427) in this proceeding. For the Commission's disposition of a petition for reconsideration of the designation order, filed May 4, 1964, by Topanga Malibu Broadcasting Corporation, see Para. 37.

[10] A complete list of the various pleadings before us is contained in the Appendix hereto.

Arroyo Grande; (d) Hi-Desert Broadcasting Corp., licensee of KDHI (1250kc, 1kw, D, Twenty Nine Palms, California) and applicant for regular use of 1110kc at Twenty Nine Palms; and (e) Gordon Broadcasting of San Diego, Inc., licensee of KSDO (1130kc, 5kw, day, 1kw, night, DA–2, San Diego, California) but not an applicant in this proceeding. Each of the interim applicants and each of the above opponents participated in the oral argument, as did intervenor KFAB Broadcasting Company, licensee of KFAB (1110 kc, 50kw, DA–N, U, Omaha, Nebraska) and the following applicants for regular authorization on 1110kc, who support the interim use of the frequency by Oak Knoll: (a) Standard Broadcasting Company, licensee of KGBS (1020kc, 50kw, DA–1, L–KDKA, Los Angeles, California); (b) Voice of Pasadena, Inc.; and (c) Western Broadcasting Corporation. KGBS seeks use of 1110kc at Los Angeles, while the latter two are applying for Pasadena.

5. The Commission's designation order found each of the five interim applicants to be legally, technically, financially and otherwise qualified to conduct the interim operation proposed, and specified for hearing only the following issues:

To determine whether grant of any of the above-captioned applications for interim operation would serve the public interest, convenience, and necessity.

If the foregoing issue is decided affirmatively to determine which of the above-captioned applications should be granted.

### *II. The Overall Public Interest Considerations Relating to Interim Authorization to Oak Knoll*

6. Upon consideration of the presentations of the parties, we have concluded, for the reasons set forth below, that (a) public interest would be served by interim use of the frequency in Pasadena; (b) the Oak Knoll proposal, as compared with those of the remaining four applicants, is the one which would most completely avoid any possible disadvantage or detriment to the applicants for regular use based upon the principles of the *Community* case [11a]; and (c) Oak Knoll must be preferred from that comparative standpoint. We deem this one factor to be of controlling comparative significance, outweighing all other comparative factors which may favor other competing applicants for interim use. Oak Knoll is a nonapplicant for regular use of the frequency; neither Oak Knoll, its parent, Broadcast Foundation, nor their officers, directors, or trustees will be involved in the subsequent proceeding for regular use of the frequency. They seek interim use only. Under these circumstances, there are major public interest benefits to be derived from interim use of the frequency. The most obvious benefit is that it will make use of a 50kw assignment instead of leaving it fallow. It would accord utmost protection of the interests of the United States under international agreements by avoiding any possibility of controversy concerning the continued use of the frequency in the Southern California area.[11b] It would supply needed funds for non-commercial educational television in this area.

[11a] *Community Broadcasting Co., Inc.*, v. *FCC*, 107 U.S. App. D.C. 95, 274 F. 2d 753, 19 R.R. 2047 (1960).

[11b] We have not invoked the provisions of Section 1.592(a)(3) of the Commission's Rules to justify our interim authorization here. We hold merely that interim use accords utmost protection because it avoids controversy.

7. In reaching these conclusions, we have considered carefully the question of what detriments, if any, would result to applicants for regular use of the frequency from the grant of an interim authorization in the light of the Court's decision in *Community, supra.* As further shown below, opponents of interim operation have advanced several arguments as to why a grant of an interim authorization would allegedly redound to their detriment in the subsequent comparative proceeding. We have considered each of these arguments in the discussion which follows, and we have rejected the views of the opponents. Moreover, they are simply incorrect in their assertion that, even absent prejudice to them, we cannot grant an interim authorization unless there is a compelling and imperative need for the radio service. The touchstone of the Commission's action is the public interest (*FCC* v. *Pottsville Broadcasting Co.*, 307 U.S. 154). In the light of this standard, where there is no detriment, no disadvantage, or prejudice to applicants in our future consideration of the subsequent proceeding, there is only benefit to be derived from the interim authorization. Under these circumstances, silencing of the frequency would be inconsistent with the public interest, since it would result in sheer waste of a frequency, and it would deprive the public of the benefits enumerated above (Para. 6). In short, it is our view that, in the circumstances of this case, public interest will be served by a grant of an interim authorization because it will promote, in accordance with Section 303(g) of the Communications Act, a "larger and more effective use of radio".

8. We turn now to the more specific issues before us for consideration based upon the contentions of the parties.

### *III. The Need for Interim Operation*

9. From the fact that Pasadena is located in one of the most heavily-served sectors of the country—the Los Angeles standard metropolitan area—the opponents of grant contend that there is a total lack of need for a continuation of the KRLA service during the interim period. Although, as opponents point out, Pasadena presently receives primary service from at least half of the more than forty other AM and FM stations located in the Los Angeles area, the applicants have presented a substantial case from the standpoint of transmission services located in Pasadena itself. Thus, the other four aural broadcast stations presently assigned to Pasadena are of specialized types, only partially satisfying the total needs and interests of the populations involved: KWKW is a Class III AM station programming in the Spanish language; KCPS is an educational FM station operating only during the school year and only during school hours; and KPPC–AM and –FM are operated non-commercially by the Pasadena Presbyterian Church, the AM station being a specified-hours station on the air only on Sundays and Friday nights for a total of 20.5 hours per week. Moreover, the power and coverage aspects of the KRLA technical facility (see Para. 1) together with the station's record of financial success (see Para. 23) lend assurance that the station has served as an effective competitive medium in the area from both the audience and advertiser standpoints. The foregoing factors serve to strengthen

the overall case for such operation. Additionally, there are other substantial benefits to be derived from the interim use of the frequency (Para. 6).

*IV. The Question of Detriment or Prejudice, and Our Comparative Choice of Oak Knoll*

10. The opponents of interim operation present two major arguments: (a) they assert, in effect, that the facts in the instant case are not substantially different than those in *Community, supra;* and (b) they further argue that any interim authorization would be prejudicial to their rights in the subsequent proceeding as applicants seeking regular use of the frequency, in that it would tend to prejudge the 307 (b), interference, and other issues in the subsequent proceeding. Since the opponents rely principally upon the *Community* case, *supra,* we think it desirable to properly delineate the facts in that case, as compared to those now before us for consideration. In the *Community* case, two mutually exclusive applicants were seeking the establishment of a television station to be operated on Channel 9 at Baton Rouge, one of the applicants being the existing UHF station in that city. Upon informal request, the Commission granted interim authority to the UHF station pending completion of the comparative proceeding for regular use of the frequency. Upon review, the Court expressed concern with respect to possible harm to the comparative hearing process, and made clear that, absent countervailing extraordinary circumstances of an impelling and imperative need for the service, an interim authorization must not result in any prejudicial climate in our future consideration of the subsequent comparative proceeding. There, the Court was primarily concerned with two factors—not present in the instant case—namely, (a) the advantages of an interim grantee as an applicant in the subsequent proceeding, and (b) the substantial investment to be made by an interim grantee in the construction of the station. Although recognizing the power of the Commission to make temporary grants prior to final determination of a comparative proceeding, the Court nevertheless concluded that such temporary grants must be grounded upon a clear, immediate, or imperative public interest need which would override and outweigh the prejudicial effects of such a grant where there would be large investments in the construction of the station for temporary use by the interim grantee, who is also a regular applicant.

11. More specifically, these are the distinguishing facts in the case before us for consideration: It is of significance that the interim applicants will be making no investment in the construction of the station, since it is a going-concern, and each proposes to lease the physical plant upon the same terms as it has been leased in the past to the prior licensee by Broadcast Equipment Corporation, the owner of the physical plant. The rental has been fixed at approximately $100,000 per year. To the extent additional studio equipment or expendable equipment may be necessary, it is evident that such items involve nominal expense only. Moreover, as shown in Paras. 22–28, *infra,* the anticipated profitability of the interim venture insures that, unlike the situation in *Com-*

*munity,* any initial investment by the interim grantee in working capital may reasonably be expected to be returned prior to the expected termination date of the temporary authorization. In our view, these facts distinguish this case from *Community,* where substantial investments were involved in the construction of the physical facilities for the interim operation.

12. It is of further significance that Oak Knoll and Radio Eleven Ten—two of the five competing interim applicants—are nonapplicants for regular use. They therefore will not participate in the subsequent proceedings, and no applicant for regular use could derive any advantage from the interim operation, such as broadcast experience and demonstrated past performance. In our view, this non-applicant status as to regular use of the frequency (a) constitutes a marked difference with respect to the Oak Knoll and Radio Eleven Ten proposals when compared with those of the other three interim applicants;[12] (b) further distinguishes the facts in this case from those in *Community,* where the interim grantee was singled out as between the two mutually exclusive applicants in the subsequent comparative proceeding; and (c) is the basis of our preference of Oak Knoll or Radio Eleven Ten, as an interim grantee, rather than the other applicants. In short, we have a serious question whether, in the particular circumstances of this case, a grant to the applicants other than Oak Knoll or Radio Eleven Ten would be consistent with the public interest in the light of the *Community* case; in any event, there is no doubt but that as a comparative matter, Oak Knoll or Radio Eleven Ten clearly are to be preferred on this score (*Community*).

13. As between Oak Knoll and Radio Eleven Ten, we prefer Oak Knoll because not even its principals will be participants in the subsequent proceeding. We further prefer Oak Knoll because existing licensees in this area seeking to improve their facilities by use of the 1110kc frequency could not, absent a waiver of our duopoly rule, participate in Radio Eleven Ten. (See, Footnote 5, *supra.*) This, we believe is inequitable. Since we have the choice of Oak Knoll available to us, no justification exists for waiver of our duopoly rule. There is also the consideration that a very substantial portion of the funds derived from the Oak Knoll interim operation will go to the support of the UHF educational station in the area (Para. 21). Taking all these factors into account, we conclude that a grant of the Oak Knoll application would better serve the public interest.

14. The second contention, that an interim authorization would tend to prejudge the 307(b) and interference issues in the subsequent proceeding to the advantage of the Pasadena applicants and to their disadvantage, rests upon an erroneous assumption. Opponents seem to assert that continued operation creates a presumption of need for the frequency in Pasadena, whereas, in their view, the subsequent proceeding would be devoid of any presumption of need for the frequency in Pasadena if it were silenced. They further argue that if the frequency were silenced, they would not then be placed under the alleged handicap of establishing a compelling

[12] Actually, only California Regional of the other three applicants now urges that its proposal be preferred. Goodson-Todman and Crown City have withdrawn in favor of Oak Knoll.

or overriding need for service in their respective communities so as to outweigh dislocation of an existing service in Pasadena.

15. Section 307(b) provides that "in considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities, as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Thus, any application for construction permit constitutes a demand for the use of the frequency, and to that extent there is a presumption of need for the service. However, this demand or presumption cannot be reasonably considered as a disadvantage resulting from an interim authorization since it stems from the filing of the applications for use of the frequency in the Pasadena area. In any event, it is to be noted that the subsequent proceeding will be a formal adjudicatory proceeding to determine, among other questions, the Section 307(b) issue of which community, if any, would best achieve a fair, efficient and equitable use of the frequency. Our decision therefore cannot be grounded upon a presumption concerning need for service in Pasadena since there are multiple existing radio services there (Para. 9) ; it must, as a matter of law, be buttressed upon substantial evidence relating to, among other factors, the comparative need of the several competing communities and comparative efficiency in utilization of the frequency.

16. Contrary to opponents' assertions, they have no burden to overcome with respect to dislocation of service in Pasadena. Each of the applicants for the different communities, as well as each of the applicants for Pasadena, has the identical burden in the subsequent proceeding of establishing a greater need for the use of the frequency in his respective community, as compared with the showings with respect to other competing communities. With an interim authorization, this burden remains unchanged—it is no greater or less than it would be if the frequency were silenced. For it is clear that we cannot, as a matter of law, divorce from the question of relative or comparative need the prior use of this frequency in Pasadena. It is, without question, one factor, among others (for example, the abundance of other radio service in Pasadena, and the public service needs of that community) which will have to be weighed and considered in determining need for regular service in Pasadena, as compared with the other communities concerned. Since Oak Knoll stands committed on this record to continue the same type of programming (including its public service programming), and to operate with substantially the same staff, and within essentially the same budget as the prior licensee, we do not believe that interim use of the frequency can in any way redound to the advantage of the Pasadena applicants in establishing the need for regular use of this frequency in Pasadena. At most, interim use would extend the use of this frequency in Pasadena for 2½ to 3 years. In any event, however, and in order to insure that no advantage can be gained by the Pasadena applicants, we now state that in the subsequent proceeding we will resolve the Section 307(b) issue without regard to the interim authorization, and that the

Pasadena applicants in the subsequent proceeding must therefore establish their showing of need for the frequency without regard to the interim operation.[13a]

17. Under these circumstances, it is clear that interim operation will have no effect upon our ability (a) to bring about in the subsequent proceeding the "fair, efficient and equitable distribution" of this frequency required by Section 307(b) of the Act, or if a Section 307(b) choice cannot be made (b) to choose the best qualified applicant. Considering the nature of the frequency (50 kw power) involved here, and the 19 applications for regular use already on file, there can be no question that there are a plethora—and not a dearth—of qualified applicants seeking its use. Indeed, the estimated 2½–3 years protracted time period for the subsequent hearing stems, in large part, from the abundant number[13b] of applicants who have already applied for use of the frequency. We, therefore, do not attach significant weight to the threatened possible withdrawal of one applicant from the subsequent proceeding should we authorize interim use of the frequency.

18. We find no merit to opponents' contentions that certain interference conditions (Paras. 29–31) if permitted to continue during the interim authorization period, set the stage for our condonation of such interference in the subsequent proceeding, to the advantage of the Pasadena applicants and to opponents' disadvantage. The short answer to these contentions is set out in Paras. 32–33, in which we condition the grant to Oak Knoll to eliminate the interference in question.

19. Finally, opponents argue that an Oak Knoll interim authorization will result in advantage to the Pasadena applicants since they will be in a position to take over a going-concern. While it is true that this could result in private benefit to a successful Pasadena applicant, the going-concern nature of the interim operation has no relevancy to a determination either of the 307(b) issue or the other issues in the subsequent proceeding. It constitutes no reason at all for a preference for any of the Pasadena applicants. Under these circumstances, to claim as opponents do, that the mere existence of the physical plant (where the interim grantee does not own it and has no investment in it) would create prejudicial climate in our ultimate determination of the subsequent proceeding not only questions our good faith—but suggests a decision on a basis having no logical foundation. We have stated we will decide the subsequent proceeding without regard to the interim authorization. The existence of facilities capable of operating on the frequency at Pasadena—but not owned by any present applicant for authorization on the frequency there or elsewhere—is no reason for deciding the issues either one way or the other, and this is so whether the

[13a] We believe that the foregoing assurance is the short answer to this issue. But in any event, we do not perceive the practical basis for the argument made. There is, we think, little practical difference between the situation where the frequency is in actual use in Pasadena (at the time of decision because of an interim operation), and one where the frequency had been in use in Pasadena for a 20-year period ending just a few years prior to our final action on the regular grant. We stress again that this case must be decided upon the facts of record, and that this is, in the final analysis, the only way to assure fair consideration of the 307(b) and other considerations involved.

[13b] With the backlog of hearing cases substantially reduced and the creation of our Review Board in 1960, the time lag for the average (AM) hearing case has decreased appreciably to a period of approximately 1 year, including the time required for a hearing, the initial decision, and the final decision.

existing facilities are used in the interim or are permitted to be idle. In this connection, we think it important to point out that some of the Pasadena applicants propose, if successful, to establish a new physical plant at a different site because of the above interference conditions.

*V. Objections to an Oak Knoll Grant*

20. *Comparative Factors*: While Oak Knoll would operate with essentially the same format as the present KRLA—with an increase in news coverage and an additional educational program of interest to children—California Regional stresses that it would convert from what has been termed KRLA's "rock and roll" format to a good music and cultural format.[14] It has not, however, established that the area is inadequately served in the foregoing respect by the other stations located there, and even a maximum showing in this respect would not overcome Oak Knoll's substantial advantage insofar as the principles of the *Community* case are concerned. And, dispelling the notion that Oak Knoll's format would be entirely "rock and roll" is that applicant's program proposal, which shows that 24% of its broadcast week of 163 hours would be devoted to non-entertainment programs.

21. RETI and a number of the opponents of interim grant appear to argue that, because of the commercial nature of the frequency involved, the charitable objectives of the Oak Knoll proposal should be weighed against that applicant. Far from serving as a basis for demerit, these objectives will result in a major public interest benefit. The reference here is to the Oak Knoll proposal to devote 80% of its profits during the interim period to Community Television of Southern California, permittee of KCET (Channel 28), Los Angeles' only educational television outlet.[15] It has been the Commission's policy over the years to foster and encourage the larger and more effective use of both UHF and educational television, and the Oak Knoll proposal is a practical means of aiding that policy. California Regional (as well as Crown and Goodson-Todman) have also submitted proposals to aid the educational station. Such proposals, however, do no more than equal that of Oak Knoll; and, in any event, the complete insulation from the regular proceeding offered by the Oak Knoll application is the dispositive comparative factor in the case.

22. *Financial Qualifications*: The Commission's designation order herein found Oak Knoll to be financially qualified, and no financial issue was specified for hearing. Topanga Malibu and others have attacked the above finding, and although many pages of pleadings and of the record are devoted to this matter, the significant questions reduce to two: (a) are the Oak Knoll estimates as to operating income and costs consistent with the station's actual experience and (b) if so, is this experience likely to continue?

[14] The Commission's designation order in this proceeding was in error in stating that each of the five interim applicants proposes a continuation of KRLA's existing programming.

[15] The remaining 20% of profits would be distributed to other charitable organizations at the discretion of the Trustees of Broadcast Foundation, Oak Knoll's sole stockholder. The officers, directors, and trustees of Oak Knoll and Broadcast Foundation would serve without compensation, and the only salaries would be those of full-time employees of the station.

23. Upon the unopposed motion of KFOX, Inc. (a party opposing interim grant), and because the data therein contained had already become public information as a result of the applications and proceedings herein, KRLA's 1963 Annual Financial Report (Form 324) was made available at the oral argument. Where Oak Knoll proposed total yearly operating income of $1,500,000, the KRLA 324 shows the figure as $1,498,000. For operating expenses, Oak Knoll proposed $1,200,000 as against $1,070,000 [16] indicated in the 324. Oak Knoll's figure, however, includes allocations for income taxes and the adjustment of the station's antenna pattern. Based on the foregoing, the first of the above questions must be answered affirmatively.

24. It is reasonable to conclude that operating income under Oak Knoll would at least equal KRLA's 1963 figure. First, revenues have continued to increase at the station notwithstanding the 1962 decision denying renewal. Second, John R. Barrett, general manager of KRLA and proposed as station manager for the interim operation, has attested that personal contacts with advertisers have assured him that, under Oak Knoll, the station would enjoy greater revenues than ever before. And third, Oak Knoll's counsel indicated at the hearing that "there has been a substantial upswing in business" at the station since it became known that interim operation is a possibility. Oak Knoll's opponents have come forward with nothing putting in question any of the foregoing, and the Commission concurs in Barrett's further assertion that the estimate of $1,500,000 for operating income is a reasonable one.

25. On the expense side, in every major category Oak Knoll proposes the same expenditures now experienced by KRLA. The same staff would be utilized, the same basic programming format would be followed, and the same leasing arrangements would be made.[17] The only significant increase would be occasioned by the matter of the proposed adjustment of the station's antenna pattern, but it is clear that Oak Knoll's estimates in this respect would have to be low by more than $300,000 before financial difficulty would be encountered.[18]

26. Based upon all of the above, it is clear that under Oak Knoll, the station's operation would continue to be profitable; and that there is no basis for challenging that applicant's financial showings or qualifications. The foregoing is confirmed by cash flow projections contained in an amendment tendered by Oak Knoll on June 15, 1964. [19] Oak Knoll would enter into business with cash on hand of $50,000, consisting of a loan from Union Bank of

[16] Not included here are sums paid to KRLA principals.

[17] Broadcast Equipment Corporation, owners of KRLA's physical facilities, would continue to lease them at $90,000 per year; and the Huntington-Sheraton Hotel would continue to lease studio space for $21,000 per year.

[18] Topanga Malibu questions whether Oak Knoll's estimates make allowance for the costs of organization, application and hearing, but has overlooked that KRLA's 324, on which Oak Knoll's estimates were based, reflects 1963 legal expenses. In any event, we do not consider omission of these items to be of material significance because of the facts set forth above which reasonably establish that the interim operation will be profitable. In this connection, we further take official notice of Table 7 of the Commission's Public Notice 43720, released November 21, 1963, entitled "Final AM-FM Broadcast Financial Data—1962". Table 7 shows that of 63 stations reporting broadcast revenues in excess of $1,000,000, only 3 reported a loss, and 60 were profitable operations.

[19] Oak Knoll's petition for leave to amend of the same date is unopposed, and it is hereby granted.

Pasadena.[20] By reason of deferred collections, Oak Knoll would realize only $13,000 from advertising during the first month, but deferred expenses would limit total expenditures during the month to $52,000. By the third month, Oak Knoll would be receiving advertising revenues at the rate of $1,400,000 per year (with 5% of the first month's advertising still uncollected), and expenditures would be at the rate of approximately $900,000 per year (with no allowance for income tax). Notwithstanding contentions by Topanga Malibu to the contrary, the cash flow projections are consistent with Oak Knoll's original presentations, and indicate the soundness of the financial proposal.

27. The Oak Knoll amendment also shows the availability of an additional $150,000 through the sale of debentures to a Washington, D.C. mortgaging banking firm. Topanga Malibu's attacks upon the debenture arrangement—contained in its supplement to petition to deny of June 17, 1964—are insubstantial, and, in any event, the Commission is satisfied that Oak Knoll has reasonably established its financial qualifications without regard to the debenture option.

28. In connection with the Oak Knoll proposal, Western Broadcasting Corporation, Goodson-Todman and others have suggested that, to insure (a) that Oak Knoll maintain "sound and adequate operating reserves"; and (b) that KCET "have a period of transition after the interim operation ceases to operate within which they could rely upon the monies which had been accrued, a condition be attached to the Oak Knoll grant that it place in escrow 50% of any funds that would be normally turned over to the educational station until the termination of the interim authority." Oak Knoll has consented to the condition, there is otherwise no objection to it, and an appropriate condition will be attached to the Oak Knoll authorization.

29. *Technical Qualifications; Overlap and Interference Conditions:* Prior to November 12, 1958, KRLA (formerly, KXLA and KPAS) was authorized to operate at 10 kw, unlimited, with the same directional antenna pattern daytime and nighttime. The nighttime authorization has remained unchanged, and KRLA presently serves to just short of its 7 mv/m contour, which contains approximately 5,000,000 persons in 1,000 sq. mi. On the above date, the Commission granted the station a construction permit for a daytime power increase to 50 kw and a daytime directional pattern different from the one utilized at night. At 50 kw, KRLA serves over 7,000,000 persons in approximately 13,000 sq. mi. The construction permit was granted notwithstanding overlap of KRLA's 25 mv/m contour with the 2 mv/m contour of KSDO (1130 kc, 5 kw day, 1 kw night, DA–2, San Diego, California),[21] and notwithstanding interference with KSDO's 0.5 mv/m contour involving on the order of 9,000 persons, constituting 0.3% of KSDO's population within its normally protected contour. The interference and overlap areas are in the Los Angeles vicinity, approximately ninety miles from the KSDO site, and they result

[20] The bank loan was proposed in the original application.
[21] The overlap area is 21 miles long and up to 4 miles wide.

from the fact that the KSDO contours extend abnormally toward Los Angeles over the Pacific Ocean salt water paths. Prior to the Commission's grant of the power increase, by letter of October 24, 1958, KSDO informed the Commission of its belief that the interference "would be negligible compared to the increased service to Los Angeles listeners", and that it had no objections to a grant of the application.

30. In July, 1960, there were before the Commission KRLA's renewal application for its licensed operation (10 kw, U, DA), and the station's application for license to cover the construction permit for the 50 kw daytime operation. In connection with the latter application, the measurements submitted by KRLA as part of its proof of performance showed the nighttime pattern to be in close agreement with the previous proof of performance of the nighttime array,[22] and the Commission had so advised KRLA by letter of March 23, 1960. Additionally there was no indication that the overlap of KRLA's 25 mv/m contour with the 2 mv/m contour of KSDO had resulted in the cross-modulation sought to be prevented by the rule involved (now 73.37; formerly, 3.37), and no technical objections of any kind were present with respect to a grant of the license for the 50 kw operation. Accordingly, when the two applications were designated for hearing (July 23, 1960) on the character counts ultimately resulting in conclusions of disqualification, no engineering or interference issues were specified by the Commission.[23]

31. Subsequently, in 1962, transmission line installations by Southern California Edison Company in the vicinity of the KRLA antenna site caused a shift in the station's nighttime pattern. As a result, the station now causes co-channel nighttime interference to station KFAB, Omaha, Nebraska.[24] KFAB's engineering consultant, on the basis of measurements recently taken by other engineers retained in this proceeding, depicts that station's received interference as embracing approximately 85,000-98,000 sq. mi. within KFAB's 0.5 mv/m-50% nighttime contour. The interference, which is inconsistent with and objectionable under the KFAB authorization, occurs in a number of Rocky Mountain and southwestern states.

32. On the basis of the above daytime overlap and interference, Gordon Broadcasting of San Diego, Inc., licensee of KSDO, has petitioned to deny each of the interim applications, including Oak Knoll's.[25] We need not decide whether or not this petition to deny has merit. For, engineering studies by RETI and Goodson-

[22] KRLA had added two towers to its daytime array, and maintenance of the previously authorized nighttime pattern required a detuning of the new towers during nighttime hours.

[23] It may also be noted that during the pendency of the KRLA proceeding, no petitions to intervene were filed by stations claiming objectionable interference either daytime or nighttime.

[24] It is also asserted that the station may cause nighttime interference to XERCN, Mexico City. However, the engineering statement in support of this contention merely reads, as follows: "XERCN . . . may be receiving interference for some percentage of time." Although a few measurements were submitted in support of this speculative allegation, the submitted measurements were not taken on an appropriate radial in a sufficient number to establish an inverse field in the direction of Mexico City, and therefore fall far short of indicating, let alone establishing, the possibility of sufficient radiation toward Mexico City to cause objectionable interference to XERCN.

[25] Other parties, including Topanga Malibu Broadcasting Company, applicant for permanent authorization on 1110 kc at Topanga, California, also base denial requests on these technical grounds as well as on the nighttime interference.

Todman would appear to indicate that KRLA's daytime array can be adjusted quite simply to not only eliminate the overlap of 2 and 25 mv/m contours but also to at least reduce the 0.5 mv/m interference.[26] Oak Knoll has stated a willingness to accept a grant conditioned on such protection to KSDO. Accordingly, we so condition our grant, and require a showing within 60 days of what steps (with cost estimates) Oak Knoll proposes to take to meet the condition. We shall then determine whether such steps or other action is appropriate. Cf. next para.[27]

33. With respect to the KFAB interference, resulting from the transmission line installation in 1962 by Southern California Edison (Para. 31), Oak Knoll has again indicated its consent to a condition that it shall bring the nighttime array into conformity. We therefore also condition the grant to require Oak Knoll to afford such protection to KFAB. Oak Knoll shall submit, within 60 days, a showing as to what it proposes to do (with cost estimates) to meet that condition (e.g., adjustment of array; reduction of nighttime power, etc.). Such showing shall, of course, be served upon KFAB. The Commission will forthwith consider the showing and determine whether Oak Knoll should be authorized to proceed along the lines proposed or whether some other more appropriate course is indicated in the circumstances (e.g., to meet fully the requirements laid down in *Community, supra*).

34. *Commission Authority*: A number of parties contend that the Commission lacks authority to grant the Oak Knoll application. The thrust of the argument is that the Commission's conditional grant rule (Section 1.592) does not contemplate a temporary authorization to a party not seeking regular assignment on the frequency, but specifically envisions a situation where two or more applicants are faced with a comparative hearing for regular authorization, and where public interest considerations warrant a conditional grant of one of them prior to completion of such hearing. It is added that, under *Community*, conditional grants may be issued "only in circumstances which meet the Commission's own rules."

35. It is true that Oak Knoll, to the extent that it has no permanent aspirations on the frequency, is beyond the specific comprehension of the rule. The request, however, is consistent with the policies underlying the rule, and the fact that it is not also within the exact wording thereof is no bar to a grant. In effect, the opposing parties are arguing that, unless the Commission has anticipated a particular proposal and established precise rules permitting its grant, the proposal must inevitably be denied. This view places too broad a construction upon the *Community* pronouncement quoted above, and overlooks that the situation, rather than the rule, is usually the first to arise. To hold that the Commission is without the power of positive action in situations not anticipated by its rules would be inconsistent with the dynamic

[26] Because the KSDO 0.5 mv/m contour includes non-urbanized areas in the vicinity of KRLA's site, it is doubtful that the interference can be entirely eliminated.

[27] Notwithstanding contentions by Topanga Malibu and others, the Commission does not regard the 10% Rule [Section 73.28(d)(8)] as involved in this proceeding. Even if it were, however, the public benefits referred to would also be sufficient to justify waiver of that rule.

nature of the broadcasting industry and its requests, and with the basic discretion and duties conferred and prescribed by the Communications Act.[28]

36. Precisely in point is the regulatory history of what is now Section 1.592(b), which provides for conditional grants to groups of applicants seeking the same television assignment. Although the rule [originally, Section 1.362(i)] was not enacted by the Commission until 1961,[29] the Commission made its first grant to an interim television group in 1953.[30] Not only did the Commission have no rule covering the novel situation then before us, but also the proposal presented conflicts with the Commission's multiple-application rules. Recognizing the overriding public interest considerations involved, the Commission granted the proposal, and thereby established a procedure which ultimately led to the adoption of a specific rule. Because comparatively few broadcast licensees are ordered to leave the air, it is unlikely that requests of the Oak Knoll type will be presented to the Commission in volume; should later experiences prove to the contrary, however, it may eventually prove desirable to effect appropriate and definitive amendments to the rules.

VI. *Topanga Malibu's Petition for Reconsideration*

37. Prior to its petition to deny of May 13, 1964, Topanga Malibu had, on May 5, 1964, filed a petition for reconsideration of the Commission's designation order of April 29, 1964 (released May 4, 1964). Virtually all of the contentions made in the petition for reconsideration were repeated in the petition to deny, which has been adequately treated above. But the principal point of the earlier petition remains undisposed of and will be considered here. Relying upon Section 309(d) of the Communications Act and Section 1.580(b) of the Commission's Rules, Topanga Malibu (supported by KCJH) contends that the designation order is a nullity in that thirty days did not elapse between the public notice of acceptance of the interim applications (April 22, 1964) and the designation of the applications for hearing.

38. Topanga Malibu has misinterpreted the applicable statutory and rules provisions. Section 309(d) is designed to insure that rights of interested parties not be foreclosed by a grant without hearing of an application less than thirty days following public notice of the acceptance for filing thereof. Notwithstanding Topanga Malibu's contentions to the contrary, neither 309(d) nor the Commission's implementing rule [Section 1.580(b)] bars the Commission from designating an application for hearing within such thirty-day period, since objections by interested parties are not thereby precluded. This is so since persons named as parties in the designation order have the right o f full participation at the hearing, including the right to seek enlargement of issues, and since interested parties not so named can secure the same

[28] *Cf., e.g.*, Sections 4(i) and 303(g) and (r). "Underlying the [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors. . . . [It] expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

[29] See 26 F.R. 11909.

[30] See *Interim Television Corp.*, 9 R.R. 961.

status through a petition for intervention. See Section 309(e) of the Act. The Topanga Malibu arguments (a) that under 309(d) a party in interest has thirty days from notice of an application's acceptance in which to file a petition to deny, and (b) that anything done by the Commission to the application within such period is a nullity, confuses form with substance: read together, paragraphs (d) and (e) of 309 do not guarantee the titles of pleadings, but only the right to file them and have them considered prior to a grant of the application to which they are directed.

39. In the instant case, Topanga Malibu had participated (through its "Opposition to Grant of Applications for Interim Authority; and Request for Dismissal of Such Applications" of April 21, 1964) in the pre-designation proceedings, and it was made a party herein in the Commission's designation order scheduling oral argument. It thereby secured everything that could be achieved by a petition to deny under 309(d) or a petition to intervene under 309(e), and no prejudice resulted to it or any other party by reason of the Commission's procedure in seeking to expedite the hearing through prompt designation of the interim applications, no one of which could be granted without further proceedings. Further, Topanga Malibu also filed a petition to deny. More properly, its petition to deny should have been titled as a petition to enlarge issues. In any event, it has been accepted and fully considered, and by any title it must be denied, as must the petition for reconsideration being treated here.

40. In connection with the above, Topanga Malibu and other opponents of interim grant have contended that they are entitled to a full evidentiary hearing upon the interim applications.[31] To the extent that there are urged unresolved comparative differences among the applicants, a hearing would serve no purpose, since Oak Knoll's complete insulation from the regular proceeding is the dispositive factor in the comparative aspect of the case. Although contentions have been made that Oak Knoll lacks technical and financial qualifications, there exists no substantial and material questions of fact with respect thereto as would warrant the further proceedings requested. A full evidentiary hearing would serve only to moot the interim applications, or to raise the further question of whether one of them should be conditionally granted pending the determination of which should ultimately receive the interim grant. Were the latter the case the considerations previously set forth would still dictate that the conditional grant go to Oak Knoll.

In view of all of the foregoing, IT IS ORDERED, This 17th day of July, 1964, that:[33]

(a) The Petition to Deny, filed by Gordon Broadcasting of San Diego, Inc. on April 21, 1964, IS GRANTED to the extent indicated in Para. 32 above;

[31] No interim applicant seeks such a hearing.

[32] Cf. *American Broadcasting Co., Inc* v. *F.C.C.*, 89 U.S. App. D.C. 298, 191 F.2d 492, 7 R.R. 2033 (1951): "To require a full-dress hearing for the issuance of a temporary, short-term, emergency license would be in effect to negate the power of the Commission to deal with a large variety of exigent situations."

[33] These actions carry with them dispositions of a large number of other petitions and pleadings filed in this proceeding both before and after its designation for hearing. Appropriate actions are ordered as to such other petitions and pleadings in the appendix attached hereto.

(b) The Petition for Reconsideration, filed by Topanga Malibu Broadcasting Company on May 5, 1964, IS DENIED;

(c) The Petition to Deny, filed by Topanga Malibu Broadcasting Company on May 13, 1964, IS DENIED;

(d) The Petition to Intervene and Statement of Position, filed by KFAB Broadcasting Company on May 22, 1964, IS GRANTED to the extent indicated in Para. 33, above;[34]

(e) The application of Oak Knoll Broadcasting Corporation, for interim authority to operate a standard broadcast station utilizing facilities of Station KRLA, Pasadena, California (1110 kc, 10kw, 50kw–LS, DA–2 U), IS GRANTED; and the competing applications of Goodson-Todman Broadcasting, Inc., California Regional Broadcasting Corporation, Crown City Broadcasting Co., and Radio Eleven Ten, Inc., ARE DENIED; and

(f) The interim authorization to Oak Knoll Broadcasting Corporation IS MADE SUBJECT TO THE FOLLOWING CONDITIONS:

(1) The term of the interim authorization shall commence at 3:00 A.M., local time, August 1, 1964; and shall terminate at 3:00 A.M., local time, on the day following the release of a Decision in the pending proceeding for regular authorization on the frequency, or at such other time as the said Decision may specify.

(2) Fifty percent (50%) of any funds which would have been paid over to Community Television of Southern California in the absence of this condition, shall be placed in escrow for that payee until the termination of the interim authorization, except that Oak Knoll Broadcasting Company shall be free to draw upon the escrow monies if and as they are needed in the operation of the interim station.

(3) Protection shall be afforded to Stations KSDO, San Diego, California, and KFAB, Omaha, Nebraska, as set forth in Paras. 32–33, above, the showings therein specified to be submitted to the Commission with sixty (60) days of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

## APPENDIX

*Pleadings Considered by the Commission in Connection With the Applications for Interim Authorization*

(a) (1) Petition for Interim Authority to Operate on the Facilities of KRLA and for Waiver of Commission Rules in Connection therewith, filed by California Regional Broadcasting Corporation on March 31, 1964.

(2) Memorandum . . . in Support of Petition . . ., filed by California Regional Broadcasting Corporation on April 22, 1964.

In substance, the foregoing pleadings request a grant of the California Regional interim application, and they ARE DENIED.

[34] The Petition to Intervene and Statement of Position as requests intervention in this proceeding was granted by the Commission by Order of June 12, 1964 (FCC 64–505, Mimeo No. 51892) to the limited extent only of permitting KFAB to participate in the oral argument.

(b) Request for STA or Conditional Grant, filed by Goodson-Todman Broadcasting, Inc. on March 31, 1964.

The request IS DENIED.

(c) (1) Petition for Consideration of Interim Application, filed by Oak Knoll Broadcasting Corporation on April 1, 1964.

(2) Memorandum of Law, filed by Oak Knoll Broadcasting Corporation on April 16, 1964.

(3) Telegram in support of Oak Knoll interim application, filed by American Federation of Television and Radio Artists (Los Angeles Local 50) on April 16, 1964.

(4) Petition for Immediate Grant of Application, or, in the Alternative, Continued Operation of Station KRLA, filed by Voice of Pasadena, Inc. on April 17, 1964.

(5) Statement . . . in Support of the Principle of the Oak Knoll Interim Application, filed by Goodson-Todman Broadcasting, Inc. on April 17, 1964.

(6) Letters (2), filed by Western Broadcasting Corporation on April 17, 1964 and June 18, 1964, respectively.

(7) Statement . . . in Support of Oak Knoll Broadcasting Corporation and in Opposition to Radio Eleven Ten, Inc., filed by Standard Broadcasting Company on April 22, 1964.

In substance, the foregoing pleadings request a grant of the Oak Knoll interim application, and they ARE GRANTED.

(d) (1) Petition for Interim Operating Authority or for Conditional Grant, filed by Crown City Broadcasting Co. on March 31, 1964.

(2) Letter, filed by Crown City Broadcasting Co. on April 23, 1964.

The petition IS DENIED.

(e) (1) Petition for Prompt Consideration and Conditional Grant of Application for Interim Authority, filed by Radio Eleven Ten, Inc. on April 17, 1964.

(2) Opposition to Petition . . ., filed by Oak Knoll Broadcasting Corporation on April 30, 1964.

(3) Reply to . . . "Opposition . . .", filed by Radio Eleven Ten, Inc. on May 4, 1964.

(4) Notice of Willingness to Accept Conditional Grant of Application, filed by Radio Eleven Ten, Inc. on May 28, 1964.

The petition is DENIED.

(f) (1) Opposition and Motion to Dismiss, filed by Radio Station KCJH on April 20, 1964.

(2) Opposition to Grant of Applications for Interim Authority; and Request for Dismissal of such Applications, filed by Topanga Malibu Broadcasting Company on April 21, 1964.

(3) Opposition to Petitions and Applications for Interim Authority, filed by KFOX, Inc. on April 21, 1964.

(4) Telegram, filed by Hi-Desert Broadcasting Corporation on April 24, 1964.

(5) Reply and Opposition . . ., filed by Goodson-Todman Broadcasting, Inc. on April 28, 1964.

The first four of the above pleadings request denial of the five interim applications, including Oak Knoll's, and they ARE DENIED.

(g) (1) Petition to Deny, filed by Gordon Broadcasting of San Diego, Inc. on April 21, 1964.

(2) Opposition . . . to . . . Petition . . ., filed by Goodson-Todman Broadcasting Inc. on May 1, 1964.

(3) Opposition . . . to . . . Petition . . ., filed by Crown City Broadcasting Co. on May 6, 1964.

As ordered in the Memorandum Opinion and Order herein, the petition IS GRANTED to the extent indicated in Para. 32.

(h) (1) Petition for Reconsideration, filed by Topanga Malibu Broadcasting Company on May 5, 1964.

(2) Opposition to Petition . . ., filed by Radio Eleven Ten, Inc. on May 6, 1964.

(3) Statement in Support of Petition . . ., filed by Radio Station KCJH on May 7, 1964.

(4) Opposition [to] Petition . . ., filed by Oak Knoll Broadcasting Corporation on May 7, 1964.

(5) Opposition to Petition . . ., filed by Goodson-Todman Broadcasting, Inc. on May 8, 1964.

(6) . . . Opposition to . . . Petition . . ., filed by Crown City Broadcasting Co. on May 20, 1964.

(7) Reply to Oppositions . . ., filed by Topanga Malibu Broadcasting Company on May 26, 1964.

As ordered in the Memorandum Opinion and Order herein, the petition IS DENIED. To the extent that KCJH's Statement requests cancellation of the oral hearing, it IS DENIED.

(i) (1) Petition to Deny, filed by Topanga Malibu Broadcasting Company on May 13, 1964.

(2) Opposition to Petition to Deny, filed by Radio Eleven Ten, Inc. on May 19, 1964.

(3) Statement in Support of Petition to Deny, filed by Radio Station KCJH on May 25, 1964.

(4) Opposition to Petition to Deny, filed by Goodson-Todman Broadcasting, Inc. on May 26, 1964.

(5) Opposition to Petition to Deny, filed by Oak Knoll Broadcasting Corporation on May 26, 1964.

(6) Opposition . . . to Petition to Deny, filed by California Regional Broadcasting Corporation on May 27, 1964.

(7) Reply to Oppositions to Petition to Deny, filed by Topanga Malibu Broadcasting Company on June 8, 1964.

(8) Supplement to Petition to Deny, filed by Topanga Malibu Broadcasting Company on June 17, 1964.

As ordered in the Memorandum Opinion and Order herein, the petition IS DENIED. To the extent that KCJH's Statement requests dismissal of the interim applications, it IS DENIED.

(j) (1) Petition to Intervene and Statement of Position, filed by KFAB Broadcasting Company on May 22, 1964.

(2) Reply to Petition to Intervene, filed by Topanga Malibu Broadcasting Company on June 4, 1964.

KFAB Broadcasting Company was granted intervention by Commission Order of June 12, 1964 (FCC 64–505, Mimeo No. (51892). As ordered in the Memorandum Opinion and Order herein, the balance of the pleading IS GRANTED to the extent indicated in Para. 33.

(k) Petition for Leave to Amend, filed by Radio Eleven Ten, Inc. on May 28, 1964. The petition IS GRANTED.

(l) Letter seeking leave to amend, filed by Goodson-Todman Broadcasting Inc. on June 1, 1964.

The request IS GRANTED.

(m) Petition for Leave to Amend, filed by Oak Knoll Broadcasting Corporation on June 15, 1964.

The petition IS GRANTED.

(n) Letter, filed by Broadcast Equipment Corporation on March 20, 1964.

(o) (1) Letter, filed by Pacific Fine Music, Inc. on April 16, 1964.

(2) Letter, filed by California Regional Broadcasting Corporation on April 20, 1964.

The letters request a withholding of action on certain of the pleadings filed prior to the letters; the letters are now moot, and ARE DISMISSED as such.

(p) Miscellaneous requests contained in various of the above pleadings, seeking acceptance of late-filed pleadings or pleadings not contemplated by the Commission's Rules. The requests ARE GRANTED, and none of the above pleadings is rejected on procedural grounds.

(q) Letter with Motion attached, filed by City of Pasadena on June 15, 1964.

(r) (1) Application, filed by Orange Radio, Inc. on March 31, 1964, requesting special temporary authority or an interim grant for use of the frequency 1110kc at Fullerton, California.

(2) Letter, filed by Orange Radio, Inc. on April 20, 1964, notifying the Commission of participation by Orange Radio, Inc. in Radio Eleven Ten, Inc.

In view of the above letter, the application IS DISMISSED as an inconsistent application within the meaning of Section 1.518 of the Commission's Rules.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY IN WHICH COMMISSIONER LEE LOEVINGER JOINS

I dissent to the grant of Oak Knoll's application for an "interim" operation.

This unprecedented grant is, in my opinion, violative of statutory requirements for an evidentiary hearing, and contrary to Commission rules and policy.

Substantial and material questions of fact as to Oak Knoll's financial, technical, and programming proposals were not resolved in evidentiary hearing processes required by Section 309(e) of the Communications Act and Sections 5, 7 and 8 of the Administrative Procedure Act. The Oral Argument which was held in this case does not, I believe, meet either the statutory requirements or the Commission's own responsibility for developing an adequate record upon which to base its public interest findings.

Unresolved are questions of whether Oak Knoll can adjust the KRLA directional antenna to avoid modification of KFAB's license, what the cost would be, and whether Oak Knoll is financially qualified to meet this and other requisite initial operating costs. An engineering affidavit filed by California Regional states that it is "impossible to obtain proper adjustment of the [KRLA] directional radiation." An engineering affidavit filed by Topanga Malibu states that "If, despite the odds against achieving an adjustment . . . despite failure to achieve adjustment in five years . . . [an] effort to conclude proper adjustment would be expected to cost in the order of hundreds of thousands of dollars and involve years of time." Oak Knoll indicates that proper adjustment can be made at a nominal cost. This "conflict of information" is recognized in the Decision of this case. Moreover, Oak Knoll is found financially qualified in the Decision on the basis of a $50,000 loan and estimated expenses and revenues approximating KRLA's 1963 figures. However, if "hundreds of thousands of dollars" are required to bring the KRLA directional antenna into adjustment to avoid modification of KFAB's license, Oak Knoll would not appear to be financially qualified. I believe the Commission must find at this time that either Oak Knoll can, and is financially qualified to, adjust the directional antenna; or provide KFAB an opportunity in an evidentiary hearing pursuant to Section 316 of the Communications Act to show why its license should not be modified by the Oak Knoll operation. The condition that Oak Knoll submit within 60 days a study of whether, and at what cost, it can adjust the array is, I believe, untenable.

Also unresolved is whether Oak Knoll's programming proposals are designed to meet the needs of the area. California Regional contends that KRLA's programming, which Oak Knoll would continue, fails to serve the needs of Pasadena; and that "no independent determination of the program service needs of the Community has been made by Oak Knoll." California Regional also contends that its own programming, based on a study of needs, would better serve the public interest. Topanga Malibu, in its Petition To Deny, contends that the KRLA programming is "frantic rock and roll" with the playing and re-playing of a limited number of popular

records, i.e. during one week "Sugar Shack" was played 91 times, "Wives and Lovers" was played 76 times, and "Since I Fell In Love With You" was played 69 times. Oak Knoll contends that its programming is responsive to the needs of the area. The question is unresolved in this proceeding.

While the applicants herein which support the Oak Knoll proposal indicate that the Oral Argument, in lieu of evidentiary hearing, was adequate, I must agree with the parties respondent which claim that their statutory rights have been denied.

Moreover, under the circumstances of this case, there seems to be no practical distinction between an "interim authorization" and a regular authorization. The decision in this case concedes that the processing and hearing of 19 applications for regular operation will take 2½ to 3 years. This does not include additional time for litigation. Radio Eleven Ten, Inc., an applicant herein, alleges that "this case may become one of the longest comparative hearings in Commission history." Broadcast licenses are granted for a period not to exceed 3 years, pursuant to Section 307(d) of the Communications Act. Thus, the so-called "interim operation" here will run as long as, or longer, than a normal three-year license period and is tantamount to a regular license. Accordingly, I believe that no short-cutting of evidentiary hearing processes in this case is warranted or legally sound.

If the authorization here involved were, in fact, for a short interim operation, there has been no showing by the applicants, and no finding by the Commission, that there is a compelling need for such "extraordinary" measure. See *Community Broadcasting Co., Inc.* v. *F.C.C.* (107 U.S. App. D. C. 95). Indeed, if no interim operation were authorized, the public presently served by KRLA would continue to receive a multiplicity of radio service. The Los Angeles-Santa Monica metropolitan area, of which Pasadena is an integral part, has 25 standard broadcast stations. It has been argued that, while other standard broadcast stations are licensed in Pasadena, KRLA is the only effective English-language local outlet, but this ignores allegations made by parties hereto that KRLA identifies itself with and programs for the Los Angeles market and does not meet the needs of Pasadena.

The *Community* case involved a *comparative* hearing on television applications for the same city, and there is no inference to be drawn that the Court would have sanctioned any type of interim operation if it had been faced with a 307(b) hearing on standard broadcast applications where the threshold question is which city has the greater need for the services proposed. Television channels are assigned to various communities on the basis of rule making. Applicants for standard broadcast stations may specify the use of a frequency in whatever communities they choose, and 307(b) considerations arise as to which community has the greater need for the use of the frequency. Thus, our rules (Section 1.592(b)) provide for merger-interim operations by television applicants, but do not make the same provision for standard broadcast applicants. The grant to Oak Knoll appears to be contrary to our rules and unprecedented; I find no case in which the Commission ever before

granted an AM interim operation where a 307(b) question was involved.

Grant of Oak Knoll's application for "interim" operation is contrary to Commission policy. The Commission, on September 18, 1963, dismissed by unanimous vote (5–0), an application by *Swannanoa Valley Broadcasting Company* for the revoked facilities of WBMT, Black Mountain, North Carolina. The applicant sought this facility so that there would be "no prolonged interruption of the radio service formerly provided by WBMT." The applicant also stated that the only other local station in Black Mountain is primarily an educational and religious station for the region and that continuation of WBMT service was needed to serve local interests in Black Mountain. The Commission stated that it could not find "extraordinary circumstances requiring emergency operations in the public interest."

The decision argues that, while there is no absolute need for the Oak Knoll interim operation, it would cause no harm and it would actually serve the public interest. Topanga Malibu Broadcasting Company contends that a principal reason for the support of interim operation by the numerous Los Angeles area applicants is to preserve 1110kc therein without interruption so as to enhance their 307(b) position on comparative consideration. I believe that, to warrant the authorization of an interim operation, the Commission must make a finding of impelling public need for the facility in Pasadena, and that this finding—or any interim operation—would be highly prejudicial to the 307(b) considerations of applicants for other communities. While the decision provides that no weight will be given to the interim operation in subsequent 307(b) considerations of need, the fact remains that discommoding a service on which the public was then relying, via the interim operation, is a factor which would be difficult for the Commission to ignore. In the *Community* case, supra, the Court stated:

> The intervenor agreed and the Commission asserts that no weight is to be given to the investment involved in the temporary operation or the advantages which inhere in satisfactory interim operation for 2 to 3 years and that this adequately safeguards appellant's rights. It is suggested that to question this involves a challenge to the good faith of the Commission. But this is not a matter only of good faith. *Ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers no matter how sincere their effort or intent.* (Emphasis added)

Similarly, Section 319 of the Communications Act prohibits construction prior to Commission approval in order to avoid "pressure" on the Commission by a fait accompli. See WJIV–TV v. F.C.C. (231 F. 2d 725, 731).

Finally, the selection of Oak Knoll in this comparative proceeding on the basis of its being least prejudicial to other applicants, rather than on a basis of its being best qualified to serve the public interest, is, in my judgment, unsound.

### Dissenting Statement of Commissioner Ford

I dissent. I do not believe that the proceedings held on these applications furnish an adequate evidentiary record upon which any of the applications can be granted an interim operation.

F.C.C. 64–641

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| GENERAL ELECTRIC CO., SCHENECTADY, N.Y. | File No. BR–264 |
| For Renewal of License of Stations: | |
| WGY, SCHENECTADY, N.Y. | File No. BRH–6 |
| WGFM, SCHENECTADY, N.Y. | File No. BRCT–2 |
| WRGB (TV), SCHENECTADY, N.Y. AND AUXILIARY TRANSMITTERS AND ASSOCIATED STATIONS IN THE AUXILIARY SERVICES | File No. BAL–4915 |
| GENERAL ELECTRIC CO. (ASSIGNOR) | File No. BALH–634 |
| and | |
| GENERAL ELECTRIC BROADCASTING CO., INC. (ASSIGNEE) | File No. BAPLCT–58 |
| For Assignment of Licenses of: | |
| WGY, SCHENECTADY, N.Y. | |
| WGFM, SCHENECTADY, N.Y. | |
| WRGB (TV), SCHENECTADY, N.Y. AND AUXILIARY TRANSMITTERS AND ASSOCIATED AUTHORIZED STATIONS IN THE AUXILIARY SERVICES | |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: CHAIRMAN HENRY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER NOT PARTICIPATING.

1. The Commission has before it the pending applications by General Electric Company for renewal of the licenses for the above-listed stations in Schenectady, New York. The company and a number of its employees were, during 1961, convicted in the Philadelphia antitrust cases for criminal conduct in fixing prices and rigging bids on sales of electrical equipment. As in the case of Westinghouse, which was involved in similar antitrust activities and whose broadcast licenses were renewed under somewhat similar circumstances (February 28, 1962, Memorandum Opinion and Order, FCC 62–243), the Commission has carefully considered the findings made in the Philadelphia proceedings for their impact on the renewal of General Electric's licenses. Interrogatories, addressed by the Commission on November 1, 1961, have elicited an extensive showing relating to the broadcast performance of the General Electric stations during the 1957–1960 license period; and General Electric's broadcast performance during 1960–1963 has been subjected to careful review. Pending General Electric applications request Commission consent to the assignment of the above licenses from the parent corporation to a wholly-owned

broadcast subsidiary corporation, constituted in such a manner as to assure the Commission that responsibility for the broadcast operation of Stations WGY, WGFM and WRGB will reside with the top management of the General Electric Company. On February 25, 1964, after conferences between the Commission's staff and counsel for General Electric, further information was submitted with respect to the manner in which the parent corporation, in conjunction with the proposed assignee, shall discharge its responsibility for the operation of the General Electric broadcast facilities.

2. General Electric was involved in substantially the same cases as was Westinghouse in the Philadelphia antitrust proceedings. The Philadelphia cases comprehended indictments charging conspiracies to fix prices, rig bids, and divide markets on electrical equipment valued at $1,750,000,000 annually. As was stated in the Westinghouse Memorandum Opinion (FCC 62–243), February 28, 1962, 22 Pike & Fischer, Radio Regulation 1023, 1025:

> The prosecuting Attorney-General characterized the proceedings as involving "as serious instances of bid-rigging and price fixing as have been charged in the more than half-century life of the Sherman Act"; the presiding judge, in imposing sentence, observed that the conduct of the corporate and individual defendants had "flagrantly mocked the image of that economic system of free enterprise which we profess. . . ."

General Electric paid fines totalling $437,500. It pleaded "guilty" in seven cases, "nolo" in thirteen. Sixteen persons connected with General Electric, including one group vice-president and three division vice-presidents, were indicted; the case against the group vice-president was nol-prossed, fifteen persons were fined, eleven drew prison sentences, and three were, in fact, jailed.

3. The antitrust conduct prosecuted in Philadelphia involved a Product Group in the heavy power equipment field, which in the General Electric organizational arrangement is responsible to a different Group Executive from the one controlling the operation of the broadcast stations. Except for the highest echelon of management in the company, there is no horizontal inter-connection between units, departments, and divisions supervised by different Product Groups. Prosecution and conviction in Philadelphia did not reach higher than the office of divisional vice-president, which for General Electric is two organizational levels removed from the President and the Chairman of the Board. The Radio and Television Division, which supervises the operation of the stations, is one of six Divisions, which, together with the General Electric Credit Corporation, make up the Consumer Products Group headed by a Vice-President and Group Executive answerable to the President, Chairman of the Board, and the Directors of the Company. No one in this organizational chain—from Chairman, Members of the Board, or President, to the Broadcasting Stations Operation, and including every Department, Unit, and Division in the Product Group—was indicted or charged in the Philadelphia proceedings.

4. The issue before the Commission is whether we can find a renewal of the General Electric stations in the public interest in the face of the serious antitrust violations attributable to General Electric in the Philadelphia cases. General Electric urges that we

can on the basis of three factors. First, the newly proposed organizational structure for General Electric's broadcast stations gives strong assurance that top management (who were not indicted in the Philadelphia cases) will play a meaningful role in the management of the stations. Second, General Electric's broadcast stations have a long and consistent record of meritorious broadcast service to the public. And, third, the new compliance program instituted by General Electric will insure adequately against further violations of the antitrust laws. These three circumstances are discussed below.

5. *The New Organizational Structure for the Broadcast Stations*: In order to resolve Commission uncertainty as to whether the organizational structure of General Electric was and would be such as to assure proper discharge of the responsibility of top management for operation of the stations in the public interest, General Electric has requested Commission consent to the segregation of its broadcast business in a separate corporation; it has formed a wholly-owned subsidiary, General Electric Broadcasting Company, Inc., to which it proposes to assign the licenses of its three stations (BAL–4915, BALH–634, BALPCT–58). The composition of the Board of Directors of the newly incorporated broadcast subsidiary assures both that top management of the parent corporation will participate actively in the direction and supervision of the broadcast operations and that the stations will be responsive to local needs and conditions. General Electric's President, a Director of the parent corporation, is Chairman of the Board of General Electric Broadcasting Company, Inc. Four of the six Directors of the broadcast subsidiary are members of General Electric's Executive Office, a 15-man body intended to be a ". . . balanced group of general executives . . . to advise and assist the Chairman of the Board in the over-all leadership through planning, organizing . . . and the formulation and determination of over-all company objectives, politicies, plans and programs." The full span of management command presently responsible for the broadcast stations' operations is represented on the Board of Directors of the broadcast subsidiary—from the General Manager of the Broadcast Company to the Chief Executive Officer of the parent Company. Upon inquiry with respect to the policies and procedures which have been adopted to assure proper supervision of the affairs of the broadcast subsidiary by the top management of the General Electric Company, the following representations were made to the Commission:

> Mr. Lang, who is Vice President and General Manager of the Stations devotes his full time to their operation. He is a person with a broad background in finance, business management, and community affairs. He makes a monthly report to each member of the Board of Directors of General Electric Broadcasting Company, Inc., reporting in detail on programming and operation of the Stations.
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> * * * * * * *
>
> The Directors [of the Broadcast subsidiary] are thoroughly informed and familiar with their responsibilities as a licensee. They are familiar with the operations and the programming of the stations. They will meet regularly and will review in depth the operations of the stations. They are keenly interested in seeing that the highest standards of public responsibility are maintained.

They are well informed as to public affairs and public service activities and the reactions of the listening audience and of community leaders to station programming.

There is frequent contact by telephone, letter, meetings, and personal visits between the Vice President and the President of the General Electric Broadcasting Company. In addition to the regular Board of Directors meetings, I [Herman L. Weiss, Vice President and Group Executive of Consumer Products Group of General Electric and Director of broadcast subsidiary] personally conduct a review in depth of the broadcasting operation at least twice a year with the President, Vice President, and the management staff of the stations. Reports are made by me on a scheduled basis at the meetings of the Executive Office and the Board of Directors of the General Electric Company.

Such reviews, meetings, and other communications assure a steady two-way flow of information and supervision between the management of the broadcasting stations and the very top management of the parent Company.

6. *General Electric's Broadcast Record*: General Electric's only regular broadcast stations are its AM, FM and TV stations in Schenectady. Operation of broadcast stations by General Electric dates back to 1922 when its station WGY went on the air. The company was also an early participant in television and FM broadcasting—its TV station WRGB commenced broadcasting as early as 1939 and its FM station WGFM in 1940. Licenses for its broadcast stations have, with only minor problems dotting the record, been regularly renewed. The programming of General Electric's stations is balanced and reflects cooperation with local civic and charitable organizations; station personnel are actively engaged in community activities and are participating members of local organizations. In accordance with the approach adopted by the Commission with respect to Westinghouse, General Electric's renewals have been processed in depth. The voluminous record reveals the following: WRGB–TV regularly programs live music employing local musicians (since 1949, every weekday evening around the dinner hour) and for the same length of time has been scheduling, at 8:00 Friday evenings, a local live, half-hour variety show featuring talented area youngsters. In 1962, WRGB–TV, responding to listener requests for a country and western music program, instituted a weekly, one half hour live program of this type utilizing local musicians and singers. WRGB–TV's 1963 renewal application indicates that during the composite week the station devoted 14.6% of its broadcast time between the hours of 6 p.m. and 11 p.m. to local live programming, and devoted 9.5% of its total time to local live presentations. During the period of 1960–1963, WRGB–TV presented a significant number of public affairs programs, drawing upon three major sources: network productions, non-network filed productions, and its own local productions.

7. WRGB–TV management was instrumental in the formation and development of the Mohawk-Hudson Council on Educational Television—originally designed for the presentation of a 30-minute educational program each schoolday morning for in-school viewing utilizing the facilities of the television station. This group, with a membership of some 100 public, private, and parochial schools, colleges, libraries, museums, etc., has matured, succored by General Electric facilities, monies and efforts, and is now able to under-

take its own station operation, non-commercially on Channel 17 in Schenectady.

8. Throughout each session of the United States Congress, WRGB–TV reserves 15 minutes each week for a broadcast by the Senators from New York State and the Representatives from the Schenectady area; the program, filmed in Washington at the station's expense, enables these representatives to discuss problems and issues confronting Congress and to answer questions provided by residents of the listening area.

9. Because of Station WGY's proximity to the State Capitol, the station maintains its own correspondent in Albany; in addition to year-round reporting, this Albany correspondent conducts a weekly 15 minute program from the Capitol when the State Legislature is in session, interviewing prominent legislators and State officials, including the Governor, with respect to current and prospective legislation.

10. General Electric's FM station, WGFM, has increased its educational programming by the addition of the significant Empire State FM School of the Air program, presented in cooperation with Syracuse University and designed for in-school listening; it presently devotes in excess of 4% of its broadcast week to programming in this category, an exemplary level for an FM station.

11. Farm programming, particularly on General Electric's radio station WGY on which a 45-minute daily program at approximately noon is presented under the direction of the full-time Farm Director for General Electric's broadcast stations, appears to be a substantial effort responsive to the needs and interests of an important segment of area listeners and includes the production of a number of major documentary programs covering many different agricultural interests in the area. News, locally gathered by a substantial full-time staff with good facilities and services available to it, is presented frequently and in depth on all these stations. The General Electric stations produce their own documentaries and commentaries probing a wide range of social, economic, and political problems of significance to the Schenectady area. The musical fare presented over WGY is varied, including jazz, classical selections, etc., and catering to the broad spectrum of tastes of its listening audience.

12. We find the foregoing record, set forth in detail by General Electric, constitutes clear evidence militating in favor of renewal of licenses; in this connection, we have also taken into account the great length of the General Electric broadcast record.

13. *The New Compliance Program*: General Electric has a long history of antitrust involvement. As in the case of *Westinghouse*, top management of General Electric pleads unawareness of the misconduct involved in the Philadelphia cases and appears to be urgently concerned with the disclosures made in those cases. Internal education and surveillance with respect to antitrust matters were company policy before the Philadelphia proceedings developed, and new programs of similar import have been developed which it is promised will be vigorously pursued. The new compliance program instituted at General Electric established:

...a still more comprehensive and intensive program for education of all managing employees concerning the Company's antitrust compliance rules and for the vigilant enforcement of those rules.

Under its strengthened program, every manager is required to certify in the presence of his superior that he has read the compliance rules and that he understands them and will comply with them. Penetrating legal and financial auditing programs have been adopted to search out possible violations should they occur in the future. In addition, Company lawyers assigned in the field to each division will intensify their education efforts at all levels of the Company in the importance of anti-trust compliance. Group executives have been ordered to make careful inquiry into any circumstances which might evidence lack of vigorous competition and to direct a written report of their findings to the Chairman of the Board and President. In the field, department general managers have been ordered to submit a report on the occasion of any major price change which will describe the change and the business reasons involved. Each of these far reaching procedures, plus several others..., is in addition to the Company's pre-existing program for enforcement of antitrust compliance.

The Company stands ready to go beyond its present expanded procedures should it conclude that still additional steps are necessary to insure future compliance with the anti-trust laws.

14. The governing rule as to the significance of antitrust activities by a broadcast applicant was restated in our recent *Westinghouse* decision, *Westinghouse Broadcasting Co., Inc.*, 22 Pike and Fischer, R.R. 1023, 1028, and is set out, in full, in the Commission's Report issued March 28, 1951, in Docket 9672 (Vol. I, Part III, Pike & Fischer, Radio Regulation 91:498) which established a uniform policy to be applied to applicants who have a record of antitrust, or other law violations. There, the Commission announced that misconduct outside the broadcast field would be considered in determining an applicant's qualification to hold a broadcast authorization. It was agreed that each case would require separate appraisal, but that recurring, wilfull offenses would count more heavily than if the conduct were remote, isolated, or inadvertent. The policy was not designed to impose additional penalty for illegal non-broadcast conduct. It did announce that behavior in other fields is a relevant circumstance to be weighed in measuring suitability for the public responsibilities involved in station operation. However, as we pointed out in *Westinghouse*, past violation of the antitrust laws is not an absolutely disqualifying fact; it is merely a circumstance from which the Commission may draw inferences as to future probabilities, and the Commission's deliberative process in these cases is designed to uncover and measure risk to the public. *Westinghouse*, supra, at p. 1028. Under these circumstances, we are obliged to evaluate the possibility that any tendency implicit in antitrust behavior in other fields will infect the applicant's broadcast operation in derogation of the public interest, which interest the Commission is, by statute, directed to safeguard.

15. We are confronted here, as we were with the *Westinghouse* renewals, by conflicting considerations—a most serious reflection on the applicant on the one hand counterbalanced by a long history of broadcast service in the public interest on the other. *Westinghouse*, supra, at p. 1029. If General Electric were a newcomer or without this long and honorable record in broadcasting, the record would raise a substantial question as to whether General Electric should be entrusted with the responsibility to operate broadcast

facilities. But here, the Commission must consider whether to withdraw facilities from a licensee which for 40 years has rendered broadcast service in the public interest. Moreover, the proposed separation of General Electric's licenses in a separate subsidiary gives further assurance of continued operation in the public interest for the proposal is designed to insure that the highest echelon of the parent company's management will be more closely and regularly involved in the direction and supervision of the broadcast stations. General Electric's new compliance program appears to be a most serious and thorough going attempt to prevent any recurrences of unlawful conduct. Taking all these factors together, we conclude that the public interest would be served by renewal of the General Electric licenses.

16. Notwithstanding the conclusion to renew, these licenses do not extend beyond June 1, 1966, and the Commission hereby puts the General Electric Company on notice as we did *Westinghouse,* that should it again engage in such significant, widespread antitrust violations in the face of the new company programs and assurances, then obviously a grave question would arise as to whether its most important and most seriously undertaken commitments to us, as well as to other governmental agencies and bodies, should be given any credence. *Westinghouse,* supra, at p. 1030. Our judgment here to renew the above licenses would then have to be reevaluated. Moreover, if any other material change in the factors herein discussed should develop, appropriate action with respect to these authorizations can be taken at a later time.

17. Accordingly, it is ordered that the above-captioned applications to renew the licenses for the General Electric Company's broadcast stations in Schenectady, New York and the above-captioned applications for assignment of licenses to General Electric Broadcasting Company, Inc., Schenectady, New York, ARE GRANTED.

Adopted July 1, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF CHAIRMAN HENRY

I dissent and shall briefly state my reasons.

This case turns upon the application of the Commission's *Uniform Policy as to Violation by Applicants of Laws of the United States,* 1 (Part 3) Pike & Fischer, R.R. 91:495. This policy, adopted in 1951 and cited with approval by the Court in *Philco Corp.* v. *F.C.C.,* 293 F.2d 864 (C.A.D.C.), was followed, without revision, in the recent *Westinghouse* decision (FCC 62–243). The majority today concurs in its continuing validity and "governing" role (par. 14).

I also believe that the Statement represents sound policy. A grant of a broadcast license such as is here involved confers use of a scarce and valuable channel of public communication. It imposes upon the licensee the obligation to operate in the public interest. Under the Communications Act, the Commission does not and

should not undertake day-to-day surveillance of how the licensee meets that obligation. Instead, it places great reliance upon entrusting these limited franchises to those whom it has found to have the requisite qualifications. The Communications Act therefore specifically requires the Commission to take into account the conduct of the applicant in granting licenses (See Section 308).

The conduct of the applicant in a nonbroadcast field clearly can be relevant to the Commission's judgment. The Commission must be concerned with whether an applicant with a record or propensity for violations of Federal laws should be given authority to operate broadcast facilities as a trustee for the public. Further, with respect to the specific area of violations of the antitrust laws, the Commission, in the *Uniform Policy* (par. 18), stressed that anti-competitive practices are "exceedingly difficult" to uncover and to correct, and that therefore, "it is important that only those persons should be licensed who can be relied upon to operate in the public interest, and not engage in monopolistic practices."

The critical issue is thus the application of the *Uniform Policy* statement to the facts of this case.

### *The Uniform Policy*

The *Uniform Policy* states that violation of Federal laws raises a "question regarding character"; that "this question as to character may be overcome by countervailing circumstances"; and that in all cases where "the applicant has been involved in violations over a long period of time or is presently engaged in illegal practices *a strong presumption of ineligibility is raised and a heavy burden of proof is imposed* on the applicant to show he is qualified to operate a broadcast station in the public interest." (p. 91:498) (emphasis added). It is important also to note the following:

(i) The *Uniform Policy* is, in terms and scope, applicable to applicants for renewal of license, as well as new applicants. See also, *Westinghouse Broadcasting Company, Inc., supra.*

(ii) The *Policy* does not depend for its application upon a showing of involvement of top management in the violations of law; it makes no reference at all to such a requirement. The majority stresses that top management of GE was not involved in the electrical conspiracy (pars. 3–4). The trial judge thought that the contrary was the case.[1] But in my view, it is immaterial whether or not top management was involved. A corporation cannot escape responsibility for its acts simply because its top management was unaware of them, any more than a broadcast licensee can do so. See *KWK, Inc.*, FCC 63–495. If it could, decentralization would surely be the order of the day.

### *The Seriousness of GE's Antitrust Violations Under the Uniform Policy*

In the Philadelphia proceedings, GE pleaded "guilty" in seven

[1] Thus, he stated that "one would be most naive, indeed, to believe that these violations of the law, so long persisted in, affecting so large a segment of the industry and finally, involving so many millions upon millions of dollars, were facts unknown to those responsible for the conduct of the corporation."

cases, "nolo contendere" in thirteen, and paid fines totalling $437,500. Fifteen of its employees were fined, eleven drew prison sentences and three were in fact jailed. There is, I think, no question as to the seriousness of these violations by GE. They were "violations over a long period of time" (*Uniform Policy*). More important, the sentencing judge used the terms "flagrantly [violative]" and "serious" in describing the activities. The then Attorney General, William P. Rogers, stated that "these indictments charge as serious instances of bid-rigging and price fixing as have been charged in the more than half century life of the Sherman Act." Indeed, the electrical defendants actually *defrauded* the Government and many state and local governmental units.[2]

Further, the electrical violations do not stand alone. It is important to view these new violations in light of the company's overall antitrust record. Cf. *Philco Corp. v. F.C.C.*, 293 F. 2d 864 (C.A.D.C.). So extensive is GE's past record of antitrust violations that were I to recite them, this dissent would probably be longer than the majority opinion.[3] This company was civilly adjudged or found guilty of antitrust violations of one kind or another in 1911; 1932; 1936; 1937; 1941; 1944; 1947 (twice); 1948 (3 times); 1949 (4 times); 1952 (twice); 1953 and 1954. In short, GE has as bad a history of antitrust violations as any applicant that has ever come before this Commission, both with respect to seriousness and length.

The *Uniform Policy* stresses the significance of finding a pattern of "continuing and callous disregard for laws . . ." (par. 12). There is such a pattern here. The Attorney General stated (on September 24, 1961):

> ... We have found in going through past cases that there have been anti-trust violations by companies continuously, that there is a fine paid and the practice continues. For instance, in General Electric, there must have been dozens of violations of the anti-trust laws by General Electric over a period of years. It didn't have any effect on them.

Further, any new program designed to ensure compliance with the antitrust laws cannot be relied upon to assure that the pattern will no longer obtain.[4] GE has long had a written policy distributed to all its management employees, requiring strict adherence to the antitrust laws. It issued this policy in 1946, because of its then lengthy record of antitrust violations. It sent out the policy directive again in 1949 and then in 1954 and in 1959 (so that all new management employees would be familiar with it). In 1958, GE's president stated to the Congress that GE "was making every effort to comply with the antitrust laws" and that:

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[2] In 1942, the Government indicted GE and several other companies under the fraud statute (18 U.S.C. 88) for engaging in collusive bidding on the sale of various types of cable to the United States. (No. 851-C, D.C.N.J., 8/17/42.) On February 15, 1943, the court fined GE $7,500 (after accepting its nolo contendere plea).

Significantly, it is now the Government's policy to bring criminal fraud suits (a felony) rather than antitrust actions (a misdemeanor), in all new cases of collusive bidding involving the United States.

[3] The GE record, so far as suits brought by the United States is concerned, is set out in pars. 6A-21 of the Government's amended complaint against GE in its previously pending civil action (Civ. Act. No. 27716, E.D. Pa., Dec. 22, 1961). A list of FTC proceedings is contained in the Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., Tr. 17695-17698, 17951-52. Even this list does not include the many private antitrust suits.

[4] The majority opinion (pars. 13-16) relies upon such a new program.

> As long ago as 1946... (GE) embarked upon an educational program, a program which has been continued to date with undiminished vigor, designed to sharpen the sensitivity and awareness of all of our people to the role and importance of the anti-trust laws.

Yet two years later, in 1960, GE was found guilty of having participated in flagrant violations of the antitrust laws during the entire period of this intensive "educational program."

In short, in view of GE's record of "violations over a long period of time" and also of recent vintage, the *Uniform Policy* clearly leads to "a strong presumption of ineligibility . . . and a heavy burden of proof [being] imposed on [GE] to show [it] is qualified to operate a broadcast station in the public interest." The majority opinion, while referring (in par. 14) rather hazily and in a comparative sense to this aspect of the *Uniform Policy*, makes no finding that GE faces such a "strong presumption" or has such a "heavy burden."

### *GE's Broadcast Record*

I do not agree that, in view of the unconditional grant of the Westinghouse renewals (FCC 62–243, February 28, 1962), "equal justice under law" dictates a like disposition of the GE renewals. Westinghouse demonstrated strong "countervailing circumstances." As I read the opinion, the key to the Commission's decision in the *Westinghouse* case was that licensee's outstanding broadcast record. Westinghouse was found to be a unique source of a great deal of worthwhile programming made available to other licensees on a nationwide basis, which source would be eliminated were its licenses not renewed. Thus, the Commission stated in *Westinghouse* (par. 15) :

> ...examination of the full Westinghouse submission demonstrates that it has made an outstanding contribution to the public interest in the broadcast field both in local service and in the development of programs which have been made available to many other stations. This latter fact is uncommon and merits special commendation. Its extensive and 'in depth' news coverage and its excellent efforts in the production of local programs, often on controversial subjects, are further indications of Westinghouse's superior past record. We conclude, upon examination of Westinghouse's voluminous record, that its operation has been an outstanding and longstanding service in the public interest.

The majority finds in GE's broadcast record "countervailing circumstances" sufficient to overcome GE's antitrust history. I have carefully examined GE's record, and I cannot find, at least at this juncture and without a detailed hearing record, that GE has met its heavy burden.

If the *Uniform Policy* is to have any meaning or real vitality, the broadcast record relied upon must be something out of the ordinary. If the public would receive roughly the same kind of service from some new licensee, it makes little sense to entrust the license to an applicant with GE's record of law violations. In such a case, there surely would not be "countervailing circumstances" warranting the risks described in the *Uniform Policy*. On the basis of the record set out in pars. 6–11 of the majority opinion, GE appears generally to be responsive to the area's needs and to be rendering an adequate and, in some respects, commendable service. But in other respects the record raises questions.

For example, the majority opinion (par. 6) relies upon GE's devotion of 9.5% of its total time to local live presentations, but ignores the fact that WRGB (TV) proposed 20.0% local live programming in its previous renewal application. Thus this local live effort might be more appropriately considered as a failure to carry out an important representation.

Additionally, in par. 11, the majority opinion commends GE's AM station for its agricultural programming which "appears to be a substantial effort responsive to the needs and interests of an important segment of area listeners . . ." However, in view of this and GE's stress as to the importance of agricultural programming to this area (with its 10% of the adult population residing on farms) a question might be presented whether the GE TV station's limited efforts in fact served community needs, since only one-fifth of one per cent of its programs were designed for this purpose.

In any event, the basic question is: Has GE shown a record of such a nature that were we to deny the renewal, a new licensee, operating on these valuable frequencies with network affiliations, could not reasonably be expected to provide comparable service? In my judgment, GE has not made such a showing at this time. Perhaps it could. But I think it clear that on the facts of this case, an evidentiary hearing is called for to examine in depth whether GE's record was of such a nature as to overcome "the strong presumption of ineligibility"—to meet its "heavy burden."

*GE's corporate reorganization*

The majority also relies upon GE's recent corporate reorganization. I agree that a revision ensuring top management's responsibility for the broadcast operations is an appropriate step. Indeed, in view of GE's description of its policy of decentralization in this record, this revision was long overdue in the broadcast field.

But the fact that GE has finally put its corporate house in order with respect to the broadcast operations is not a "countervailing consideration." Westinghouse has long had a corporate arrangement ensuring responsibility by top management in the broadcast field—yet this factor was not relied upon in renewing its licenses (see pars. 13–16 of the *Westinghouse* decision). And I think it was correct not to do so. Otherwise, the applicant who has run afoul of the *Uniform Policy* could simply revise its corporate structure with respect to the broadcast field, and claim renewal on that basis. Very little would be left of the *Uniform Policy* under such a procedure.

In sum, the Commission has before it the most serious case ever presented under the *Uniform Policy*. The majority, in granting GE's application without an evidentiary hearing, holds that GE's meritorious past programming offsets its long history of willful and knowing violations of federal law. In so doing it depresses its sights alarmingly, and thereby invites broadcast licensees to do likewise. In a now or never situation, the majority opinion, as I read it, clearly states "never."

FEDERAL COMMUNICATIONS COMMISSION,

MINUTE DIVISION,

*Washington, D.C., July 31, 1964.*

Hon. PHILLIP S. HUGHES,
*Assistant Director for Legislative Reference,*
*Bureau of the Budget,*
Washington, D.C.

DEAR MR. HUGHES: This refers to your request of July 21 for the Commission's views with respect to the Federal Aviation Agency's July 20 comment on the Commission's legislative proposal to amend the Communications Act of 1934 with respect to painting, illumination, and dismantlement of radio towers.

The Commission has no objection to the amendment proposed by the FAA in its July 20 letter. In reverting to this earlier language, however, we would propose one minor clarifying change. In the last sentence at the beginning of the phrase dealing with dismantlement, we would substitute "and" for "or" to make it clear that the authority to require dismantlement is in addition to the painting and illumination requirement and not limited to occasions when the tower owner has failed to maintain the prescribed painting and illumination.

Thus, the bill would read:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 303(q) of the Communications Act of 1934 (47 U.S.C. 303(q)) is amended by inserting after the period at the end thereof the following: "The permittee or licensee shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation."

I am also enclosing a revised explanation of the proposed amendment to reflect these language changes.

Please let us have your prompt advice as to whether the proposal, as amended, is in accordance with the program of the President.

This latter was adopted by the Commission on July 29, 1964, Commissioners Bartley and Ford dissenting and Commissioner Los not participating.

By direction of the Commission.

E. WILLIAM PERRY, Chairman.

F.C.C. 64R–364

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| INTEGRATED COMMUNICATION SYSTEMS, INC. OF MASSACHUSETTS, BOSTON, MASS. | Docket No. 15323<br>File No. BPCT–3167 |
| UNITED ARTISTS BROADCASTING, INC., BOSTON, MASS. | Docket No. 15324<br>File No. BPCT–3169 |
| WGBH EDUCATIONAL FOUNDATION, BOSTON, MASS. | Docket No. 15325<br>File No. BPCT–3277 |
| For Construction Permits for New Television Broadcast Stations | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER DISSENTING AND ISSUING A STATEMENT.

1. The Review Board has before it for consideration six separate interlocutory pleadings [1] in the above-captioned UHF television proceeding, one of which is completely independent and the other five arising from a common source.

*WGBH's Motion To Enlarge and Delete Issues*

2. WGBH Educational Foundation (WGBH) requests the following addition to the already existing comparative issue: [2]

> 9(d) The programming service proposed in each of the applications as considered in the light of the following factors:
> (1) Whether there are particular types or classes of programs for which there is an unfulfilled need in the area proposed to be served.
> (2) The extent to which the program proposal of each applicant would meet such needs.

In support of its request, WGBH alleges that there is a greater need in Boston for an educational television service, proposed by it, than another commercial service, as proposed by Integrated Communication Systems, Inc. of Massachusetts (ICS) and United Artists Broadcasting, Inc. (United Artists). In view of the Commission action in *Rollins Broadcasting, Inc.*, FCC60–1390, 20 RR 976, reconsideration denied, FCC 61–165, 20 RR 978, the issue will be added.

[1] The Board has before it for consideration: (1) Motion to enlarge issues and delete issue, filed March 2, 1964, by WGBH Educational Foundation (WGBH); (2) Appeal from ruling of Hearing Examiner, filed April 13, 1964, by United Artists Broadcasting, Inc. (United Artists); (3) Appeal from ruling of Hearing Examiner, filed April 13, 1964, by WGBH; (4) Motion and (5) Further motion to modify issues, filed March 12 and March 16, 1964, respectively, by United Artists; (6) Motion to enlarge issues, filed April 13, 1964. by United Artists; and timely filed responsive pleadings addressed to each.

[2] Designation Order, FCC 64–96, released February 12, 1964.

3. WGBH's further request for the addition of an adequacy of staff issue as to ICS will be dismissed as moot in view of the grant of an identical request by previous Board action.[3] Its additional request for deletion of a Rule 73.613(a) issue as to itself,[4] which is unopposed, will be granted. The inclusion of this issue was based on the erroneous assumption that the studio of WGBH–TV (where WGBH is to have its main studio) was located outside of Boston, while in fact it is in Boston proper. Where an issue was designated as a consequence of a mistake of fact, it may be deleted. See *KWEN Broadcasting Company,* FCC 64R–64, released February 7, 1964.

4. The other five petitions are predicated on the following facts. In the designation Order the Commission designated a financial qualifications issue as to ICS, but restricted it to described deficiencies. It appears that eight stockholders made loan commitments to ICS totalling $219,000, and the Commission questioned the ability of two of these persons to meet their commitments totalling $75,000. On March 3, 1964, ICS tendered an amendment to its application along with a petition for leave to amend. By Order released April 6, 1964 (FCC 64M–286), the Hearing Examiner granted the amendment. In summary, the amendment consists of financial data for a Mr. Slaton (one of the six financially qualified stockholder-lenders) and a change in ICS' financial plan by the addition of two new persons (Messrs. Loring and Hill) as directors and substantial stockholders. Loring and Hill in addition have agreed to lend ICS a total of $100,000. Both United Artists and WGBH appeal from the Hearing Examiner's ruling granting ICS's amendment; United Artists seeks to modify the financial issue in order to determine whether Slaton is financially qualified to meet his commitments;[5] and seeks further to enlarge the issues to determine the financial qualifications of Loring and Hill and to ascertain Section II personal information for these two persons. United Artists also seeks to broaden the financial issue as to ICS to determine whether the above-mentioned loan commitments of the original eight stockholders are still binding since they appear to have lapsed on December 31, 1963.[6]

*Appeals from Examiner's Ruling*

5. United Artists, and WGBH by adoption of United Artists' position, attack the Examiner's ruling on four grounds. First, is the matter of diligence. United Artists shows that ICS by amendment filed in December, 1963, supposedly fixed the amount and interests of stockholders and that the largest stockholder was shown to be ICS's parent corporation (73.5%); that ICS now claims that negotiations with Loring and Hill were going on for many months prior to the instant (March, 1964) amendment whereby the parent's

[3] In a Memorandum Opinion and Order, FCC 64R–248, released May 5, 1964, United Artists' request for an adequacy of staff issue as to ICS was granted.

[4] Section 73.613(a) of the Commission's Rules reads, in pertinent part, as follows: "The main studio of a television broadcast station shall be located in the principal community to be served."

[5] This motion was filed before ICS's amendment was accepted, thus it was hinged on the success of the amendment.

[6] It should be noted here that the Hearing Examiner added a sufficiency of funds issue as to ICS on motion of WGBH in a Memorandum Opinion and Order, FCC 64M–436, released May 19, 1964.

dings may be reduced to 43.5%; that this major amendment was
d eleven months after the filing of the application without a
wing of good cause for the long delay. Second, United Artists
acks the Examiner's reliance on the Commission's statement in
designation Order which provided for "an alternate showing
financial qualifications." United Artists alleges that this only
ans that ICS can bring in new information to show the financial
lifications of the two stockholders originally in issue, or perhaps
'alternate" the Commission means another financial plan. How-
r the subject amendment is not even that, rather it is an *addi-*
to ICS's financial plan. Third, United Artists alleges disrup-
of the Commission's processes. Although ICS's application
on file eleven months before designation, ICS now comes for-
rd with new parties and incompleted plans. United Artists al-
es finally that ICS's amendment would prejudice the other two
licants and better ICS's comparative position since the two
stockholders are both Boston area residents and thus ICS's
l ownership will increase from 2% to 22%.

. In opposition, ICS alleges by way of good cause, that the Com-
sion should be apprised of the existing facts at the time of
ignation; that since the final commitments from Loring and Hill
re not obtained until January 23 and 29, 1964, and it filed its
endment on February 11, 1964,[7] it acted with due diligence; that
"alternate showing" language in the designation Order does in
t anticipate the filing of this type of amendment; that it will in
t lose comparative ground since neither Loring nor Hill will par-
pate in the station's management; and that WGBH will not be
t comparatively since it is totally locally owned. The Bureau,
upport of the appeal, alleges that the Examiner erred in relying
the "alternate showing" language of the Commission in order
permit such a major amendment; and that Commission policy
s not permit amendments which involve major changes in an
lication and further complicate the hearing.

. The Examiner's ruling will be affirmed and the appeals there-
m denied because of our finding that the requisite "good cause"
acceptance of post-designation amendments has been shown.
e principal element of this "good cause" is the timing of ICS's
endment. The commitments of Loring and Hill were signed by
uary 29, 1964, and designation did not occur until February 5,
4. In addition, ICS, without knowledge of designation since
designation order was not released until February 12, 1964,
empted to submit the amendment as a matter of right on Feb-
ry 11, 1964. Thus, it is apparent that designation was not the
tivating force behind ICS's amendment.[8] Any comparative ad-
tage which ICS may gain is incidental to the main purpose of
amendment which is to provide additional financial resources.
ile such comparative advantage is ordinarily a factor weighing

[7] Apparently ICS submitted the information contained in its amendment at this time, but
out a petition for leave to amend. The latter was filed on March 3, the record filing date.
ough the designation Order's release date was not until February 12, the amendment rule
tion 1.522) is set in terms of date of designation, February 5 in this case, thus, using either
(February 11 or March 3) the present amendment has to be considered post-designation.
ompare *Cleveland Broadcasting, Inc.*, FCC 64R-278, released May 21, 1964, and *Cleveland*
*dcasting, Inc.*, FCC 64R-315, released June 10, 1964, where amendments were not allowed
use they were formulated and submitted long after designation.

against allowance of an amendment, it is the Board's view that, under the particular circumstances here presented, the public interest is better served by allowance of the amendment than by literal enforcement of the amendment rule without regard to any other considerations.

*Motions to Modify and Enlarge Issues*

8. In its petition to enlarge issues, filed April 13, 1964, United Artists points out that ICS has submitted no financial statements for Loring and Hill, the new stockholders, nor have certain questions in Section II of the application been answered as to these persons. Therefore, United Artists asserts that the financial qualifications issue as to ICS should be enlarged to determine whether Loring and Hill are financially qualified to meet their loan commitments and that an issue should be added to ascertain Section II information as to the same two persons. The Broadcast Bureau supports United Artists and urges that the issues be enlarged. In its amendment, ICS did not include balance sheets for either Loring or Hill. On the basis of the information which was submitted, it is impossible to determine whether either person is financially qualified to meet his $50,000 loan and $2,500 capital commitment. There is now a financial qualifications issue in this proceeding and that issue will be deemed to permit an inquiry into the financial ability of Loring and Hill. As to the requested Section II information, this portion of United Artists' request will be denied. In its amendment, ICS submitted supplements to its original Section II containing the business interests of both Loring and Hill. As to the specific questions in Section II concerning alien ownership, bankruptcy, family relationships, etc., which United Artists alleges have not been answered for Loring and Hill, ICS pointed out in its opposition to the appeal from Examiner's ruling that it did not intend to amend the answers to these questions, and that hence the answers are the same for Loring and Hill. In view of this explanation, no purpose would be served by the addition of the requested issue. This does not, of course, imply approval of ICS's failure to supply complete Section II information in the first instance.

9. In the original application, eight stockholders of ICS pledged a total of $219,000 in loans. The Commission found six (including Gunther Slaton) of the eight to be financially qualified to meet their commitments and designated a financial qualifications issue as to the other two. In its March 3, 1964, amendment, ICS submitted an affidavit from Gunther Slaton, setting forth his assets and liabilities. On March 12, 1964, United Artists filed a motion to modify the issues requesting that the scope of the financial qualifications issue against ICS be enlarged to include an inquiry into *Slaton's financial* ability to meet his loan commitment. In support of its request, United Artists points to Slaton's financial statement, which is as follows:

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|---|---|
| Assets: | |
| *Real estate* | $40,000 |
| Various listed stocks | 30,307 |
| Loan receivable | 1,000 |
| Total assets | $71,307 |

ilities:

| | |
|---|---|
| Mortgage on real estate | $ 9,000 |
| Loan against stock | 15,000 |
| Loan | 1,800 |
| Total liabilities | 25,800 |
| Net worth | 45,507 |

ted Artists alleges that, based on the foregoing information, a stantial question exists as to Slaton's ability to fulfill his $15,000 commitment to ICS.[9] The Broadcast Bureau supports the mo- to modify the issue. The Bureau points out that Slaton's id assets of "approximately $30,000" less his current liabilities 'approximately $17,000" leaves a difference of "approximately ,000." The Bureau thus concludes that the $13,000 in net liquid ets is insufficient to assure Slaton's ability to lend ICS $15,000. 0. The Board notes that neither the petitioner nor the Bureau considered the real estate listed by Slaton in the amount of ,000 against which there is listed a long term mortgage of 00. It is further noted that Slaton stated in his affidavit the owing: "It is my intention to use the excess of my assets over ilities to realize the funds I have agreed to loan Integrated Com- nication Systems, Inc. of Massachusetts." The Commission does require a premature liquidation of fixed assets to find an appli- t financially qualified. See *Michigan Broadcasting Company*, C 60–443 (1960), wherein the Commission said, ". . . the value his real estate holdings provides ample assurance of the avail- ity of such funds as may be needed." Having shown that he a current net asset position of $13,000, the Board sees no rea- for additional evidence to establish the fact that Slaton can e an additional $2,000 on real estate valued at $40,000 in which owns an equity of $31,000. Therefore, the motion will be denied.

1. Finally, United Artists filed a motion to modify issues on rch 16, 1964, in which it pointed out that the loan agreements eight of the original stockholders of ICS are conditioned upon issue of a construction permit by December 31, 1963, an event ch has not occurred. Thus, United Artists urges that the finan- qualifications issue as to ICS should be widened to allow in- ry into this subject. Only the Broadcast Bureau responded to petition and it supports United Artists' position. The $219,000 ch these eight persons have promised to lend to ICS is vital to 's financial plan. Thus, whether their commitments are still d should be ascertained. The existing financial qualifications is- shall be deemed to permit this inquiry.

Accordingly, IT IS ORDERED, This 2nd day of July, 1964, That motion to enlarge and delete issues, filed March 2, 1964, by BH Educational Foundation, IS DISMISSED in part and ANTED in part; and Issue No. 7 in the designation Order (FCC 96) IS DELETED; and the issues in this proceeding ARE EN- RGED by the addition of the following issue:

9(d) The programming service proposed in each of the ap- plications as considered in the light of the following factors:

(1) Whether there are particular types or classes of pro-

nited Artists' doubts about Slaton's stocks are unfounded. One stock is a large mutual fund he rest are common stocks listed on the New York Stock Exchange.

grams for which there is an unfulfilled need in the area proposed to be served.

(2) The extent to which the program proposal of each applicant would meet such needs.

IT IS FURTHER ORDERED, That the appeals from the ruling of the Hearing Examiner, filed April 13, 1964, by United Artists Broadcasting, Inc. and WGBH Educational Foundation, ARE DENIED; and

IT IS FURTHER ORDERED, That the motion to modify issues, filed March 12, 1964, by United Artists Broadcasting, Inc., IS DENIED; and

IT IS FURTHER ORDERED, That the further motion to modify issues, filed March 16, 1964, by United Artists Broadcasting, Inc., IS GRANTED; and

IT IS FURTHER ORDERED, That the motion to enlarge issues, filed April 13, 1964, by United Artists Broadcasting, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF BOARD MEMBER DONALD J. BERKEMEYER

I dissent from the Order insofar as it denies the appeals of United Artists and WGBH from the Hearing Examiner's Order permitting ICS to amend its application to add two new stockholders and make related changes. Although ICS completed arrangements for the amendment before designation and attempted to amend as of right before learning of designation, the fact is that the amendment and the petition for leave to amend were not filed until after the date of designation, and the requisite "good cause" for acceptance of post-designation amendments was not shown. ICS's amendment fails to meet several of the criteria which have generally been applied in amendment cases. ICS will gain a comparative advantage through substantial increase in its local ownership, new parties will be added in the persons of two new substantial stockholders, the issues should be amended to inquire into the financial qualifications of the new parties, and the amendment resulted from the voluntary act of the applicant. ICS asserts that the proferred amendment's sole purpose is to shore up its financial resources, but the reason cited has been apparent for nearly a year. While the Commission's designation Order can be construed as permitting the type of amendment offered by ICS, I cannot agree that this is the correct interpretation and that the Commission intended to permit such a material change in the guise of an "alternate showing."

F.C.C. 64–662

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>INDIAN RIVER BROADCASTING CO. (WIRA),<br>FORT PIERCE, FLA.<br>Has: 1400 kc, 250 w, U, Class IV<br>Requests: 1400 kc, 250 w, 1 kw.-LS, U, Class IV<br>For Construction Permit | Docket No. 15571<br>File No. BP–15740 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LEE DISSENTING.

1. The Commission has before it for consideration a "Petition For Reconsideration, Rehearing And Other Relief" filed April 24, 1964 by WFTL Broadcasting Company, licensee of Station WFTL, Ft. Lauderdale, Florida, directed against the Commission's action of March 25, 1964 (Public Notice 49343, dated March 26, 1964) granting without hearing the above application, and pleadings in opposition and reply thereto.

2. Petitioner alleges that the one kilowatt operation of WIRA would cause objectionable interference within its normally protected (0.5 mv/m) service area. The interference would occur within a 303 square mile area in which reside 2,266 persons or approximately one-half of one percent of the population within the service area. It is asserted that the Commission, in granting the power increase, ignored petitioner's rights under Section 316(a) of the Communications Act of 1934, as amended, by modifying its license without written notice and without affording it the opportunity to show cause in a hearing why its license should not be modified. In support of this position, petitioner cites *F.C.C.* v. *National Broadcasting Company* (*KOA*), 319 U.S. 239 (1943). Petitioner now asks that the grant to WIRA be set aside and designated for hearing or, in the alternative, that WFTL's pending application (File No. BP–15882) for a similar increase in power be granted.

3. In opposition, WIRA acknowledges that its increase in power did constitute a modification of the WFTL license but asserts that the present petition for reconsideration is untimely since petitioner has failed to exercise its pre-grant rights under Section 309(d) of the Act and has not cured this fatal defect by making the requisite showing of good cause under Sections 1.106(b) and 1.106(c) of

the Rules.[1] As authority, *Springfield Television Broadcasting Corp. v. F.C.C.*, 328 F.2d 186, 1 RR 2d 2083 (1964) is cited. WIRA further contends petitioner's reliance on the *KOA* case is misplaced, maintaining that since the *KOA* decision Congress amended the Act to substitute the present Section 309(d)(1) pre-grant petition system for the old 309(c) post-grant protest; that to implement this amendment, the Commission concurrently[2] adopted Section 1.359(c) [now 1.580(i)] of the Rules which bars petitions to deny after an application's "cut-off" date; that petitioner was given notice, by "cut-off" list No. 48 published July 26, 1963, of the potential modification of license and, in effect, invited to file a pre-grant petition to deny at any time prior to September 3, 1963; and, that the aforementioned changes in the Act and the Rules "operate to delineate the requirements of Section 316(a) so that the Commission's action constitutes no violation of that section of the Act."

4. In reply, petitioner denies that any legislative history, court, or Commission decisions support WIRA's argument that the pre-grant procedure enacted by Congress in 1960 and implemented by the Commission in the same year modified the operation of Section 316(a) of the Act. With respect to WIRA's contention that petitioner was given notice of an impending modification of license by virtue of the WIRA application being placed on a published "cut-off" list, petitioner maintains that this argument ignores the specific language of Section 316(a), and that notice of the filing of an application does not constitute knowledge that such application will be granted.

5. Since the basis for the petition is a claim that the WIRA grant would result in objectionable interference within WFTL's normally protected service area, we find that petitioner has standing as "a party aggrieved" within the meaning of Section 405 of the Act and the *KOA* case, *supra*.

6. We find that the *Springfield* case, cited above, is not applicable. In that case, the Commission was originally faced with allegations concerning economic harm and rebroadcast rights under Section 325 of the Act.[3] The basis for the petition therein was not, as it is here, a claim of interference amounting to a modification of license. The statutory mandate of Section 316(a) as interpreted by the Supreme Court in the *KOA* case, *supra*, is unequivocal. Petitioner has shown that the interference which would occur within WFTL's normally protected service area would constitute a modification of its license. Accordingly, petitioner must be afforded

[1] Sections 1.106(b) and (c) provides: ". . [A]ny other person aggrieved or whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which he is aggrieved or his interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding. (c) A petition for reconsideration which relies on facts which have not previously been presented to the Commission or to the designated authority, as the case may be, will be granted only under the following circumstances: (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; (2) The facts relied on were unknown to petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest."

[2] The effective date of both the amendment to the Act and the Rule change was December 12, 1960.

[3] Memorandum Opinion and Order, In re Millers River Translators, Inc., 25 R.R. 516.

the opportunity of showing in a public hearing why the modification should not take place.

7. In view of the foregoing, the Commission is of the opinion that the grant of the above-captioned application should be set aside and that the application should be designated for hearing.

Accordingly, IT IS ORDERED, That the grant of the application of Indian River Broadcasting Company IS SET ASIDE.

Except as indicated by the issues specified below, the applicant is legally, technically, financially, and otherwise qualified to construct and operate as proposed. However, the Commission is unable to make the statutory finding that a grant of the application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated on the issues set forth below:

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

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WIRA and the availability of other primary service to such areas and populations.

2. To determine whether the proposed operation of Station WIRA would cause objectionable interference to Station WFTL, Ft. Lauderdale, Florida, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

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

IT IS FURTHER ORDERED, That the "Petition For Reconsideration, Rehearing And Other Relief" filed April 24, 1964 by WFTL Broadcasting Company IS GRANTED to the extent indicated above and IS DENIED in all other respects.

IT IS FURTHER ORDERED, That WFTL Broadcasting Company, licensee of Station WFTL, IS MADE A PARTY to the proceeding.

IT IS FURTHER ORDERED, That in the event of a grant of the application, the construction permit shall contain the following conditions:

Permittee shall submit with the application for license antenna resistance measurements made in accordance with Section 73.54 of the Commission's Rules.

Permittee shall accept such interference as may be imposed by other existing 250 watt Class IV stations in the event they are subsequently authorized to increase power to 1000 watts.

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant and party respondent herein, pursuant to Section 1.221(c) of the Commission Rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present

evidence on the issues specified in this Order.

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

Adopted July 15, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64M–669

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>SYMPHONY NETWORK ASSOCIATION, INC., FAIRFIELD, ALA. | Docket No. 15460<br>File No. BPCT–3238 |
| WILLIAM A. CHAPMAN AND GEORGE K. CHAPMAN, D.B.A. CHAPMAN RADIO & TELEVISION CO., HOMEWOOD, ALA. | Docket No. 15461<br>File No. BPCT–3282 |
| For Construction Permits for a New Television Broadcast Station | |

MEMORANDUM OPINION AND ORDER

BY CHESTER F. NAUMOWICZ, JR., HEARING EXAMINER:

1. The Hearing Examiner has for consideration (1) a Petition to amend application, filed by William A. Chapman and George K. Chapman d/b as Chapman Radio and Television Company on July 6, 1964, together with an opposition thereto filed on behalf of Symphony Network Association, Inc. on July 8, 1964; and (2) the exhibits submitted by the applicants constituting their direct cases on the designated issues.

2. The petition to amend application was submitted by William A. Chapman, *pro se*. It would modify the engineering and financial aspects of this applicant's proposal. The petition states "in order to clarify and answer some of the Commission's questions outlined in its order [of designation], prior to the hearing . . . Chapman Radio and Television Company respectfully requests that the attached Amendment be accepted and made a part of its Application . . . ." No further allegation directed to the "good cause" requirements of 47 CFR 1.522(b) is offered.

3. What constitutes good cause for the submission of a post-designation amendment depends largely on the nature of the amendment and the circumstances of each individual case. However, in all cases there must be a recitation of the facts on which the applicant relies to demonstrate good cause for grant of his requested relief. In that the instant petition is wholly devoid of any such recitation, it must be denied, and the proffered amendment rejected. Nevertheless, in view of the Hearing Examiner's action, *infra*, continuing the procedural dates herein, the rejection will be without prejudice to the prompt resubmission of the amendment accompanied by a petition delineating the scope of the amendment and the facts relied upon to establish good cause for its submission subsequent to the designation of the application for hearing.

4. By Order of the Hearing Examiner released June 12, 1964, following prehearing conference, it was directed that this would be primarily a written case, with exhibits to be informally exchanged on July 13, 1964, and formally exchanged on July 20, 1964. Pursuant to this order, copies of the preliminary exchange were served on the Hearing Examiner on July 13, 1964. The exhibits of both parties contain what appear to be fatal procedural and substantive defects.

5. The Chapman exhibits are premised upon acceptance of the amendment discussed above. Since this amendment is to be rejected, much of the exhibit material is deprived of relevance. Moreover, much of the exhibit material fails to meet even the most liberal standards of competence governing the admissibility of evidence, and, assuming *arguendo* that all of the exhibits could be received in evidence, there would remain a grave question of whether the applicant had met its burden of proof on the designated issues.

6. The Symphony Network exhibits are no less defective. Although this applicant was represented by counsel at the prehearing conference, the exhibits were exchanged by the President of the applicant corporation. This procedure is not permissible. A corporate applicant must be represented by counsel in proceedings before this Commission, and this requirement applies to all significant aspects of the hearing process.[1] Thus, the purported exchange of this applicant's exhibits must be deemed a nullity not constituting compliance with the requirements of the order governing the conduct of this proceeding. Nor are the Symphony Network exhibits significantly more satisfactory than those of Chapman from an evidentiary standpoint. In significant areas they appear to lack the competence qualifying them for admission into evidence, and, even hypothecating their admission, it is by no means clear that they would suffice to carry the applicant's burden of proof.

7. The Hearing Examiner is not unaware that the deficiencies in the pleadings before him are probably attributable to the unfamiliarity of the applicants with both the requirements of the Commission's processes and of fundamental legal concepts of proof. However, while ignorance may exculpate the parties from any suspicion of having deliberately filed defective pleadings, it will not furnish a cure for the defects. Therefore, it is probable that if this hearing proceeds as presently scheduled, the result will be the dismissal or denial of both applications for reasons not necessarily related to their actual merits under the designated issues.[2] In view of the Commission's policy of favoring the development of UHF television service, it is deemed appropriate to forestall this probable result by rescheduling the procedural dates

[1] While a corporation may be represented by one of its officers if he qualifies as an attorney under 47 CFR 1.23, and appears in his capacity as an attorney, nothing in the instant record indicates that the President of Symphony Network meets this requirement.

[2] It is recognized that the defects in the July 13, 1964, informal exchange might be cured by the formal exchange on July 20, 1964. However, in light of the fundamental nature of the deficiencies, this possibility is not deemed sufficiently likely to warrant delaying the issuance of the instant order.

herein, and affording the applicants an opportunity to reform their exhibits.[3]

Accordingly, IT IS ORDERED, this 14th day of July, 1964, that the petition for leave to amend filed by Chapman Radio and Television Company on July 6, 1964, IS DENIED, and the amendment tendered therewith IS REJECTED; and,

IT IS FURTHER ORDERED, on the Hearing Examiner's own motion, that the procedural dates established by the Hearing Examiner's order released herein on June 12, 1964, ARE CONTINUED as follows: informal exchange, from July 13, 1964 to August 17, 1964; formal exchange and notification of oral testimony, from July 20, 1964 to August 24, 1964; notification of witnesses, from July 24, 1964 to August 28, 1964; and commencement of hearing, from July 27, 1964 to September 1, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

CHESTER F. NAUMOWICZ, JR., *Hearing Examiner.*

BEN F. WAPLE, *Secretary.*

[3] Nothing herein shall be construed to foreclose or discourage either applicant from securing the services of counsel to assist in the further presentation of this case.

F.C.C. 64–643

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| S & W ENTERPRISES, INC., WOODBRIDGE, VA. | Docket No. 12993<br>File No. BP–11438 |
| INTERURBAN BROADCASTING CORP., LAUREL, MD. | Docket No. 12994<br>File No. BP–12058 |
| SCOTT BROADCASTING CORP. (WJWL), GEORGETOWN, DEL. | Docket No. 12995<br>File No. BP–12229 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS LEE, COX, AND LOEVINGER NOT PARTICIPATING.

1. The Commission has before it for consideration a petition for leave to amend its application, together with an amendment tendered therewith, and a supplement thereto, filed March 23, 1964 and May 19, 1964, respectively, by Interurban Broadcasting Corporation (Interurban), and related pleadings.[1] The petition for leave to amend arises from the fact that the unavailability of Interurban's transmitter site became known to the Commission only after oral argument on the exceptions to the Initial Decision had been heard before the Commission *en banc*, and prior to the issuance of the Commission's final decision in this proceeding.[2] Interurban originally had air space clearance of its proposed antenna site and tower. However, the subsequent construction of a new airport nearby caused the Federal Aviation Agency to withdraw the air space approval previously granted.

2. Following the Commission's letter of September 11, 1963, a series of reports have been filed by Interurban indicating the steps taken concerning acquisition of a new transmitter site which would

[1] Opposition of S & W Enterprises, Inc., filed April 6, 1964; comments of the Broadcast Bureau respecting the petition, filed April 7, 1964; reply, and petition for acceptance of reply, to Broadcast Bureau's comments, filed by S. & W Enterprises, Inc. on April 13, 1964; reply of Interurban, filed April 16, 1964, to pleadings directed to its petition for leave to amend; supplement to petition for leave to amend, filed May 19, 1964, by Interurban; and letter (dated May 21, 1964) filed May 21, 1964, by S & W Enterprises, Inc. opposing acceptance of the Supplement filed by Interurban.

[2] On July 11, 1963, the Chief, Broadcast Bureau filed a statement bringing to the Commission's attention the fact that questions existed regarding air space clearance of the proposed site and tower of Interurban Broadcasting Corporation. By letter dated September 11, 1963, the Commission advised Interurban that a question existed as to air space clearance of its proposed antenna site and tower; Interurban was granted 30 days within which to respond to the Broadcast Bureau's statement, filed July 11, 1963, giving full details as to the present status of the matter before the Federal Aviation Agency. On October 10, 1963, Interurban requested an extension of time to October 21, 1963, to respond to the statement of July 11, 1963. This request, which was unopposed, is granted; a responsive pleading was filed by Interurban on October 21, 1963.

meet with the approval of the Federal Aviation Agency.[3] In its "Final Report" filed March 16, 1964, Interurban indicated that it was then able to designate an alternate site, and was in the process of preparing an appropriate engineering amendment which it hoped to file within one week. Incorporated within this Report is a response to the S & W response to Interurban's "Second Further Report," the response setting forth the details of the problems which precluded Interurban from designating an alternate site at an earlier time. On March 23, 1964, Interurban filed its petition for leave to amend its application and tendered therewith an amendment designating a new transmitter site, to which responsive pleadings have been filed. Thereafter, Interurban tendered on May 18, 1964 a supplement to its previously tendered amendment asking that it be associated with the earlier tendered petition for leave to amend and the amendment.[4]

3. In support of its petition for leave to amend, Interurban asserts that good cause exists for submission of the amendment since the necessity of changing site arose only after oral argument had been held, and that it acted diligently to obtain a new site as reflected in the "Reports" filed earlier herein which are incorporated by reference. It is stated that the amendment does not require enlargement of the issues or the addition of new parties since no new or increased interference will be caused to any existing station or pending application. In this connection, reference is made to the engineering statement attached to the amendment which indicates that the only interference caused by or received from Interurban's application as originally filed (apart from interference to and from the mutually exclusive proposal for Woodbridge, Virginia) was interference to and from Station WJWL, Georgetown, Delaware; that no new interference will be caused or received as a result of the amendment; that Interurban's new site will be about 1900 feet further way from Georgetown than was the original site;[5] and that no change is proposed in any of the specifications or parameters of the directional array. Interurban points out also that the propagation path from Station WJWL to the proposed new site is almost the same as that to the original site. It is said that to

[3] S & W Enterprises, Inc. responded on March 5, 1964 to a "Second Further Report" filed by Interurban on February 24, 1964. In that Report, Interurban stated that it had been offered land on both sides of the Patuxent River for its transmitter site, that a decision had not been reached as to which side of the river should be designated, and that it was anticipated that the decision could be made "in the next few days", following which an appropriate engineering amendment would be prepared and tendered. S & W Enterprises, Inc. (S & W) submits that Interurban has had more than sufficient time to take whatever steps might be appropriate and that the time has passed when it should even be permitted to submit further amendments for consideration by the Commission. It is stated that if the Commission is not now prepared to grant the S & W application promptly on a comparative basis and deny Interurban, the Interurban application should be promptly dismissed for being patently defective and for the clearest lack of prosecution by the applicant since July 1, 1963, and that the application of S & W be granted. The Commission will address itself to these contentions in the discussion concerning the petition for leave to amend which S & W opposes, and where arguments similar to those set forth here are renewed.

[4] The supplement of May 18, 1964 is responsive to the comments of the Chief, Broadcast Bureau which were filed on April 7, 1964. The Bureau stated that it would interpose no objection to acceptance of the Interurban amendment and retention of the application in hearing status ". . . if the applicant can demonstrate that the proposed site will conform to the requirements as outlined in Section 73.24(g) of the rules [blanketing requirements]; submit a detailed photo of the site, and if it receives the necessary FAA air space clearance . . ." S & W submitted a reply to the Bureau's comments, asking that the reply be accepted as an "additional pleading" under Section 1.45 of the Rules. The Commission authorizes the filing of the reply. The reply states that the procedure suggested by the Bureau is inappropriate, and that the amendment filed by Interurban must be judged on its own merits, it being too late for further amendments. We reject this view in light of the circumstances which are present in this proceeding.

[5] The new site is approximately 4,900 feet on a bearing of 347° from the original site.

the extent that the site change might affect the interference picture between Station WJWL and the Interurban proposal, the result could only be a reduction in interference caused and received with respect to WJWL both as operating and as proposed.

4. The supplement [6] to the earlier tendered amendment includes an enlarged photograph showing the site and the blanket contour, and statements that there will be no population within the blanket area as observed from a house count, that there are no structures or man-made formations in the vicinity that will cause pattern distortion or reradiation, and that power lines along the road facing the site are of the low tension type usually found feeding residential areas, located approximately 3/10 of a mile from the site. Submitted also with the supplement are copies of an option to lease the property to be used as a new site, and a "Notice of Determination of No Hazard" issued May 12, 1964 by the Air Traffic Division, Eastern Region, Federal Aviation Agency.[7] Interurban states that on May 15, 1964, the County Commissioners of Prince George's County adopted a resolution granting a special exception for the construction of a radio transmitter facility at the designated site.

5. The question to be determined is whether good cause has been shown for grant of the petition for leave to amend. Section 1.522(b) of the Commission's Rules and Regulations sets forth the considerations which are controlling here with respect to Interurban's petition for leave to amend. As the Rule points out, requests to amend an application after it has been designated for hearing will be granted only for good cause shown. Where a request is made to amend an engineering proposal (other than to make changes with respect to the type of equipment specified) the Rule provides as follows:

> . . . good cause will be considered to have been shown only if, in addition to the usual good cause considerations, it is demonstrated that (1) the amendment is necessitated by events which the applicant could not reasonably have foreseen (e.g., notification of a new foreign station or loss of transmitter site by condemnation); (2) the amendment could not reasonably have been made prior to designation for hearing; and (3) the amendment does not require an enlargement of issues or the addition of new parties to the proceeding.

6. Diligence is an element of the complex of factors which constitutes good cause. S & W's argument regarding the lack of diligence by Interurban speaks in terms of the approximate nine-month period which has passed between formal notice from the Commission of the site problem and submission of the amendment.[8] It is suggested that the various reports filed by Interurban during the nine-month period contain no specific, detailed factual information concerning the steps taken to acquire a new site, the specific time period required and why. Instead, S & W asserts, Interurban submitted generalized, self-serving, and undocumented statements without the details of time, place, etc. needed to evaluate its efforts. S & W submits that Interurban's failure to show diligence is ap-

[6] S & W opposes acceptance of the supplement for the reasons given in its opposition to acceptance of the earlier tendered amendment.

[7] The Antenna Survey Branch of the Commission's Field Engineering Bureau confirmed on May 20, 1964 that Air Space approval had been granted.

[8] Approximately a seven-month period passed between formal notice and submission of the amendment, See footnote 2, *supra*.

parent, and that without such a showing the "good cause" required by Section 1.522 (b) of the Rules cannot be found.

7. Contrary to the position asserted by S & W, we believe that Interurban has shown that it has been diligent in seeking a new transmitter site, and in filing its petition for leave to amend. The reports filed by Interurban do not set forth in detail the time and places at which events occurred in its search for a new transmitter site. Recognizing that the acquisition of a new site presents a number of problems, lack of diligence is not demonstrated by failure to include in reports precise details as to all steps which are taken looking toward specification of a new site. It is enough that the applicant report, as Interurban did here, that continuing efforts are being made to acquire a new site.[9] Moreover, the reports filed by Interurban show a good faith effort on its part to keep the Commission informed as to the progress being made.

8. S & W submits that, apart from the failure to show diligence, the proposed amendment should be rejected because it is incomplete, ambiguous, and fails to show that the proposed site is available. As first filed, Interurban's amendment was deficient in these respects. As amended in the supplement, these deficiencies have been corrected. It would be harsh indeed in the circumstances shown herein to follow S & W's suggestion that rejection of the proposed amendment is the proper course to follow. The contention that another period of delay (to await zoning and aeronautical clearances) is introduced which should not be tolerated at this late point is not well taken. In short, S & W seeks to default the Interurban application as fatally defective. In view of the discussion which has been set forth above, we believe that such action is unwarranted.

9. Stating that a major thrust of Interurban's argument is that its proposed amendment should be accepted in order to give the Commission a choice between Woodbridge, Virginia, and Laurel, Maryland, under Section 307 (b) of the Act, S & W submits that 307 (b) considerations do not warrant acceptance of the proposed amendment. We disagree. Interurban has met the "usual good cause considerations", and the public interest would be served by permitting a choice to be made between the applicants under Section 307 (b) of the Act.

10. In addition to the "good cause" considerations, Section 1.522(b) of the Rules specifies three other considerations as to which good cause for amendment must be shown. See par. 5, *supra*. Interurban could not reasonably have foreseen that the Air Space approval of its transmitter site would be withdrawn because of the subsequent construction of an airport nearby. Nor, in the circumstances which have been referred to herein, could Interurban reasonably have made the amendment prior to the designation of these applications for hearing.

11. As a third element, Section 1.522 (b) provides that good cause

[9] S & W points out that extensions of time to file further reports were not granted by the Commission beyond October 21, 1963. In the nature of the proceeding, requests for extension of time to file additional reports were unnecessary in view of the unique circumstances attending the search for a new site.

will be considered to have been shown only if the amendment does not require an enlargement of issues or the addition of new parties to the proceeding. S & W does not contend that allowance of the amendment would require either enlargement of the issues or the addition of new parties. It does assert, however, that the change of approximately one mile in the transmitter site alters the locations of the several signal contours proposed by Interurban. As an example, S & W states that within the 5 mv/m contour now specified in the Interurban application there would be a population of 538,134, whereas within the same contour from the new proposed site there would be approximately 412,539 persons, or a loss of 125,595 persons. It is stated that "[it]is evident that there would be changes in other significant contours." Pointing out that this proceeding has involved such engineering considerations as the application of the 10% Rule and the significance of the several contours (2 mv/m, 5 mv/m and 10 mv/m) in terms of primary service to the areas involved, as well as Section 307(b) considerations, S & W submits that the proposed amendment fails to show what the true engineering impact would be upon the area in controversy. Because of the foregoing, S & W contends that acceptance of the amendment would require reopening of the record to review the consequences of the new enginering, permit its testing in the hearing process, and permit further consideration of the case by the Commission. It is also contended that if the record is reopened it would be necessary to rely upon 1960 population figures since the hearing was held upon the basis of 1950 Census figures essentially. The foregoing considerations, it is said, require denial of the petition for leave to amend, and termination of the proceeding.

12. In reply to S & W, Interurban asserts that even if it is assumed that population changes of the magnitude claimed by S & W might occur within the 5 mv/m contour, this is of no consequence to any issue in the proceeding and that it creates no reason to assume that any changes adverse to Interurban would occur in any of the contours whose change could have an effect in this proceeding. Interurban submits that the only significance of the 5 mv/m contour herein is its coverage of the city of Laurel, and that the proposed amendment will not in any way affect this coverage. Adverting to its engineering statement to the effect that the site change reduces interference both caused to and received from Station WJWL in a degree too minute to be subject to exact calculation, and to the Bureau's statement that the site change will not significantly alter any of the contour locations, interference areas and population data, Interurban states that if S & W had any relevant data controverting these determinations it should have been set forth in its opposition pleadings.

13. We agree with the Broadcast Bureau and Interurban that the change of transmitter site will not significantly alter any of the contour locations, interference areas, and population data. S & W's reference to the population change within the 5 mv/m contour is not of significance inasmuch as it does not contend that Interurban will fail to provide a minimum field intensity of 5 to 10 mv/m over the most distant residential section of Laurel, Maryland. For the foregoing reasons, no need exists to reopen the

record herein to review the consequences of the new engineering data and to permit its testing in the hearing process.

14. In summary, good cause has been shown by Interurban for grant of its petition for leave to amend, and for acceptance of the amendment, as supplemented, to its application. Good cause is found in the following circumstances: Interurban acted diligently in seeking a new transmitter site; the effect of the amendment is *de minimis;* the amendment requires neither enlargement of the issues nor the addition of new parties to the proceeding; the amendment does not give Interurban a competitive advantage in the Section 307(b) considerations; the amendment is necessitated by events which Interurban could not reasonably have foreseen; the amendment could not reasonably have been made prior to designation for hearing; reopening of the record is not required; and any delay which has occurred in the progress of the proceeding has come about by events which were beyond the applicant's control.

15. In view of the foregoing, IT IS ORDERED, this 15th day of July, 1964, That the above-described petition for leave to amend application filed on March 23, 1964 by Interurban Broadcasting Corporation IS GRANTED; and

IT IS FURTHER ORDERED, That the amendment to the application, tendered for filing on March 23, 1964 and as supplemented on May 19, 1964, IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–659

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>JOHN A. BARNETT, ROSWELL, N.MEX.<br>Requests: 1020 kc., 10 kw., 50 kw.–LS,<br>DA–2, U, Class II–A<br>For Construction Permit | File No. BP–15668 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE, LEE, AND FORD DISSENTING.

1. The Commission has before it for consideration the "Petition to Deny by Westinghouse Broadcasting Company, Inc.," licensee of Station KDKA, Pittsburgh, Pennsylvania, on October 25, 1962 directed against the grant of the above-captioned application.

2. The petitioner claims that a grant of the pending application would be contrary to the public interest because:

(a) Operation of the proposed Class II–A station in Roswell on 1020kc, will foreclose the use of higher power by KDKA in the event higher power is subsequently authorized by either the Commission or the Congress;

(b) In the event higher power is subsequently authorized, the grant will foreclose the Commission in meeting its statutory duty to allocate higher power stations in an equitable manner among the various states;

(c) The grant of the application would be contrary to the view expressed in House Resolution No. 714 adopted July 2, 1962.

(d) The grant of the application would cause destructive interference to a large portion of the existing secondary service area of Station KDKA.

KDKA states that it has not received the modification notice required by Section 316 of the Act nor has it been given an opportunity to show cause why such an order of modification should not be issued.

3. KDKA does not make any specific allegations of standing, but claims that a grant of this application would cause electrical interference to the secondary service area of KDKA. However, the petitioner did not submit any engineering study setting forth the loss of population in support of its claim of electrical interference. The Commission has studied the proposal and has found that no electrical interference is, in fact, caused to the secondary service area of KDKA, under the Commission's Rules in force subsequent to the Clear Channel decision adopted September 13,

1961.[1] Therefore, the threshold question presented is whether Station KDKA has standing to file this petition to deny. Under the doctrine of *Interstate Broadcasting Company* v. *FCC*, 285 F.2d 270, 20 R.R. 2112 (1960) a station has standing if it pleads *with specificity*, the losses beyond its normally protected contour. Here no showing has been made to meet the specificity requirements of the *Interstate Case*. In a series of cases the Commission has conferred standing under the doctrine of *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 9 R.R. 2008 (1940), only if the alleged injury was direct and immediate and more than nominal or highly speculative. *In re Application of National Broadcasting Co., Inc.* 15 R.R. 611 (1953). *In re Application of Central Wisconsin Television, Inc.* 24 R.R. 912 (1963). Upon consideration of the pleading of KDKA, we find that KDKA lacks standing to file the petition to deny because this Roswell Class II–A proposal does not cause any interference within the normally protected contours of the existing operation of KDKA, and any interference that would be caused to a higher power operation of KDKA would be speculative in nature. Accordingly, the petition of KDKA will be dismissed for lack of standing. Since this proposal will not cause interference to Station KDKA, a grant thereof would not modify the license of Station KDKA and therefore the notification provisions of Section 316 of the Act are not applicable.

4. In view of the foregoing the Commission concludes that Station KDKA is not a party in interest under Section 309 of the Communications Act of 1934, as amended and its petition will be dismissed for lack of standing, and the Commission further finds that a grant of the application will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the petition to deny filed by Westinghouse Broadcasting Company IS DISMISSED, and that the above-captioned application IS GRANTED upon the conditions and specifications contained in the construction permit.

Adopted July 15, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

[1] 21 R.R. 1801. The Clear Channel decision, the Commission's denials of petitions for reconsiderations (including the Westinghouse petition for reconsideration) and the rejection of tendered 750 kilowatt applications were sustained by the United States Court of Appeals for the District of Columbia Circuit in the case of *The Goodwill Stations, Inc.* v. *FCC*, 325 F.2d 637, 1 R.R. 2d 2040, (1963).

F.C.C. 64–655

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>PARKER PARKER ET AL. (TRANSFERORS)<br>and<br>PAT LEA ET AL. (TRANSFEREES)<br>For Transfer of Control of Central Arkansas Broadcasting Co., Inc., Permittee of Station KCAB, Dardanelle, Ark. | File No. BTC–4429 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX DISSENTING.

1. The Commission has before it (1) the above-captioned application; (2) a Petition to Deny, filed on January 3, 1964, by C. R. Horne, tr/as The Valley Broadcasters (Valley), the licensee of Station KXRJ, Russellville, Arkansas; and (3) pleadings responsive thereto.

2. The Petitioner alleges that the transfer application should be denied or designated for hearing because the principals of the permittee effected an unauthorized transfer of control without the prior consent of the Commission; the principals misrepresented certain information to the Commission; the principals did not file certain information as required by Section 1.613 and 1.615 of the Rules of this Commission; and the economic impact of a new station in Dardanelle would be detrimental to the public interest. In a "Supplement to the Petition to Deny", filed on January 29, 1964, Petitioner further alleged that certain alleged violations of the Arkansas laws for the public issuance of securities raised other substantial and material questions.

3. The applicants' response to the Petition to Deny alleged that the Petitioner did not have standing to attack the subject transfer application; that there had been no unauthorized transfer of control; the applicants had made no misrepresentations; that any violations of statutes or regulations were made in good faith, and that steps had been taken to rectify them; and that the Dardanelle area had the economic ability to support another station with no harm to the public interest.

4. The petitioner has shown that he is a party in interest in regard to this transfer application. The petitioner operates a station in a community which is less than 10 miles from Dardanelle, and he has made an uncontested allegation that 16 of the proposed transferees of KCAB are area businessmen who spent approximately $15,000 in annual advertising on his station, KXRJ.

The fact that the proposed transfer poses a direct threat of the loss of substantial advertising revenue to the Petitioner establishes him as a party in interest. cf. *Camden Radio, Inc.* v. *FCC*, 220 F. 2d 191, 10 Pike & Fischer RR 2072 (1954); *General Times Television Corp.*, 13 Pike & Fischer RR 1049 (1956); and *The Central Connecticut Broadcasting Company*, 1 Pike & Fischer RR 2d 639 (1963).

5. Although the Petitioner has shown private injury from the proposed transfer, he has not raised material and substantial questions of fact and after a consideration of the pleadings we have determined that a grant of the application would serve the public interest, convenience, and necessity. The Petition contains several speculative allegations about the qualifications of the applicants but the Petitioner has not supported them with proper allegations of specific facts sufficient to show a grant of the application would be *prima facie* inconsistent with the public interest, as provided in Section 309(d)(1) of the Act.

6. The Petitioner's only allegation of misconduct by the applicants which is partially substantiated by the information before us is the allegation that the applicant had failed to report within 30 days certain changes in officers, owners, and directors, and certain contracts so as to violate Sections 1.613 and 1.615 of the Commission's Rules. Subsequent to August 9, 1963 certain individuals resigned from their positions as officers and directors and there were changes in the officers, directors and owners of the permittee. Although some of these changes were not reported within 30 days, they all were correctly reported by October 21, 1963. There is no evidence that the permittee attempted to deceive this Commission. There are no remaining substantial and material questions of fact concerning these transgressions, and we do not find that the conduct of the applicants disqualifies them as licensees.

7. The allegations of an unauthorized transfer of control [1] to the 25 transferees in the subject application is based on certain changes of financial plans; certain changes in personnel, including the fact that one of the transferees, Pat Lea, has been Treasurer and a director of Central Arkansas since September 10, 1963; and a discrepency in the reported date for Mr. Lea's agreement to purchase stock. To counter this allegation, the applicants have stated unequivocally that "the transferees have no voting rights in Central until such time as the Federal Communications approves the transfer." The Petitioner alleged that some of the transferees agreed to purchase stock because they were promised a 10% discount on advertising, but he presents no affidavit from a person with personal knowledge of such agreements, and each of the transferees submitted a sworn statement "that no person or corporation promised me I would receive a ten (10) percent discount on all future advertising, if I would purchase said stock."

[1] Although the original subscribers to 180 of 330 of the permittee's shares have withdrawn from the operation of the station, we do not find that their withdrawal amounted to a transfer of control because no individual or group in privity increased stock holdings to 50% or more, and no such individual or group decreased holdings so as to lose affirmative or negative control. In addition, all of the stock of the permittee was held by persons approved by the Commission.

Without passing on the timeliness of petitioner's allegations that violations of Arkansas securities regulations raised questions about the qualifications of the applicants, we find that no substantial question exists in view of the corrective measures which satisfied the Arkansas Securities Commissioner. Petitioner alleges that the changed role of W. Lyle Sturtevant, editor and publisher of the weekly *Dardanelle Post-Dispatch,* indicates that earlier representations to this Commission were false. We are of course concerned with the role of this editor of the only local newspaper, but his proposed role as officer, director, and holder of 60 of 330 shares is substantially similar to that proposed in the application for the construction permit, and the applicants have stated KCAB will operate independently of Mr. Sturtevant's newspaper and in no way will be affiliated with the newspaper. It is also noted that the *Post-Dispatch* is a weekly paper and that several other daily newspapers and broadcast stations serve the area.

8. Petitioner's attempt to raise issues of economic impact detrimental to the public interest, such as those considered in *Carroll Broadcasting Co.* v. *FCC,* 258 F. 2d 440, 17 Pike and Fischer RR 2066 (1958); is untimely because petitioner has given no grounds to show that the problem is now more acute that it was at the time of the grant of the original construction permit in July, 1963. A petitioner who has neglected a timely opportunity to raise such economic questions cannot at petitioner's convenience play the role of a vigilante, *Desert Telecasting,* 1 Pike & Fischer RR 2d 132 (1963); *Robert J. Thomas (WCCB–TV),* 1 Pike & Fischer RR 2d 1047 (1964). Furthermore, the Petitioner has made no *prima facie* showing that the advent of another station would harm the public interest. The allegation that the area cannot generate enough revenue for another station is supported only by reference to a slight population loss for Yell and Pope counties between 1950 and 1960, and an alleged decline of $800,000 in the effective buying power of Pope County between 1961 and 1962. The applicants have countered with many other statistics indicating economic growth, and the 1962 financial reports filed with this Commission show that the 6 stations in the area of Dardanelle had aggregate gross revenue of $264,904, expenses of $204,030, and net revenue of $60,874, with only one station showing a net loss. More basically, petitioner has made no specific showing of any public, as distinguished from private, injury which would result from the proposed transfer, and operation of KCAB.

9. In view of the fact that the Commission granted initial program test authority on March 24, 1964, while this application was pending, Section 1.597 of the Commission Rules (the "three-year" Rule) is applicable. We note, however, that the proposed transfer arose from the unusual circumstances of a *bona fide* dispute which led to the withdrawal of the subscribers for a majority of the stock of the licensee; that none of the principals involved have any other past or present broadcast ownership interests; and that no element of trafficking or disruption of service appears. Accordingly, a waiver of Section 1.597 is warranted.

10. In view of the foregoing, IT IS ORDERED, this 15th day

of July, 1964, that the Petition to Deny filed by C. R. Horne, tr/as The Valley Broadcasters, IS HEREBY DENIED; that Section 1.597 is waived with respect to this application; and that the above-described application IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–656

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>WRATHER CORP. (ASSIGNOR)<br>and<br>WPIX, INC. (ASSIGNEE)<br>For Assignment of License of Station<br>WBFM, New York, N.Y. | File No. BASCA–138; BAPLH–51 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS FORD AND COX DISSENTING.

1. The Commission has before it for consideration (a) the above-captioned applications; (b) a petition filed February 18, 1964 by the National Association of Broadcast Employees and Technicians, AFL-CIO (NABET) to deny said applications or alternatively to designate them for hearing and allow NABET to intervene as a party in interest; (c) pleadings relating to said petition; (d) a supplemental petition filed May 19, 1964 by NABET; and (e) pleadings relating thereto.

2. Petitioner alleges in its first petition that since November, 1961 it has engaged in collective bargaining, pursuant to certification by the National Labor Relations Board (N.L.R.B.), to establish the wages, hours, and working conditions of the employees of the station in an appropriate bargaining unit of "approximately six employees classified as operators and operators-engineers;" that there is in effect a collective bargaining agreement between NABET and Station WBFM which will expire November 6, 1964; that the buyer in the subject applications, in answer to a letter from NABET asking if the buyer would also recognize NABET as the bargaining representative by becoming a party to the agreement, stated that the retention of assignor's personnel was not included in the contract to sell and that it did not expect it would need additional technical personnel because it had a substantial staff in connection with its television station; and that this refusal by the buyer to agree to assume NABET's collective bargaining agreement with the seller constitutes sufficient allegations that petitioner will suffer injury of a direct, tangible and substantial nature as a result of this assignment and, as such, establishes NABET as a party in interest.

3. NABET further alleges that a grant of this application would be *prima facie* inconsistent with the public interest, convenience and necessity because the buyer's alleged refusal to bargain collectively contravenes national labor policy. NABET's petition is accompanied by an affidavit from Eleanor Belack,

NABET's regional representative in New York City, and copies of her letters to and the reply from the buyer concerning its adherence to the collective bargaining agreement.

4. In its opposition to the petition the buyer, WPIX, Inc., alleges that NABET's argument that all of the workers it represents would be fired is speculative since in its letter to NABET it stated that "We may wish to consider the qualifications of some of the present WBFM employees, if we find a need when our plans are further along." The buyer further alleged that this question of individual workers' rights is a matter of private rights and is not within the Commission's jurisdiction; that the Commission is not the proper forum before which such rights should be adjudicated; that if Congress had wanted the Commission to have this jurisdiction it would have specifically so stated; that there is no national labor policy question here as the buyer's engineering department employees at its television station have been unionized since 1948 by International Brotherhood of Electrical Workers (IBEW); that IBEW and NABET are "rival unions" and that this is not a question of union versus non-union but of union versus union. The buyer's opposition includes an affidavit from L. J. Pope stating that he is Vice-President in Charge of Operations for WPIX ,Inc.; that he wrote the letter answering NABET's query about the buyer's proposed labor relations policies; that his primary reason for taking this position about not agreeing to take over the seller's employees or their union contract was that WPIX, Inc., has had a longstanding collective bargaining relation with Radio and Television Broadcast Engineers' Union, Local 1212, IBEW, AFL-CIO; and that the contract provides that the union's jurisdiction extends to all employees engaged in "radio broadcast" operations.

5. In its separate Opposition to the Petition the seller, Wrather Corp., concedes that the petitioner has alleged facts sufficient to give it standing as a party in interest under Section 309(d) of the Communications Act. However, it alleges that the private employment rights of the six workers concerned should not be adjudicated by the Commission but before some more suitable forum; that as a matter of "established contract law in New York" a reference "to successors and assigns" of the employer in the preamble or recitals of a labor contract forms no part of the contract itself and as a consequence such a contract is not assignable to a succeeding employer without his consent; and that no national labor policy will be violated because the buyer has other union contracts and is willing to negotiate with anyone who will be employed by the station.

6. In its reply to the two Oppositions NABET argues that if the jobs and job rights of the six persons now working for WBFM are to be extinguished, some proof of countervailing considerations of the public interest should be offered; that since none have been advanced, a hearing is required to determine if the public interest will be served by the sale of a radio station entailing the possible loss of jobs by six persons. NABET also alleges that the national labor policy issue turns not on a question of whether the National

Labor Relations Act has been violated "but instead whether the proposed buyer has showed a disposition to ignore national labor policy to encourage collective bargaining."

7. On May 19, 1964, NABET filed a supplemental petition to deny this application restating that the question is whether the proposed buyer "has shown a disposition to ignore national labor policy to encourage collective bargaining" and discussing the recently decided case of *John Wiley & Sons, Inc.* v. *Livingston*, —, U.S. —, 11 L. Ed. 2d. 898, 84 S. Ct. —, 32 U.S.L. Week, 4285 in which the Supreme Court answered in the affirmative the question of "whether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer . . ." (11 L.Ed. 2d at 901). NABET argued that that decision requires the buyer here, WPIX, Inc., to become a party to the collective bargaining agreement between NABET and Wrather Corporation and that by failing to state in advance of the grant of the assignment that it will become such a party is in violation of national labor policy.

8. Oppositions to this supplemental petition were filed by both Wrather and WPIX, Inc. Wrather contends that the petition is untimely and not in accordance with Section 1.45(c) of the Commission's Rules;[1] and argues that the *Wiley* case, involves solely an arbitration issue, a question whether the merger of a unionized corporation into a non-unionized corporation relieved the survivor of the duty to arbitrate assimilated employee's grievances pursuant to the unionized corporation's premerger bargaining contract; that the case does not apply to this transaction because there was no other union involved, whereas WPIX, Inc., is a party to a collective bargaining agreement, albeit with another union; that the Commission can only be concerned with the questions of "(1) whether the buyer has exhibited hostility toward employees and (2) whether the assignee intends to deny any employees any rights safe-guarded to them by law and by national labor policy"; and that neither question is here involved.

9. WPIX, Inc., in its opposition to the supplemental petition, also argues that *Wiley* is distinguishable from this assignment, and advances arguments similar to those of Wrather, stressing that *Wiley* concerned a merger of two corporations, not a sale by a corporation of one relatively small part of its business; and that the Supreme Court had indicated (in a footnote, at 11 L.Ed. 2d. 906), that a different result might have been reached if another union were affiliated with the merged corporation. In response to NABET's assertion that consummation of this assignment would subject WPIX to various legal actions by NABET involving breach of contract and charges of unfair labor practice, WPIX stated that if such suits would be brought in the proper forums they would be answered.

10. The Commission is of the opinion that NABET has demonstrated that it is a party in interest. *Rockford Broadcasters, Inc.* 1 Pike & Fischer RR 2d. 405 (1963) and *Transcontinent Television*

[1] Section 1.45(c) provides: Additional pleadings may be filed only if specifically requested or authorized by the Commission.

*Corporation* 21 Pike and Fischer RR 945 (1961). However, we are of the view that NABET has failed to allege any matter demonstrating that a grant of the above-captioned application would not serve the public interest.

11. NABET's objections to this assignment are, in effect, centered in two principal issues: (1) whether an assignment which may result in the loss of jobs by employees of the station currently represented by NABET under a contract expiring November 6, 1964 is in the public interest; and (2) whether the refusal of WPIX, Inc. to assume the contract between NABET and the assignor's employees (even though it intends to continue its collective bargaining relation with another union) contravenes national labor policies and is *prima facie* inconsistent with the public interest.

12. The issue of the claim of continuing job rights by the six technical employees of WBFM, even after a station sale, is not a matter within this Commission's jurisdiction. We have long held that such claims must be brought in the appropriate forum, be it the civil courts or before the NLRB. *Transcontinent Television Corporation* (op. cit.) and *A. A. Schmidt* 14 Pike and Fischer RR 1156 (1957).

13. As to whether WPIX Inc.'s position, in regard to becoming a party to or assuming the contract with NABET, violates or demonstrates a disposition to ignore national labor policy we think it does neither. WPIX Inc.'s pleading contains uncontroverted representations concerning the existence of its present collective bargaining agreements and its intentions not to deny union representation to any future employees of WBFM. If it is later determined by appropriate authorities that WPIX, Inc.'s actions did constitute an unfair labor practice it would appear to be a conclusion reached from a reasonable difference in interpretation and not one reflecting on the character qualification of the assignee. Cf. *Greater Huntington Radio Corp.*, 14 Pike & Fischer RR 270c (1956). Although the Commission is not bound to consider any new matter contained in NABET's supplemental petition not filed in accordance with Commission Rule 1.45(c) we have nevertheless carefully considered the *John Wiley & Sons* case and conclude it is not applicable to the facts of the subject dispute.

14. In view of the foregoing IT IS ORDERED That the Petition to Deny applications filed by NABET is DENIED.

Adopted July 15, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

F.C.C. 64R–383

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>MARIETTA BROADCASTING CO., INC. (WBIE),<br>MARIETTA, GA. | Docket No. 15319<br>File No. BP–15405 |
| SHERIDAN W. PRUETT AND CHARLES M.<br>ERHARD, JR., D.B.A. COBB COUNTY BROAD-<br>CASTING CO., MARIETTA, GA.<br>For Construction Permits | Docket No. 15320<br>File No. BP–15443 |

ORDER

BY THE REVIEW BOARD:

The Review Board having before it for consideration the joint request for approval of agreement and dismissal of application, filed April 1, 1964, by Marietta Broadcasting Company, Inc. (WBIE) and Sheridan W. Pruett and Charles M. Erhard, Jr., d/b as Cobb County Broadcasting Company;[1]

IT APPEARING, That by Memorandum Opinion and Order (FCC 64R–290), released May 26, 1964, the Review Board found the agreement in compliance with applicable Commission Rules, but in the absence of supporting evidence could not find that withdrawal of the Cobb County application would be consistent with Section 307(b) of the Communications Act; and

IT FURTHER APPEARING, That the Review Board held the joint request in abeyance until completion of publication pursuant to Rule 1.525(b)(2); and

IT FURTHER APPEARING, That such publication has taken place; and that the requisite notice of publication has been filed with the Commission pursuant to Rule 1.525(b)(5); and

IT FURTHER APPEARING, That thirty days have elapsed since completion of publication; and that no further application has been filed; and

IT FURTHER APPEARING, That the above dismissal is consistent with the public interest, convenience and necessity; that with a dismissal of the Cobb application, there remain no impediments or oppositions to grant of the Marietta application; and that such grant would likewise be consistent with the public interest, convenience and necessity;

IT IS ORDERED, This 17th day of July, 1964, That, the dismissal agreement submitted with the foregoing joint request IS

[1] Before the Review Board for consideration are: (1) Joint request for approval of agreement and dismissal of application, filed April 1, 1964, by Marietta Broadcasting Company, Inc. (WBIE), and Cobb County Broadcasting Company; (2) related affidavits, filed May 5, 1964, by Cobb County; (3) response, filed April 14, 1964, by the Broadcast Bureau; and (4) petition to enlarge issues, filed February 26, 1964, by Marietta Broadcasting Company, Inc.

APPROVED, that the said joint request IS GRANTED, and that the application of Cobb County Broadcasting Company for a construction permit for a new standard broadcast station at Marietta, Georgia, IS DISMISSED; and

IT IS FURTHER ORDERED, That the application of Marietta Broadcasting Company, Inc. (WBIE), for a construction permit for a new standard broadcast station at Marietta, Georgia, IS GRANTED; and

IT IS FURTHER ORDERED, That, pending a final decision in Docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission Rules are not extended to this authorization, and such operation is precluded; and

IT IS FURTHER ORDERED, That the construction permit shall contain a condition that Marietta shall accept any interference that may result in the event of a subsequent grant of the application of WFLI, Inc. (BMP–8439), Lookout Mountain, Tennessee; and

IT IS FURTHER ORDERED, That the petition to enlarge issues, filed on February 26, 1964, by Marietta Broadcasting Company, Inc. (WBIE), IS DISMISSED, and this proceeding IS TERMINATED.

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

F.C.C. 64R–382

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of OTTAWA BROADCASTING CORP. (WJBL), HOLLAND, MICH. For Construction Permit | Docket No. 15180 File No. BP–15189 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Broadcast Bureau, pursuant to Section 1.301 of the Commission's Rules, appeals from a ruling of the Hearing Examiner, granting a petition for leave to amend the above-captioned application.[1]

2. A brief chronology of events in this case would prove helpful to its understanding. Ottawa Broadcasting Corporation (WJBL) is the licensee of Station WJBL, Holland, Michigan, which operates on 1260 kc with 5kw power, directional antenna, daytime. The application which is the subject of this proceeding proposes nighttime operation on the same frequency with 1 kw power, using a different directional pattern for nighttime operation. This application was filed on November 6, 1961. On May 1, 1963, WJBL amended its application by specifying the use of a new antenna site and modifying its proposed directional antenna system. The Commission, on September 27, 1963, released a Memorandum Opinion and Order, FCC 63–880, designating the application for hearing on issues involving areas and populations; interference caused to Station WFBM, Indianapolis, Indiana, or any other existing standard broadcast stations; and Section 3.28(d) (3) (now 73.28(d) (3)) of the Rules.

3. Following a prehearing conference held on October 23, 1963, the Examiner, by Order, FCC 63M–1174, released October 25, 1963, scheduled December 2, as the date for the informal exchange of written case material; December 16, for the formal exchange of the applicant's direct case; December 27, for the notification of witnesses; and January 7, 1964, as the date for the commencement of the hearing. These dates were subsequently postponed three times by the Hearing Examiner, at the request of WJBL with no objections from WFBM or the Broadcast Bureau. Two of these requests to postpone were, WJBL contended, caused by its inability to take measurements at a new antenna site due to inclement weather and contractor work schedules; and the third

[1] The Review Board has the following pleadings under consideration: (1) Broadcast Bureau's appeal from Examiner's ruling, filed June 1, 1964; and (2) a joint opposition thereto, filed June 11, 1964, by Ottawa Broadcasting Corporation and Time-Life Broadcast, Inc.

was caused by a request of the Broadcast Bureau for further measurements. On May 6, 1964, WJBL requested a further postponement to afford it a sufficient amount of time to have a determination of its petition to amend and to "complete the necessary engineering and non-engineering exhibits with resulting changes from accepted amendments . . ." The Broadcast Bureau opposed, but the Examiner, by Order, FCC 64M–437, released May 19, 1964, granted the petition and rescheduled the dates, as follows: July 1, for the informal exchange of engineering material; July 13, and the formal exchange of the applicant's direct case; July 21, for the notification of witnesses; and July 28, 1964, for the commencement of the hearing.

4. On May 11, 1964, WJBL filed a petition for leave to amend its application and submitted an amendment modifying the proposed antenna array so as to provide better protection for WFBM. By Memorandum Opinion and Order (FCC 64M–450) released May 22, 1964, the Examiner granted the petition and accepted the amendment, based mainly on WJBL's allegation that it had no indication that a question of interference to WFBM existed, after its May 1963 amendment, until the designation Order was released.

5. In its petition, the Broadcast Bureau contends that WJBL's amendment fails to meet the requirements of Section 1.522(b) of the Rules, which provides that engineering amendments after designation will be permitted only if, among other things, the amendment is necessitated by events which the applicant could not reasonably have foreseen and the amendment could not reasonably have been made prior to designation for hearing. The Bureau points out that WJBL did not file the proferred amendment until nearly eight months after release of the designation Order, and contends that WJBL had knowledge of the possibility of interference to Station WFBM for as long as two years prior to the release of the hearing Order; and that an "unsupported engineering judgment" of the parties that WJBL's nighttime proposal would not cause interference to WFBM does not constitute compliance with Section 1.522(b) of the Rules. In support of its contentions, the Bureau cites *Rockland Broadcasting Co.*, FCC 62–581, 23 RR 314a, reconsideration denied, *sub nom, Delaware Valley Broadcasting Co.*, FCC 62–969, 23 RR 316 (1962); *Lake-Valley Broadcasters, Inc.*, FCC 64R–46, 1 RR 2d 1090 (1964); *Robert L. Lippert*, FCC 61–7, 21 RR 60 (1961); and *Skyline Broadcasters, Inc.*, FCC 61–72, 21 RR 152 (1962).

6. In their joint opposition, WJBL and Time-Life Broadcast, Inc., licensee of Station WFBM, allege that the parties discussed the possible engineering problems in December of 1962; that, relying upon the judgment of its engineers, WJBL, in May of 1963, submitted an engineering amendment designed to protect all existing stations; that WFBM raised no objections to the May, 1963, amendment and indicated that the amended pattern offered adequate protection; that no facts tending to show that WJBL might have been mistaken in relying upon its May, 1963, amendment came to light during the interval between the filing of the amendment and the designation for hearing; and that, therefore, WJBL

could not have reasonably foreseen or submitted the proper amendment before designation for hearing.

7. WJBL and WFBM further contend that the engineering changes in the recent amendment are "minimal"; that the eight-month delay after designation for hearing was caused by difficulties resulting from the forced move of WJBL's transmitter site; and that the cases cited by the Bureau are distinguishable because in all of those cases the applicants were aware of the interference problems long before their applications were designated for hearing. WJBL and WFBM request oral argument on the Bureau's petition.

8. The Review Board is of the opinion that the amendment here should be allowed. The cases cited by the Broadcast Bureau all involved situations where the applicant knew or should have known of the interference problem at the time an issue was designated. Here, WJBL, with the concurrence of WFBM, the station with which the interference problem existed, concluded, on the basis of advice of engineering counsel, that it had solved the problem prior to designation. Moreover, the amendment involved is minimal in nature [2], and its acceptance would simplify the hearing and eliminate the interference to Station WFBM. Finally, it does not appear, nor does the Bureau contend, that allowance of the amendment would result in prejudice to any of the parties, that it would require the addition of new parties or issues, that it would delay the proceeding, or that it would have any other undesirable effects.

9. Under these circumstances, the Board concludes that allowance of the subject amendment is warranted. See *Pinellas Radio Co.*, FCC 63R–125, 25 RR 100 (1963). The request for oral argument in connection with this matter will be denied. It is not the Board's practice to hold oral argument with respect to interlocutory matters except in the most unusual circumstances.

Accordingly, IT IS ORDERED, This 17th day of July, 1964, That the Broadcast Bureau's Appeal from Examiner's Ruling, filed June 1, 1964, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] WJBL's amendment involves a change in its directional pattern by changing the current and phase ratios slightly so that the signal radiation from the minor lobes of the pattern in the direction of WFBM have been reduced to eliminate the interference to WFBM. There is a slight increase in radiation in the major lobe (2.2%). The maximum expected operating values (MEOV) either have not been changed or have been decreased on certain azimuths, and the proposed coverage remains practically unchanged.

F.C.C. 64R–394

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of | |
| WHDH, INC., BOSTON, MASS. | Docket No. 8739<br>File No. BPCT–248 |
| GREATER BOSTON TELEVISION CORP., BOSTON, MASS.<br>For Construction Permits for New Television Stations (Channel 5) | Docket No. 11070<br>File No.<br>BPCT–1657 |
| In Re Applications of | |
| WHDH, INC., BOSTON, MASS.<br>For renewal of license | Docket No. 15204<br>File No. BRCT–530 |
| CHARLES RIVER CIVIC TELEVISION, INC., BOSTON, MASS. | Docket No. 15205<br>File No.<br>BPCT–3164 |
| BOSTON BROADCASTERS, INC., BOSTON, MASS. | Docket No. 15206<br>File No.<br>BPCT–3170 |
| GREATER BOSTON TV CO., INC., BOSTON, MASS.<br>For Construction Permits for New VHF Television Broadcast Stations | Docket No. 15207<br>File No.<br>BPCT–3171 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Boston Broadcasters, Inc. (BBI) petitions the Review Board to enlarge issues with respect to WHDH, Inc. (WHDH), the existing licensee in this comparative proceeding, to determine whether there has been an unauthorized transfer of control of WHDH and whether WHDH possesses the requisite character qualifications to be a Commission licensee in light of the facts developed under the former issue.[1]

2. In a similar petition to enlarge issues filed November 18, 1963, Charles River Civic Television, Inc. (Charles River) also urged that an unauthorized transfer of control of WHDH had occurred through transfers of stock of the Boston Herald-Traveler Corp. (Herald-Traveler)[2] by officers, directors and others owning 1% or more of its stock. Charles River suggested that control of a widely-held corporation rests with that group of stockholders whose stock transfers must be reported to the Commission and

[1] The pleadings before the Review Board include: (1) Petition to enlarge issues, filed May 13, 1964, by Boston Broadcasters, Inc.; (2) Opposition, filed June 8, 1964, by WHDH, Inc.; (3) Opposition, filed June 8, 1964, by the Broadcast Bureau; and (4) Reply, filed June 15, 1964, by petitioner.

[2] WHDH is wholly-owned by the Herald-Traveler which, itself, is a widely-held corporation.

pointed out that those stockholders who owned 100% of the "control group" stock of Herald-Traveler in 1954 now own only 37.5% of the new "control group." The Review Board denied Charles River's requested enlargement in a Memorandum Opinion and Order (FCC 64R–128) released March 12, 1964, on the basis that the 1954 "control group" did not have *de jure* control and that Charles River had failed to show that it had *de facto* control.

3. BBI's contention that *de facto* control of WHDH has been transferred is based upon an earlier Commission Decision (*WHDH, Inc.*, 22 FCC 767, 13 RR 507 (1957)). Petitioner points out Paragraph 14 of that Decision, wherein the Commission found that Sidney Winslow, Jr. and his family owned the principal holding (about 23%) in Herald-Traveler and that Winslow, the president, was a "major factor" on the Board of Directors, and that Winslow was one of three members of a Standing Proxy Committee, which, at the annual stockholders' meeting of Herald-Traveler in March of 1954, voted over 80% of all of the shares that were voted. These facts, BBI contends, are a *prima facie* indication that Winslow had *de facto* control of Herald-Traveler in 1954. Since Winslow died on July 14, 1963, and since only one member of the original proxy committee remains today, BBI alleges that a shift in *de facto* control can be assumed. Also noted by BBI is the additional finding by the Commission in paragraph 5 of the cited decision, that Winslow as president of Herald-Traveler voted all of the stock of WHDH, Inc. BBI also attempts to trace a transfer in *de jure* control in that more than 50% of the Herald-Traveler stock is now held by persons who have acquired such interests since 1954. Petitioner points out that ownership reports filed by WHDH through April 13, 1964, reflect total stockholdings (ranging from .01% to 12.22%) of persons who are strangers to the original 1954 applicant in the amount of 52.59% of the total Herald-Traveler stock issued and outstanding.[3] The ownership reports, according to BBI, also show that the 1954 officers, directors and 1% or more stockholders have reduced their interests from 31.95% to 6.551% of Herald-Traveler stock. Since the original owners of WHDH no longer own 50% of the licensee's parent corporation and since the Commission's prior consent to such a transfer of control has not been sought or granted, BBI contends that Section 310(b) of the Communications Act has been violated and that such violation raises a question concerning WHDH's character qualifications.[4]

4. Both WHDH and the Broadcast Bureau oppose BBI's request to enlarge issues in the proceeding. WHDH asserts that however important "executive control" (as allegedly exercised by Winslow) might be in the qualifications of a corporate licensee, it is not

[3] In its reply to WHDH's opposition, BBI notes that WHDH, in its June, 1964, ownership report, discloses the purchase of an additional 7,830 shares by Greater Boston Distributors which increases its total holding to 72,395 shares (13.7%) and which raises the 52.59% figure to 54.07%.

[4] BBI also notes, in response to WHDH, that the Instructions of FCC Form 323 "Ownership Report" list specific examples of transfers of control which require *prior* Commission approval. BBI asserts that the seventh illustration governs the present situation when it states:

"A, B, C, D, and E each own 20% of the stock of X corporation. A, B, and C sell their stock to F, G, and H at different times. A transfer is effectuated at such time as C sells 10% or more of his stock. In other words, a transfer is effectuated at such time as 50% or more of the stock passes out of the hands of the stockholders who held stock at the time the original authorization for the licensee or permittee corporation was issued."

within the purview of Section 310(b) which has been construed to apply to voting control. WHDH also attacks BBI's claim of a shift in *de jure* control on the basis that there has been no showing of privity among the new majority stockholders of the Herald-Traveler as is required by the Note to Section 1.343(c)(4) of the Rules and by the Instructions to FCC Form 323. In countering BBI's assumption that control shifts between any two arbitrarily selected dates if more than 50% of a corporation's stock comes into new hands, WHDH points to Commission authorizations subsequent to 1957 which have dealt with the qualifications of WHDH; therefore, BBI's selection of 1954 as a basic date has no warrant in statute or precedent. The Broadcast Bureau, in its opposition, further asserts that BBI's petition is improper in seeking to enlarge issues in Docket Nos. 8739 and 11070 since those proceedings are before the U.S. Court of Appeals for the District of Columbia Circuit.[5] The Bureau contends that BBI is not a party to those proceedings and its petition to enlarge issues with respect thereto is addressed to a tribunal without jurisdiction.

5. Section 310(b) of the Communications Act, as amended, requires prior Commission consent to a transfer of control of any corporation (or parent corporation) holding a license. The term "control," as used in Section 310(b) and in the Commission's Rules, may embrace *de facto* as well as *de jure* control; however, there is no exact formula by which the Commission is bound to determine whether "control" of a corporate licensee has been transferred or acquired. *Press-Union Publishing Co.*, 7 RR 83 (1951); *Western Gateway Broadcasting Corp., (WSNY)*, 6 RR 1325 (1951). In this proceeding, petitioner's allegations present a substantial question of whether there has been a transfer of effective *de facto* control of Herald-Traveler since 1954. A substantial question is likewise presented by BBI's claim of a transfer in *de jure* control of Herald-Traveler. According to the latest ownership reports filed by WHDH and interpreted in the BBI petition, more than 50% of the stock of Herald-Traveler is now held by strangers to the original 1954 applicant.[6] As the Instructions to FCC Form 323 point out, a transfer of control is effectuated at such time as 50% or more of the stock passes out of the hands of stockholders who held stock at the time the *original authorization* was issued. The fact that *de jure* control in these circumstances might not amount to actual control of the corporate licensee because of a failure to exercise *de facto* control does not mean its existence can be ignored. See *Pacifica Foundation*, FCC 64–43, 1 RR 2d 747 (1964). Accordingly, petitioner has alleged sufficient facts to raise a substantial question of whether there has been a transfer of control (either *de facto* or *de jure*) of the

[5] *Greater Boston Television Corporation v. Federal Communications Commission, et al.* Case No. 17785.

[6] In its opposition, Herald-Traveler asserts that some 6% of the 52% total was transferred prior to the 1957 Commission decision. However, it is not shown that the 1954 application was amended to reflect these alleged transfers. Moreover, as is pointed out in footnote 3, additional stock was transferred after the filing of the petition. Under the circumstances, it cannot be determined on the basis of the interlocutory pleadings before us whether more or less than 50% of the stock has been transferred; such determination should be made on the basis of an evidentiary record.

Herald-Traveler and the issues in this proceeding will be enlarged as requested.

6. The Board also notes that the Commission has considered the opinion of April 16, 1964, of the U.S. Court of Appeals for the District of Columbia Circuit, in *Greater Boston Television Corporation* v. *Federal Communications Commission* (Case Nos. 17785 and 17788), which remanded this case for further proceedings to determine the effect of the death of Robert B. Choate (a principal of WHDH) on the Commission's Decision (33 FCC 449) of September 25, 1962.[7] In a Memorandum Opinion and Order (FCC 64–404) released May 8, 1964, the Commission reopened the proceedings in Docket Nos. 8739 and 11070 and specified issues relative to Choate's death and its effect on the earlier grant to WHDH. The Commission also consolidated those proceedings (Docket Nos. 8739 and 11070) with the proceedings in Docket Nos. 15204–15207 for the limited purpose of adducing evidence on the specific issues relating to Choate's death in accordance with the Court's remand order. Therefore, the Bureau correctly maintains that BBI's petition is improper in seeking to enlarge issues in Docket Nos. 8739 and 11070, which proceedings are before the Court and to which BBI is not a party; and insofar as BBI's request pertains to said proceedings, it will be dismissed.[8]

7. Two minor matters remain. First, the Bureau in its opposition contends that the petition is untimely. However, as is pointed out by the petitioner in its reply pleading, the transfers which placed over 50% of the stock in the hands of strangers were not reported to the Commission until April 13, 1964; the filing of the instant petition one month thereafter does not constitute an unconscionable delay. Second, WHDH points out that since 1957 it has received various authorizations and licenses and it argues that any question of transfer of control must turn upon whether there has been a transfer since the date of such formal Commission determination. The flaw in their argument is that none of these Commission actions purported to approve a transfer of control, nor was such approval requested by WHDH; the Commission is not estopped from instituting an inquiry into a matter upon which it did not rule and was not requested to rule.

Accordingly, IT IS ORDERED, This 4th day of August, 1964, That the petition to enlarge issues, filed May 13, 1964, by Boston Broadcasters, Inc. IS GRANTED insofar as it pertains to Docket Nos. 15204–15207, and IS DISMISSED insofar as it pertains to Docket Nos. 8739 and 11070; and the issues in this proceeding ARE ENLARGED by the addition of the following issues:

> To determine whether the control of WHDH, Inc., and the Boston Herald-Traveler Corporation has been transferred without Commission authorization in violation of Section 310(b) of the Communications Act.

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[7] In that Decision, the Commission granted the application of WHDH, Inc. and denied competing applications filed by Greater Boston Television Corp. and Massachusetts Bay Telecasters, Inc.

[8] In a Memorandum Opinion and Order (FCC 64–691) released July 27, 1964, the Commission denied a petition to reopen the record in Docket Nos. 8739 and 11070 in order to evaluate further changes in the applicants. The Commission noted again that the proceedings were reopened only to consider the effect of Choate's death on the WHDH application.

To determine, in view of the facts developed under the foregoing issue, whether WHDH, Inc., possesses the requisite character qualifications to be a Commission licensee.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–407

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>NORTHERN INDIANA BROADCASTERS, INC.,<br>MISHAWAKA, IND.<br>For Construction Permit | Docket No. 14855<br>File No. BP–14771 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON DISSENTING AND VOTING FOR DENIAL OF PETITIONS.

1. The application in this proceeding is for a construction permit for a new standard broadcast station (910 kc, 1 kw, DA–2, U, Class III) at Mishawaka, Indiana. This application was designated for hearing by Commission Order released November 27, 1962 (FCC 62–1210). The hearing issues require determinations of the areas and populations that would be served, the interference that would be caused by the proposed operation, and whether the proposed operation would contravene the provisions of Section 3.35 of the Rules with respect to overlap and concentration. An Initial Decision (FCC 63D–138) proposing to grant the application was released December 2, 1963. Exceptions to the Initial Decision have been filed by the Broadcast Bureau and by WLS, Inc., a respondent in this proceeding.

2. On February 7, 1964, Clarence C. Moore, licensee of Station WCMR, Elkhart, Indiana, filed a petition requesting that the issues in this proceeding be enlarged to determine whether the application was filed in whole or in part with the intent that it would be an additional South Bend, Indiana, station.[1] The applicant, in its opposition filed February 27, 1964, opposes the petition on the merits, for untimeliness and on the ground that the petitioner is not a party to the proceeding. A reply to this pleading was filed by petitioner on March 16, 1964. An extension of time to March 16, 1964, for filing this reply was granted by the Review Board by Order, released March 12, 1964 (FCC 64R–132). On February 27, 1964, the Broadcast Bureau filed Comments also proposing that the issues be enlarged; the Bureau's proposal is based upon the petitioner's allegations of fact and upon grounds, set forth *infra*, not included in the petition. On March 16, 1964, the applicant filed an opposition to the Bureau's pleading, and with this opposition filed a separate petition requesting acceptance of this opposition. The applicant's request is based upon the fact that the Bureau relied upon new matters to which the applicant

[1] Other issues requested in the petition were denied by the Commission in *Northern Indiana Broadcasters, Inc.*, released July 7, 1964 (FCC 64–597).

had not had an opportunity to respond. The applicant's request is reasonable and will be granted.

3. At the outset, the Review Board is confronted with the fact that the petitioner is not a party to this proceeding and does not seek to become a party. Its petition will therefore be dismissed. However, the Bureau, in its Comments, has in effect adopted the showing made by the petitioner, and, although its pleading is entitled "Comments," it is in effect a petition to enlarge issues to determine whether the proposal would contravene Section 73.28(d)(3) of the Commission's Rules, the so-called ten percent rule.[2] As such, it is untimely. However, inasmuch as the Bureau relies, in part, upon the affidavits submitted with the petition, and since it is not chargeable with prior knowledge of these affidavits, the Bureau cannot be charged with being dilatory. The engineering information (concerning the proposal's coverage of South Bend) upon which the Bureau relies is not new matter, but, as will appear below, its significance in the context of a possible ten percent rule violation has recently taken on added significance, and the Bureau's delay in filing its request on such grounds is not wholly inexcusable. In any event, the matters presented to the Board in this unorthodox series of pleadings have a significant impact upon the public interest, and for that reason require consideration on their merits. The fact that the Bureau did not allege that Mishawaka is not a separate community from South Bend is not fatal to its request; for the reasons hereinafter indicated, the critical fact is the proposal's coverage of South Bend, and such coverage forms part of the basis of the Bureau's request.

4. Mishawaka has a population of 33,361, is located in the urbanized area of South Bend, Indiana, and is contiguous to South Bend, which has a population of 132,445 (see paragraph 12 of the Findings of the Initial Decision). The proposed operation is directionalized toward South Bend, and the Bureau alleges that daytime it would provide a signal intensity of 10 to 25 mv/m over the main business district of the city of South Bend, at least a 5.0 mv/m signal over the entire city, and a 2.0 mv/m or greater signal over the entire South Bend urbanized area. At night, the proposal would place a 10 to 25 mv/m signal over the main business district of South Bend, a 7.8 mv/m (interference-free) signal over 80% of South Bend and two-thirds of the South Bend urbanized area.[3] The proposed operation would receive interference nighttime affecting approximately 29% of the population within its normally protected contour. See paragraph 2 of the Findings of the Initial Decision; no exception has been taken to this Finding. The proposal would provide a first local outlet to Mishawaka, and, if regarded as a Mishawaka proposal, it can claim the benefit of an exception to the ten percent rule.

5. In two affidavits attached to the petition and relied upon by the Bureau in its Comments, the affiants, Clarence C. Moore and

[2] As proposed by the Bureau, the issue would read as follows: "To determine whether the proposal should be considered a Mishawaka station for purposes of applying Section 73.28(d)(3) of the Commission's Rules."

[3] See paragraph 5 of the Findings of the Initial Decision as to nighttime coverage of South Bend. No exceptions have been filed with respect to these findings concerning nighttime coverage.

his consulting engineer, E. Harold Munn, Jr., state that at a meeting on June 1, 1962, the applicant's president and 92.5% stockholder, William N. Udell, stated that his primary interest in proposing the Mishawaka station was to serve South Bend. In its opposition, the applicant states that it "does not deny, for the purposes of this pleading, that Udell either made or may have made the statements attributed to him." In explanation of the statement, the applicant states that when adversaries meet, it is entirely reasonable for one to attempt to "plant decoys to divert the other's attention." It is also stated in the opposition that the statement may have been made "while he [i. e., Udell] was upset." In his affidavit, which was attached to the opposition pleading, Udell states that he "may very well have said . . . that the Mishawaka station would provide an excellent signal to South Bend and would carry some programs of interest to South Bend," and that "as the meeting dragged on, my tension and discomfort increased and I may have made some statements that I would not have made on sober reflection." In an effort to demonstrate that South Bend is not its chief interest, the applicant cites testimony at the hearing that the proposed station would carry programs of local interest to Mishawaka, and that it was expected that most (70%) of the advertising revenue would be derived from "local accounts," with the remaining 30% divided between national and regional accounts. In further support of its contention that its proposal was not intended as a South Bend proposal, the applicant submits affidavits from two of its consulting engineers to the effect that Udell never requested that the application be designed for the primary purpose of serving South Bend rather than Mishawaka, and that if the maximum possible signal over the city of South Bend had been desired, a transmitter site three to four miles west of the present site would have been proposed.

6. The Commission has in the past designated for hearing proposals which would receive more than 10% interference, but which propose a first transmission outlet in a suburban community and therefore seek to benefit from an exception to the ten percent rule. See *William S. Cook,* FCC 62–1100 (1962); *Edina Corp.,* FCC 62–845 (1962); *People's Broadcasting Co.,* FCC 62–187 (1962), *Golden Triangle Broadcasting Co.,* FCC 63–111 (1963). In each of these cases, a strong signal would be put over the central city by the suburban proposal, and the Commission's concern was expressed in terms of whether the suburban community was a "separate community," (*Cook, Golden Triangle* and *Edina*), or whether the facilities and programming were intended for the central city and whether the suburban community was specified as the principal city in order to circumvent the ten percent rule (*People's Broadcasting*). In *Cook,* the ten percent rule issue was designated because the suburban community had previously been determined, for 307(b) purposes, not to be a separate community. See *Denver Broadcasting Company,* 28 FCC 1060, 19 RR 1205 (1960). In its Notice of Proposed Rule-Making in re Amendment of Part 3 of the Commission's Rules regarding AM station assignment (FCC 63–468), 25 RR 1615, the Commission, in paragraph 44, referred

to a proposed rule which would preclude grants of applications intended to provide a multiple service to a large community while ostensibly providing the first local service to a suburb; under the proposed rule, grants of such applications would have been precluded if the suburban community had a population of less than 50,000 and the proposal would place a 2 mv/m signal over a city in excess of 50,000. In explanation of this proposal, the Commission, in footnote 51 of the Notice, stated:

> Applications of this type have, under our present rules, come to be a source of major concern to the Commission. The problem has been most acute in two areas: Applicants seeking to gain a comparative "307(b) advantage" have come to specify small communities adjacent to large cities so that they may, nominally, provide a first local service to the small town. The applicant's signal, of course, provides excellent coverage to the big city. A similar problem has arisen in the case of applicants seeking to take advantage of the nighttime "first local service exception" to par. 3.28(d)(3) of the Rules. In *Denver Broadcasting Company*, 28 FCC 1060, 19 RR 1205 (1960), and several similar cases, the Commission attempted to deal with these situations on an ad hoc basis. See also *Huntington Broadcasting Company v. FCC*, 89 U. S. App. D. C. 222, 192 F. 2d 33, 7 RR 2030 (1951). The National Association of Broadcasters also expressed concern about this problem at the January 7–8 Radio Conference.

For reasons not here material, the Commission did not adopt the proposed rule. See Report and Order in re *Amendment to Part 73 of the Commission's Rules, regarding AM station assignment standards*, FCC 64–609, released July 7, 1964. In paragraph 35 of that Report and Order, however, the Commission stated that "We shall continue to examine suburban applications closely, on a case-by-case basis, to determine whether they should be regarded as proposing a new service for their nominal community or whether, instead, the proposal should be regarded as an application for the central city." Again both *Huntington Broadcasting* and *Denver Broadcasting* were cited. Of significance is the fact that the Commission bracketed together the ten percent rule problem and 307(b) problem insofar as suburban proposals which will serve the central city are concerned.[4]

7. The use of the separate community test specified in the ten percent rule designation orders cited in the preceding paragraph has not been limited to ten percent rule cases. It has long been employed in 307(b) cases. Thus, both in *Huntington Broadcasting* and in *Denver Broadcasting*, it was concluded that the suburban community was not a "separate community." In both instances, this conclusion was based primarily upon the fact that the suburban proposal would place a signal over the central city. The "separate community" test has also been specifically included in hearing issues in 307(b) cases. See, for example, the hearing issues quoted in *Kent-Ravenna Broadcasting Co.*, FCC 61–1350, 22 RR 605. The Commission in *Kent-Ravenna* also stated that the

[4] The quoted statements in the cited Notice and in the cited Report and Order are not construed by the Board as representing an expression of new policy, but rather as a restatement of a problem with which the Commission has been concerned for sometime, as is evidenced by its earlier designation Orders in ten percent rule cases, cited *supra*. Reliance on the quoted statements from the Notice and from the Report and Order does not, therefore, involve reliance on a new policy or new standards not applicable to applications filed prior to the adoption of the Report and Order. Cf. *WFYC, Inc.*, 34 FCC 644, 25 RR 307 (1963); *International Radio, Inc.*, 35 FCC 762, 1 RR 2d 701 (1963); *Hawkeye Broadcasting, Inc.*, 34 FCC 855, 24 RR 558 (1963); see paragraph 2 of the Commission's Memorandum Opinion and Order denying the petition for reconsideration in *Radio Crawfordsville, supra*.

standard 307(b) issue includes the separate community question, and that a separate community issue would therefore no longer be designated as such. In dealing with this "separate community" problem in 307(b) cases, the Commission has not resolved the question in terms of whether the suburban community was "separate" from the central city in a political, economic, or sociological sense. Instead, in line with the earlier decisions in *Huntington Broadcasting* and *Denver Broadcasting, supra,* the Commission has, in several relatively recent cases, decided the question in terms of whether the suburban proposal would place a primary signal over the central city. See *Radio Crawfordsville, Inc.,* FCC 63–480, 25 RR 533; FCC 63–839, 25 RR 1001; *Speidel Broadcasting Corp.,* FCC 63–618, 25 RR 723; FCC 63–1135, 1 RR 2d 726; affirmed *Speidel Broadcasting Corp.* v. *FCC,* Case No. 18318, U. S. Court of Appeals, District of Columbia Circuit, July 3, 1964; *Monroeville Broadcasting Co.,* FCC 63–1080, 1 RR 2d 607; FCC 64–113, 1 RR 2d 993; *Massillon Broadcasting Company, Inc.,* FCC 64–320, 2 RR 2d 409. The *Monroeville* decision, it should be noted, grew out of the *Kent-Ravenna* proceeding, in which, as has been indicated, the Commission first designated a specific separate community issue and later in that same proceeding stated that the 307(b) issue includes the separate community question.

8. There is no apparent reason for concluding that coverage of the principal city is not the appropriate yardstick for determining whether a suburb is a separate community for purposes of the ten percent rule. There are, in fact, affirmative reasons for concluding that coverage in this context is the appropriate test. Thus, parallel treatment of 307(b) and ten percent rule cases is reflected in the Commission's action in *Cook, supra,* in designating a ten percent rule issue because of a prior determination that the suburb was not a separate community for 307(b) purposes; as was noted above, the suburb had previously been determined not to be a separate community because of the suburban proposal's coverage of the central city. That the Commission regards the 307(b) and ten percent rule questions involved in suburban proposals as presenting the same basic problem is clearly indicated in its statement, in the Notice of Proposed Rule Making, quoted in paragraph 6, *supra.* That the same test, namely, coverage of the central city, is to be used in both the 307(b) cases and ten percent rule cases is reflected by the Commission's citation, in the quoted statement, of *Huntington Broadcasting* and *Denver Broadcasting,* in both of which the coverage test was employed. Further support for the view that the same test should be employed in 307(b) cases and in ten percent rule cases is to be found in the Commission's statement, quoted in paragraph 6 hereof, in its Report and Order, *supra,* that a determination will in each case be made as to whether the suburban proposal should be regarded as proposing a new service for its nominal community or whether it should be treated as an application for the central city. Both the Notice and the Report and Order thus serve to confirm what had previously been heralded in *Cook, supra,* namely, that coverage of the central city is the critical criterion in both ten percent rule and

307(b) cases. To resolve the question in terms of whether the suburban community is "separate" in a political, economic, or sociological sense would be unrealistic in view of the highly tenuous relevance which such test has to the basic problem with which the Commission is concerned, namely, that presented by a proposal which will serve the central city but which specifies a suburban community without a local station as its principal community and can for that reason technically claim the benefit of an exception to the ten percent rule. In this connection, it should be noted that in *Radio Crawfordsville, supra,* the Commission approached the separate community question in this light, and treated the proposal as a Chicago proposal because of the coverage of the latter city.

9. The fact that "separate community" issues have been designated in ten percent rule cases does not militate against the conclusion herein that the question of coverage of the central city is controlling. The ten percent rule designation orders specifying a separate community issue antedate the Commission's decision in *Radio Crawfordsville, supra,* and at the time these designation orders were adopted, the Commission also spoke in terms of "separate community" in 307(b) cases. As has been shown, however, the Commission, from *Huntington Broadcasting* through *Massillon, supra,* resolved the separate community question in terms of coverage of the central city. The adoption of the test of coverage of the central city in ten percent rule cases involving suburban proposals does not constitute the formulation of new policy. It is merely a recognition that the 307(b) and ten percent rule problems in suburban cases are regarded by the Commission in the same light, and that the basic approach to the resolution of the problem in ten percent rule cases should be permitted to undergo the same evolution as has occurred in 307(b) cases. See *Charles County Broadcasting Co., Inc.,* paragraph 7, FCC 63–821, 25 RR 903.

10. In view of the gradual development of the tests to be employed with respect to suburban proposals, the Bureau cannot reasonably be faulted for not having sought, on the basis of the coverage of South Bend, enlargement of the issues at an earlier date. While the developing Commission policy may have antedated by some months the Bureau's pleading—which was triggered by the affidavits submitted by the petitioner—it would be both unrealistic and unfair to charge the Bureau with dilatoriness in an area in which the Commission's approach has been undergoing a gradual evolution. This is not a case in which the Commission has expressly announced its policy, and the Bureau's delay in seeking enlargement of the issues cannot reasonably be dated back to the time of designation.

11. In view of the service, both daytime and nighttime, that would be provided to all or most of South Bend, enlargement of the issues is warranted.[5] It is recognized, of course, that an Initial

[5] The fact that 20% of South Bend would not be served nighttime does not require a contrary conclusion. See *Radio Crawfordsville, supra.*

Decision has already been released, and that the status of the proceeding militates to some extent against enlargement except under unusual circumstances. Such circumstances are, however, present here. A basic public interest question is presented, and its importance has been emphasized by the Commission in its Notice of Proposed Rule Making and in its Report and Order referred to in paragraph 5. In addition, the applicant does not deny that Udell may have stated that his primary interest was in serving South Bend, and under these circumstances the applicant cannot reasonably complain about the lateness of the inquiry. This statement as to Udell's interest takes on significance in view of the fact that primary service would be provided to South Bend.[6] The fact that, as stated by the applicant's consulting engineer, even better coverage of South Bend could have been obtained by locating the transmitter site three or four miles from that proposed in the application, does not in itself serve to dispel the consequences of the proposal's principal city coverage of South Bend daytime and its 80% coverage of South Bend nighttime. The applicant also seeks to counteract the inferences which may be drawn from the fact of coverage of South Bend by noting, as pointed out above, that some of its programming and most of its advertising is centered on Mishawaka. However, most of the proposed programming is entertainment and therefore of general interest, and the purely local programming does not eliminate the need for a further inquiry as to whether the applicant's proposal should, for ten percent rule purposes, be treated as a South Bend proposal. See *Massillon Broadcasting Co., Inc., supra,* paragraph 12.

Accordingly, IT IS ORDERED, This 7th day of August, 1964, That the request made in the motion filed by Clarence C. Moore on February 7, 1964, for an issue as to whether the application herein is intended as an additional South Bend station IS DISMISSED; and

IT IS FURTHER ORDERED, That the petition filed March 16, 1964, by Northern Indiana Broadcasters, Inc., for acceptance of an additional pleading IS GRANTED, and the additional pleading IS ACCEPTED; and

IT IS FURTHER ORDERED, That the Broadcast Bureau's request that the proceeding be remanded to the Hearing Examiner IS GRANTED to the extent indicated herein, and DENIED in all other respects; and

IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issues:

To determine whether the application herein should be considered as a Mishawaka proposal or as a South Bend proposal for purposes of applying Section 73.28(d) (3) of the Commission's Rules.

To determine, in the event it is determined pursuant to the foregoing issue that the proposal herein should be treated as

[6] In *Northern Indiana Broadcasters, Inc.*, FCC 64-597, released July 7, 1964, the Commission accepted Udell's explanations that his statements that he intended other proposals as blocking applications were not to be taken literally. These explanations were accepted primarily because the other facts in the case rebutted any inference of blocking. In the case before the Board, on the other hand, the service to South Bend is consistent with an alleged intent to serve South Bend.

a South Bend proposal, whether the interference which would be received by the proposal herein would affect more than ten percent of the population within its normally protected primary service area in contravention of Section 3.28(d) (3) of the Commission's Rules, and, if so, whether circumstances exist which would warrant a waiver of said Section; and

IT IS FURTHER ORDERED, That the proceeding IS REMANDED to the Hearing Examiner for further hearing and preparation of a Supplemental Initial Decision.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–416

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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| In Re Applications of | |
| PAUL DEAN FORD AND J. T. WINCHESTER, LONDON, OHIO | Docket No. 15279<br>File No. BPH–3936 |
| THE BROWN PUBLISHING CO., URBANA, OHIO | Docket No. 15281 |
| For Construction Permits | File No. BPH–4138 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Broadcast Bureau petitions the Review Board to enlarge issues in this proceeding to determine whether a grant of the application of The Brown Publishing Company (Brown) would create a concentration of control of the media of mass communication in Urbana, Ohio, contrary to the public interest.[1]

2. By Order (FCC 64–37) released January 21, 1964, the Commission designated a consolidated proceeding involving the mutually exclusive applications of Paul Dean Ford and J. T. Winchester to operate a new FM station in London, Ohio, and the applications of Charles H. Chamberlain and of Brown to operate in Urbana, Ohio.[2] In the designation order, the Commission noted that Brown was the publisher of the only local newspaper in Urbana; that the Brown application requested authority to construct and operate the only broadcast station in Urbana; and that these facts may be considered under the comparative issue in this proceeding. The designation order then specified a Section 307(b) issue and a contingent comparative issue. On April 16, 1964, Chamberlain and Brown filed a joint petition with the Review Board which sought approval of an agreement looking toward dismissal of the Chamberlain application. By Memorandum Opinion and Order (FCC 64R–335) released June 17, 1964, the Board delayed final consideration of the joint petition pending receipt of additional affidavits and also delayed consideration of the Broadcast Bureau's instant petition to enlarge issues pending final action on the dismissal agreement. With the subsequent receipt of supporting affidavits, the Review Board granted the joint petition and dismissed the Chamberlain application.[3] On July 16, 1964, the Hearing Examiner noted in an Order (FCC 64M–675) that a rule-making petition had been recently granted which

[1] The pleadings before the Review Board include: (1) Petition to enlarge issues, filed April 29, 1964, by the Broadcast Bureau; (2) Opposition, filed May 13, 1964, by The Brown Publishing Company; and (3) Reply, filed May 25, 1964, by the Bureau.

[2] The mutually exclusive application of a fourth party, Floyd Byler (Urbana, Ohio), was dismissed with prejudice by the Chief Hearing Examiner by Order (FCC 64M–157) released February 25, 1964.

assigned FM Channel 292A to London, Ohio, and that, as a result, the London applicant proposed to amend its application to specify said channel instead of Channel 269 which is at issue in this proceeding.

3. In its petition to enlarge issues, the Bureau refers to the designation order which notes Brown's ownership of the only Urbana newspaper and which states that facts relative to said ownership may be considered under the comparative issue in this proceeding. With the dismissal of the Chamberlain application and the expected withdrawal of the London applicant, the Bureau points out that the comparative issue becomes moot as the proceeding changes from multi-party status to that of single applicant. In the absence of enlarged issues, it is the Bureau's contention that the substantial question of undue concentration of control of the media of mass communication in Urbana cannot be explored. The Bureau contends that Brown's newspaper ownership, as noted in the designation order, indicates that a problem exists and must be explored in a standard comparative context or as a matter of basic qualifications. In support of its argument, the Bureau cites *Miami Broadcasting Company,* FCC 63–774, 1 RR 2d 43, released August 6, 1963. The Bureau alleges that good cause exists for its petition since, prior to the filing of the joint petition by Brown and Chamberlain, it believed that the facts of concentration of control could be explored under the comparative issue.

4. The Bureau justifies its request to enlarge issues solely on the ground that the elimination of comparative considerations in this proceeding now raises a question of basic qualifications with regard to the Brown application. The Board cannot agree with the Bureau's contention under these circumstances. In its designation order, the Commission specifically noted the facts of Brown's newspaper ownership and concluded that any consideration thereof may be made in a comparative context. The Commission did not include a specific issue which concerned Brown's qualifications to be a licensee in light of its newspaper ownership. If the Bureau maintains that such newspaper ownership indicates a problem that *must* be explored in a hearing as a test of basic qualifications, it is difficult to justify the delay in filing its petition three months after the designated issues were published in the Federal Register (29 FR 622) on January 24, 1964, on the ground that the comparative issue has now become moot. See Rule 1.229(b).

5. The Board also notes that the Bureau's petition does not contain any specific allegations of fact concerning the possibility of concentration of control with the grant of Brown's application. See Rule 1.229(c). The instant proceeding is distinguishable from *Miami Broadcasting Co., supra,* which involved an application for the voluntary assignment of an existing license to the owner of the only local newspaper. Whereas in *Miami* verified petitions to deny the transfer were filed by citizens' groups in regard to potential concentration of control, the Bureau's request in this proceeding contains no factual allegations other than Brown's newspaper ownership. Even though the Commission has an obligation to de-

[3]Review Board Order (FCC 64R–398) released August 6, 1964.

termine whether the grant of an application will result in a concentration of control of communications media,[4] the mere factor of newspaper ownership *per se*, is not viewed as a basis for disqualification although the Commission does consider said factor in a comparative context. See *Madison County Broadcasters*, 30 FCC 694, 21 RR 615 (1961); *WHDH, Inc.*, 22 FCC 767, 13 RR 507 (1957). Since the Bureau's petition is insufficient to support its request, the Board will deny the proposed enlargement of issues as against the only remaining applicant for the new Urbana FM service.

Accordingly, IT IS ORDERED, This 12th day of August, 1964, That the petition to enlarge issues, filed April 29, 1964, by the Broadcast Bureau, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

[4] See *Clarksburg Publishing Company v. Federal Communications Commission*, 96 U. S. App. D. C. 211, 225 F. 2d 511, 12 RR 2024 (1955).

F.C.C. 64R–433

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| FLORIAN R. BURCZYNSKI, STANLEY J. JASINSKI AND ROGER K. LUND, D.B.A. ULTRAVISION BROADCASTING CO., BUFFALO, N.Y. | Docket No. 15254<br>File No.<br>BPCT–3200 |
| WEBR, INC., BUFFALO, N.Y. | Docket No. 15255 |
| For Construction Permits for New Television Broadcast Stations | File No.<br>BPCT–3211 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has under consideration a petition filed by WEBR, Inc.[1] requesting review of a Memorandum Opinion and Order of the Hearing Examiner [2] which granted a petition for leave to amend the application of Ultravision Broadcasting Company.

2. The above two mutually-exclusive applications for a new UHF television broadcast station at Buffalo, New York were designated for hearing in a consolidated proceeding by Commission Order, FCC 63–1191, released December 31, 1963. The Commission stated that

> Based on the information contained in the application of Ultravision Broadcasting Company, it appears that cash in the amount of approximately $202,000 will be required for the construction and initial operation of the proposed station. The applicant's plan for financing is based upon approximately $3,000 in cash, a loan of $60,000 from Mr. Burczynski, new capital of $35,000 to be furnished by Mr. Lund, and a proposed bank loan of $150,000. The letter from Manufacturers and Traders Trust Company with reference to the $150,000 loan, however, contains no terms and appears to be conditional. Accordingly, it cannot be determined that the applicant is financially qualified. The evidence to be adduced with respect to the financial issue to be specified in connection herewith will be restricted to the deficiencies described, or to an alternate showing of financial qualifications.

3. On February 19,1964, Ultravision filed a petition for leave to amend its application which, among other things, substituted a new letter from Manufacturers and Traders Trust Company concerning the $150,000 loan. Ultravision's petition was granted by the Examiner on March 9, 1964.[3] On June 9, 1964, Ultravision filed another petition for leave to amend its application to include an additional loan commitment of $50,000 from one John J. Maroone. The purpose of the amendment was to "help end such doubts" as "WEBR has been trying to create . . . as to Ultravision's ability to

[1] Before the Board are: Petition for Review, filed June 30, 1964, by WEBR, Inc.; Opposition, filed July 13, 1964, by Ultravision Broadcasting Company; Opposition, filed July 13, 1964, by the Broadcast Bureau; and Reply, filed July 20, 1964, by WEBR, Inc.

[2] FCC 64M–582, released June 23, 1964.

[3] Order, FCC 64M–198, released March 10, 1964.

effectuate its proposed programming." [4] The Examiner granted Ultravision's petition (see note 2, *supra*) and it is this action which is the subject of the present appeal.

4. WEBR contends that the Examiner's ruling allowing the amendment was inconsistent with the precedent of *Grand Broadcasting Co.*, FCC 62M–200, 23 RR 203, "affirmed by the Commission on review" FCC 62–500, released May 11, 1962;[5] the amendment would not eliminate the possibility of a general financial issue against Ultravision; the amendment would prejudice WEBR in a "basic comparative area, i.e., the relative ability of the two applicants in this proceeding to effectuate their respective programming proposals"; and allowance of the amendment would create a precedent inconsistent with Rule 1.522 (which requires a showing of good cause for amendment of an application after designation for hearing) and with the policy which requires finalization of financial plans prior to designation for hearing.

5. The amendment under consideration has no bearing on the existing hearing issues, since the financial qualifications issue as to Ultravision is a restricted one, as noted in paragraph 2, *supra*. However, in its comments on the question certified to the Commission by the Review Board (see note 4), filed on May 26, 1964, the Broadcast Bureau has urged that the Commission add the "customary" financial issue against Ultravision and that the test of financial qualifications be "the usual cost of placing the station on the air plus three months operating expenses assuming no revenue and the additional cost of amortizing loans and interest payments and all equipment payments during the first year." In view of this, good cause exists for the amendment. *Cf. Beacon Broadcasting Systems, Inc.*, FCC 60–118, 19 RR 927. WEBR's contention that it will suffer a comparative disadvantage as a result of the amendment must be rejected. WEBR is prejudiced only to the extent that it may be denied the possibility of obtaining a grant by default through its opponent's disqualification, and the Commission does not recognize this as a position deserving protection. *Fisher Broadcasting Co.*, 30 FCC 177, 19 RR 997 (1961). The possibility that this may have some bearing on the comparative issue should not alter the result. *Ibid.* Finally, allowance of the amendment will not delay the hearing (which is presently scheduled to resume on September 15, 1964) inasmuch as it does not bear

[4] Ultravision's reference is to a motion to modify and enlarge issues, filed January 22, 1964, by WEBR which requested, among other things, (a) addition of an issue concerning the reasonableness of Ultravision's estimate of revenues for the first year of operation and (b) removal of the restriction (see paragraph 2) on the financial qualifications issue. By Memorandum Opinion and Order, FCC 64R–192, released April 10, 1964, the Board certified to the Commission the first of the requests; it denied the second.

[5] In *Grand, an* applicant sought to amend to include a new $50,000 loan "to remove all doubts" concerning its financial qualifications. The basis of the request was applicant's concern that it would be required to have available funds to cover expenses which would accrue after the first three months of operation. The Examiner concluded that good cause for the amendment was not shown. The Commission denied a petition for review of that action on the ground that the petitioner's basis for seeking leave to amend rested on an erroneous assumption; i.e., the Commission held that applicant would not be required to have available funds to cover expenses other than those which would occur in the first three months of operation. In view of the grounds for the Commission's denial of the petition for review, the *Grand* opinion is inapposite to the present proceeding.

on the issue as presently restricted. For the above reasons, WEBR's petition for review will be denied.[6]

Accordingly, IT IS ORDERED, This 20th day of August, 1964, That the Petition for Review, filed June 30, 1964, by WEBR, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[6] WEBR and Ultravision make several contentions in the course of their pleadings on which the Board expressly declines to pass. Included are WEBR's contention that the $50,000 loan will not obviate the necessity for further inquiry into these matters, and Ultravision's contention that WEBR has waived its right to cross-examine Maroone on the loan.

F.C.C. 64R–434

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of<br>REVOCATION OF LICENSE OF RADIO STATION WTIF, INC., FOR STANDARD BROADCAST STATION WTIF TIFTON, GA. | Docket No. 15176 |
| In Re Applications of<br>WDMG, INC.<br>For Renewal of License of Standard Broadcast Station WDMG Douglas, Ga. | Docket No. 15177<br>File No. BR–1709 |
| WMEN, INC.<br>For Renewal of License of Standard Broadcast Station WMEN Tallahassee, Fla. | Docket No. 15274<br>File No. BR–3030 |
| B. F. J. TIMM, JACKSONVILLE, FLA.<br>For Construction Permit | Docket No. 15275<br>File No. BP–13649 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

1. B. F. J. Timm and WDMG, Inc. (hereinafter Timm) appeal to the Review Board [1] from the Hearing Examiner's denial (FCC 64M–493, released June 3, 1964) of their motion to quash a subpoena duces tecum directed to Timm, the owner of Station WDMG in Douglas, Georgia.

2. This proceeding involves the license revocation of Station WTIF in Tifton, Georgia; renewal applications of WDMG, Douglas, Georgia, and WMEN, Tallahassee, Florida; and application for a construction permit for a new Jacksonville, Florida standard broadcast station. The original designation Order (FCC 63–871) released September 30, 1963, consolidated the revocation proceeding and the application for renewal of license of the Douglas station. The designation order recites the following areas of Commission concern: that Station WSIZ, the only other broadcast station in Douglas, Georgia, returned its license to the Commission in November of 1958, and that shortly thereafter WDMG, Inc., purchased the assets of Station WSIZ at a price that appeared to be substantially in excess of market value; that Timm subsequently

[1] Before the Review Board for consideration are: appeal to Review Board from Examiner's adverse ruling, filed by Timm on June 10, 1964; opposition, filed by the Broadcast Bureau on June 17, 1964; and reply, filed by Timm on June 29, 1964.

submitted a statement to the Commission to the effect that he did not participate in any way in this decision of Station WSIZ to terminate operations; that a serious question is presented as to the reliability of Timm's statement; that a serious question is presented as to whether Timm was the real party in interest in the 1956 application for a new station in Alma, Georgia, the purpose of which was to impede or bar the construction of a new facility (Station WSIZ) at Douglas, Georgia. In addition to the foregoing, the designation order states that there is a serious question as to whether there has been an unauthorized transfer of control of Station WTIF to Timm. The hearing issues specified by the Commission in this designation order are repeated in its subsequent designation Order, cited *infra*.

3. By Order (FCC 64–36), released January 17, 1964, the proceeding designated for hearing by the earlier designation was consolidated with the WMEN renewal and the Jacksonville application. The January 17, 1964, designation order called into question Timm's financial qualifications to construct and operate the proposed Jacksonville station. The following hearing issues were specified by the Commission in its 1964 order:

1. To determine whether B.F.J. Timm engaged in improper conduct designed to prevent or eliminate broadcast competition in Douglas, Georgia;
2. To determine whether B.F.J. Timm was the real party in interest in an application for a new radio station at Alma, Georgia, for the purpose of impeding and barring the construction of Radio Station WSIZ. Douglas, Georgia;
3. To determine whether in or about January, 1961, B.F.J. Timm assumed control of the licensee of Station WTIF, Tifton, Georgia, in contravention of Section 310(b) of the Communications Act of 1934, as amended;
4. To determine whether B.F.J. Timm engaged in misrepresentations to the Commission or demonstrated a lack of candor in statements filed with the Commission in connection with the closing of Station WSIZ;
5. To determine whether B.F.J. Timm is financially qualified to construct and operate his proposed standard broadcast station at Jacksonville, Florida;
6. To determine whether, in light of the evidence adduced in the foregoing issues, B.F.J. Timm possesses the requisite character qualifications to be a licensee of the Commission; and
7. To determine whether, in light of all the evidence adduced with respect to the foregoing issues, a grant of the above-captioned and described applications would serve the public interest, convenience and necessity.

The burden of proof in the revocation proceeding was placed on the Bureau; but as to the other matters it rests with the licensee.

4. The subpoena which is the subject of this appeal directed Timm to appear and produce the following:

Profit and loss statements, balance sheets, auditors' worksheets, minute books, books of account, payroll records, capital account books and corporate income tax returns of WDMG, Inc. for the years of 1955 to 1962, inclusive; and the personal income tax returns of B.F.J. Timm and Beth L. Timm for the years of 1953 to 1962 which show their salaries, commissions, bonuses, directors' fees, dividends and other forms of compensation received, as an officer, director, stockholder, employee or personally during the aforesaid years from WDMG, Inc.

In his pleadings to the Examiner and to the Review Board Timm has claimed a procedural right to see the request for subpoena on the ground that "no public policy in favor of according it [the request] confidential treatment exists"; "refusal to afford one subpoened a copy of the underlying request emasculates his right to

move that the subpoena be quashed"; and the request may contain "fatal defects which *require* that the subpoena be quashed." On appeal, Timm has also alleged that Section 3 of the Administrative Procedure Act (authorizing examination by persons directly involved of matters of official record except when held confidential for good cause shown), and Commission Rule 1.333(b) (providing for the issuance of subpoenas) give him a right to examine the Broadcast Bureau's written request for a subpoena; and that the refusal to allow inspection is based on no written rules.

5. These contentions are without merit. As the Broadcast Bureau points out in its opposition pleading, Rule 1.333(d) specifically provides that copies of such requests need not be served on the parties. And Section 6(c) of the Administrative Procedure Act, relating to the issuance of subpoenas, grants no such right. In *Newton Broadcasting Company,* FCC 63–270, 25 RR 174 (1963), the Commission stated:

> The legislative history of Section 6(c) of the Administrative Procedure Act ... indicates that when Congress put in the provision providing that a party requesting a subpoena need only show general relevance and scope, it intended, *inter alia,* to prevent detailed evidence from falling into the hands of the party's adversaries. The Commission recognized the *ex-parte* nature surrounding the issuance of subpoenas when it amended [what was then Section 1.832] in order to make it clear that other parties need not be served with the request for a subpoena. (Footnote omitted.)

6. In the Hearing Examiner's opinion (FCC 64M–493) released June 3, 1964, denying the motion to quash, the details of the requested subpoena were not discussed. Instead, the Examiner expressed "considerable sympathy" with the appellants' allegations of hardship, but stated that if Timm really wants exoneration he "should not be heard to complain", particularly when his license is at stake. "A posture herein has been reached, willy-nilly," he added, "where exoneration requires complete katharsis." The Examiner disposed of the question of relevancy and materiality as follows:

> On the question of relevance and materiality, the Hearing Examiner has no qualms and does not opine that he is required to set forth his evidential views in a situation whose facets under the issues are immediately patent.

7. In the pleading before the Review Board, and in the motion to quash, appellants submit that a request for the financial records of WDMG, Inc., over a ten-year period is onerous and burdensome. They assert that none of the issues contemplates an inquiry into the extent of compensation received by Timm from WDMG, Inc., and they further note that the Commission, in denying Timm's earlier request for a bill of particulars, stated (FCC 64–228, released March 20, 1964) that the designation order "specifically delineates" the matters in issue. They further point out that Bureau counsel has seen copies of the WDMG, Inc., withholding forms showing the compensation paid to Timm during the years 1957–1959, and that the Bureau has not made any showing that these withholding forms are unreliable. Appellants also state that they have offered to make available all of the financial books of WDMG, Inc., on the condition that they be used solely for the purpose of showing the compensation paid to Timm, and that this offer is unlimited as

to time and place. They also characterize the subpoena requested by the Bureau as a fishing expedition.

8. The Bureau, in defense of its request for the subpoena and in defense of the Examiner's action granting its request, asserts that the hearing issues contemplate a full-scale inquiry. Timm's bona fides, it maintains, are in issue. The Bureau rejects the claim of hardship noting that he refused to respond to questions concerning his income and that of Mrs. Timm from WDMG, Inc. during the years 1957–1959, and that he would supply information concerning such income only if a subpoena duces tecum were directed against him. The Bureau further maintains that the information sought by the subpoena duces tecum will permit a comparison of the compensation received by Timm during the years he was not faced with economic competition and during the years that Timm was confronted with such competition. Moreover, says the Bureau, it will permit a determination of whether Timm withdrew funds in order to conceal the extent of the financial success attained by WDMG. The Bureau further "believes" that additional emoluments were received by the Timms in addition to their salaries in order to minimize the true economic and financial capacity of WDMG after the application for a competing station in Douglas, Georgia, was filed.

9. Section 1.333(b) of the Commission's Rules requires that a request for a subpoena duces tecum shall specify with particularity the books, papers, and documents desired and the facts expected to be proved thereby. As is evident from the Bureau's pleading, summarized above, an effort was made by the Bureau to show the relevance and materiality of the information sought. The appellants' offer to permit inspection of the financial records of WDMG, Inc., for the purpose of ascertaining the sums paid to Timm and/or his wife, would, as the Review Board understands this offer, permit the Bureau to obtain, without limitation as to time or place, all of the information sought in the last half of the subpoena duces tecum requested by it. As to the remaining documents sought, viz., profit and loss statements, etc., the Bureau has limited itself to a showing in a general way of what some of these documents might disclose. It has not, however, attempted to show that all of these documents over a ten-year period are relevant to the issues in this proceeding. For example, the minute books presumably contain entries completely unrelated to the matters in issue in this proceeding. Similarly, payroll records would show payments to station announcers, engineers, etc., the relevance of which has not been shown by the Bureau. The auditor's worksheets and capital account books likewise would contain matters completely unrelated to the questions in issue herein. The income tax returns of the Timms may likewise show not only their income from WDMG, Inc., but also from other sources, and no showing is made that income from any other sources is in any way material to this proceeding.

10. Under the circumstances, the Review Board concludes that, to a substantial extent, the subpoena duces tecum sought by the Bureau is lacking in specificity. Under somewhat parallel circumstances, the Commission denied, on grounds of lack of specificity, a request for all papers and correspondence, financial reports, con-

tracts, minutes of stockholders meetings, etc., over a four-year period, as contrasted with the ten-year period involved in the instant proceeding. See *Spartan Radiocasting Co. (WSPA-TV)*, 12 RR 435 (1955). The *Spartan* subpoena was successfully challenged because it failed to meet the requirement of the Rule that requests for subpoena "shall specify with particularity the books, papers, and documents desired and the facts expected to be proved thereby." The Bureau supported the opposition; the Examiner refused to issue a subpoena; and the Commission denied a petition for review of the Examiner's action (pp. 437–438):

We agree with the Bureau that the Examiner's ruling was fully justified in the circumstances of this case. Examination of the request for 'all' papers, documents, etc. referred to in footnote 1 leaves no doubt that the subpoena in question contravenes the 'specificity' requirement of Section 1.832.[2] Protestants have, in effect, requested *all* documents, papers, memoranda, etc., on subjects such as sites, purchase of land or equipment for such sites, bids for construction, the purchase of WSPA, the obtaining of network programs or affiliation, etc., without the least regard for specificity, in the obvious hope of finding some relevant or pertinent evidence in the mass of material to be gleaned through. As Mr. Justice Holmes so aptly stated in a case involving an analogous situation, Federal Trade Commission v. American Tobacco Company, 264 U.S. 398, 'the right of access given by the statute is to documentary evidence, not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting the evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it.... We assume for present purposes that even some part of the presumably large mass of papers relating only to interstate business may be so connected with charges of unfair competition in interstate matters as to be relevant, but that possibility does not warrant a demand for the whole....' Were we to allow subpoenas in the form here requested by protestants, the result would be the complete negation of the specificity requirement of Section 1.832. In view of the clear language of Section 1.832, our prior decisions (see *Gulf Television Company*, 11 RR 822, 824), and in the interests of orderly administrative process, we affirm the Examiner's ruling.

11. For the reasons indicated, Timm's appeal will be granted, and the Hearing Examiner's grant of the subpoena duces tecum will be set aside. Our action herein does not, of course, foreclose the Bureau from making further requests for subpoenas duces tecum which meet the requirements of the Commission's Rules.

Accordingly, IT IS ORDERED, This 20th day of August, 1964, That the appeal of B. F. J. Timm and WDMG, Inc., from the Examiner's ruling, IS GRANTED; and the subpoena duces tecum issued on April 23, 1964, IS QUASHED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] The cited rule included substantially the same provisions as the current Section 1.333(b) of the Commission's Rules.

F.C.C. 64–763

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of PENINSULA BROADCASTING CORP., HAMPTON, VA. For Construction Permit To Make Changes in the Facilities of Television Broadcast Station WVEC–TV | File No. BPCT–3279 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LEE DISSENTING.

1. The Commission has before it for consideration: (a) the above-captioned application of Peninsula Broadcasting Corporation, permittee of Television Broadcast Station WVEC–TV, Channel 13, Hampton, Virginia, filed December 26, 1963; (b) Petition to Deny, filed February 10, 1964, by Lynchburg Broadcasting Corp., licensee of Television Broadcast Station WLVA–TV, Channel 13, Lynchburg, Virginia (Petitioner); (c) objections, filed February 11, 1964, pursuant to Section 1.587 of the Commission's Rules, by The Association of Maximum Service Telecasters, Inc. (MST); (d) Opposition and Reply, filed March 2, 1964, by the applicant, against (b) and (c), above [1]; (e) Further Objections, filed March 11, 1964, by MST.

2. Applicant presently operates Station WVEC–TV (ABC) from a transmitter site within the city limits of Norfolk, Virginia, with effective radiated visual power of 316 kw and an antenna height above average terrain of 410 feet. By its application, the applicant seeks authority to move its transmitter to a point .2 miles south southeast of Shoulders Hill, Virginia, a move of approximately 9.7 miles west from its present site and in the direction of Station WLVA–TV. The applicant also proposes to increase antenna height above average terrain to 980 feet and directionalize its antenna to suppress radiation in the direction of Station WLVA–TV, the ABC-affiliated co-channel station in Lynchburg, Virginia. No change is proposed in power. Operating as proposed, Station WVEC–TV would be approximately 161.6 miles from Station WLVA–TV, whereas Section 73.610 of the Commission's Rules requires a minimum mileage separation of 170 miles in Zone I in which both stations are located. The applicant, therefore, would be approximately 8.4 miles short to the Lynchburg co-channel station. The applicant proposes to provide

[1] Applicant requested, and was granted, an extension of time within which to file its Opposition and Reply.

"equivalent protection" to Station WLVA–TV and has requested a waiver of Section 73.610 in order to permit it to operate at short-spacing. It is to this proposed short-spaced operation that the petitioner and MST object.

3. The applicant challenges the standing of the petitioner and MST in this proceeding, alleging that the "equivalent protection" to be provided would afford petitioner greater protection from interference than that to which the petitioner would be entitled by reason of the separation requirements. The applicant contends, therefore, that a grant of its application would not result in modification of the petitioner's license. Applicant's position in this respect is amply supported by our decision in *New Orleans Television Corp.* (WVUA–TV), FCC 62–853, 23 RR 1113; affirmed *sub nom Capitol Broadcasting Company* v. *Federal Communications Commission,* 116 U.S. App. D.C. 370, 324 F. 2d 402, 25 RR 2151. In that case, it was held that a station's license was not modified where the station would not be required to receive a greater degree of interference from the applicant's station than if the applicant were operating at standard spacing with the full facilities to which it is entitled under the Commission's Rules [2]. MST does not claim standing as a "party in interest" within the meaning of Section 309(d)(1) of the Communications Act, but only claims status as an objector pursuant to the provisions of Section 1.587 of the Commission's Rules. It is apparent, therefore, that neither the petitioner nor MST has standing as a "party in interest". Nevertheless, we think that the matters raised by the pleadings deserve consideration on the merits.

4. There are presently three television broadcast stations placing principal city signals over the Norfolk urbanized area: Station WAVY–TV, Channel 10, Portsmouth, Virginia (NBC); Station WTAR–TV, Channel 3, Norfolk, Virginia (CBS); and Station WVEC–TV, the ABC affiliate. The Grade B contour of Station WRVA–TV, Channel 12, Richmond, Virginia (ABC), intersects the present and proposed Grade B contours of Station WVEC–TV and the area of overlap constitutes approximately one-third of the Station WVEC–TV present and proposed Grade B coverage areas. Additionally, the petitioner, Station WLVA–TV, is also an ABC affiliate.

5. Essentially, the applicant urges a grant of its application on the basis that Station WVEC–TV and ABC are at a competitive disadvantage in the non-metropolitan areas of Norfolk because the other two stations in the area are operating with 1,000 foot towers and have appreciably larger coverage areas; that the proposed move will enhance the competitive positions of Station WVEC–TV and ABC *vis-a-vis* the other stations and networks in the market; and that the proposed move will entail no loss areas, but will result in a gain area within the predicted Grade B contour of approximately 3,000 square miles containing more than 190,000 persons. The applicant points out that its proposed use

[2] See also *WTEV Television, Inc.,* FCC 62–852, 23 RR 1050b; affirmed *sub nom Rhode Island Television Corporation et al* v. *Federal Communications Commission,* 116 U.S. App. D.C. 40, 320 F. 2d 762, 25 RR 2103.

of the "equivalent protection" technique will provide Station WLVA–TV a greater degree of protection than it now enjoys because the present co-channel interference area will be reduced. Applicant states that a move is necessary, if it is to improve its coverage, because it is now operating with maximum power and at the greatest height which could be approved with respect to air safety considerations. The applicant cites the *New Orleans, Louisiana,* and *Enid, Oklahoma,* cases [3] in support of its request for waiver of Section 73.610 of the Rules, alleging that short-spacing is warranted in order to provide three competitive network services to the area.

6. The petitioner and MST object to the short separation as unnecessary and in contravention of the Commission's Rules. Petitioner alleges that a grant of the application would operate to "freeze" Station WLVA–TV to its present site and would preclude relocation at any time in the future. The petitioner also complains that the proposal would impose upon it certain expenses and responsibilities attending maintenance and operation of equipment required in connection with the applicant's proposed "equivalent protection". MST states that the proposal involves a move away from Norfolk with a resultant 85% reduction in the strength of Station WVEC–TV's signal in the heart of Norfolk. Furthermore, MST alleges, the proposed move would not bring a first Grade B signal to any area, would bring a second Grade B signal to about 580 persons in a 10 square mile area, and would bring a third Grade B signal to about 14,000 persons in a 282 square mile area. A first *ABC* Grade B signal would be brought to approximately 33,000 persons representing between 5,000 and 6,000 television homes. With the exception of these 33,000 persons, MST states that the proposed gain area is already within the Grade B coverage area of some other ABC-affiliated station and to the extent that ABC coverage would be increased by the expansion of Station WVEC–TV's Grade B contour, it would be decreased by losses in coverage by other ABC affiliates. It follows, MST reasons, that it is by no means certain that a grant of the application would improve ABC's competitive position. Because of the substantial reduction in field strength in Norfolk, MST argues, the proposed move cannot be justified, citing the *WOOD* case [4]. Finally, MST argues that the use of "equivalent protection" in a situation such as is here presented is contrary to the Commission's policy as expressed in Docket No. 13340 [5].

7. The desire to improve the position of Station WVEC–TV and ABC in the Norfolk market to the point where they will be more competitive with the other stations and networks in that market is the basic reason underlying the applicant's proposal. In this connection, it is clear that the passage of time has demonstrated that the site limitations imposed upon the applicant initially have

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[3] *New Orleans Television Corp.* (WVUA-TV), FCC 62–853, 23 RR 1113, released July 31, 1962; Memorandum Opinion and Order, Docket No. 14231, FCC 63–739, 25 RR 1780, authorizing short-spaced assignment of Enid, Oklahoma, station.

[4] *WOOD Broadcasting, Inc.* (WOOD-TV), 30 FCC 115, 20 RR 618; reversed and remanded *sub nom Television Corporation of Michigan* v. *Federal Communications Commission,* 111 U.S. App. D.C. 101, 294 F. 2d 730, 21 RR 2107.

[5] FCC 61–994, 21 RR 1695; FCC 61–1445, 21 RR 1710a, both released December 13, 1961.

prevented it from becoming fully competitive in the Norfolk area. Faced with a similar competitive situation in the *Capital Cities* case [6] in Albany, New York, the Commission recognized the desirability of rectifying the earlier error with respect to the site limitations under which the applicant was there laboring, and we authorized operation at short-spacing and the use of the "equivalent protection" technique [7]. The Commission's efforts to relieve competitive imbalance in situations where the public interest requires it is further illustrated in *Fisher Broadcasting Co.*, FCC 63–595, 25 RR 746. In that case, the Commission authorized operation at short-spacing where it was found that operation from the existing site had failed to permit comparable and more effective and healthy competition among a greater number of stations in the area. In the *New Orleans* case, *supra*, the Commission, in dealing with objections similar to those presented here, permitted short-spaced operation for the purpose of assuring the existence of a third truly competitive station in the market and thereby making available competitive facilities to the networks. We also found that protection against co-channel interference afforded by the use of the "equivalent protection" technique does not result in modification of license. The Court of Appeals, in affirming the Commission's decision, said, in part:

Equivalent protection from interference, which was thought to be adequate as of the present time, was afforded to Capitol. We can not say that these conclusions are without support and are erroneous.

8. We have considered the other matters raised by the petitioner and MST and we find no merit in the allegations made with respect thereto. It is true that the applicant's proposal entails a move away from Norfolk, but a principal city signal of 98 dbu, 21 db in excess of that required by the Commission's Rules will, nevertheless, be provided to the principal community to be served. No person in applicant's present service area will be deprived of service, but there will be significant gains and there will be a reduction in interference which Station WLVA–TV now receives. With respect to the allegation that a grant of the application would operate to "freeze" petitioner to its present site, we find this contention to be without merit and based solely on conjecture. Petitioner also alleges that the use of precision offset equipment by the applicant would impose upon it certain expenses and responsibilities which it has not agreed to accept. The short answer to this argument is that the petitioner is not required to install or maintain such equipment because the efficacy of the "equivalent protection" technique is not dependent upon the use of precision offset equipment. The petitioner will not suffer additional interference whether such equipment is used or not. MST's argument that it is by no means certain that a grant of the application would appreciably improve applicant's and ABC's competitive position ignores the fact that a gain of 190,000 persons and a first ABC service to 33,000 persons must inevitably result in some improve-

[6] *Capital Cities Broadcasting Corp.* (WTEN), FCC 63–129, 24 RR 1067.
[7] See also *Van Curler Broadcasting Corp.* (WAST), FCC 63–130, 24 RR 1079; *St. Anthony Television Corporation* (KHMA), FCC 64–330, 2 RR 2d 348; Enid, Oklahoma, case, Docket No. 14231, FCC 63–739, 25 RR 1780.

ment of the competitive situation. In any event, such an argument cannot be the basis for action adverse to the applicant. Finally, MST's reliance on the *WOOD* case is misplaced because, unlike here, the Commission was there dealing with a situation involving the creation of a "white area", the loss of a second Grade B signal to 42,000 persons, and the loss of a Grade A signal to a city of significant size. None of these factors is present in the matter now before us.

9. Our examination of the facts presented by the pleadings and statistics otherwise available to the Commission convinces us that a serious competitive imbalance exists in the Norfolk market. For example, Station WVEC–TV receives a much lower national spot rate than either of its competitors and realizes only 17% of the national spot business in the market. Other comparative figures disclose similar disparities and reveal the significant competitive inferiority of the applicant and ABC in the area. While it is neither our purpose nor function to assure competitive equality in any given market, we have a duty to at least take such actions as will create greater opportunities for more effective competition among the networks in major markets. In the matter before us, 33,000 persons would, for the first time, enjoy a choice of three network services, and more than 190,000 persons would receive an additional television service. There would be no loss of service now being received by anyone. Since the applicant cannot expand its coverage area from its present site, the relocation of its transmitter appears to us to be the appropriate vehicle whereby the public interest may be enhanced. As we have pointed out, the petitioner will receive no greater interference than that which it would be required to receive if the applicant were operating at standard spacing. The Commission has long been concerned with the problem of making three truly competitive network services available to the public in major markets and where the opportunity is presented to achieve this objective without detriment to anyone and with benefit to many, we think that it is clear that a grant of the application would be warranted.

10. In view of the foregoing, the Commission finds that the petitioner and MST are without standing as "parties in interest" within the intent and meaning of Section 309(d)(1) of the Communications Act and Section 1.580(i) of the Commission's Rules. The Commission further finds that, on the merits, no substantial and material questions of fact have been raised and that a grant of the application would serve the public interest, convenience and necessity.

11. In order to guarantee the applicant's performance in accordance with its proposal to provide "equivalent protection" to Station WLVA–TV, we will so condition the grant as to assure applicant's compliance therewith.

Accordingly, IT IS ORDERED, That the Petition to Deny, filed herein by Lynchburg Broadcasting Corp., IS DISMISSED, and that the Objections filed herein by The Association of Maximum Service Telecasters, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That Section 73.610 of the Com-

mission's Rules IS HEREBY WAIVED.

IT IS FURTHER ORDERED, That the application (BPCT-3279) of Peninsula Broadcasting Corporation IS GRANTED, subject to specifications and conditions to be issued.

Adopted July 29, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–761

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of WGSB BROADCASTING CO., EAST LANSING, MICH. Requests: 730 kc., 500 w., DA–Day, Class II For Construction Permit | File No. BP–14976 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE ABSTAINING FROM VOTING.

1. The Commission has before it for consideration (a) the "Petition to Deny" filed on February 11, 1963, by WGN, Inc., licensee of standard broadcast station WGN, Chicago, Illinois, directed against a grant of the above-captioned application; (b) the "Opposition to Petition to Deny" filed on February 26, 1963, by WGSB Broadcasting Company, the applicant herein; (c) the "Reply to Opposition to Petition to Deny" filed on March 18, 1963, by the petitioner; (d) the "Response to Reply to Opposition to Petition to Deny", filed on April 9, 1963, by the applicant accompanied by a "Motion to Accept Pleading"; and (e) a "Reply to Motion to Accept Pleading" filed on April 17, 1963, by WGN.

2. The petition to deny sets forth the signals that are available in the service area and the applications pending for East Lansing, Michigan and also sets forth the entire history of Station WGN's active participation in the rule-making proceeding concerning Clear Channel operations in Docket No. 6741, down to and including its appeal filed December 27, 1962, challenging the validity of certain actions of the Commission on ten different grounds including modification of its own license and, also that the Commission's action was arbitrary and capricious violating the Fifth Amendment and certain Sections of the Communications Act of 1934, as amended. In paragraph 16 of the petition to deny, it is stated:

> The above-captioned application proposes an operation that would cause interference not only to the present service of WGN, but also to the 750kw service for which WGN filed application on November 13, 1962. Details of the extent of that interference are set forth in the attached engineering affidavit. Moreover, the establishment of a station at East Lansing as proposed would create an obstacle to a later grant of WGN's application for 750kw power.

The petitioner submits an engineering statement that claims that the above-captioned proposal would violate Section 73.28(d)(3) of the Commission's Rules (10% Rule) and also alleges that its proposed operation at 750 kw will receive interference from this

East Lansing proposal. However, the petitioner's engineering exhibit does not show that any interference would be caused to its existing operation from this proposal. The petitioner then requests that the application be denied on ten different grounds because a grant of the application:

1. Would hamper effective judicial review to which WGN is entitled under the aforementioned appeal and petition for review now pending in the United States Court of Appeals for the District of Columbia.
2. Would make more difficult a grant of WGN's application for 750 kw power to improve service to underserved areas that the above-captioned proposal will not reach.
3. Would modify the licese of WGN without the hearing required by Sections 303(f) and 316 of the Act.
4. Would violate Section 307(b) of the Act by failing to provide a fair, efficient and equitable distribution of radio service among the several stations and communities.
5. Would ignore House Resolution 714 of the House of Representatives of July 2, 1962.
6. Would violate Section 303(f) of the Act which mandates the Commission, as public convenience, interest or necessity requires, to prevent ruinous interference between stations.
7. Would deprive a large and substantial number of listeners of WGN serv-
8. Would make more difficult the achievement of higher power needed on clear channels to serve the vital interests of military and civil defense.
9. Would deny the November 18, 1962, application of WGN for 750kw without the hearing required by Section 309(e) of the Act.
10. Would be in violation of Section 73.28 of the Commission's Rules.

3. The applicant's opposition is based on two points, *viz.*, (a) that WGN does not have standing to file the petition to deny based on its own showing that interference will not be caused to its existing operation, and (b) that WGN does not acquire standing because of its rejected application to operate at 750kw of power and concludes therefore that WGN, the petitioner, does not re-

ices of such services.

ceive any immediate or direct injury from this proposal, should it be granted. It is also stated in the opposition that an appeal from an Order of the Commission does not give standing before the Commission, *Radio Cabrillo*, 19 R.R. 1184 (1960), and the applicant alleges that WGN's claim is baseless because the Report and Order in the Clear Channel Matter in Docket No. 6741 provided for a Class II–A assignment on WGN's frequency. Finally, WGSB claims that the method used in calculating the interference received by the above-captioned proposal was improper because the claim of interference was based on MEOV's (maximum expected operating values) instead of the use of proposed contours based on theoretical values.

4. In the reply, the petitioner submits an additional engineering statement that shows that the applicant's proposed theoretical operation can not be achieved. Petitioner claims the applicant is using a directional antenna system with zero or no field radiated in the null directions, in order to avoid an apparent violation of the 10% Rule. The applicant tendered a "Response to Reply to Opposition to Deny" because of new allegations raised by WGN in its reply coupled with a "Motion to Accept Pleading" on the grounds that the Reply should be stricken because of the new matters. A "Reply to Motion to Accept Pleading", was filed

disputing the contentions of the motion but stating that if the Commission believes that the pleading will be helpful to it, no objection would be interposed to consideration of the Response. The substance of the Response is that WGN's engineering statement is not correct and includes its own engineer's statement to contradict WGN's showing.

5. The threshold question presented is whether Station WGN has standing to file this petition to deny. WGN does make the statement that a grant of this East Lansing proposal would cause interference to the existing operation of WGN, but its engineering exhibit does not support that statement. The applicant specifically denies that its proposal would cause interference to the existing operation of WGN. In the reply to motion to accept pleading, WGN asserts that it does have standing under the doctrine of the case of *Interstate Broadcasting Company* v. *F.C.C.* 285 F.2d 270, 20 R.R. 211p (1960) which states that a station has standing if it pleads, with specificity, the losses beyond the normally protected contour. The major tenet of the *Interstate* case, *supra,* was that the alleged injury must be pleaded with specificity. Also, in a series of cases the Commission has conferred standing under the doctrine of *F.C.C.* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 9 R.R. 2008 (1940), only if the alleged injury was direct and immediate and more than nominal or highly speculative. *In re Application of National Broadcasting Co., Inc.* 15 R.R. 965, (1957). The relationship between the section complained of and the claimed injury must bear a causal connection. *In re Application of Mid-West Television, Inc.,* 9 R.R. 611 (1953). *In re Application of Central Wisconsin Television, Inc.,* 24 R.R. 912 (1963). Upon examination of the pleadings of WGN, together with both of its engineering exhibits which do not reflect any interference to its existing operation but only to its proposed operation with 750 kw of power, we find that WGN lacks standing to file the petition to deny because no specific losses were alleged beyond its normally protected contour, and accordingly, the petition will be dismissed.

6. Even assuming *arguendo* that WGN has standing, the controversy between the applicant and petitioner concerning possible violation of Section 73.28(d) (3) of the Rules, must be resolved in favor of the applicant. The Commission has consistently held that proposed theoretical values are to be used for the projection of coverage of contours, and that MEOV's are to be used for computing interference which would result to other stations. *South Central Broadcasting Corporation* (WIKY) 7 R.R. 107, 112. Based on the theoretical values, we find that the proposal does not violate Section 73.28 (d) (3) of the Rules. The remaining claims of WGN are all based on the Commission's rejection of its application to operate with 750kw of power, (Memorandum Opinion and Order, FCC 62–1209) and the resulting judicial appeal taken from the rejection of its application. All these grounds are speculative in nature and do not come within the doctrine of immediate and direct injury as required under the *Sanders* doctrine, *supra.*

7. In any event, on October 31, 1963, the United States Court of Appeals for the District of Columbia Circuit in the case of *The*

*Goodwill Stations, Inc.* v. *F.C.C.* 325 F.2d 637, 1 R.R. 2d 2040, (1963), sustained the Commission's action in rejecting WGN's application for a power increase to 750kw. Therefore, WGN's contention that a grant of this proposal would prejudice its 750kw application is moot. However, since then, WGN has tendered an application under 74.301 *et. seq.* for a "developmental" operation. Our studies disclose that the amount of mutual interference involved is not sufficient to preclude a grant of either. Moreover, the type of operation proposed by WGN, to utilize power in excess of 50 kilowatts, is not provided for by the Commission's Rules. Therefore, and in view of a letter from the WGSB Broadcasting Company accepting the indicated interference from the developmental proposal of WGN, we find that the indicated interference should not bar favorable consideration of the East Lansing proposal at this time. The Commission therefore finds that a grant of the East Lansing application, File No. BP–14976, would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the Petition to Deny of WGN, Inc., IS DISMISSED, in part, and DENIED, in part, and the application IS GRANTED upon the conditions and specifications contained in the construction permit.

Adopted July 29, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–758

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>MELVIN B. WARNER, TAMPA, FLA.<br>For Construction Permit | File No.<br>BPH–4380 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the application of Melvin B. Warner, filed March 24, 1964, as amended April 20, 1964, for a construction permit for a new FM broadcast station in Tampa, Florida; (b) a "Petition to Deny" and "Supplement to Petition to Deny" filed April 23, 1964 and April 30, 1964, respectively, by Warner Bros. Pictures, Inc., against (a) above; (c) "Opposition to Petition to Deny and Supplement Thereto", filed May 1, 1964 to (b) above; (d) "Petition to Extend Time" filed May 4, 1964 by Warner Bros.; (e) applicant's "Opposition to Petition to Extend Time," filed May 7, 1964; (f) a reply to the opposition to the petition for extension of time filed by petitioner on May 27, 1964; and (g) petitioner's reply to the applicant's opposition to the petition to deny the application filed on May 20, 1964.[1]

2. Although the applicant originally filed his application above noted as "Melvin B. Warner, tr/as Warner Brothers Station", he later, by amendment, changed the name of the application to the above-captioned "Melvin B. Warner".

3. Petitioner asserts common law and statutory property rights in the name "Warner" or variants thereof because of its historical prominence and achievement in the entertainment field and alleges the probability of gross injury arising from the use by a licensee of the Commission of a name it alleges is "exclusively associated in the public mind with Petitioner" and further raises questions of public interest, character qualifications, and unfair competition based on the proposed use of the applicant's name as originally applied for and prays for a hearing on these issues.

4. It further appears that prior to the filing of the "Petition to Deny" and without knowledge of the petitioner, the applicant had amended his application to eliminate the phrase "tr/as Warner Brothers Station", so that his application appears as above-captioned—"Melvin B. Warner".

5. Petitioner, in his "Supplement to Petition to Deny" acknowl-

[1] The Broadcast Bureau has not, pursuant to Section 0.281(o) of the Commission's Rules, specifically extended the time for the filing of petitioner's reply to the applicant's opposition. However, the Commission, in reaching its determination in this matter, has considered all pleadings submitted.

edges the filing of the above amendment but contends that the same will not vitiate the original petition and asserts that "inevitable confusion" in the public mind will result in applicant's future use of "any variation of the Warner name in connection with the . . . station . . ." and cites as an example of its anticipated damage the confusion in the public mind when the applicant, as he proposes to do, plays and offers for sale his own records on the station. Petitioner is majority owner of Warner Bros. Records, Inc., a competing recording enterprise.

6. Applicant's "Opposition to Petition to Deny and Supplement Thereto" asserts that the amendment by which Applicant specifies his own name with no trading name renders petitioner's basic contention as moot and characterizes as "frivolous" petitioner's supplemental attempt to prevent applicant from using his own name in his own business.

7. The petitioner's reply of May 20, 1964 seeks to buttress its previously stated contentions and suggests that the applicant's failure to deny petitioner's allegation that he plans to use his station as a vehicle for the merchandising of records in competition with Warner Bros. Records, Inc., raises the presumption that the applicant intends to use the public airwaves on a large scale to promote his record business.

8. With reference to the allegations concerning the applicant's and petitioner's records, it must be conceded that the applicant's statement in the application as originally filed, that he intends to play some of his records on the station and offer them for sale was not entirely responsive to the request in the application form (Paragraph 9, Section IV of FCC Form 301) that an applicant indicate the number of hours per week which will be used in promoting any activity other than broadcasting in which he is engaged. However, the application has been amended to include a statement that the applicant will broadcast not more than an average of one spot announcement per day in connection with the performance of his records. The application as originally filed indicated that the applicant is president and director of Capricorn Records, Inc., which has issued no stock and is inactive. In the applicant's amendment, he indicates that he is planning to issue one album, but no other releases have been issued. In the future, there will be no more than four or five records per year. Under these circumstances, the Commission finds that it cannot reasonably be expected that the applicant intends to promote his record business on a large scale.

9. Upon due consideration of all the contentions advanced by the petitioner, the Commission finds that they do not raise a substantial or material question of fact which would require a hearing. The applicant must be aware that if he engages in practices deemed by the petitioner to constitute unfair methods of competition, the petitioner may seek relief in a forum of appropriate jurisdiction, but the Commission does not find that under the facts as presented herein an application of its Rules and Regulations places a person whose surname happens to be Warner under a legal disability to engage in broadcasting under that name.

10. Upon consideration of the application the Commission finds

that the proposed operation will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, This 29th day of July, 1964, That the petition to deny the application of Melvin B. Warner filed by Warner Bros. Pictures, Inc., IS HEREBY DISMISSED.

IT IS FURTHER ORDERED, That the application for a construction permit for a new FM broadcast station in Tampa, Florida, IS HEREBY GRANTED subject to the conditions in the construction permit.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64-748

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>JEROME B. ZIMMER AND LIONEL D. SPEIDEL<br>D.B.A. MISSOURI-ILLINOIS BROADCASTING<br>CO. (KZIM), CAPE GIRARDEAU, MO.<br>Has CP: 1220 kc., 250 w., Day, Class II<br>For Construction Permit | File No. BP-15057 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration; (a) the decision in the case of *KGMO Radio-Television Inc.*, v. *F.C.C.*, 2 R.R. 2d 2057, Case No. 18064, decided May 22, 1964 by the United States Court of Appeals for the District of Columbia Circuit remanding the case to the Commission for further proceedings; (b) the "Motion to Dismiss Petition for Reconsideration" filed on June 5, 1964, by the above-captioned applicant directed against the "Petition for Reconsideration and Request for Stay" filed on April 12, 1963, by KGMO Radio-Television, Inc., licensee of standard broadcast station KGMO, Cape Girardeau, Missouri, which was directed against the Commission's action of March 13, 1963, granting without hearing the above-captioned application [1]; (c) the "Motion to Strike Missouri-Illinois Broadcasting Company's Motion to Dismiss" and the "Opposition to Motion to Dismiss" filed on June 18, 1964 by KGMO Radio-Television, Inc.; and (d) the opposition to the motion to strike and the reply to the opposition filed on June 26, 1964 by the permittee.

2. The Court of Appeals for the District of Columbia Circuit, in the *KGMO* case, affirmed the principle set forth in the case of *Carroll Broadcasting Company* v. *F.C.C.*, 258 F.2d 440 (1958) to the extent that the Commission may inquire into the question whether the economic effect of a second license in the area would be to damage or destroy service to an extent inconsistent with the public interest. The Commission, at the time it granted the above-captioned application, stated that in addition to pleading the legal conclusion that a grant of the new proposal would injure the protesting existing station to the extent that the public interest would suffer a net loss or degradation of program service, the existing station must support the conclusion with specific allegations of fact sufficient to show that the existing station is a party in interest

[1] 1 R.R. 2d 1 (1963).

and that a grant of the application would be *prima facie* inconsistent with the public interest standards of Section 309 of the Communications Act of 1934, as amended. *Missouri-Illinois Broadcasting Company,* 1 R.R. 2d (1963). Also set forth in the Commission's decision granting the application were illustrations of the types of information necessary to support an economic issue.

3. In the Motion to Dismiss, Missouri-Illinois contends that one of the purposes of the remand in the above-mentioned decision was to give the Commission an opportunity to determine if the KGMO petition for consideration was filed in accordance with Section 1.106 of the Commission's Rules in view of the failure of KGMO to file a petition to deny prior to grant. Missouri-Illinois also claims that the Court held that the Commission may decide the case on other grounds and that the Commission may in "its discretion consider and act upon any of its Rules." Missouri-Illinois then alleges that KGMO knew, at least one month prior to the KZIM grant, of the closing of the factory on which it based its petition for reconsideration and therefore KGMO could have participated prior to the KZIM grant. Missouri-Illinois also contends that because its construction permit has been stayed pending resolution of the proceedings, additional reasons are present requiring early dismissal of the KGMO petition. However, Missouri-Illinois does concede that the decision permits the Commission to allow KGMO to supplement its allegations in support of its request for an economic issue.

4. In the motion to strike, KGMO claims that the motion to dismiss is in the nature of an opposition to the KGMO petition for reconsideration filed on April 12, 1963 and should be stricken as duplicative and not timely filed. KGMO also claims that even if the date of the remand by the Court of Appeals is the fixed date starting a new time period, it is also not timely filed. While Missouri-Illinois did not set forth the specific authority under which its motion to dismiss is filed, the Commission will waive the provisions of Sections 1.41 and 1.45 of the Commission's Rules to the extent necessary to permit consideration of motion on its merits. KGMO also filed an opposition to the motion to dismiss in which it urges that the Commission either immediately grant a hearing or permit KGMO to supplement it allegations in support of the economic issue.

5. In the reply to the opposition, the permittee reiterates its contention that KGMO in its opposition implicitly admitted that the only fact that occurred after the grant of the KZIM application was the closing of the second largest factory in Cape Girardeau and that KGMO had actual or constructive notice of the closing at least one month prior to the KZIM grant (at the time of the first newspaper announcement), and therefore could have ascertained all the facts prior to the grant. The remaining contentions of the reply are argumentative in nature.

6. However, the Court, in remanding the case to the Commission stated, among other things, that the existing station did not have notice of the pleading requirements necessary to support the economic issue, as set out in the Commission's decision granting the application and also stated that the Commission could, in its discretion, permit the existing station to amend and amplify its allega-

tions in line with the *Missouri-Illinois* case.[2] Upon consideration of the Court's decision, the Commission has decided to allow KGMO an opportunity to amend and amplify its allegations in the petition to deny pursuant to the decisions of the Court and the Commission. The questions set forth below should be fully answered as part of the amended petition for reconsideration. Even though it was stated in the Commission's decision, we again stress that the illustrations of the type of information necessary to support a *Carroll* issue set forth in the original *Missouri-Illinois* decision were not all inclusive. Therefore, in addition, any information that would aid the Commission in the disposition of the economic issue also should be submitted. The questions are:

(1) What is the total amount of retail sales in the community and the area for the proceeding three years? If sales are in a decreasing pattern, set forth the reasons which should include information as to any unusual economic conditions in the area.

(2) What is the total number of businesses in the community and the area?

(3) What is the total advertising revenue potential in the community and the area?

(4) What is the amount of local advertising revenue actually earned by our station in the community and the area?

(5) Set forth, for at least the three preceding years, your total revenues, total expenses, net profit or loss and the average number of employees

(6) How many of the existing businesses in the community and the area do not now advertise on the radio?

(7) State, in detail, the specific advertisers that would shift their advertising to the proposed station. How many advertisers will split their advertising time between the existing station or stations and the proposed station?

(8) What are the other competing advertising media in the community and the area?

(9) State, in detail, how a grant of this proposal would cause a net loss or degradation of program service to the area.

(a) What public service programs do you now broadcast?

(b) How many public service spot announcements do you broadcast each week?

(c) What public service programs would have to be discontinued? spot announcements?

(d) What public service programs will have to be shifted to other time segments? spot announcements?

(e) As to (c) and (d) what percentage of the total broadcast time is represented by the public service programming?

(f) What is the cost of carrying these programs and

[2] The Court in the concluding paragraph of the majority opinion stated:
"We think it is within the Commission's authority to require more information than appellant give. But since the appellant had no notice, in the Comission's past decisions or otherwise that more would be required, the petition should not be denied on the ground that more was not furnished. We therefore remand the case to the Commission. Unless it decided the case on other grounds, it should permit appellant to amend and amplify the petition. The Commission may in its discretion consider and act upon any of its Rules."
As noted above, the Commission in its discretion will allow KGMO an opportunity to amend its petition for reconsideration.

what saving will be effected in dropping or shifting this programming? What is the cost of carrying the public service spot announcements and what saving will be effected in dropping or shifting spot announcements? What programming personnel changes will be required?

(10) What information, if any, do you have that some or all of the public service programming will not be carried by the proposed station?

(11) Will a grant of the proposal require you to make substantial changes in your total present program format and policies. State full details.

(12) Set forth any other information which is sufficiently related to the economics of broadcasting, including the specific relationship between any assumed losses in revenue to the withdrawal of particular programs or program services in support of the question raised in petition to deny concerning the inability of the area to support another broadcast station without loss or degradation of program service to the area.

7. The additional information that KGMO may desire to submit in support of its request for an economic issue must be on file within sixty (60) days from the date of this Memorandum Opinion and Order. A copy of this data will be furnished to the permittee who will then have fifteen (15) days from receipt thereof to file opposition data.

8. In the event that KGMO does not submit the information specified in paragraph 6, the Commission will dismiss the KGMO petition for reconsideration and dissolve the outstanding stay of the construction permit of Missouri-Illinois Broadcasting Co.

9. In view of the foregoing, the Commission is of the opinion that action with respect to the above-captioned proposal should be held in abeyance pending the further proceedings described above.

Accordingly, IT IS ORDERED, That the Motion to Strike filed by KGMO Radio-Television, Inc., IS DENIED; and that the provisions of Section 1.41 and Section 1.45 of the Rules ARE WAIVED to the extent necessary to permit consideration of the Motion to Dismiss Petition for Reconsideration filed by Missouri-Illinois Broadcasting Co.;

IT IS FURTHER ORDERED, That further proceedings with respect to the above-captioned construction permit ARE HELD IN ABEYANCE pending completion of the proceedings as set forth herein;

IT IS FURTHER ORDERED, That if and when KGMO Radio-Television, Inc. timely files with the Commission such material as it deems necessary, a copy SHALL BE SERVED on the permittee.

IT IS FURTHER ORDERED, That the permittee, with within fifteen (15) days of the date of service of data from the permittee, SHALL FILE its opposition with the Commission.

IT IS FURTHER ORDERED, That the Motion to Dismiss filed by the permittee IS DENIED.

Adopted July 29, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–745

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of<br>DOVER BROADCASTING CO. (WDOV), DOVER, DEL.<br>Has: 1410 kc., 5 kw., Day, Class III<br>Requests: 1410 kc., 5 kw., DA–N, U, Class III–A<br>For Construction Permit | File No. BP–15456 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration (a) the above captioned application, as amended to date; (b) the "Petition to Deny Application" filed April 15, 1963, by Capital Broadcasting Corp., licensee of Station WKEN, Dover, Delaware, and (c) pleadings in opposition and reply thereto.

2. Petitioner bases its claim of standing on the fact that it is the licensee of Station WKEN, Dover, Delaware and in direct competition with the applicant for advertising revenues. We find the petitioner is a "party in interest" under Section 309(d)(1) of the Communications Act of 1934, as amended. *F.C.C.* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940).

3. The petition to deny lists three reasons which it claims cause the grant to be inconsistent with the public interest. The petitioner's first claim is that due to the nighttime limitation of 27.49 mv/m, the 92.6% area loss (424 square miles) and 79.3% population loss (53,862 persons) within the nighttime normally protected contour is "... interference to such an extent that its service would be reduced to an unsatisfactory degree" so that the proposed operation would be in violation of Section 73.24(b) of the Commission's Rules. However, the applicant amended his proposal on June 26, 1963, to change the antenna pattern slightly to provide more flexibility in adjustment. Additional field intensity measurement data was submitted at that time. Based on this additional information, with the 27.49 mv/m limitation, the losses amounted to 33,751 persons (69.2%) in an area of 240.6 square miles (89.6%). WKEN has not filed any pleading controverting the data submitted in the June 26, 1963 amendment.

4. In the *Strafford Broadcasting Corp.* case (24 R.R. 835, released January 18, 1963) the Commission held that a determination as to whether or not interference received reduces proposed service to an unsatisfactory degree depends upon a number of factors including coverage of the principal community, availability of

other services, effect upon use of the channel at other locations, and interference to existing stations.

5. In the present case, the Commission finds the proposed operation would provide satisfactory coverage to the city of Dover, provide the city of Dover (population 7250) with its first primary nighttime service and causes no interference to existing stations according to the Commission's Rules. The applicant also submitted an engineering study selecting several cities where the frequency could possibly be used and concluded that the effect of this proposed operation would be minimal due to present high levels of skywave interfering signals. The petitioner claims that even though this operation, in theory, may not affect further allocations on the channel, it would render a practical allocation impractical because of the necessity for a complicated antenna system. However, the petitioner submitted no engineering data in support of such claim. The Commission is of the opinion, therefore, that the applicant's showing as to the effect on future allocations is reasonable, and has not been controverted by the petitioner.

6. The petitioner further asserts that (a) the design of the antenna pattern is incorrect because of the failure to incorporate assumed losses, (b) the antenna system cannot be adjusted and maintained as proposed because of inadequate tolerance, and (c) the parameters specified for the WDOV antenna are inconsistent with the pattern shown in the application. The applicant has amended to provide more flexibility in adjustment of the array. Moreover, as amended, the proposed antenna parameters accurately depict the proposed directional radiation pattern.

In view of the foregoing, we find that no substantial or material question of fact has been presented by the petition to deny and that a grant of the above-captioned application will serve the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, That the petition to deny filed by the Capital Broadcasting Corp., IS DENIED, and that the application of Dover Broadcasting Company IS GRANTED, upon the conditions and specifications set forth in the construction permit.

Adopted July 29, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–743

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Applications of

CHARLES W. JOBBINS, COSTA MESA-NEWPORT BEACH, CALIF.
Requests: 1110 kc., 1 kw., Day, Class II

RADIO SOUTHERN CALIFORNIA, INC., PASADENA, CALIF.
Requests: 1110 kc., 10 kw., 50 kw.-LS, DA–2, U, Class II

GOODSON-TODMAN BROADCASTING, INC., PASADENA, CAL.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U. Class II

ORANGE RADIO, INC., FULLERTON, CALIF.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II

PACIFIC FINE MUSIC, INC., WHITTIER, CALIF.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II

THE BIBLE INSTITUTE OF LOS ANGELES, INC., PASADENA, CALIF.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II

CHRISTINA M. JACOBSON AND LESLIE H. HACKER D.B.A. RADIO STATION KCJH (KCJH), ARROYO GRANDE, CALIF.
Has: 1280 kc., 500 w., Day, Class III
Requests: 1110 kc., 1 kw, 5 kw.–LS, DA–N, U, Class II

C. D. FUNK AND GEORGE A. BARON, A PARTNERSHIP D.B.A. TOPANGA MALIBU BROADCASTING CO., TOPANGA, CALIF.
Requests: 1110 kc., 500 w, DA–2, U, Class II

CALIFORNIA REGIONAL BROADCASTING CORP., PASADENA, CALIF.
Requests: 1110 kc., 50 kw., DA–2, U, Class II

STANDARD BROADCASTING CO. (KGBS), PASADENA, CALIF.
Has: 1020 kc., 50 kw., DA–1, L–KDKA, Class II, Los Angeles, Calif.
Requests: 1110 kc., 50 kw., DA–2, U, Class II, Pasadena, Calif.

MITCHELL B. HOWE, PETER DAVIS, EDWIN M. DILLHOEFER, AND C. HUNTER SHELDEN D.B.A. PASADENA CIVIC BROADCASTING CO., PASADENA, CALIF.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II

MARSHALL S. NEAL, ROBERT S. MORTON, ARTHUR HENISCH, MACDONALD CAREY, BEN F. SMITH, DONALD C. MCBAIN, ROBERT BRECNNER, LOUIS R. VINCENTI, ROBERT C. MARDIAN, JAMES B. BOYLE, ROBERT M. VAILLANCOURT, AND EDWIN EARL D.B.A. CROWN CITY BROADCASTING CO., PASADENA, CALIF.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II

HI-DESERT BROADCASTING CORP. (KDHI), TWENTY-NINE PALMS, CALIF.
Has: 1250 kc., 1 kw., Day, Class III
Requests: 1110 kc., 10 kw., DA–N, U, Class II

PASADENA COMMUNITY STATION, INC., PASADENA, CALIF.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II

BROADCASTERS OF BURBANK, INC., PASADENA, CALIF.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II

VOICE OF PASADENA, INC., PASADENA, CALIF.
Requests: 1110 kc., 10 kw., 50 kw,–LS, DA–2, U, Class II

WESTERN BROADCASTING CORP., PASADENA, CALIF.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II

PASADENA BROADCASTING CO., PASADENA, CALIF.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II

KFOX, INC. (KFOX), PASADENA, CALIF.
Has: 1280 kc., 1 kw., Day, Class III, Long Beach, Calif.
Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II, Pasadena, Calif.
For Construction Permit

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN THE RESULT; COMMISSIONER LOEVINGER DISSENTING.

1. The Commission has before it for consideration (a) the above-

captioned applications tendered for filing on or before March 31, 1964:[1] (b) the "Motion to Dismiss" seventeen of the nineteen applications filed on May 7, 1964 by Christina M. Jacobson and Leslie H. Hacker d/b as Radio Station KCJH;[2] (c) opposition pleadings from sixteen of the seventeen applications against which the motion to dismiss has been directed; and (d) a reply by KCJH.

2. The only competing application of KCJH that has not been challenged by the KCJH motion to dismiss is the application of Hi-Desert Broadcasting Corporation. Of the seventeen tendered proposals that have been challenged, only Broadcasters of Burbank, Inc. has not filed an opposition, either in whole or in part, to the motion to dismiss.

3. KCJH's motion to dismiss is directed against the seventeen applications that request a waiver of the freeze. KCJH contends that the seventeen application should be dismissed because the KCJH proposal which will provide nighttime primary service to a "white" area must be favored under the statutory mandate of Section 307(b) of the Communications Act of 1934, as amended, as against the seventeen applicants who will not provide service to any areas and populations not already receiving a plethora of signals because they are, in effect, applications for another standard broadcast station for the Los Angeles area. Since it claims the 307(b) question will be controlling, KCJH urges that the Commission deny the requests for waiver to avoid a complicated, extensive and lengthy hearing, because the outcome is not in doubt as KCJH will be favored under Section 307(b) of the Act. It is claimed that because the applications are in violation of the freeze criteria, a hearing is not a matter of right even on the Section 307(b) question.

4. The opposition pleadings fall into three general categories. California Regional Broadcasting Corporation moves to strike the KCJH pleading on the grounds that the Commission's Rules do not provide for the filing of a motion to dismiss. However, KCJH filed under Section 1.41 of Rules which provides that informal requests may be filed (if a formal procedure is not required) setting forth the facts relied upon, the relief sought, the statutory or regulatory provisions involved and the interest of party filing the pleading. KCJH has complied with Section 1.41 of the Rules and the Commission will consider the pleading on its merits. California Regional's motion to strike will be denied. California Regional filed, as a part of its pleadings, in the alternative, an opposition to the motion to dismiss.

5. The second category of opposition pleadings are the partial motions to dismiss filed by Goodson-Todman Broadcasting, Inc. and Topanga Malibu Broadcasting Company. Goodson-Todman and Topanga Malibu, in the main, oppose the KCJH motion to dismiss. However, these two prospective applicants request that applications not requesting a waiver of the freeze or those that have submitted incomplete engineering data should be dismissed. These

[1] All the applicants but Hi-Desert Broadcasting Corporation and Radio Station KCJH have requested a waiver of Section 1.571 of the Commission's Rules. Hi-Desert and KCJH are in compliance with the "freeze" criteria as set forth in Section 1.571 according to the data submitted.
[2] Filed pursuant to Section 1.41 of the Rules.

contentions will be fully discussed and disposed of in succeeding paragraphs. Charles W. Jobbins supports the KCJH motion in all respects except as to his own proposal because his proposal is not designed to serve the Los Angeles area because it is specifically designed to bring a first service to Orange County and is therefore not within the ambit of the KCJH motion. This too will be further discussed and disposed of later in the opinion.

6. The final category of pleadings are the oppositions to the KCJH motion to dismiss. We shall not set forth the grounds contained in each opposition separately, but will deal with them on a totality basis. The grounds are:

(a) KCJH has not attacked the reasons advanced in support of the requests for waiver of the freeze.

(b) The freeze was not intended to apply to applications specifying the continuation of an existing service.

(c) There is no certainty that KCJH will prevail on 307(b) grounds because the "white" area factor is not the only element in the determination of the Section 307(b) question.

(d) There is a good possibility that KCJH will not prevail on 307(b) grounds because its proposal would be an inefficient use of the frequency and also would be in violation of the clear channel criteria.

(e) In any event, the determination of a 307(b) between competing qualified applicants cannot be made without an evidentiary hearing.

(f) KCJH's "white" area claim may not be supported in an evidentiary hearing.

(g) The Pasadena proposals are not for a new service but only for the continuation of an existing service, so the question of adding another service to the Los Angeles area is not a true contention, and under the intent of the notice inviting applications, the Commission contemplated replacing or improving the KRLA service.

(h) Under the *Kessler* case,[3] even if the KCJH application would be accepted, the other complete applications would have to be considered, even though they are in violation of the freeze, or it would result in a denial of *Ashbacker* rights [4] of the competing applicants.

(i) KCJH could serve more nighttime "white" area by improving its present facilities (1280kc) than by shifting to 1110 kc.

7. In reply, KCJH asserts that this is a proceeding for a new station and not the continuation of an existing service and therefore, the freeze is applicable. It is reiterated that the waiver requests must be denied because the granting of another service in the Los Angeles—Pasadena area is contrary to the freeze because it just adds another service to a saturated market that would serve no "white" area. Also KCJH contends under *Swannanoa Valley*, 1 R.R. 2d 193 (1963) that a pre-existing station in violation of the freeze cannot justify a non-compliance by a new station. KCJH renews its contention that a hearing is not required because the

[3] *Kessler* v. *F.C.C.* 1 R.R. 2d 2061 (1968).
[4] *Ashbacker Radio Corporation* v. *F.C.C.* 326 U.S. 327 (1945).

seventeen tendered applications are in violation of the Commission's Rules. KCJH contends that the *Kessler* case, supra, is only applicable to applications that were mutually exclusive with an application on file on the date of the adoption of the freeze (May 10, 1962). As to the possible violation of the clear channel criteria, KCJH asserts that the only Class II–A applications that have been filed on 1120kc are in Oregon and that KCJH will provide adequate protection to the II–A proposals so that there is no violation of the clear channel criteria. With respect to the contention that the KCJH proposal is inefficient, it is claimed that, since the "white" area factor is controlling, inefficiency is not a question. KCJH also states that any information set forth in the oppositions concerning the improvement of its existing facilities is not relevant to the decision on this motion or in the proceeding.

8. Four of the applicants that specify Pasadena, California as the station location have incorporated the engineering data of the present KRLA operation in lieu of the engineering information requested by the present Section V–A of FCC Form 301. The adoption of the new engineering section of the application requires much more data and more exhibits than was required at the time the present authorizations were made to KRLA. Moreover, Form 301 permits incorporation of data by reference only if the data were filed by or on behalf of the applicant. Also, the changes in population due mainly to the 1960 Census and to other factors renders much of the engineering data obsolete. Therefore, the applicants, who have incorporated the KRLA engineering data, have not filed a complete application. However, the Commission is of the opinion that the submission requirements of Section V–A of FCC Form 301 should be waived to the extent necessary to permit consideration of these applications on their merits. Unusual and unique circumstances are present in this situation because they propose the continuation of an operation in existence. There is no question of the initiation of service or the resumption of service following a extended period in which the facilities were not in use. However, we stress that the applicants incorporating the KRLA engineering duty will be required to demonstrate compliance with the Communications Act and the Commission's Rules e.g., interference to existing station (Section 316); interference received (Section 73.28(d)); coverage rules (Section 73.188); overlap of contours (Section 73.37); and any other applicable engineering requirements.[5] If an applicant desires to submit this engineering data to avoid possible specification of technical issues, it may do so within sixty (60) days from the release date of this Opinion. In view of the foregoing, the requests of Goodson-Todman and Topanga Malibu, that the applicants who incorporated the KRLA engineering data be dismissed, will be denied.

9. KCJH and KDHI meet a specific exception to the "freeze" criteria and therefore must be accepted for filing. As to the KCJH contention that the requests of the other applicants for waiver of the "freeze" should be denied and the applications should be re-

[5] References to specific sections of the Commission's Rules are to the Rules as in force prior to the adoption of the amended Rules in the Commission's Report and Order, adopted July 1, 1964 (FCC 64–609).

turned, the Commission is of the opinion that the unusual circumstances present in this case require that the provisions of the "freeze" should be waived for the limited purpose set forth hereafter. The Commission, in its Public Notice (FCC 64–142), released February 20, 1964, invited applications proposing to use the frequency vacated by Station KRLA. Since the tendered proposals specify several different communities as their station location, the Commission is of the opinion that it should, on its own motion, waive the provisions of the "freeze" criteria to the extent necessary to permit consideration of the applications on the question of which of the tendered proposals would, in the light of Section 307(b) of the Act, best provide a fair, efficient and equitable distribution of radio service. Our waiver of the "freeze" to permit consideration of the applications on the Section 307(b) question, should not be construed as a pre-judgment of the merits of any of the applications. Accordingly, the KCJH request for denial of the waivers of the "freeze" will not be granted. All the above-captioned applications will be accepted for filing for the reasons and purposes set forth above. In view of our action in waiving the "freeze", it is not necessary to discuss the other grounds raised by KCJH and supported by Charles W. Jobbins.

10. All the above-captioned proposals are technically in contravention of the intent of Section 1.569 of our Rules since a Class II–A facility is provided for in California or Oregon on 1120 kilocycles under Section 73.22. However, studies indicate that existing stations effectively preclude such a facility in any area where these proposals would materially affect such an assignment. Thus, we will waive Section 1.569 of our Rules for all the applicants in the proceeding.

Accordingly, IT IS ORDERED, That the provisions of Section 1.566 of the Commission's Rules ARE WAIVED insofar as requiring the submission of engineering data required by Section V–A, FCC Form 301 by those applicants incorporating the engineering data of Station KRLA, Pasadena, California which is on file with the Commission, subject to the terms and conditions set forth above.

IT IS FURTHER ORDERED, That the provisions of Section 1.569 of the Rules ARE WAIVED for all the applications in this proceeding.

IT IS FURTHER ORDERED, That on the Commission's own motion the provisions of Section 1.571 of the Rules ARE WAIVED to the extent necessary and the above-captioned applications ARE ACCEPTED for filing for the purpose set forth above.

Adopted July 29, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–791

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application of
BIRMINGHAM BROADCASTING CO., IRONDALE, ALA. (REQUESTS FACILITIES OF STATION WIXI)
For Construction Permit

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER ABSENT.

1. The Commission has before it for consideration the above-captioned application tendered for filing on December 13, 1963, and accompanying request that the pertinent provisions of Section 1.571(c) of the Commission's Rules be waived to allow acceptance and immediate processing of the application; and (b) and a request dated August 28, 1964, that temporary operating authority be granted pursuant to Section 309(f) of the Communications Act of 1934, as amended, to permit the applicant to operate the existing facilities of Station WIXI, Irondale, Alabama, pending processing of the application.

2. By Commission Order dated December 6, 1963, Station WIXI was required to cease operations on January 1, 1964, at 3:00 A.M. Central Standard Time. The United States Court of Appeals for the District of Columbia stayed the effectiveness of this Order pending a decision on the merits of certain Commission's Orders concerning Station WIXI. The mandate of the Court, affirming (1) the Commission's action in denying the license application of W. D. Frink t/a Jefferson Radio Company, and (2) the Commission's action in its refusal to consent to an assignment of the permit of W. D. Frink t/a Jefferson Radio Company to Jefferson Radio Company, Inc., was received by the Commission on August 24, 1964. By separate concurrent Order of the Commission, W. D. Frink has been permitted to continue the operation of Station WIXI until September 8, 1964 at 3:00 A.M.

3. In its tendered application, Birmingham Broadcasting Company requested a waiver of the processing line procedures to permit immediate consideration of the application, together with a request for temporary operating authority, under Section 309(f) of the Communications Act, in order to maintain the existing service of Station WIXI. This applicant and W. D. Frink have entered into an agreement whereby this applicant would acquire the equipment of Station WIXI and also the use of its transmitter site and studio. In its renewed request, dated August 28, 1964, for temporary authority, Birmingham Broadcasting Company states that the agree-

ment for the use of the facilities is still in effect. It also claims that the station furnishes a local rural—agricultural service to the Irondale-Leeds area that is not provided by other stations in the area.

4. The proposal as tendered December 13, 1963, is in compliance with the Commission's Rules, as amended on July 1, 1964, (FCC 64–609) in that no interference will be caused or received by operation proposed by Birmingham Broadcasting Company. Accordingly, the application will be accepted for consideration under these Rules.

5. With respect to the request for temporary operating authority, Section 309(f) of the Communications Act provides that should the Commission find that there exists "extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest," temporary operating authority may be issued for a period not exceeding ninety days. Such authority may be extended, upon proper findings, for a period not to exceed an additional ninety days.

6. With the termination of operations by Station WIXI, Irondale, Alabama would be without a local broadcast outlet. The Commission has considered the facts presented by the applicant and concludes that "extraodinary circumstances" exist that require continuation of local broadcast service through issuance of temporary operating authority and that failure to continue service to the Irondale area would have an adverse effect on the public interest. Also, for the same reasons, the Commission finds that the public interest would be served by waiving the provisions of Section 1.571(c) of the Rules to permit immediate consideration of the application. *Superior Broadcasting Company*, 22 R.R. 847 (1962); *Capital Broadcasting, Inc.*, 22 R.R. 780 (1962); WAJM, Inc., 24 R.R. 86 (1963); *Community Radio of Saratoga Springs* New York, Inc., 2 R.R. 2d 290 (1964).

7. As noted above, under Section 309(f) of the Act, the temporary operating authority granted herein can be extended by the Commission, upon proper findings, only for an additional ninety (90) days. Therefore, if competing applications are filed, necessitating a comparative hearing for the frequency, operation by Birmingham Broadcasting Company cannot be authorized by the Commission beyond that second ninety day period, and unless the competing applicants will have agreed upon terms under which the Commission may authorize a joint interim operation pending completion of such comparative proceeding, the temporary operation by Birmingham Broadcasting Company will be terminated pending a final decision by the Commission in the comparative proceeding.

8. Simultaneously with the present action, the Commission is issuing a public notice establishing a date on which the application of Birmingham Broadcasting Company will be considered ready and available for processing.

9. In view of the foregoing, IT IS ORDERED, That the application of Birmingham Broadcasting Company IS ACCEPTED for filing and the request for waiver of Section 1.571(c) of the Rules IS GRANTED; and

IT IS FURTHER ORDERED, That pursuant to Section 309(f) of the Communications Act of 1934, as amended, Birmingham Broadcasting Company IS GRANTED temporary operating authority to operate the facilities formerly occupied by Station WIXI, Irondale, Alabama in accordance with the terms of the former license of Station WIXI for a period of 90 days from the September 8, 1964, the date of the cessation of operations by W. D. Frink t/a Jefferson Radio Company.

Adopted August 31, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–446

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of RHINELANDER TELEVISION CABLE CORP., RHINELANDER, WIS. For Construction Permit | Docket No. 14971 File No. BP–14648 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

1. Rhinelander Television Cable Corporation (Rhinelander) seeks to have the record in this proceeding reopened, and requests permission to amend its application.[1]

2. This proceeding involves the application of Rhinelander Television Cable Corporation (Rhinelander) for a permit to construct a new standard broadcast station at Rhinelander, Wisconsin. On February 25, 1963, the Commission released a Memorandum Opinion and Order, FCC 63–166, designating the application for hearing on issues to determine whether there are adequate revenues to support more than one standard broadcast station in Rhinelander, Wisconsin, without loss or degradation of standard broadcast service (*Carroll* issue); whether Rhinelander is financially qualified to construct and operate its proposed station (financial issue); and the efforts made by Rhinelander to ascertain the programming needs and interests of the area to be served and the manner in which the applicant proposes to meet such needs and interests (*Suburban* issue). Oneida Broadcasting Company, licensee of Station WOBT, Rhinelander, Wisconsin, was made a party to the proceeding.

3. In an Initial Decision, FCC 63D–130, released November 13, 1963, Hearing Examiner Basil P. Cooper recommended denial of the application based, in part, on his conclusion that Rhinelander is not financially qualified. Exceptions were filed by Rhinelander, WOBT, and the Broadcast Bureau, and oral argument before a panel of the Review Board was scheduled by Order, FCC 64R–206, released April 14, 1964, for May 12, 1964. However, on April 28, 1964, Rhinelander filed a petition to stay oral argument alleging that Clarence W. Gilley, Rhinelander's sole stockholder, had sold the assets of the corporation and that it intended to file a petition to reopen the record and/or a petition for leave to amend in the

[1]The Review Board has the following pleadings under consideration: (a) petition to reopen record, filed June 8, 1964, by Rhinelander; (b) petition for leave to amend, filed June 8, 1964, by Rhinelander; (c) oppositions to (a) and (b), filed June 17, 1964, by Oneida Broadcasting Company; (d) opposition to (a), filed June 22, 1964, by the Broadcast Bureau; (e) opposition to (b), filed June 23, 1964, by the Broadcast Bureau; and (f) errata to (e), filed June 24, 1964, by the Broadcast Bureau.

very near future. Therefore, on May 7, 1964, the Board released an Order, FCC 64R–253, postponing oral argument and affording Rhinelander 30 days in which to file a petition to reopen the record and/or petition for leave to amend.

4. In its petition for leave to amend, Rhinelander requests permission to amend its application "to show a change in financial resources." In support of its petition, Rhinelander states that until approximately February 17, 1964, it operated a community antenna cable system in Rhinelander, Wisconsin, but on that date, Gilley sold the corporation's assets, inclusive of the operating cable system. However, Rhinelander points out, only the assets of the corporation were sold; the corporation itself remains in existence; and the buyer of the assets, Midwest Video Electronics, Inc., has agreed to lease the present community antenna system tower to the applicant without charge for a period of five years.[2] The sale of its assets has, Rhinelander contends, changed the complexion of its financial qualifications.[3]

5. In support of its allegation that good cause for the amendment exists, Rhinelander contends that allowance of the amendment will not affect present issues, will not require addition of new parties or issues, will not unduly delay the proceeding, and will not give Rhinelander any competitive advantage. Rhinelander points out that its application has been on file with the Commission since January 31, 1961, and contends that it "would be irreconcilable with sound judgment to maintain that an applicant's composition should remain unchanged pending finalization of its application before the Commission, especially over such a long period of time." Finally, Rhinelander cites three cases where, it contends, the Commission allowed amendments subsequent to the release of an Initial Decision.[4]

6. In its petition to reopen the record, Rhinelander requests that the record be reopened, and that the proceeding be remanded to the Hearing Examiner "for further proceedings consistent with the financial materials within the Petition for Leave to Amend," and the issuance of a Supplemental Initial Decision. As precedent for this request, Rhinelander relies on *Page Boy Radio Corp.*, FCC 63R–320, 25 RR 765 (1963).

7. In its opposition to the petition to amend, respondent WOBT first points out that although the sale of the assets took place on February 17, 1964, Rhinelander did not notify the Commission of this change in its position until April 28, 1964, over two months after the sale took place; during that time, Rhinelander allowed the Commission to proceed with the processing of its application and schedule oral argument; and Rhinelander filed its notice of intention to participate in oral argument knowing of the change. Thus, WOBT contends, Rhinelander has not shown complete candor and has been dilatory.

8. In addition to the foregoing, WOBT alleges that "good cause"

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[2] A copy of the lease agreement is attached to the petition.
[3] Also attached to the petition is a recent balance sheet of Clarence W. Gilley.
[4] The cases cited by Rhinelander are: *Independent Broadcasting Company*, 6 RR 1390 (1951); *Albuquerque Broadcasting Co.*, FCC 58–111, 16 RR 755 (1958); and *Jefferson Radio Company*, FCC 59–784, 17 RR 808a (1959).

for the proffered amendment is lacking for the following reasons: the changed circumstances here do not result from matters beyond Rhinelander's control; the result of the amendment would be to allow Rhinelander to "patch up" an incompletely prepared application and hearing record when deficiencies in Rhinelander's financial showing were pointed out several times throughout the hearing; and the amendment itself is incomplete and incorrect. In connection with the latter allegation, WOBT points out that the amendment does not show whether there are any changes in the financing plan for the proposed station; no new balance sheet for the applicant corporation was submitted reflecting the sale of its assets or the disposition of its liabilities; and Gilley's personal balance sheet is incomplete and fails to reflect the details of a new venture of Gilley's.[5]

9. WOBT further contends that the proffered amendment is "major" in nature, and its acceptance would necessitate further hearing, thus defeating the prompt and expeditious determination of this proceeding. In support of this contention, WOBT alleges that the proposed radio station and the cable system are so interwoven that the changed circumstances affect the estimated costs,[6] operating costs,[7] and financing plan of the proposed station.

10. Finally, WOBT contends that rejection of the amendment would result in the application becoming fatally defective due to the material changes in the proposal, and "would require the denial of the application, terminating the rights of the applicant." In support of this contention, WOBT cites *Huntington Broadcasting Co.*, 5 RR 342, 347 (1949); and *The Riverside Church in the City of New York*, FCC 62–968, 24 RR 195 (1962).

11. In its opposition to the petition to reopen the record, WOBT reiterates several of the arguments made in its opposition to the petition for leave to amend, and contends that there are no "unusual or compelling circumstances" in this proceeding to justify reopening the record at this late date. WOBT attempts to distinguish the *Page Boy* case, *supra*, cited by Rhinelander; there, the circumstances of an applicant were changed after being granted in a comparative hearing, and the Board reopened the record in order to determine the effect of these changes on the possible grant of the application.

12. The Broadcast Bureau, in its oppositions, urges denial of the petitions, contending that good cause is not present because Rhinelander was not diligent; the amendment is the result of Rhinelander's voluntary acts; and grant of the amendment would require reopening of the record and a new evidentiary hearing, thus disrupting the Commission's processes.

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[5] Gilley's balance sheet indicates that he is negotiating, through the Small Business Administration, for a loan of $40,000 for the construction of a "Volkswagen Building." However, Gilley states that the venture will not necessitate any initial outlay of funds, and no payments to the Small Business Administration are to be made until January, 1965.

[6] With respect to the estimated construction costs, WOBT notes, among other things, that Gilley planned to build a room on the existing cable substation at the antenna location to house the transmitter, but the lease with Midwest Video Corporation makes no provision for constructing a building, or for the installation and maintenance of Rhinelander's ground system for the antenna.

[7] With respect to the operating costs, WOBT notes that Gilley and several other employees of the cable corporation were to serve as employees of the proposed radio station without substantial increase in compensation; salary costs for these positions are now involved; and costs for insurance, utilities, and telephone will increase as a result of the elimination of the joint operation.

13. Section 1.522(b) of the Rules states that requests to amend an application after it has been designated for hearing "will be granted only for good cause shown." In *Sands Broadcasting Corp.*, FCC 61M–1218, 22 RR 106 (1961), the criteria used to determine whether "good cause" for amending exists were summarized, as follows: that the moving party demonstrate that the applicant had acted with due diligence; that it is not necessary to change the issues or add new ones; that it is not necessary to add new parties; that the proposed amendment was not required by a voluntary act of the applicant; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage. As pointed out by the Broadcast Bureau and WOBT, Rhinelander has not shown that it acted with due diligence or that the proposed amendment was not required by its voluntary act. Moreover, in view of the interrelationship between the cable system and the proposed radio station, allowance of the amendment would raise new questions concerning Rhinelander's proposed staff and transmitter site. See footnotes 6 and 7, *supra*. We conclude that "good cause" for the proposed amendment is lacking.

14. In addition to the requirements for "good cause" set forth in the preceding paragraph, an additional factor must be considered because the amendment here proposed was submitted subsequent to the release of an Initial Decision. As stated by the Board in *Simon Geller*, FCC 63R–147, 25 RR 171 (1963), ". . . it has been the longstanding policy of the Commission not to permit an amendment subsequent to the release of an Initial Decision where, as here, the application as amended cannot be granted without a further hearing." To permit an amendment after the issuance of an Initial Decision where a further hearing is necessitated would result in hardship to the other parties, and would be contrary to the orderly dispatch of Commission business.[8] Here, as indicated in footnotes 6 and 7, the effect of the proposed amendment is not limited to financial qualifications. Its allowance would require a further hearing to determine, among other things, whether the real estate which has been sold can still be used for constructing a building to house the transmitter, and whether this land may also be used for the ground system of the antenna as proposed in the application. We believe that the policy against allowing amendments after an Initial Decision has been released has particular force in these circumstances because "good cause" for the amendment has not been shown.

15. For the foregoing reasons, the petition for leave to amend will be denied. The petition to reopen the record is predicated upon a grant of the proffered amendment and therefore the petition to reopen the record will also be denied. In view of the above, it appears appropriate to determine whether the parties here intend to proceed with oral argument. Therefore, the parties will be afforded ten days from the release date of this Memoran-

[8] The three cases cited by Rhinelander (see footnote 4) all deal with amendments involving changes in ownership where the Commission had already approved transfer applications. The amendments involved did not result in further hearings or delay the completion of the proceeding and therefore the cases are inapposite here.

dum Opinion and Order in which to indicate whether they desire to participate in oral argument.

Accordingly, IT IS ORDERED, This 9th day of September, 1964, that the Petition to Reopen Record and the Petition for Leave to Amend, both filed June 8, 1964, by Rhinelander Television Cable Corporation ARE DENIED; and the parties to this proceeding ARE AFFORDED ten days from the release of this Memorandum Opinion and Order in which to indicate whether they intend to participate in oral argument in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

F.C.C. 64–823

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of<br>KEN-SELL, INC., WEST PALM BEACH, FLA.<br>Requests: 107.9 mc. (Ch. 300), 25.9 kw. ERP, U<br>For FM Construction Permit | File No. BPH–4358 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the above-captioned application, which was granted on May 15, 1964; (b) a "Petition for Reconsideration," filed June 17, 1964 by George H. Buck, Sr., George H. Buck, Jr., Adrian C. Leiby, and Sydney King Russell, d/b as WJNO Radio, and by George H. Buck, Sr., George H. Buck, Jr., Sydney King Russell, and Joseph L. Beisler, d/b as WJNO Radio; (c) an "Opposition" to that petition filed July 24, 1964, by Ken-Sell, Incorporated; and (d) a "Reply to Opposition," filed August 12, 1964, by WJNO Radio.

2. WJNO Radio claims standing, under Section 1.106 of the Rules, as a person aggrieved or adversely affected by the grant of the Ken-Sell application, in that WJNO Radio is licensee of standard broadcast Station WJNO, West Palm Beach, Florida; that WJNO is in direct competition with Ken-Sell's West Palm Beach standard broadcast Station WIRK; and that duplication of the WIRK(AM) programming and advertising on the proposed Ken-Sell FM station would enhance Ken-Sell's competitive position vis-a-vis WJNO Radio to the economic detriment of the latter. We agree that WJNO Radio is a person aggrieved or adversely affected within the meaning of Section 1.106 of the Rules, and Section 405 of the Communications Act of 1934, as amended.

3. However, Ken-Sell contends that WJNO Radio's petition for reconsideration is defective in that it does not comply with the requirement, set forth in Section 1.106(b) of the Rules, that "If the petition is filed by a person who is not a party to the proceeding, it . . . shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." WJNO Radio did not exercise its right under Section 1.580(i) of the Rules to file a pre-grant petition to deny the application, or its right under Section 1.587 of the Rules to file an informal objection. The only excuse offered by WJNO Radio for its failure to so express its opposition to the Ken-Sell application prior to the grant is the fact that Ken-Sell's application for renewal of the WIRK(AM) license was in "deferred status" until just a few days before its FM con-

struction permit application was granted.[1] (Presumably, WJNO Radio had anticipated that action on the FM application would be delayed more than it was by the WIRK(AM) deferral.) Though this serves as an explanation for WJNO Radio's delinquency, it is clear that it is an inadequate justification for its failure "to participate in the earlier stages of the proceeding." Accordingly, we hold that WJNO Radio's failure to raise the matter previously, or satisfactorily to justify this failure, as required by Section 1.106 of the Rules, renders its petition for reconsideration defective. *Springfield Television Broadcasting Corporation* v. *F.C.C.* 328 F.2d 186, 1 R.R. 2d 2083 (D.C. Cir 1964); *Valley Telecasting Co., Inc.* v. *F.C.C.*, —— F.2d ——, 2 R.R. 2d 2064 (D.C. Cir. 1964). Nonetheless, we have examined the substantive allegations submitted by WJNO Radio in connection with that petition to determine whether their consideration is required in the public interest. We find that WJNO Radio's allegations are insufficient to raise a public interest question, for the reasons set forth hereafter, and, therefore, are of the view that the petition for reconsideration filed by WJNO Radio must be denied.

4. WJNO Radio contends (a) that its application for a new West Palm Beach FM station—tendered more than a month after the Ken-Sell FM application was granted—contains engineering and programming proposals far superior to those in the Ken-Sell application,[2] and that the Rules provide for only one FM station at West Palm Beach; and (b) that substantial discrepancies in the program service portion of the Ken-Sell FM application raise questions as to whether the Ken-Sell programming representations were made conscientiously and in good faith.

5. WJNO Radio's contention that its FM application should be comparatively considered with the Ken-Sell application at this late stage—after the Ken-Sell application has already been granted, and despite the fact that the WJNO application was not even filed at the time of the Ken-Sell grant—is unsupported by precedent [3] and unsupportable as a matter of sound policy. WJNO Radio had an opportunity to compete with the Ken-Sell proposal, but failed to use it; it will have another opportunity to compete with Ken-Sell at renewal time.

6. With respect to WJNO Radio's contentions regarding the program service portion of Ken-Sell's FM application, we are satisfied, on the basis of the explanations offered in the Ken-Sell "Opposition" pleading and accompanying affidavit, that bad faith was not involved. Many of the discrepancies were patently evident. We agree with WJNO Radio's contention that the program service portion of the application was not prepared with adequate care. However, that is not sufficient reason to set aside the grant when weighed against Ken-Sell's long and generally satisfactory record as a broadcast licensee. Finally, it is noted that Ken-Sell

[1] The WIRK (AM) license was renewed on May 8, 1964; public announcement of the renewal was made on May 11. No opposition to it was filed by WJNO Radio either before or after the grant.

[2] In that the WJNO Radio proposal would serve approximately 50 percent more listeners with more than 114 hours of non-duplicative programming, whereas the Ken-Sell FM station would duplicate the programming of its sister station, WIRK (AM), 100 percent.

[3] See *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327, 331 (1945).

stated in the application that its FM station's programming would consist entirely of duplication of the programming of WIRK(AM). The WIRK(AM) license was renewed several days before the FM application grant; Ken-Sell's application for renewal of the WIRK (AM) license was granted only after careful scrutiny of the program service portion of that application. Indeed, grant of the renewal was delayed somewhat because of the licensee's initial failure to supply full program information. Under these circumstances, once the WIRK (AM) license was renewed the only FM program service question remaining concerned the desirability of 100 percent duplication; in the absence of a competing application, and consistent with present Commission policy, that question was resolved in favor of the Ken-Sell FM proposal. That being the case, the specific discrepancies in the FM program proposal are without decisional significance.

Accordingly, IT IS ORDERED, this 2d day of September, 1964, That the "Petition for Reconsideration" filed June 17, 1964, by WJNO Radio IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–840

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application of
SEWARD BROADCASTING CORP. (KIBH),
SEWARD, ALASKA
Has: 1340 kc., 250 w., SH
Requests: 950 kc., 1 kw., SH
For Construction Permit

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: CHAIRMAN HENRY ABSENT.

1. The Commission has before it for consideration the above-captioned application tendered for filing on August 28, 1964. The applicant requests a waiver of the provisions of Section 1.571 (c) of the Commission's Rules to permit immediate processing of the application and requests that temporary operating authority be granted, pursuant to Section 309 (f) of the Communications Act of 1934, as amended, to permit the Seward Broadcasting Corporation to operate on 950 kilocycles with one kilowatt power, Specified Hours (12 noon to midnight) pending processing of the application for construction permit.

2. Station KIBH has been authorized to operate at Seward, Alaska for many years on 1340 kilocycles with 250 watts, Specified Hours (12 noon to midnight). The disastrous Alaskan earthquake of March, 1964 completely destroyed the station. On August 25, 1964, the Commission granted KIBH Special Temporary Authority to operate on a noncommercial basis on 1490 kilocycles with 50 watts power with a temporary antenna system.

3. With respect to the request for temporary operating authority, Section 309 (f) of the Communications Act provides that should the Commission find that there exists "extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest," temporary operating authority may be issued for a period not exceeding ninety days. Such authority may be extended, upon proper findings, for a period not to exceed an additional ninety days.

4. The applicant indicates that a delay in the institution of such emergency operation would seriously prejudice the public interest in that throughout the Alaskan winter, Seward would have to rely on the limited power service now authorized which is being operated on a noncommercial basis. In addition, the imminence of the winter will cause great difficulty in the completion of the construction of the facilities.

5. KIBH is the only standard broadcast station serving the Seward area, and it is clear that the present operation with only 50 watts and temporary antenna system is not adequate to provide the needed service. The Commission has considered the application and the facts presented by the applicant and concludes that the applicant is legally, technically, financially and otherwise qualified to operate as proposed, that "extraordinary circumstances" exist that require the reinstitution of regular broadcast service through the issuance of temporary operating authority and that failure to grant such authority would have an adverse effect on the public interest. Also, for the same reasons, the Commission finds that the public interest would be served by waiving the provisions of Section 1.571(c) of the Rules to permit immediate consideration of the application. *Superior Broadcasting Company,* 22 R.R. 847 (1962); *Capital Broadcasting, Inc.,* 22 R.R. 780 (1962); WAJM, Inc., 24 R.R. 86 (1963); *Community Radio of Saratoga Springs New York, Inc.,* 2 R.R. 2d 290 (1964).

6. Simultaneously with the present action, the Commission is issuing a Public Notice establishing a date on which the application of Seward Broadcasting Corporation will be considered ready and available for processing.

In view of the foregoing, IT IS ORDERED, that the request of Seward Broadcasting Corporation for waiver of Section 1.571(c) to permit immediate consideration of the above-captioned application IS GRANTED.

IT IS FURTHER ORDERED, that pursuant to Section 309(f) of the Communications Act of 1934, as amended, the Seward Broadcasting Corporation IS GRANTED temporary operating authority to operate at Seward, Alaska, on 950 kilocycles with one kilowatt power, Specified Hours, for a period of 90 days from the release date of this Order.

Adopted September 9, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–883

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>LOUIS VANDER PLATE, FRANKLIN, N.J.<br>Requests: 102.3 mc., Ch. 272, 355 w., 750 ft.<br>For Construction Permit | File No.<br>BPH–3952 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS FORD AND LOEVINGER ABSENT; COMMISSIONER COX DISSENTING.

1. The Commission has before it for consideration (1) the above-captioned application, as amended to date; (2) the "Petition to Deny Application of Louis Vander Plate for a new FM station at Franklin, New Jersey;" filed on September 27, 1963, by Sussex County Broadcasters, Inc. licensee of Stations WNNJ and WNNJ–FM, Newton, New Jersey; (3) pleadings in opposition and reply thereto; (4) a Supplemental Reply in re: Petition to Deny" filed on May 22, 1964, by the petitioner; (5) Further Supplemental Reply filed on June 23, 1964, by the petitioner; and (6) an answer to the latter pleading filed on July 6, 1964 by Vander Plate.[1]

2. Sussex County claims standing under Section 309(d) of Communications Act, of 1934, as amended, on the grounds that this proposed station would compete with petitioner's stations for audience and for business, thus causing it losses in advertising revenues. Vander Plate, the applicant, claims that petitioner does not have standing because it admittedly sold only $250 worth of time to Franklin merchants. However, because of the alleged competition for revenues and audience, the Commission finds that Sussex County Broadcasters, Inc. is a "party in interest" within the meaning of Section 309(d) of the Communications Act of 1934, as amended. *F.C.C.* v. *Sanders Brothers*, 309 U.S. 470, 9 R.R. 2008 (1940).

3. Vander Plate claims that the petition to deny was not timely filed because petitioner did not object to the applicant's request, in rule making proceedings, that Channel 272 be assigned to Franklin, New Jersey. The application was originally filed as of November 15, 1962. However, on December 17, 1962, the Commission imposed a freeze, with certain exceptions not applicable here, on the grant of applications for FM broadcast stations pending finalization of the proposed Table of Assignments for FM stations. The proposed Table of Assignments, released August 1, 1963, provided for Channel 272 at Franklin. The petition to deny was filed on

[1] Newton, New Jersey and Franklin, New Jersey are separated by approximately 10 statute miles. WNNJ provides service to Franklin, New Jersey.

September 27, 1963. Since the application was in condition to be granted only after August 1, 1963, the Commission is of the opinion that the petitioner was diligent in exercising its rights. The petition is timely filed.

4. Sussex County claims that the Vander Plate application must be denied for three reasons, viz. (1) the applicant is not financially qualified; (2) the applicant has grossly over-estimated the available revenues; and (3) no showing has been made that the proposed programming will serve the public interest.

5. Petitioner's claim that the applicant is not financially qualified rests on two grounds. First, it is contended that the claimed liquid assets may not be available to construct and operate even under the applicant's original estimates. The second contention is that the applicant has understated the costs to construct the proposed station and to operate it for a reasonable time. With respect to the first contention, the applicant sets forth costs of construction and operation (for a period of three months) amounting to $24,166. To defray these costs, applicant shows a demand note of $3,000, a bank loan commitment of $18,000 and profits from a nursing home amounting to $3,000. These three items total to $24,000. By Commission letter of October 25, 1963, applicant was informed of certain deficiencies in his proposed financing. On October 31, 1963, Vander Plate amended his application to reflect increased costs of construction ($20,355) and increased costs of operation ($7,534) amounting to $27,889. Information submitted with the amendment reflect cash on deposit in the amount of $9,533.06 and a bank loan commitment of $21,000. Therefore, under long term Commission policy, the applicant is financially qualified to construct the titioner, while conceding that applicant is financially qualified based The requested issue will be denied. In the supplemental reply, pestation and operate as proposed for a reasonable period of time. on its own estimates, reiterates its claim that the expense estimates are low, especially in view of the applicant's proposal to produce 35 hours per week of "live" programming. Finally, petitioner claims that the "Evansville" issue [2] is required if a financial issue is not specified.

6. As set forth above, petitioner claims that the estimates of cost construction and operation are not realistic. These allegations are general in nature and unsupported by factual data. Also, the applicant, by his amendment of October 31, 1963, set forth detailed analyses of his costs of construction and operation. Absent a clear showing that the estimates are unrealistic, the Commission will not permit petitioner's judgment to be substituted for that of the applicant. The requested issue concerning the reasonableness of operating expense and costs of construction will be denied. Also because no showing has been made in support of the "Evansville" issue, it will also be denied.

7. As to the availability of estimated revenue, petitioner alleges that 1961 Final AM–FM Broadcast Financial Data shows that the estimated revenues of $45,000 for the proposed operation exceeds

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[2] The "Evansville" issue covers the question as towhether the applicant has sufficient funds available to effectuate its program proposal.

the national average by over $6,000, and that less than 25% of the FM broadcast stations earned a profit in 1961. Petitioner also calculated a ratio of non AM–associated FM broadcast revenues to national retail sales for the year of 1961 and then applied it to projected 1963 retail sales for Sussex County. Under this formula total revenue for an FM only licensee would be $1,905.00. Petitioner claims that the most revenue ever attributable to his FM operation was $4,500 and that the FM operation of WNNJ–FM now earns on the average of $209.00 per month. Also, petitioner claims that the Franklin merchants purchased only $250.00 worth of FM time during the first seven months of 1963. In opposition, Vander Plate states that he will provide a new FM service over a wide area with a substantial population, and that his revenue estimate of $45,000 was based on his own experiences as a businessman in the area and on conversations with other businessmen and FM operators in the area. Also, by a later amendment containing a detailed breakdown, Vander Plate claims that there are total revenues available in the amount of $49,000.

8. The petitioner has not alleged that there are insufficient revenues available in the area to support an additional FM broadcast station. All that the petitioner has done is challenge the applicant's estimate of revenue. We think that this is insufficient to raise a substantial or material question of fact in the circumstances of this case. Where an applicant is found to be financially qualified to construct and operate the proposed station for a reasonable period of time without revenue, and the petitioner has not made any allegations supported by specific and material facts, that a grant of the proposal would result in a net loss or degradation of program service to the area, the Commission, in the absence of any unusual or peculiar circumstances, will not inquire into the reasonableness of an applicant's estimated revenues.[3]

9. The petitioner claims that the applicant has submitted no evidence that the proposed programming will serve the needs and interests of the area. The principal thrust made by petitioner concerns the substantial amount of religious programming which is set forth in the proposal. The petitioner requests that the "Suburban issue" [4] be specified on the grounds that applicant has made no attempt to ascertain the real program needs and desires of the area. Petitioner claims that the 17.1% religious programming set forth in the application does not reflect the actual amount of religious programming, because many of the programs which are classified in other program categories are actually religious in nature, thus raising religious programming up to approximately 50%. Also, because of the statement that the entertainment will be devoted to Christian music, petitioner raises a possible question as to whether the proposed programming actually approaches 100% religious in nature. Finally, petitioner requests that the Commission inquire into the type of recorded commercial programs that are to be carried.

10. In the opposition, Vander Plate claims that his proposed programming is "well balanced with an emphasis on programs of a

[3] *Carroll Broadcasting Company* v. *F.C.C.* 258 F. 2d 440 (1958).
[4] *Henry et al. (Suburban Broadcasters)* v. *F.C.C.* 302 F. 2d 191 (1962).

religious nature . . ." It is claimed that adequate provision has been made for other types of programs. He claims to have made a survey of the needs and desires of the community he proposes to serve, and he is convinced that the proposed programming will be widely accepted by not only the residents of Franklin but those residing outside of Franklin. By an amendment of June 12, 1964, Vander Plate submitted an affidavit setting forth the names of fourteen persons in the area, nearly all civic leaders in the community, with whom he had discussed the proposed programming. In addition, Vander Plate states that he has conferred with church groups of various denominations and that they all expressed a desire for the type of programming proposed in the application. To WNNJ's supplemental reply has been attached affidavits from four of those persons named by Vander Plate. None deny that Vander Plate conferred with them. The statements contained in the affidavits submitted by WNNJ do not refute that Vander Plate actually conducted a survey and also do not raise substantial and material questions of fact requiring an evidentiary hearing as to the general substance of the conversations between Vander Plate and the affiants. Also in the June 12 amendment, Vander Plate claims that the titles of certain programs might cause them to be construed as religious programs, but that they are programs of music that are not necessarily religious in nature. We find that the programming was adopted after consultation with members of the community sought to be served and appears to meet the needs of the area.

11. In concluding, petitioner raises the question of whether discrimatory employment practices will be followed because of the following statement in the application:

> My aspirations have always been to operate a Christian radio station. I plan to fulfill this desire by establishing a truly, community station with Christian principles and Christian personnel, a station that this community may be justly proud of.

In the amendment of July 12, 1964, Vander Plate states that his facilities will be open to all religious denominations and that there will be no discrimination in the hiring of personnel.

12. In view of the foregoing, it appears that no substantial or material questions of fact have been presented by the petition to deny, and that a grant of the above-captioned application will serve the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, That the petition to deny filed by Sussex County Broadcasters, Inc. IS DENIED; and that the application of Louis Vander Plate IS GRANTED upon the conditions and specifications set forth in the construction permit.

Adopted September 23, 1964.

FEDERAL COMMUNICATIONS COMMISSION.

F.C.C. 64–885

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of CAPITOL BROADCASTING CO., INC., ROANOKE RAPIDS, N. C. For Construction Permit for New Television Broadcast Translator Station | File No. BPTTV–1991 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS FORD AND LOEVINGER ABSENT; COMMISSIONER COX ABSTAINING FROM VOTING.

1. The Commission has before it for consideration (a) the above-captioned application; (b) a "Statement of the University of North Carolina, Consolidated Office" filed with respect to (a) above on September 19, 1963, by the University of North Carolina, licensee of Station WUNC–TV, Channel 4, Chapel Hill, North Carolina; (c) a resolution of the Mayor and Board of Commissioners of Roanoke Rapids adopted December 9, 1963, with respect to (a) above; (d) a letter filed on December 17, 1963, by WTAR Radio–TV Corporation (WTAR), licensee of Station WTAR–TV, Channel 3, Norfolk, Virginia, with respect to (a) above; (e) a letter filed January 10, 1964, by Capitol Broadcasting Company, Incorporated, licensee of Station WRAL–TV, Channel 5, Raleigh, North Carolina, and applicant herein, directed against (d) above; (f) a letter filed January 30, 1964, by WTAR directed against (e) above; and (g) a letter on behalf of the Mayor and Board of Commissioners of Roanoke Rapids dated April 22, 1964, regarding (c) above.

2. On June 20, 1963, the applicant filed the present application for a construction permit for a new television broadcast translator station to serve Roanoke Rapids, North Carolina, by rebroadcasting its Station WRAL–TV on Output Channel 4. On October 16, 1963, the application was amended to specify operation on Output Channel 2.[1]

3. WTAR objects to this application on two grounds: (a) that it will permit the applicant to provide service beyond its predicted Grade B contour in violation of Section 74.732(e)(1) of the Commission's Rules,[2] and (b) that it will cause interference to WTAR's signal in Roanoke Rapids in violation of Section 74.703(b) of the

[1] Since the University of North Carolina had objected to the possibility of interference to Station WUNC-TV, this mooted its objections.

[2] Section 74.732(e)(1) of the Rules provides that,

"The licensee or permittee of a television broadcasting station, an applicant financially supported by such licensee or permittee, or any person associated with the licensee or permittee, either directly or indirectly, will not be authorized to operate a VHF translator under any of the following circumstances:

"(1) Where the proposed translator is intended to provide reception beyond the Grade B contour of the television broadcast station proposed to be rebroadcast."

Rules.[3] The first argument is based on the fact that Roanoke Rapids lies at the outer perimeter of Station WRAL–TV's predicted Grade B contour and that this predicted contour runs through the city. However, the proposed translator site is located within Station WRAL–TV's predicted Grade B contour and, although the Commission has carefully examined the proposal, it cannot be determined that a grant of this proposal would result in any appreciable increment to the applicant's predicted coverage. In any event, it is not necessary finally to resolve this issue since resolution of the remaining issue must determine the Commission's decision regarding this matter.

4. WTAR objects that grant of this application will result in interference to its signal which is received and used in Roanoke Rapids. Confirmation for this claim of actual service is found in a resolution of the Mayor and Board of Commissioners of Roanoke Rapids adopted December 9, 1963, which states, in relevant part, that,

> Whereas, the residents of Roanoke Rapids can, do and wish to continue to, receive broadcasts originating from Television Station WTAR–TV, operating in Norfolk, Virginia on adjacent VHF Channel 3, and it is believed that operation of the aforesaid Translator on VHF Channel 2 might interfere with the reception of broadcasts from Television Station WTAR; and
>
> Whereas, for the aforesaid reason, the Mayor and Commissioners of Roanoke Rapids are of the unanimous belief and opinion that any action by the Federal Communications Commission which would permit the use of VHF Channel 2 for such Translator transmission would be detrimental to the best interests of the residents of Roanoke Rapids.

The applicant does not deny the claim that WTAR now serves Roanoke Rapids nor does it deny the allegation that interference will result to WTAR's signal. Instead, the applicant argues that even if interference is caused by operation of the proposed translator, WTAR is not entitled to protection from an adjacent channel station located more than sixty miles from it. The applicant urges that Section 73.610(c)(1) of the Rules establishes sixty miles as the minimum mileage separation between adjacent channel VHF stations and that the distance between Station WTAR–TV's transmitter and the proposed translator site is approximately 72.3 miles. The applicant argues that since a full power station would be authorized at this separation, it is not understandable how WTAR has standing to protest this application. This position, however, entirely ignores Section 74.702 of the Rules, which provides that a VHF translator shall cause no interference to the direct reception of any television broadcast station operating on the same or an adjacent channel, and Section 74.703(a) of the Rules, which provides that an application for a new translator station will not be

[3] Section 74.703(b) of the Rules provides that,

"It shall be the responsibility of the licensee of a VHF translator to correct at its expense any condition of interference to the direct reception of the signals of a television broadcast station operating on the same channel as that used by the VHF translator or on an adjacent channel, which occurs as the result of the operation of the translator. Interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the translator, regardless of the quality of such reception or the strength of the signal so used. If the interference cannot be promptly eliminated by the application of suitable techniques, operation of the offending translator shall be suspended and shall not be resumed until the interference has been eliminated. If the complainant refuses to permit the translator licensee to apply remedial techniques which demonstrably will eliminate the interference without impairment of the original reception, the licensee of a translator is absolved of further responsibility."

granted where it is apparent that interference will be caused. In these circumstances, we find that WTAR has made a *prima facie* showing that there will be interference between the proposed translator station and Station WTAR–TV, *Southern Minnesota Broadcasting Co.*, FCC 63–590, 25 R.R. 744. The only remaining question, therefore, is whether the Commission should waive these provisions of the Rules on its own motion. However, there has been no showing by the applicant to justify such action, and no justification for such an action is apparent.

Accordingly, IT IS ORDERED, This 23d day of September, 1964, that the above-captioned application IS DISMISSED on the Commission's motion for failure of the applicant to show compliance with Section 74.702 and 74.703(a) of the Commission's Rules.

IT IS FURTHER ORDERED, That the pleadings listed in paragraph 1 above are DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–899

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| HARRY WALLERSTEIN, RECEIVER, TELEVISION COMPANY OF AMERICA, INC.<br>For Renewal of License of Station KSHO–TV, Las Vegas, Nev. | Docket No. 15006<br>File No. BRCT–397 |
| HARRY WALLERSTEIN, RECEIVER, TELEVISION COMPANY OF AMERICA, INC. (ASSIGNOR)<br>and<br>TELEVISION COMPANY OF AMERICA, INC. (ASSIGNEE)<br>For Assignment of License of Station KSHO–TV, Las Vegas, Nev. | Docket No. 15007<br>File No. BALCT–181 |
| REED R. MAXFIELD, ROBERT W. HUGHES, CARL R. HULBERT, AND ALEX GOLD (TRANSFERORS)<br>and<br>ARTHUR POWELL WILLIAMS (TRANSFEREE)<br>For Transfer of Control of Nevada Broadcasters' Fund, Inc., Holding Company of Television Company of America, Inc., Licensee of Station KSHO–TV, Las Vegas, Nev. | Docket No. 15008<br>File No. BTC–3965 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX NOT PARTICIPATING.

1. The Commission has before it for consideration a Petition for Immediate Favorable Action on Applications for Renewal of License and for Transfer of Control, filed July 2, 1964, by Harry Wallerstein, as Receiver for Television Company of America, Inc. and Arthur Powell Williams, Transferee; Opposition to the petition filed August 10, 1964, by the Chief, Broadcast Bureau; and Reply to the Opposition filed September 8, 1964, by petitioners.[1]

2. The instant petition requests the Commission to "terminate this hearing proceeding and grant immediately, the Receiver's application for renewal of license; assign the license to Television Company of America, Inc. (. . . "TCA") which would be controlled by Arthur Powell Williams through his ownership of a majority of the stock of Nevada Broadcasters' Fund, Inc. . . ., the parent corporation" of TCA. Petitioners urge that since the evidentiary record does not reflect adversely on either petitioner and since

[1] Petitioners have also filed, on July 2, 1964, a Petition for Waiver of Rule 1.111 if Deemed Necessary. See par. 6, *infra*.

petitioners were not responsible for the acts of their predecessors, the actions of such predecessors are irrelevant and immaterial as to whether grant of the applications of Wallerstein and Williams would serve the public interest.

3. Petitioners are requesting substantially the same relief which was denied by the Commission when it acted upon an earlier filed petition for reconsideration and grant without hearing. (Memorandum Opinion and Order released July 5, 1963, FCC 63–625). Most of petitioners' affirmative arguments for granting their petition are concerned with facts (or the reciprocal lack thereof) brought out during the hearing [2]. These relate to the unblemished record of KSHO–TV while Wallerstein has been the licensee; lack of participation in the operation of the station by any of the alleged "wrongdoers",[3] such wrongdoing being admitted *arguendo;* lack of benefits to any of the *arguendo* "wrongdoers" from grant of the instant application; benefits to the innocent stockholders of the various corporations involved; and the precarious position of KSHO–TV as a weak third station in Las Vegas, necessitating immediate action by the Commission.

4. The Broadcast Bureau asserts, and we are in accord, that petitioners' position is refuted by reference to the hearing order and issues thereunder and to our aforementioned action on the petition for reconsideration and grant without hearing decided in July 1963. As noted by the Bureau, only one of the issues in such hearing order related exclusively to Williams (Issue 11), whereas the remaining issues were concerned with the conduct of TCA and/or the principals of TCA preceding the advent of petitioners and having no direct bearing on them. Our concern with those connected with TCA prior to the advent of petitioners is reflected in our Memorandum Opinion and Order denying reconsideration and grant without hearing, wherein we stated:

> Moreover, the petitioner, in effect, requests this Commission to ignore the past events and consider only the future of KSHO–TV. This the Commission cannot do.

5. Petitioners also ignore the fact that Wallerstein is the licensee of KSHO–TV solely because of the fact that he was appointed Receiver by the U. S. District Court, District of Nevada, in the voluntary bankruptcy proceeding involving TCA.[4] When Wallerstein was appointed Receiver, TCA was authorized to remain in possession to operate the station. Thus, a Receiver as a licensee cannot be considered in the same category as other licensees during renewal proceedings. Commission policy regarding renewal applications filed by trustees or receivers is well established. Grant of a license to a trustee or receiver by its very nature is temporary, and action on applications for renewal of license filed by such trustees or receivers is deferred until an as-

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[2] Hearings in this matter have been concluded. The record was finally closed on June 10, 1964, and proposed findings and conclusions and reply findings were filed, the latter on August 7, 1964.

[3] The issues in this proceeding relate to misrepresentations, unauthorized transfers of control, and failure to file various contracts and reports with the Commission.

[4] TCA filed a petition for an arrangement with creditors under Chapter XI of the Bankruptcy Act (11 USC 701, *et seq.*). Wallerstein was appointed Receiver of TCA by the U.S. District Court on October 18, 1961. The Commission granted involuntary assignment of KSHO-TV's license to Wallerstein on November 16, 1961.

signee has been found, an application for assignment of a license has been filed, and the qualifications of the assignee have been considered. Petitioners point to no case where the license of a receiver was renewed without a qualified assignee being present at the same time. Since Wallerstein has filed an application to assign the license, after renewal, back to TCA it is axiomatic that TCA's qualifications must be considered concurrently with the renewal application. The Commission recognized this by adding an additional issue in its July 1963 Memorandum Opinion and Order which stated:

> 12. To determine whether, on the basis of the evidence adduced under the foregoing issues, the proposed assignee, Television Company of America, Inc., possesses the requisite qualifications to be a licensee.

In view of the foregoing the Commission finds no reason to by-pass the issuance of the initial decision and the subsequent procedures available to the parties herein.

6. Petitioners have also filed a Petition for Waiver of Rule 1.111 if Deemed Necessary. In view of the disposition of the Petition for Immediate Favorable Action on Applications for Renewal of License and for Transfer of Control, the petition for waiver will be dismissed as moot.

Accordingly, IT IS ORDERED, This 30th day of September, 1964, that the Petition for Immediate Favorable Action on Applications for Renewal of License and for Transfer of Control filed July 2, 1964, by Harry Wallerstein, as Receiver for Television Company of America, and Arthur Powell Williams, Transferee, IS DENIED;

IT IS FURTHER ORDERED, That the Petition for Waiver of Rule 1.111, if Deemed Necessary, filed July 2, 1964, by Harry Wallerstein, Receiver, Television Company of America, and Arthur Powell Williams, Transferee, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–471

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>SPRINGFIELD TELECASTING CO. SPRINGFIELD, ILL. | Docket No. 15449<br>File No. BPCT–2838 |
| MIDWEST TELEVISION, INC., SPRINGFIELD, ILL. | Docket No. 15450<br>File No. BPCT–2846 |
| For Construction Permits for New Television Broadcast Stations | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Midwest Television, Inc. (Midwest) petitions the Review Board to enlarge issues in this comparative proceeding to include nine issues with respect to Springfield Telecasting Co. (Springfield), the competing applicant; one issue with respect to respondent Plains Television Corporation (Plains); and one issue with respect to Midwest itself which would expand the scope of an issue already designated.[1]

2. The mutually-exclusive applications of Springfield, filed December 22, 1960, and of Midwest, filed February 7, 1961, which requested a construction permit for a new UHF television broadcast station to operate on Channel 26, Springfield, Illinois, were designated for hearing by the Commission in a Memorandum Opinion and Order (FCC 64–387) released May 4, 1964. In the designation Order, the Commission noted that Springfield, a corporation, is the successor to Richard S. Cole, trading as Springfield Telecasting Company, who originally filed the application as an individual. The Commission also noted that Midwest is the licensee of television broadcast Stations WCIA, Channel 3, Champaign, Illinois, WMBD–TV, Channel 31, Peoria, Illinois, and KFMB–TV, Channel 8, San Diego, California and of radio Stations WMBD, Peoria, Illinois, and KFMB (AM) and KFMB–FM, San Diego, California; and that respondent Plains Television Corporation is the licensee of television broadcast Stations, WICS, Channel 20, Springfield, Illinois; WCHU, Channel 33, Champaign,

[1] The pleadings before the Review Board include: (1) Motion to enlarge issues, filed May 25, 1964, by Midwest Television, Inc.; (2) Opposition, filed July 2, 1964, by Springfield Telecasting Co.; (3) Partial opposition, filed July 2, 1964, by Plains Television Corporation; (4) Comments, filed July 2, 1964, by the Broadcast Bureau; and (5) Reply, filed August 7, 1964, by Midwest Television, Inc. On July 15, 1964, Springfield filed a "Supplement" to its Opposition and indicated that the material attached thereto was not received in proper form at the time of the filing of the opposition. The Board notes that such attached material was apparently prepared before the last day for filing oppositions, and that Springfield has not requested permission to file an additional pleading. Since Springfield's "Supplement" was filed in violation of Section 1.45 of the Commission's Rules, the Board will dismiss such pleading and material attached thereto.

Illinois; and WICD, Channel 24, Danville, Illinois. The Commission found that no challenge had been offered to Plains' standing as a party in interest in this comparative proceeding and that Plains had standing under Section 309(e) of the Communications Act. The Springfield and Midwest applications were then designated for hearing upon issues which included: (1) a determination whether Springfield is authorized to do business in Illinois and whether a grant of its application would be consistent with Section 73.613 of the Commission's Rules; (2) a determination whether a grant of the Midwest application would be consistent with Sections 73.636 and 73.613 of the Rules; (3) a "Suburban" issue as against Midwest; and (4) the standard comparative issue. On the same date that Midwest filed its motion to enlarge issues with the Board, it also requested that the Hearing Examiner include an "Evansville Issue" with respect to Springfield. In an Order (FCC 64M–475) released May 28, 1964, the Examiner delayed consideration of the latter motion pending final action by the Review Board on the Midwest request for a standard financial issue as against Springfield.

*Suburban Issue*

3. In its instant request for the addition of a "Suburban" issue, Midwest alleges that Springfield, the corporate applicant, has not demonstrated any effort to determine the needs and interests of the proposed service area even though amendments to the original application reflect substantial revisions in Springfield's programming proposals. Midwest points out that the efforts of Richard S. Cole, on behalf of the original applicant, to survey community needs in August, 1961, (as integrated in an amendment filed October 18, 1961) are now outdated in light of substantial programming modifications and that there is no indication that further investigations have been made on behalf of the corporate applicant to justify such changes. In support of its contention, petitioner notes that none of Springfield's officers, directors or stockholders is a resident of Illinois or has business interests in the state, and that the Springfield application does not indicate the presence of any principal in the Springfield area since the Cole survey of August, 1961.[2] Springfield, in its opposition, disagrees that amendments to its application amount to substantial changes in its program schedule and alleges that the proposals are the result of the assistance and advice of a counsel and consulting engineer and of a person "experienced in the operation of small market television stations" and also of personal visits, statistical information and existing programming. Springfield emphasizes the absence of any claim that the proposed program schedule will not meet community needs and desires and points out that the prior Cole analysis is sufficient indication of said needs and desires. The Board agrees that revisions in Springfield's programming proposals reflect *substantial* changes and that there has been no

[2] The three principals involved in the Springfield application include: Richard S. Cole, President; Robert H. Gries, Vice-President; and Robert D. Gries, Secretary-Treasurer. Robert H. Gries is the father-in-law of Cole and the father of Robert D. Gries. All three principals are directors of and equal owners in the corporate applicant.

attempt to justify said revisions in terms of a continuing investigation of the needs of the Springfield area.[3] Although revised proposals might reflect an attempt to serve changing community needs, Springfield's response does not try to show familiarity with, or investigation of, community needs that might prompt such revisions. *Don L. Huber*, FCC 62–142, 22 RR 954 (1962). In this connection it should be noted that none of Springfield's principals is a resident of, or has financial interests in, the State of Illinois. In light of these considerations, Springfield's obligation under the *Suburban* doctrine goes beyond reliance upon a 1961 community survey and upon unsupported allegations of continuing familiarity with the needs of the Springfield area. See *Dean & Golden*, FCC 61–1160, 22 RR 140 (1961). Therefore, the requested "Suburban" issue will be added.

*Adequacy of Staff Issue*

4. Midwest also requests that the issues be enlarged to determine whether Springfield is qualified to operate its station in view of its staff proposal. Petitioner notes that Springfield has submitted alternative programming proposals based upon affiliated and non-affiliated operations. The Springfield proposal with network affiliation, according to Midwest, contemplates 105-¼ broadcast hours per week of which 16-¾ hours would be local live programming and anticipates a total staff of 20 persons allocated among the various departments as follows: program—7; commercial—3; technical—5; art—1; film—1; and news—3. Without network affiliation, Springfield anticipates 66-¾ hours per week of which 22-¼ hours would be devoted to local live programming and proposes a staff of 13 employees as follows: program—5; commercial—2; technical—3; art-film—1; and news—2. In addition, proposals would schedule live programming every day and in each of three time periods. The reasons which prompted the Board to include a staffing issue in *Integrated Communication Systems, Inc. of Massachusetts*, FCC 64R–248, 2 RR 2d 861 (1964) and *TVUE Associates, Inc.*, FCC 64R–56, 1 RR 2d 1013 (1964) are not present in the instant proceeding as Midwest contends. In those proceedings, the Board noted that adequate information as to number of personnel involved and allocation of functions was not provided and, in the *TVUE* case, also that the novelty and complexity of proposed programming raised a question of staff adequacy. Even though the Springfield application reflects extensive local live programming, the facts relied on by petitioner do not establish a sufficient basis for questioning said proposals. Unlike the *Integrated* and *TVUE* proceedings, the Springfield application indicates a precise number of personnel who are allocated specific functions and there is no question raised as to "novel or

[3] A comparative analysis of programming proposals of October, 1961, and of January 1964, as summarized in the Midwest petition, indicates that Springfield would: (1) reduce local live programming by 9 hours per week; (2) reduce religious programming by 3½ hours per week; (3) reduce both agricultural and educational programming by about ¾ hour per week; (4) reduce news programming by about 3 hours per week; (5) reduce talk programming by about ½ hour per week; (6) increase discussion programming by nearly 3 hours per week; (7) reduce entertainment by 1 hour per week; (8) nearly double total spot announcements and reduce noncommercial spot announcements by 27 per week; and (9) reduce total broadcast hours by 7 per week.

complex" programming proposals. The Board agrees with the Bureau's position in this regard that the question of staff adequacy should be considered within the standard comparative context and, as a result, the issue requested by Midwest will be denied.

*Spot Announcement Policy Issue*

5. Midwest also raises a question concerning Springfield's policy in regard to spot announcements. In an amendment dated January 7, 1964, and in response to Section IV, paragraph 3(b) of FCC Form 301,[4] Springfield answers that "the commercial limitations set forth in the television Code of the NAB will be followed." Petitioner points out that the NAB television code provides no standards as to either the number or length of spot announcements allowed in a given period and since Springfield has not included the number of spot announcements and the length thereof in a given 14-½ minute period, an unresolved question remains concerning its policy in this area. In connection with this allegation, the Board notes that the Commission has had an opportunity to consider the question of Springfield's spot announcement policy in the general context of over-commercialization. On November 26, 1963, respondent, Plains, in a "Further Petition to Deny" Springfield's application, contended that an amended program proposal of 1690 spot announcements constituted patent over-commercialization inconsistent with the NAB Code. On December 26, 1963, in a "Reply to Opposition", Plains specifically pointed to Springfield's failure to respond to Section IV, paragraph 3(b) of FCC Form 301 with respect to the number and length of announcements other than a reference to the NAB Code. In this context, the Commission released its designation Order in this proceeding which stated in regard to the Plains' petition: "Finally, with respect to the alleged over-commercialization, no specific issue appears warranted since the programming proposals of the applicants will, in any event, be explored under standard comparative issue '6(c)' herein."[5] Since the question of Springfield's policy in this area was specifically before the Commission before designation and was ruled upon in the designation Order, the Board can perceive no reason to include such an issue in the absence of a showing that the Commission's ruling was based upon a misapprehension as to the facts.[6]

*Availability of Network Affiliation Issue*

6. Midwest seeks the addition of an issue which would question the availability of a network affiliation to Springfield and would also consider the feasibility of a non-affiliated operation. In support of its request, Midwest points out that the Springfield application does not show the availability of a network affiliation; that there is little possibility of obtaining such affiliation; and that a

[4] Paragraph 3(b) requires a statement as to the practice of the station with respect to the number and length of spot announcements allowed in a given period.

[5] See paragraph 4, Memorandum Opinion and Order (FCC 64-387) released May 4, 1964.

[6] In *Commercial Advertising Standards*, FCC 64-22, 1 RR 2d 1606, 29 FR 503 (1964) the Commission did not adopt specific standards limiting the commercial content of programming but did recognize NAB Codes as appropriate limitations in the form of industry-formulated restrictions. The Commission then stated that it would continue to require station applicants to state their policies with regard to the number and frequency of commercial spot announcements.

non-affiliated operation might not be economically feasible. Petitioner states that Springfield, Illinois, is part of the Springfield-Decatur-Champaign-Urbana-Danville television market which already has three different network affiliations. In its request, Midwest refers to an affidavit of the President of a former UHF permittee in Springfield, filed on October 6, 1959, in Docket Nos. 11747 and 12936, which allegedly supports its contentions in regard to the non-availability of network affiliation and the feasibility of non-affiliated operation. The Board cannot agree that the addition of such an issue is warranted. Springfield has not presumed network affiliation and has, in fact, included alternative proposals in regard to such affiliation. No factual allegations are provided by Midwest which support the conclusion that *no* network affiliation is possible in the Springfield area. It should also be noted that the only television station licensed in Springfield at present is an NBC affiliate and that Midwest, itself, proposes a CBS affiliation even though limited to rebroadcast operation. The inclusion of a 1959 affidavit on the possibility of non-affiliated status is also insufficient basis for the requested enlargement.

*Studio and Transmitter Site Availability Issue*

7. Midwest next questions the availability of proposed land and buildings for Springfield's transmitter and studio and the terms and conditions of said availability. Petitioner points to the response to Section III, paragraph 1(a) of FCC Form 301, wherein Springfield answers "lease" as to the estimated cost of acquiring land and acquiring, remodeling, or constructing buildings. (See Amendment to Springfield's application, filed October 8, 1963). Springfield's failure to provide information in regard to the existence of a lease or to cost estimates of a proposed lease, according to Midwest, is sufficient to raise questions concerning the identity and financial ability of the lessor, the terms of the lease and the conditions affecting land and building availability under a lease. The importance of disclosure is further emphasized by petitioner when it states that the proposed studio and transmitter site is in the middle of a vacant field. Springfield attempts to counter these allegations by identifying the lessor and pointing out that the lease cost of both the land and building is included in its cost of operation.[7] Under these circumstances, where uncertainty exists as to the terms of the lease and the financial ability of the lessor (who apparently will construct the proposed building), the Board concludes that the requested issue should be added. *Jefferson Standard Broadcasting Co.*, FCC 60–24, 19 RR 670 (1960). Even if the Board were to consider the further factual allegations contained in the supplemental opposition filed by Springfield and dismissed as in violation of Section 1.45 of the Rules, it would grant the request. Springfield does not submit a copy of a lease or an agreement incorporating the terms thereof either in its opposition or supplement. However, Springfield, in its supple-

[7] According to Springfield's opposition, "the land and building will be leased from Springfield Industrial Park, a trust owning and developing 200 acres free and clear of the Illinois National Guard Depot". Since the Springfield application does not include construction costs for studio and transmitter, it is assumed that the lessor will bear the construction costs.

ment, does include a letter submitted by the proposed lessor's agent which indicates that a studio and transmitter site is available *subject* to conditions including prior sale, satisfactory agreement and conclusion of arrangements within 12 months (letter dated February 6, 1964). In an attempt to furnish supporting information in response to Midwest's contentions, Springfield actually casts further doubt upon the reasonable assurance of an available site for its studio and transmitter; therefore, addition of the issue appears justified.[8]

*Financial Qualifications Issue*

8. In support of its request for a standard financial qualifications issue against Springfield, petitioner alleges that $268,300 in available funds must be shown for a network affiliated station (including $211,424 for construction costs plus $56,875 for three months' operating costs) and $256,425 for a non-affiliated operation (including $211,424 construction costs plus $45,000 operating costs). Midwest contends that only $225,000 of the required funds are available (consisting of $6,000 existing capital, $69,000 new capital from stock subscriptions, and $150,000 from debentures). See Exhibit 3 of Amended Springfield Application, filed October 8, 1963. Midwest discounts the availability and amount of RCA Credit on the grounds that quoted estimates are uncertain or do not provide for the costs of tower foundations, erection charges, painting and of an RCA tape recorder. The Board cannot agree with petitioner as to the uncertainty of RCA credit. In a letter of credit dated January 3, 1964, RCA indicates total construction costs of $235,762 which explicitly includes the cost of a tape recorder; therefore, credit in the amount of $176,821 is available to Springfield. In regard to the costs of tower foundations, erection charges and painting, Springfield points out that $25,000 is intended to cover such expenses as a contingency allowance which seems reasonable to the Board. Under these circumstances, Springfield adequately demonstrates the availability of funds to meet the requirements of either a network or non-affiliated operation as follows:

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|---|---|
| 25 percent RCA downpayment | $58,941 |
| 3 months' network operation ($45,000 for nonaffiliated operation) | 56,875 |
| Contingency allowance | 25,000 |
| Approximate 3-month RCA installment payment | 11,100 |
| Total | $151,916 |

As the Bureau points out, Midwest admits the availability of $225,000 which more than covers construction costs and initial operating expenses, and does not question the ability of any of the Springfield principals to meet their respective financial commitments. Thus, more than enough is available, even accepting some of the possible contingencies referred to in the petitioner's reply. The Board's denial of the requested financial issue, like

[8] The conditions imposed by the proposed lessor result in further uncertainty concerning the availability of a site for even the period of the application's prosecution. In *Cabrillo Broadcasting Co.*, FCC 62R-133, 24 RR 608 (1962), the Review Board, in denying the addition of a site availability issue stated that it is sufficient that the site be available for the period for which the license is sought.

the Bureau's position, presupposes that Springfield is not responsible for construction costs of studio and transmitter facilities and that rental of such facilities is included within operating costs.

*Public Stock Sale Issue*

9. In an amendment to Section II, Item 22 of the Springfield application, filed on November 5, 1963, Springfield stated:

> It is the intention of the applicant to sell some of its stock to leading citizens of the Springfield, Illinois area at some date in the future. However, control of the Corporation will remain in the hands of the present three stockholders.

The Springfield application indicates that 250 shares of no par, common stock are authorized and that the proposed station will be financed through the sale of 150 shares at $500 per share to three subscribers, Richard Cole, Robert H. Gries and Robert D. Gries.[9] On the basis of these facts, Midwest seeks an issue to determine the facts and circumstances surrounding, and the implications and effects of, Springfield's intention to sell stock to persons who do not appear as parties to its application. Midwest contends that Springfield may have stockholders with as much as a 49.9% undisclosed interest who do not appear in Section II of the Corporate application for Commission appraisal. Midwest's request is not supported by any new facts of undisclosed interests which may be contrary to information now on file with the Commission. Springfield specifically disclaims any agreements or understandings with respect to additional stockholders and merely evidences an intention at some future time to include Springfield area residents in its ownership. Therefore, the issue will not be added by the Board.

*Comparative Coverage Issue*

10. Midwest submits an engineering affidavit in support of its request for the addition of a comparative coverage issue with respect to the proposed Grade B contours of the applicants. Petitioner points out that it proposes to operate with 17.26 kilowatt visual power with antenna height of 589 feet above average terrain and Springfield proposes operation with 19.15 kilowatt power and antenna height of 390.8 feet. According to the attached engineering affidavit, Midwest proposes greater coverage than Springfield which results in substantial differences in areas and populations to be served. Within Grade B contours, Midwest would encompass a population of 188,365 persons in an area of 1,802 square miles and Springfield would encompass a population of 160,902 persons in an area of 1,269 square miles. As a result of these differences, it is alleged that Springfield would include within its predicted Grade B contour only 85% of the population and 70% of the area included in Midwest's proposal. Since the competing proposals have transmitter sites some distance apart, Midwest shows that the predicted Grade B contours are not concentric. Therefore, it is alleged, that, within the Midwest contour, a population of 32,893 persons in an area of 636 square miles would not be within the Springfield contour and that, within Springfield's contour, a popu-

[9] See Section II, page 2 and Exhibit 3 of Amendment, filed October 8, 1963.

lation of 5,430 persons in an area of 103 square miles would not be within Midwest's predicted contour. In response to Midwest's contentions, Springfield states that the difference in population to be served is less than 28,000 persons and that the proposed transmitter sites are not so separated as to serve substantially different areas and populations.[10] The Board is of the opinion that petitioner has shown that there is a sufficient difference in the relative coverage areas and populations of the Grade B contours to warrant inclusion of an issue. *Cleveland Broadcasting, Inc.*, FCC 64R–41, 1 RR 2d 949 (1964); *Guadalupe Valley Telecasting Co., Inc.*, FCC 64R–91, 1 RR 2d 1019 (1964). The issue, as requested, will be limited to a comparison of Grade B contours.[11]

*Feasibility of Proposals and Extended Financial Qualifications Issue*

11. Midwest asserts that the "Evansville" issue and the standard financial and comparative issues do not permit adequate exploration of the question whether Springfield is able to effectuate, develop and maintain its program proposals beyond the initial three-month period. As a result, Midwest requests the addition of the following issue:

To determine whether, under all the circumstances, the program proposals of Springfield Telecasting Co. are feasible in the Springfield market, whether or not it has a network affiliation; to determine whether there is a reasonable prospect that the program proposals of Springfield Telecasting Co. can be effectuated; and to determine whether Springfield Telecasting Co. has financial qualifications *beyond* the heretofore usually accepted showing of ability to construct and to operate a television station for three months without revenues and, if so, to determine whether Springfield Telecasting Co. is qualified to operate in the manner proposed for a sustained period.

Midwest contends that Springfield overlooks the inherent problems confronting a new UHF station when it proposes ambitious and expensive operation despite a lack of television broadcast experience. Petitioner cites the fact that Springfield anticipates substantial first-year profits, either with or without network affiliation, in spite of proposed early debt retirement and in spite of reported losses of numerous UHF stations.[12] The Springfield estimates are unrealistic in terms of industry experience, according to Midwest, and contrary to reasonable expectations in the Springfield area. In order to avoid further UHF failures, Midwest urges the Commission to require an adequate showing of sound financial and operating proposals beyond the initial three-month period and in support thereof, Midwest cites the Review Board's action in certifying similar issues to the Commission in *Ultravision Broadcasting Co.*, FCC 64R–192, 2 RR 2d 271 (1964);

[10] According to the engineering affidavit submitted with the Midwest request, the Midwest transmitter site is approximately 8 miles northeast of the site proposed by Springfield.

[11] The Bureau supports the addition of a comparative coverage issue limited to a consideration of Grade B contours only. Midwest has limited its showing to a difference in Grade B contours and the Bureau asserts that to so define the issue would be consistent with its position in *Ultravision Broadcasting Company*, FCC 64R-192, 2 RR 2d 271 (1964), to the effect that Grade B coverage is adequate in dealing with adjudicatory and allocation matters and has decisional significance.

[12] Midwest points out that the Commission's Report on Final TV Broadcast Financial Data —1962, Public Notice B-40706 (September 19, 1963) showed that of 18 UHF stations reporting revenues comparable to those estimated by Springfield ($200,000 to $400,000) 8 reported losses and only 4 reported profits as great as those estimated by Springfield.

*Cleveland Telecasting Corp.*, FCC 64R–220 (1964); and *Integrated Communication Systems, Inc. of Massachusetts*, FCC 64R–248, 2 RR 2d 861 (1964). Petitioner contends that its arguments are pertinent to UHF applications generally, whether or not the station is proposed for a previous all-VHF community, as in the *Ultravision, Cleveland* and *Integrated* cases, and whether or not the proposed station would have network affiliation.

12. In certifying issues to the Commission similar to the one requested by Midwest, the Review Board was primarily concerned with the comparative disadvantages confronting the proposed entry of a UHF operation into a previous all-VHF community where the three major networks were already affiliated. As the Bureau points out, in each of the proceedings where the Board certified such an issue, the financial qualifications of the applicants were already in issue and, accordingly, the Board's concern for UHF development increased. In this proceeding, however, it should be noted that Springfield is an area of all-UHF local service [13] and of one station, an NBC affiliate, although it is recognized that the Springfield area is part of another major television market where all networks are represented. Moreover, the financial qualifications of Springfield are not in issue. In fact, the Board has specifically rejected a simultaneous request by Midwest to question the availability of Springfield's funds and has indicated that such funds exceed initial working requirements by more than $70,000.[14] If feasibility of UHF proposals generally is the problem as Midwest suggests, the Board cannot perceive why Springfield should be required to demonstrate greater qualifications than other UHF applicants. Since the rationale of the *Ultravision, Cleveland* and *Integrated* cases is not present in these proceedings and since Springfield has adequately demonstrated financial ability in excess of the usual Commission requirements, the requested issue will be denied.

*Plains' Opposition Issue*

13. Midwest also proposes the addition of an issue relative to Plains Television Corporation, the party respondent in this proceeding and licensee of television broadcast Station WICS, Springfield. The requested issue seeks to determine the facts and circumstances surrounding Plains' opposition to the grant of either application herein and whether such facts constitute an abuse of the Commission's processes or reflect adversely on its qualifications as a licensee. Midwest alleges that Plains has interjected itself in this proceeding to prevent or delay the advent of a second local television service in Springfield and primarily to hinder any expansion in the scope of Midwest's operations. In support of this latter contention, Midwest points out: (1) that

[13] See *In the Matter of Deintermixture of Springfield, Illinois*, FCC 62-798, 23 RR 1579 (1962), where the Commission stated that Springfield should continue as an all-UHF area insofar as local service is concerned in order to encourage UHF growth in the market.

[14] This figure is derived from the larger cost estimates of network affiliation and includes the total contingency allowance. As indicated in paragraph 8 of the Opinion, the Board assumes that Springfield is not responsible for studio and transmitter construction costs and that operating cost estimates include rental provisions for such facilities. The Board's estimate of available funds does not consider any revenues from the possible sale of the remaining 100 shares of Springfield common stock.

Plains has not alleged the possibility of Springfield's competition even though grant of Springfield's application would result in the loss of some revenues; and (2) that Plains has not opposed an application for Channel 36 at Springfield filed on January 3, 1964, by WPFA Radio, Inc. (File No. BPCT–3280). The Board can see no factual basis to warrant addition of the issue. In the designation Order in this proceeding, the Commission specifically noted that *no challenge* had been offered to Plains' standing as a party in interest and the Commission then stated that Plains had statutory standing to appear as a party. Plains appeared and opposed the applications, and its opposition resulted in issues being designed against the applicants. Midwest has not alleged sufficient facts to justify an abuse of process or qualifications issue as to Plains in this proceeding.

*Enlargement of Designated Issue 2 (73.636)*

14. Midwest requests the Board to enlarge the scope of designated Issue 2 in this proceeding, the duopoly and concentration of control issue under Section 73.636 of the Rules, in order to enable it to compare the services and operations of Midwest with other television services in the area and to ascertain the reasons for the differences therein. Midwest contends that a meaningful determination under Section 73.636 can only be made in light of such a factual comparison of services provided and of the reasons for differences therein; and that Section 73.636(a)(2) which looks to the "extent of other competitive service" requires evidence as to the nature, scope, quantity and quality of the comparable services. If Midwest's service in the Central Illinois area is dominant, as Plains has asserted in its petition to deny the Midwest application, then Midwest requests the ability to explore the reasons therefor. The Board notes that, by a Report and Order of June 9, 1964, in Docket No. 14711, the Commission revised Section 73.636 of the Rules and that Midwest has joined in requests to stay the effective date of the revised rules and to reconsider said Report and Order. Basically, Midwest requests the Board to undertake what should be, except in unusual circumstances, initially a question for the Hearing Examiner.[15] *Springfield Television Broadcasting Corp.*, FCC 64R–234, 2 RR 2d 841 (1964). An initial clarification by the Hearing Examiner as a result of further hearing conferences on said issue is warranted and is apparently anticipated. The Examiner may want to consider not only the impact of the revised rules upon the Midwest application but also the scope of an issue thereunder; therefore, the instant request by Midwest will be denied.

*Springfield's Requested Issue*

15. In its opposition to the Midwest motion to enlarge issues, Springfield petitions the Review Board to add an issue to the proceeding to determine whether the Midwest application was filed for the purpose of impeding, obstructing, or delaying the consid-

[15] In a hearing conference held on July 28, 1964, the Hearing Examiner continued further consideration of this aspect of the proceeding. By Order (FCC 64M–895) released September 17, 1964, a further hearing conference was rescheduled for October 9, 1964.

eration of any other application. In spite of the availability of Channel 36, according to Springfield, Midwest filed its application for Channel 26 which resulted in a consolidated hearing and delayed any possible upset of Midwest's dominance in the Central Illinois area. Procedurally, the Springfield request is defective in that it is improperly made in a responsive pleading. *Saul M. Miller,* FCC 62R–122, 24 RR 550 (1962); *Charles County Broadcasting Co., Inc.,* FCC 63R–76, 24 RR 1153 (1963). Also, Springfield petitions to enlarge issues more than a month after the last day for filing such motions [16] and does not allege good cause for the delay. In addition to procedural deficiencies, the Board notes the following factual allegations of Midwest in response to the instant request: (1) that, as of the filing date of the Midwest application, a construction permit, issued to WMAY–TV, Inc. was outstanding for Channel 36 in Springfield; and (2) that Midwest could not employ Channel 36 at its proposed transmitter site because of mileage separation requirements. Under these circumstances, the Board must dismiss Springfield's request.

Accordingly, IT IS ORDERED, This 5th day of October, 1964, That the motion to enlarge issues, filed May 25, 1964, by Midwest Television, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and the issues in this proceeding ARE ENLARGED by the addition of the following issues:

1. To determine the efforts, if any, made by Springfield Telecasting Co. to ascertain the needs and interests of the area proposed to be served and the manner in which the applicant will meet such needs and interests.

2. To determine whether the land and buildings proposed by Springfield Telecasting Co. for its transmitter and studio will be available and, if so, on what terms and conditions.

3. (a) To determine the location of the proposed Grade B contours of the applicants in this proceeding.

(b) To determine, on a comparative basis, the areas and populations within the respective Grade B contours which may reasonably be expected to receive actual service from the applicants' proposed operations.

(c) In the event the proof under parts (a) and (b) hereof shall establish that either applicant will bring actual service to areas and populations not served by its competitor, to determine the number of services, if any, presently available to such areas and populations; and

IT IS FURTHER ORDERED, That the request made in the opposition, filed July 2, 1964, by Springfield Telecasting Co., for the addition of an issue with respect to Midwest Television, Inc., IS DISMISSED; and

IT IS FURTHER ORDERED, That the supplement to opposition, filed July 15, 1964, by Springfield Telecasting Co., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[16] The issues in this proceeding were published in the Federal Register on May 8, 1964 (29 FR 6098). The last day for filing petitions to enlarge issues was May 25, 1964.

F.C.C. 64–916

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>TUSCHMAN BROADCASTING CORP. (ASSIGNOR)<br>and<br>BOOTH BROADCASTING CO. (ASSIGNEE)<br>For Consent to the Voluntary Assignment of Licenses of Stations WABQ and WXEN–FM, Cleveland, Ohio | Files Nos.<br>BAL–5097;<br>BALH–680 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY, COX AND LOEVINGER DISSENTING.

The Commission has before it for consideration (a) the above-captioned applications; and (b) a petition to deny the above-captioned applications, filed on behalf of Rudolph Jones, on July 31, 1964. No opposition to the petition to deny has been filed. The Commission also received a telegram on July 1, 1964, and a letter on July 2, 1964, from petitioner's counsel objecting to the sale of the stations.

On May 6, 1964, the Commission issued a public notice of the acceptance of the applications for filing. The telegram objecting to the sale of the stations was not received until July 1, 1964 and the petition to deny was not filed until July 31, 1964. Section 1.580(i) of the Commission's Rules requires that petitions to deny be filed no later than 30 days after issuance of a public notice of the acceptance for filing of the application against which the petition to deny is directed. Accordingly, the petition to deny the applications was not timely filed and is procedurally defective in this respect. It is noted that the petition and its supporting affidavit of personal knowledge are signed by counsel, and that a copy of the petition was served through the United States mails upon the licensee's attorney in Toledo, Ohio.

The gist of the petition and earlier letter is that the proposed sale of the stations is an attempt by the licensee to avoid the consequences of a civil action brought by petitioner in the courts in Ohio against the licensee corporation since a sale of the stations would result in all assets of the licensee being depleted, thus rendering nugatory any future judgment recovered by the petitioner. The Commission has been supplied with a copy of the civil action, filed August 31, 1962, Case No. 771717, in the Court of Common Pleas for Cuyahoga County, State of Ohio. Apparently a pre-trial conference was scheduled in April of 1964 and was postponed at the request of the licensee-defendant. The complaint alleges that

plaintiff was discharged as chief engineer for the subject stations on October 30, 1961, because he exercised his constitutional right of invoking the Fifth Amendment in refusing to answer questions before the House of Representatives' Committee on UnAmerican Activities concerning his past communist affiliations or connections and that the press releases subsequently released by the licensee in this regard defamed his character and damaged his earning capacity. The plaintiff is asking compensatory damages of $225,000 and exemplary damages of $500,000.

In order to have standing to petition to deny an application under Section 309(d) of the Communications Act, petitioner must establish that he is a party in interest within the meaning of Section 309(d) (1) thereof. From an economic standpoint, a "party in interest" is one reasonably certain to incur a substantial injury specifically as a result of the potential Commission action to which objection is made. *F.C.C.* v. *Sanders Brothers*, 309 U.S. 470 (1940); *National Broadcasting Company (KOA)* v. *F.C.C.*, 132 F. 2d 545 (D.C. Cir. 1942), aff'd 319 U.S. 239 (1943); *James Robert Meachem*, 12 R.R. 1427 (1955). We have held that where a petitioner is either a plaintiff or a judgment creditor of a licensee which is seeking permission to sell a station, petitioner was not a party in interest failing a showing that those particular station assets were necessary to satisfy any judgment, awarded or otherwise. *Stanmark, Inc.*, 18 R.R. 996 (1959); *Northern Pacific Radio Corp.*, 23 R.R. 186, 190 (1962).

In the case before us, Mr. Rudolph Jones lacks even the status of a creditor; he is merely a plaintiff in a defamation of character suit. Further, no showing has been made that these particular station assets are needed to satisfy some speculative future judgment. We accordingly find that petitioner lacks the necessary standing as a party in interest within the meaning of Section 309(d) (1) of the Communications Act.

However, we have examined the petition on its merits. We find that petitioner has not pleaded any adverse public interest ramifications in the event of the grant of the applications for the assignment of licenses of the stations. Indeed, we cannot find any such consequences stemming from a grant of the applications.

Accordingly, IT IS ORDERED, That the petition of Rudolph Jones to deny the assignment of licenses of Stations WABQ and WXEN-FM, Cleveland, Ohio, IS DISMISSED and the above-captioned applications ARE GRANTED.

Adopted October 7, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–480

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of | |
| WHDH, INC., BOSTON, MASS. | Docket No. 8739<br>File No. BPCT–248 |
| GREATER BOSTON TELEVISION CORP., BOSTON, MASS. | Docket No. 11070<br>File No. BPCT–1657 |
| For Construction Permits for New Television Stations (Channel 5) | Docket No. 15204<br>File No. BRCT–530 |
| In Re Applications of | Docket No. 15205 |
| WHDH, INC. (WHDH–TV), BOSTON, MASS. | File No. BPCT–3164<br>Docket No. 15206 |
| For Renewal of License | File No. BPCT–3170 |
| CHARLES RIVER CIVIC TELEVISION, INC. BOSTON, MASS. | Docket No. 15207<br>File No. BPCT–3171 |
| BOSTON BROADCASTERS, INC., BOSTON, MASS. | |
| GREATER BOSTON TV CO., INC., BOSTON, MASS. | |
| For Construction Permits for New VHF Television Broadcast Stations | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

1. The Review Board has before it for consideration a motion, filed July 31, 1964 by Boston Broadcasters, Inc. (BBI), to clarify the following issue which was added to these proceedings by the Review Board in Memorandum Opinion and Order, released March 12, 1964 (FCC 64R–128):

> To determine, with respect to the stockholders, directors, and officers of WHDH, Inc.'s parent corporation, the Boston Herald-Traveler Corp., the information required by Section II of FCC Form 301, and, in light of the evidence adduced, to determine whether WHDH, Inc., is legally qualified.

Oppositions were filed by WHDH, Inc. (WHDH) and the Broadcast Bureau on August 10, and September 4, 1964, respectively.

2. On June 3, 1964, WHDH submitted to the other parties in the proceeding its Exhibit 7 in response to the above-quoted issue. BBI contends that such exhibit fails to comply with the aforesaid issue because no information concerning the stockholders, directors, and officers with respect to Question 10, Section II of Form 301 is included; that absent such responsive information a finding as to WHDH's legal qualification would be impossible; and that although BBI has requested the information "WHDH has taken the position that nothing more is required of it." BBI therefore urges "that the Review Board affirm that the above-quoted issue requires the

submission of information concerning the officers, directors and stockholders of the Boston Herald-Traveler Corp. in response to Question 10 of Section II of Form 301." In its opposition WHDH first contends that ". . . item 15 of Section II of [FCC Form 301] . . . specifies that with respect to the Herald-Traveler Corporation, only items 11 and 15 need be answered and only the information requested in Tables I and II of Section II is required [and] . . . that [therefore] BBI's motion . . . is in substance and effect a motion, both untimely and unsupported, to include a new issue which would require WHDH to submit information not called for by FCC Form 301." Second, WHDH contends that the Examiner has had no opportunity to rule on the admissibility, accuracy, or completeness of Exhibit 7 and that "orderly procedure would seem to require that the Examiner in the first instance rule upon the meaning of issues specified for the hearing."

3. The Broadcast Bureau likewise opposes the petitioner's request, and it is the Review Board's view that the position of the Bureau is well taken. Thus, as is pointed out by the Bureau, the exhibits submitted by WHDH in response to the issues have not been admitted in evidence, and WHDH had not, at the time the petition was filed, begun to present its direct case. Until the direct case of WHDH is a matter of record, there is no occasion for a ruling on the question raised by the petitioner. If, after the record has been closed, the petitioner is of the view that WHDH has not complied with the issue in question, it is clear that petitioner may express its view in its proposed findings and conclusions, or in exceptions to the Initial Decision. It also may be possible for the petitioner to raise a question as to the completeness of an exhibit at the time it is offered into evidence. There is no basis, however, for a ruling by the Review Board concerning documents which have not been offered into evidence.

Accordingly, IT IS ORDERED, This 14th day of October, 1964, That the motion to clarify issue, filed July 31, 1964, by Boston Broadcasters, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–925

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
LIABILITY OF CHEYENNE BROADCASTING CO., INC., LICENSEE OF STATIONS KVWO-AM–FM, CHEYENNE, WYO.
For Forfeiture

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated July 22, 1964, addressed to Cheyenne Broadcasting Company, Inc., the licensee of Stations KVWO–AM–FM, Cheyenne, Wyoming, and (2) the response to the Notice of Apparent Liability by the licensee filed August 26, 1964.

2. The Notice of Apparent Liability was issued because, following a Commission staff investigation into the operation of Stations KVWO–AM–FM, it appeared that:

(a) Leo R. Morris acquired the controlling stock interest in the licensee corporation in October 1963 without the filing of an application for transfer of control of the licensee and without the licensee's receipt of the Commission's consent to the transfer, in willful or repeated violation of Section 310(b) of the Communications Act and Section 1.540 of the Commission's Rules; and

(b) From February 1962 to April 1964 many transfers of stock in the licensee occurred, none of which was filed with or reported to the Commission, in willful or repeated violation of Section 1.613 of the Commission's Rules.[1]

The Notice of Apparent Liability indicated that for the willful or repeated failure to observe the Act and the Rules the licensee was, pursuant to Section 503(b) of the Communications Act, subject to a forfeiture of one thousand dollars ($1,000).

3. In its response to the Notice of Apparent Liability the licensee does not deny committing the violations as charged but alleges, in mitigation, that all of the unauthorized transfers "were necessitated by economics"; that the responsibility for most of the unauthorized transfers "was on those no longer subject to the forfeiture" (presumably since they are no longer stockholders in the licensee), and that the full burden should not be placed upon the two remaining

[1] Because of their number and complexity, the numerous unreported transactions are best summarized in chart form, a copy of which is attached to this Memorandum Opinion and Order. On June 19, 1964 the licensee filed with the Commission an application for transfer of control which, if approved, would give the Commission's recognition to the unauthorized transfer of control and to the various unreported transactions long before effectuated. On August 14, 1964, the Commission granted the licensee's request.

individuals [2] who "are attempting to straighten out the entire matter" and, lastly, that the licensee "is having a difficult time in meeting its obligations" and therefore the "forfeiture will work an extra hardship."

4. That the various stock transactions may have been "necessitated by economics" does not excuse the licensee from reporting such stock changes or from requesting and receiving the Commission's consent before transferring control of the licensee corporation. Nor are we impressed with licensee's attempt to place the blame for the violations of the Communications Act and the Rules upon prior officers or directors of the licensee corporation. Such argument ignores the fact that the licensee corporation has had the same president, Leo R. Morris, since 1961 and that all of the violations took place since he assumed that office. Morris was personally involved in some of the unreported transactions and as president and operating head of the licensee corporation he could hardly avoid knowledge as to the rest of the stock transactions or the responsibility for reporting them. It was Morris who acquired the controlling interest in the licensee corporation in October 1963 without filing an application for transfer of control of the licensee and without receiving the Commission's consent to the transfer. Moreover, the Commission's staff investigation reveals that it was Morris who engaged in correspondence with the Commission's staff in November 1963, which correspondence demonstrates his awareness of Commission requirements.[3]

5. In our opinion, the licensee has demonstrated a lack of concern for or indifference to compliance with the Communications Act and our Rules. The circumstances clearly indicate that the violations occurred because of the licensee's laxity. We believe that the violations could, and indeed should, have been easily avoided and that there is ample evidence of both willful and repeated violations of Section 310(b) of the Communications Act and Sections 1.540 and 1.613 of the Rules thereunder. *Midwest Radio-Television, Inc.*, FCC 63–1024; *Paul A. Stewart Enterprises*, 25 RR 375.

7. Finally, with respect to the amount of the forfeiture and licensee's plea of economic hardship, it should be pointed out that at the time we issued the Notice of Apparent Liability for $1,000 in this case we considered and weighed all relevant factors, including licensee's financial status. All of the arguments in mitigation raised by the licensee in its response to the Notice of Apparent Liability have been given careful consideration. In view of the seriousness and extent of the violations in this case, we conclude that a forfeiture of one thousand dollars is not excessive.

8. In consideration of the foregoing, IT IS ORDERED that Cheyenne Broadcasting Company, Inc., the licensee of Stations KVWO–AM–FM, Cheyenne, Wyoming, FORFEIT to the United States Government the sum of one thousand dollars ($1,000). Payment of the forfeiture may be made by mailing to the Commission a

[2] At the present time, Leo R. Morris, the president of the licensee corporation, owns 60 per cent of the stock in the licensee corporation. Richard L. Haag owns 30 per cent and Douglas Nelson owns 10 per cent.

[3] Morris wrote two letters to the Commission's Denver field office, one dated November 13, 1963, and the other dated November 15, 1963, regarding the Commission's forms pertaining to an ownership change.

check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30 days) of the date of receipt of this Memorandum Opinion and Order.

9. 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 Cheyenne Broadcasting Company, Inc.

Adopted October 7, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

*Cheyenne Broadcasting Co., Inc.*

| | Ownership of shares of stock as indicated by— | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Form 323, 3/5/62 | Form 323, 6/1/62 | The corporation's stock book as of— 7/1/61 | 3/6/62 | 7/1/62 | 12/5/62 | 12/7/62 | 10/11/63 | 3/17/64 | 3/32/64 |
| Leo R. Morris ... | 200 | 200 | 200 | 200 | 200 | 400 | 400 | 700 | 700 | 700 |
| Tosh Suyematsu . | 150 | 150 | 150 | 150 | 150 | 150 | 150 | 150 | 0 | 0 |
| Norman Udevitz | [1]150 | 0 | 150 | 150 | 0 | 0 | 0 | 0 | 0 | 0 |
| Carrol P. Orrison | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 0 |
| H. Phil Ruckman | [2]100 | 0 | 100 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Jack B. Friedberg | [1]100 | 0 | 100 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| F. L. Whitehead | [1]50 | 0 | 50 | 50 | 0 | 0 | 0 | 0 | 0 | 0 |
| Richard Haag ... | 50 | 50 | 50 | 50 | 50 | 50 | 50 | 50 | 200 | 300 |
| Unissued ..... | [3]100 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Treasury ..... | 0 | [2]200 | 0 | 0 | 200 | 0 | 0 | 0 | 0 | 0 |
| John W. Black .. | 0 | [1]300 | 100 | 300 | 300 | 300 | 300 | 0 | 0 | 0 |
| Total .... | 1,000 | 1,000 | 1,000 | 1,000 | 1,000 | 1,000 | 1,000 | 1,000 | 1,000 | 1,000 |

[1] Transfer of stock to Black.
[2] Ruckman shares returned to Treasury.
[3] Designated as Treasury stock on 6/1/62.

F.C.C. 64–904

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In the Matter of AMENDMENT OF SECTIONS 73.35, 73.240, AND 73.636 OF THE COMMISSION'S RULES RELATING TO MULTIPLE OWNERSHIP OF STANDARD, FM AND TELEVISION BROADCAST STATIONS | Docket No. 14711 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONER HYDE CONCURS.

1. In a Report and Order (FCC 64–445) released in this proceeding on June 9, 1964, and published in the Federal Register on June 12, 1964 (29 Fed. Reg. 7535) we amended the "duopoly" portions of the multiple ownership rules (Sections 73.35, 73.240, and 73.636) effective July 16, 1964. Prior to amendment, they were couched in terms of prohibiting parties from owning, controlling, or operating (1) standard broadcast stations if their primary service contours overlapped substantially, (2) FM broadcast stations which served substantially the same area, and (3) television broadcast stations which served substantially the same area. The amendments substituted for these general norms the following fixed standards: (1) standard broadcast stations—no overlap of predicted or measured 1 mv/m contours, (2) FM broadcast stations —no overlap of the predicted 1 mv/m contours, and (3) television broadcast stations—no overlap of the predicted Grade B contours.

2. In addition to the foregoing, the amendments specified that the new requirements would apply to applicants for new stations, major changes in existing stations, assignments of licenses, and transfers of control (except for assignments or transfers which are *pro forma* or by operation of law) ; that they would not apply to Class IV standard broadcast stations requesting power increases; that they would not apply to television stations which are primarily "satellite" operations; and that they would not require divestiture, by any licensee, of existing facilities, but that commonly owned stations with prohibited overlapping contours could not be transferred or assigned to a single person or entity.

3. The Commission now has before it petitions for reconsideration of the aforementioned Report and Order, and petitions for stay of the effective date of the new amendments adopted therein.[1]

[1] Petitions for reconsideration were timely filed by the following: Veterans Broadcasting Company, Inc.; Columbia Broadcasting System, Inc.; American Broadcasting Stations, Inc.; *et al.*; William N. Udell; Abacoa Radio Corporation; Tidewater Broadcasting Company, Inc.; Northern

*Continued on next page*

Many of the points raised in the petitions for reconsideration are substantially the same as those previously considered in this proceeding. We have disposed of them in the Report and Order released June 9, 1964, herein and adhere to our original reasoning and decisions concerning them, which were reached after careful consideration. They will therefore be given no further discussion here.[2]

4. Some petitioners raise matters which are considered at this stage either for the purpose of clarifying or elaborating our previously expressed views on the subject, for disposing of new arguments which we believe merit consideration, or because they make suggestions for modifications of the rules which we believe to be appropriate.

*Overlap Existing After Major Change in Facilities*

5. CBS and American Broadcasting Stations, Inc., *et al.* (American) observe that the new rules state, in part, that a license will not be granted if the grant will result in any overlap of the kind proscribed for the particular broadcast service. They point out that since the new rules apply to applicants for major changes of existing facilities, this would appear to mean that a station in an overlap situation before the effective date of the new rules could not obtain a license for a major change which might result in a degree of overlap less than or the same as that existing before the proposed change, but could only obtain an authorization for a major change if it resulted in removing all overlap. CBS and American respectively urge that the rule should permit such major changes if there is no increase or no substantial increase in overlap. It is the intent of the Commission that after a major change of facilities of such a station, overlap need not be eliminated but may be equal to or less than that existing previously, and may consist partly or entirely of terrain not included in the previous overlap as long as the amount of area subjected to overlap is not increased, absent a substantial increase in "overlap" population. We are amending the rules accordingly.[3]

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*Continued from preceeding page*
Indiana Broadcasters, Inc.; Association on Broadcasting Standards, Inc.; Metromedia, Inc.; Storer Broadcasting Company; Southeastern Broadcasting Corporation; and The Broadcasting Company of the South. Petitions for stay were filed by: Station WFRA, Franklin, Pa.; William N. Udell; Abacoa Radio Corporation; Tidewater Broadcasting Company; Northern Indiana Broadcasters, Inc.; Storer Broadcasting Company; Veterans Broadcasting Company, Inc.; and American Broadcasting Stations, Inc.; *et al.*

[2] As before, several parties urge that the *ad hoc* approach be used for dealing with duopoly problems instead of the fixed standards adopted in the new rules. Our reasons for adopting fixed standards are stated in the Report and Order and are not repeated here. In addition to arguing for the *ad hoc* approach, some petitions for reconsideration state that the fixed standard policy of the new overlap rules is inconsistent with the Commission's recently adopted policy (Memorandum Opinion and Order, FCC 64-590, released July 8, 1964) in Docket Nos. 14895 and 15233 under which, pending the outcome of the proceedings therein, we decided that we would treat on an *ad hoc* basis the question of imposing conditions on applications for microwave facilities intended to serve CATV systems located between the Grade A and Grade B contours of local television stations. The duopoly and the CATV situations involve dissimilar considerations, and therefore there is no inconsistency in our policies with regard to them.

[3] In general, the standard used in these situations will be that of area, as in our new AM assignment rules, rather than the much more complicated criterion of population. Such a standard will fulfill our objective of keeping commonly owned or controlled stations a reasonable distance apart. However, there may be situations where, with no increase in area, the "overlap" population would be increased by such an amount that the change in facilities would be in the public interest. In these situations the Commission must reserve the power to deny the application.

*Computation of UHF Grade B Contours*

6. The petition of American Broadcasting Stations, Inc., *et al.* directs attention to the fact that the newly adopted amendment to Section 73.636 prohibits overlap of Grade B contours of television stations computed in accordance with Section 73.684 of the Rules. That section specifies that the distance to the field intensity contours of UHF stations shall be calculated in accordance with the F (50,50) field intensity chart in Figure 9 of Section 73.699. Petitioners state that the use of the Figure 9 curves for UHF is inappropriate because the field strength indications therein are too optimistic for UHF service. It is averred that the Notice herein, although not specifically so stating, implied the use of the "Appendix A" curves appearing in the Commission's T.R.R. Report No. 2.4.16, dated October 22, 1956, in the calculation of Grade A contours for UHF stations in connection with the Grade A overlap rule which was proposed in the Notice. It is suggested that we should permit the same method to be used in calculating the Grade B contours which we have adopted as the standard.

7. It is true that the Notice herein implied that the "Appendix A" curves could be used in the calculation of contours of UHF stations in connection with the duopoly rules. However, we anticipate issuing in the near future a Notice of Proposed Rule Making that will invite comments on proposed new curves for UHF which the Commission's staff has developed. Since for certain powers and heights the proposed new curves will be more optimistic with regard to Grade B coverage than the "Appendix A" curves (although less optimistic than the Figure 9 curves) we believe it would not be appropriate to adopt the "Appendix A" standard, if the purposes of the duopoly rule are to be achieved. We adhere to our original decision to use Figure 9 in calculating UHF Grade B contours for the purposes of the overlap rules pending the adoption of new curves which should not be too far in the future. However, as a matter of policy, in the meantime individual cases in which the applicant can show that it is in the public interest to use different criteria will be dealt with on an *ad hoc* basis.

*Applicability of the New Rules*

8. Footnote 23 of the Report and Order stated that the new rules, the effective date of which was July 16, 1964, would apply to pending applications, including hearing cases, as well as to new applications. It touched briefly on the possibility of amendment of pending applications to comply with the new rules, and ended by saying that non-conforming applications not amended to comply would be dismissed when the new rules became effective. In a Public Notice (FCC 64–636) released July 9, 1964, the Commission announced its decision to liberalize this policy so that applications in hearing status concerning which a Hearing Examiner had released an Initial Decision prior to June 9, 1964 (the date of release of the Report and Order herein), would be disposed of under the old overlap rules in effect prior to July 16, 1964.

9. Some of the petitions for reconsideration request that the policy expressed in footnote 23 be changed so that the new rules

will not be applicable to any applications which were on file on June 9, 1964, the release date of the Report and Order. Another request asks that they not apply to applications in hearing status with regard to which the record has been closed.

10. In reaching our May decision in this matter, we considered the question of whether or not the new rules should be applied to all applications, including those previously filed, or only to applications tendered in the future. Obviously, the adoption of any overall rule more strict than previous rules may adversely affect applications filed under the earlier rules, and assertions of equitable claims in such cases are frequently made, as they have been here.[4] But any "equities" must be secondary to the public interest. As we emphasized in the Report and Order, we regard the adoption of fixed standards concerning duopoly to be a matter of great importance in the public interest. *Ad hoc* determinations hitherto made have not resulted in a satisfactory pattern of administration. Therefore, we decided that, while divestiture of existing facilities would not be required, pending applications as well as future applications would be governed by the new rules. Later, as mentioned, we made an exception in hearing cases where the parties and the Hearing Examiner had been through the burden of hearing and the Hearing Examiner had prepared his Initial Decision. This we believe to be a reasonable balance under the circumstances, and we affirm our decisions in this respect.

*Waivers*

11. Many comments in this proceeding urged that the nature of the overlap problem is such that it needed to be treated on an *ad hoc* basis, as in the past, rather than on the basis of a fixed rule of the type adopted herein. In discussing this matter in the Report and Order (footnote 12), we pointed out that the adoption of a fixed rule did not mean that all flexibility is lost. We referred to the fact that the Commission continues to have the duty to make the "ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" *N.B.C.* v. *U.S.*, 319 U.S. 190, 225 (1943). And, citing *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), we stated that a request for waiver of the new rule which showed on its face that application of the rule would be inappropriate would be entitled to a hearing.

12. Several parties in their petitions for reconsideration refer to the matter of waivers. Their arguments go in two directions. On the one hand it is stated that the hoped-for efficiency and definiteness of the approach of the fixed rule will not in fact materialize because requests for waiver will be entitled to a hearing and it is likely that duopoly hearings will continue to be held in the future although in the context of requests for waiver. On the other hand, it is averred that the fixed rule is likely to be administered so strictly that it will be an absolute rule with no waivers granted and no flexibility whatsoever, contrary to the *N.B.C.* and *Storer* cases.

[4] Some of the petitions urging such claims mention particular situations which were later covered by our Public Notice concerning hearing cases in which an Initial Decision had been reached.

13. We cannot agree with either of these arguments. Concerning the former, it may be pointed out that under the *Storer* case not all requests for waiver must be granted a hearing. Only those which set forth reasons, sufficient if true, to justify a waiver need be accorded such treatment. Thus no plethora of waiver hearings is to be expected. With regard to the latter argument, it is said that the new fixed rule is premised on the theory that contour overlap is the only factor of importance in deciding overlap problems, regardless of the existence of numerous particulars that formerly were given consideration under an *ad hoc* approach. Hence, it is stated, to grant a waiver based on special circumstances arising out of particular facts would be to deny the validity of the premise underlying the new rule; and waivers, therefore, cannot be expected to be granted. This does not follow. In adopting a fixed rule, we did so for the reasons stated in the Report and Order which led us to the conclusion that such a rule would be in the public interest. But we did not and do not now deny the existence of other factors that could be of importance in duopoly situations, and it certainly does not follow that adoption of the fixed rule forever forecloses giving consideration to the existence of special circumstances if waivers are requested.[5]

*Major Changes in Existing Facilities*

14. In paragraph 23 of the Report and Order we stated that the new overlap rules would apply to applications for major changes in existing facilities as well as for new facilities. Several petitioners urge that the new rules, effective July 16, 1964, should not apply to applications for major changes of facilities of stations which were in existence prior to July 16 ("older" stations), but only to major changes of stations authorized on or after that date. They argue that, as now applicable, the rules would effectively "freeze" some of the "older" stations in their present facilities. As some of these petitioners point out, the reason given in paragraph 23 for applying the new rules to applications for major changes as well as to applications for new stations—to prevent an applicant from getting a grant of facilities with intentionally limited service area to avoid overlap and then applying later for increased facilities which would involve it—applies to stations authorized in the future more than to existing stations. However, this is not the only reason for our decision on this aspect of the matter. Clearly, overlap resulting from increases in facilities is just the same, and has the same undesirable effects, as overlap from grant of new stations. Therefore, while we recognize (as mentioned before) that some "older" stations may have to continue with relatively limited facilities, in our view it is appropriate to apply the new rules to applications for increases in facilities, whether for stations now existing or for stations authorized in the future, except for now-existing UHF stations as discussed below.

[5] Storer, in its petition for reconsideration, makes an additional argument in support of the view that the fixed rules will be treated as absolutes in violation of the *N.B.C.* and *Storer* decisions. It states that in a case wherein it requested a waiver of the concentration of control portion of the multiple ownership rules concerning television stations, the Commission required an impossible burden of proof in support of a waiver request. *Storer Broadcasting Company*, FCC 56–1133, 14 Pike & Fischer, R.R. 742 (1956). The simple answer to this argument, as a reading of the case will show, is that the burden was not impossible but merely had not been met.

15. The foregoing principle is appropriate as a general policy. However, consideration of another factor moves us to relax that position insofar as major changes in existing UHF stations are concerned. In the joint petition of American Broadcasting Stations, Inc., *et al.* it is urged that prohibition of Grade B overlap involving UHF stations would inhibit the full development of UHF television, contrary to the expressed policy and past actions of the Commission. Petitioners point out that to foster UHF television, the Commission has, among other things, adopted measures relaxing certain technical requirements for UHF stations.[6] In addition, petitioners mention that in a number of cases UHF stations have facilities which could and should be changed to improve coverage and competitive position, and that many of these stations contemplated future improvement when originally authorized under the then existing rules. They thus argue that the Grade B overlap standard works against the development of UHF not only with regard to new stations, but with regard to existing stations, and would favor a relaxation of the new rules in both types of situation. With regard to new UHF stations, we believe that while it is conceivable that a relaxation of the duopoly rules might hasten UHF development to a limited extent, it would be at the expense of diversity of programming and desired competition. On balance, we believe the loss in diversity would outweigh the speculative and limited gains which may be achieved in UHF development. In this connection, it must be borne in mind that we hope that ultimately UHF stations will exist in large numbers. It would not be appropriate to relax our standards for what will be a very large portion of the television service.

16. However, with regard to UHF stations now in existence, there are additional considerations. As pointed out by this petitioner, a number of these stations filed originally for relatively limited facilities, hoping to expand later as the economics of this service warranted. Many UHF operations have lost substantial sums during the lean early days of UHF. In our view, it would not be appropriate to adopt, as to existing UHF stations, rules stricter than those under which they applied originally. Moreover, to deny such stations the opportunity to improve service by new, stricter duopoly rules might tend to keep them in an inferior position competitively, thus thwarting the developments we have otherwise tried to encourage. Such denial could conceivably lead to a station's demise, thus lessening diversity and competition which it is the purpose of these rules to achieve. The number of UHF stations now authorized is not large enough that overlap occurring from this source would substantially impinge on over-all diversity of programming and opportunity for competition. Therefore, as to major changes of UHF stations authorized as of September 30, 1964, which would result in Grade B overlap with a commonly owned, operated, or controlled television station, the two stations

[6] Second Report and Order, Docket No. 14229. FCC 63-300, released April 2, 1963; Memorandum Opinion and Order, Docket No. 14229, FCC 63-723, released July 29, 1963. In addition, we have taken other steps toward this end, which include urging the passage of the all-channel receiver law, adopting and implementing rules, and authorizing the formation of an industry advisory committee—the Committee for the Full Development of All-Channel Broadcasting—for the purpose of expediting the expansion of UHF television service.

having been under common ownership, operation, or control as of September 30, 1964, the new Grade B standard will not apply. The attached Appendix amends Section 73.636 accordingly. As stated therein, applications of such stations for major changes will be considered on a case by case basis.

*Satellite Television Operations*

17. The new rules do not apply to television stations which are primarily "satellite" operations. The Report and Order and the new Note 4 to Section 73.636 state that such operations will be examined on a case by case basis to determine whether a station is or is not primarily a satellite, and whether overlap with a commonly owned station exists to a degree contrary to the public interest. On further consideration of this matter, we believe that some discussion and elaboration of the satellite concept is in order.

18. A satellite station is one operating on a channel specified in the television Table of Assignments and meeting all of the technical requirements of our rules, but one which usually originates no local programming and which may, and often does, involve overlap with a commonly owned "parent" station to a degree which would not be consistent with the duopoly rules. It rebroadcasts the programming of the parent station, usually a station under the same ownership in the same region. Such stations have been authorized, since 1954, on the basis of relaxation of our policies concerning local program origination and, if necessary, waiver of Section 73.636 as to overlap. The purpose has been to bring television service to small communities and sparsely settled areas where there is insufficient economic basis for a full-scale television operation. It has been our hope—fulfilled in many instances—that satellite stations would develop with time into more nearly full-scale operation, with local studios and local program origination.

19. We have no doubt that it is in the public interest to authorize satellite television stations. Nor do we doubt the wisdom of exempting them from the duopoly rule as we have done, in the interest of promoting service to the kind of areas they are intended to accommodate. In addition, we are of the opinion that satellites which ultimately achieve a financial base that permits them to originate local programming should be permitted to do so. Otherwise, local programming would be kept off the air contrary to the public interest. Accordingly, Note 4 to Section 73.636 is amended to state specifically that a satellite television station having Grade B overlap with a commonly owned non-satellite parent television station may subsequently become a non-satellite station with local studios and locally originated programming. However, if a satellite has Grade B overlap with a commonly owned nonsatellite parent station and the satellite achieves a position in which the amount of locally originated programming is such that the station is no longer a satellite, the rules prohibiting transfer or assignment of commonly owned stations with Grade B overlap to a single person, group, or entity will apply.

20. As mentioned, satellites involve a deviation from general Commission policy with respect to local programming, as well as to overlap. We shall require all applicants proposing such opera-

tions to make a showing as to why the satellite form of operation is necessary for the community for which they are applying. Our decision will depend on the facts of each case; but in general satellite grants will be made only in communities having no local television station. We have deviated from this principle in some past situations, but it does not appear equitable or in the public interest to relax our policies and rules for one station when its competitor in the same town is held to a higher standard and when the community appears able to support a full-scale operation. Any extension of this principle (for example, when there is an existing regular station in a nearby community) will be determined in individual situations. As mentioned in the Report and Order, where Grade B overlap would exist, consideration will also be given in each case to whether the degree of overlap with a commonly owned station is such as to be inconsistent with the public interest. Also, when the matter arises, individual consideration will be given to the question of whether a station is "primarily a satellite."

*Other Matters*

21. The petitions for stay filed herein request that the effective date of the new duopoly rules be extended until (1) the conclusion of Commission action on petitions for reconsideration, or (2) until conclusion of court appeals. With regard to the former request, it is now moot inasmuch as our action today disposes of the petitions for reconsideration.[7] As to the second request, we regard it as premature. The appropriate time for filing of such a request for stay is on or after the date of filing of a court appeal. No such appeal has been filed.

22. In view of the foregoing, IT IS ORDERED, That effective October 12, 1964, Part 73 of the Commission rules and regulations is amended as set forth in the attached Appendix. Because these amendments relieve a restriction, because they are partly editorial in nature, and because it is in the public interest that they become effective as soon as possible in order to complement rules which became effective July 16, 1964, the usual thirty-day effective date provisions of Section 4 of the Administrative Procedure Act are inapplicable.

23. IT IS FURTHER ORDERED, That the petitions for reconsideration mentioned in footnote 1 of this document ARE DENIED, except for that filed by Columbia Broadcasting System, Inc., which IS GRANTED, and the Joint Petition for Reconsideration by the Commission filed by American Broadcasting Stations, Inc., *et al.* which IS GRANTED insofar as it is consistent with the action taken herein and which in other respects IS DENIED.

24. IT IS FURTHER ORDERED, That the petitions for stay mentioned in footnote 1 of this document ARE DISMISSED.

25. Authority for the adoption of the amendments to the rules herein is contained in Sections 4(i) and (j), 303, 307(b), and 405 of the Communications Act of 1934, as amended.

[7] We note, however, that prior to the August recess, in view of the fact that our reconsideration was not then complete, and so that no hardship would be worked on any party and the normal processes of the Commission would not be disrupted, dismissing of applications not conforming with the new rules was suspended by the Commission on its own motion. That suspension has continued to and terminates as of the present date.

Adopted September 30, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

Commissioner LEE concurring and stating: "I am in favor of the amendments but I would go further."; Commissioner HYDE concurring in Commissioner Lee's statement.

NOTE: Rules changes herein will be covered by T.S. III(64)-3.

## APPENDIX

1. Section 73.35 of the Commission Rules is amended by adding the word "or" at the end of paragraph (a) which follows the introductory text and by changing the second sentence of NOTE 3 and adding parenthetical material following that sentence so that paragraph (a) and NOTE 3 will read as follows:

§ 73.35 *Multiple ownership.*

* * * * * * *

(a) Such party directly or indirectly owns, operates, or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations, computed in accordance with § 73.183 or § 73.186; or

* * * * * * *

NOTE 3: Paragraph (a) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Paragraph (a) will apply to applicants for new stations, assignments of licenses, transfers of control (except those applications for assignment of license or transfer of control listed in Section 1.540(b) of this chapter), and major changes in existing stations except major changes that will result in overlap no greater in area than that already existing. (The resulting overlap areas in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, and necessity.) Commonly owned stations with overlapping contours prohibited by paragraph (a) of this section may not be transferred or assigned to a single person, group, or entity. Paragraph (a) of this section will not be applied to Class IV stations requesting power increases.

2. Section 73.240 of the Commission Rules is amended by adding the word "or" at the end of subparagraph (1) of paragraph (a) and by changing the second sentence of NOTE 3 and adding parenthetical material following that sentence so that subparagraph (1) of paragraph (a), and NOTE 3 will read as follows:

§ 73.240 *Multiple ownership.*

(a) * * *

(1) Such party directly or indirectly owns, operates, or controls one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1 mv/m contours of the existing and proposed stations, computed in accordance with § 73.313; or

* * * * * * *

NOTE 3: Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Paragraph (a)(1) will apply to applicants for new stations, assignments of licenses. transfers of control (except those applications for assignment of license or transfer of control listed in § 1.540(b) of this chapter), and major changes in existing stations except major changes that will result in overlap no greater in area than that already existing. (The resulting overlap areas in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, and necessity.) Commonly owned stations with overlapping contours prohibited by paragraph

(a) (1) of this section may not be transferred or assigned to a single person, group, or entity.

3. Section 73.636 of the Commission Rules is amended by adding the word "or" at the end of subparagraph (1) of paragraph (a), and by changing NOTE 3 and NOTE 4 to read as follows:

§ 73.636 *Multiple ownership.*

(a) * * *

(1) Such party directly or indirectly owns, operates, or controls one or more television broadcast stations and the grant of such license will result in overlap of the Grade B contours of the existing and proposed stations, computed in accordance with § 73.684; or

* * * * * * *

NOTE 3: Paragraph (a) (1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Paragraph (a) (1) will apply to applicants for new stations, assignments of licenses, and transfers of control (except those applications for assignment of license or transfer of control listed in § 1.540(b) of this chapter). Paragraph (a) (1) will not be applied to major changes in UHF television broadcast stations authorized as of September 30, 1964, which will result in Grade B overlap with another television broadcast station that was commonly owned, operated, or controlled as of September 30, 1964. Such major changes will be considered on a case by case basis to determine whether such overlap exists with a commonly owned, operated, or controlled station as to be against the public interest. Paragraph (a) (1) will apply to major changes in other television broadcast stations, except changes that will result in overlap no greater in area than that already existing. (The resulting overlap areas in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, and necessity.) Commonly owned stations with overlapping contours prohibited by paragraph (a) (1) of this section may not be transferred or assigned to a single person, group, or entity.

* * * * * * *

NOTE 4: Paragraph (a) (1) of this section will not be applied to television stations which are primarily "satellite" operations. Television "satellite" operations will be considered on a case by case basis in order to determine whether such overlap exists with a commonly owned, operated, or controlled station as to be against the public interest. Whether or not a particular station which does not present a substantial amount of locally originated programming is primarily a satellite operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade B contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned "non-satellite" stations with Grade B overlap may not be transferred or assigned to a single person, group, or entity.

F.C.C. 64–933

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of ELYRIA-LORAIN BROADCASTING CO. For Renewal of Licenses of STATIONS WEOL–AM AND FM, ELYRIA, OHIO | File Nos. BR–2173; BRH–571 |
| For Transfer of Control of STATIONS WEOL–AM AND FM, ELYRIA, OHIO | File No. BTC–4589 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it (a) the above-captioned application for transfer of control, which was granted on June 25, 1964: (b) the above-captioned applications for renewal of license of WEOL; (c) a petition filed on July 27, 1964 by The Lorain Journal Company which sought a reconsideration of the grant of the transfer application and a denial of the renewal applications; and (d) pleadings responsive thereto.[1]

2. The petitioner, which is the publisher of the *Lorain Journal* and a stockholder of the licensee of Station WWIZ, Lorain, Ohio, alleges that there was an unauthorized transfer of control of the licensee of WEOL because over 50% of the stock was transferred to newcomers and *de facto* control shifted to Lorain County Printing and Publishing Co. without prior Commission consent; that the transfer of control application granted on June 25 was improperly filed on FCC Form 316; that the fiduciary duties of the trustee who holds 99% of the stock of the transferee precludes his acting in the public interest; and that the transfer of control of the licensee of the station which possibly, for an extended period of time, could be the only station in the county [2] to one of the two daily newspapers in the county raises questions of concentration of control which requires a hearing.

3. The applicants respond that the petitioner has no standing; that they filed the proper application form for the transfer of control; that there was no change of *de facto* control; that any technical transfer of control through the sale of 50% of the stock to newcomers was inadvertent; and that the trustee who controls the transferee is qualified to be a principal of the licensee.

[1] The last responsive pleading was filed on August 31, 1964. The Commission had granted a motion, filed on July 28, for extension of time to reply to the petition.

[2] The Commission denied the application for the renewal of the license of WWIZ, the other station in the county, *WWIZ, Inc.*, 36 FCC 561, and on September 16, 1964, denied a petition for reconsideration of the denial of the renewal, FCC 64–848.

4. We find that the petitioner is a party in interest because as the publisher of the *Lorain Journal*, one of two daily papers published in Lorain County, it stands to face increased competition from Lorain County Printing & Publishing Co. which publishes the other daily paper and is the proposed transferee of the licensee for WEOL (AM & FM) which may soon be the only broadcast stations in the county.[3] Cf. *Clarksburg Publishing Co.* v. *F.C.C.*, 225 F. 2d 511, 12 Pike & Fischer, R. R. 2024 (1955). The petition for reconsideration was timely filed under the provisions of Section 405 of the Communications Act and Section 1.106(c) of the Commission's Rules. A petition to deny under Section 309(b) and (c) of the Act does not lie against a transfer of control application filed on FCC Form 316 and in any event the petitioner did not have an opportunity to file any type of pregrant protest. For the reasons given below, we agree with petitioners that the application should have been filed on FCC Form 315 but the petitioner did not have any opportunity to file even an informal protest because the Form 316 application was granted on the date of the public notice of acceptance of the application for filing.

5. In regard to the renewal application, the petitioner has shown that he is a party in interest for the renewal of the license of a station with which its newspaper competes for advertising, *Elyria-Lorain Broadcasting Co., Inc.*, 13 Pike & Fischer, R.R. 116A (1955); *Richland, Inc.* (*WMAN*), 13 Pike & Fischer, R.R. 113 (1955), and the petition was filed within thirty (30) days of the public notice of acceptance of the application for filing.

6. The history of the ownership of Elyria-Lorain Broadcasting Company, the licensee of WEOL, indicates that there has been such a substantial change of ownership that the transfer application should have been filed on FCC Form 315; that a transfer of control apparently occurred when 50% of the stock passed to stockholders upon whose qualifications the Commission had not passed; and that there was a possible transfer of *de facto* control without prior Commission consent. The Commission granted Elyria-Lorain Broadcasting the original construction permits for WEOL–FM on October 7, 1947, and for WEOL on October 21, 1947. The subject application filed June 22, 1964, on FCC Form 316, was the only transfer or assignment application which the Commission granted for WEOL. The applicants, however, concede that by December 12, 1960, 50% of the stock of Elyria-Lorain was held by individuals or entities other than the original 62 stockholders upon whose qualifications the Commission had passed when it granted the construction permits. It also appears that the present transferee, Lorain County Printing, acquired its first stockholding (25.3%) in June, 1958; that shortly after the acquisition of these shares, Schoepfle, the President of Lorain County Printing, was named as President of Elyria-Lorain Broadcasting; and that certain other indicia of possible *de facto* control of Elyria-Lorain Broadcasting by Lorain County Printing have appeared since 1958. The transfer application now before the Commission proposes that Lorain County Printing increase its stockholding in Elyria-Lorain Broadcasting from

[3] Lorain County Printing & Publishing publishes the Elyria *Chronicle-Telegram*. Elyria is approximately 7 miles from Lorain.

46.9% to 60%. Thus, the only application which was filed for the acquisition of 60% of the licensee by the publisher of the only daily local newspaper published in Elyria was a short Form 316.

7. Section 309 of the Communications Act requires any application which involves a substantial change in ownership or control to be filed in a form to give all interested parties at least a 30 day opportunity to file objections. Furthermore, any application must contain the information necessary for us to make a public interest finding. Consequently, we are ordering Elyria-Lorain Broadcasting to file a transfer of control application on FCC Form 315. This application should (1) describe the transactions whereby 50% of the stock passed to newcomers; (2) describe the influence which Lorain County Printing has been exerting over the licensee; (3) describe any trusts under which any controlling block of stock is held; (4) describe the advertising practices of Station WEOL and the Elyria *Chronicle-Telegram,* particularly in regard to any proposed joint rates; and (5) describe other media serving Elyria, with particular attention to the amount of space and time they give to Elyria and Lorain County affairs. The application should also contain a statement of the reasons for the applicants' belief that any unauthorized transfer of control or concentration of control over mass media would not disqualify the proposed transferee.

8. Action on the renewal applications will be deferred pending consideration of the new transfer of control application.

Accordingly, IT IS ORDERED, This 14th day of October, 1964, That, the grant of the above-captioned transfer of control application IS HEREBY SET ASIDE;

IT IS FURTHER ORDERED, That, within 15 days of the date of this Order, Lorain County Printing & Publishing Co. SHALL RETRANSFER any of the 200 shares of stock which it might have acquired from the Loren M. Berry Foundation as proposed by the above-captioned application.[4]

IT IS FURTHER ORDERED, That, on or before November 13, 1964, AN APPLICATION SHALL BE FILED on FCC Form 315 for the transfer of control of Elyria-Lorain Broadcasting Co.;[5] and

IT IS FURTHER ORDERED, That, the petition filed by The Lorain Journal Company IS GRANTED to the extent indicated above and DENIED in all other respects.

Adopted October 14, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[4] In view of the fact that the applicants have not notified the Commission of consummation of the proposed transfer it appears that it will probably not be necessary to retransfer any stock.

[5] The transferee in this application should be the party or parties whom the applicants now propose for stockholders of a majority of the stock or for *de facto* control. There need not be separate applications for any previous transfers of control, but the application should describe any earlier transfers and the parties involved.

F.C.C. 64R–492

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of<br>TVUE ASSOCIATES, INC., HOUSTON, TEX. | Docket No. 15212<br>File No. BPCT–3161 |
| UNITED ARTISTS BROADCASTING, INC., HOUSTON, TEX. | Docket No. 15213<br>File No. BPCT–3166 |
| For Construction Permits for New Television Broadcast Station | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON DISSENTING AND VOTING FOR APPROVAL OF AGREEMENT.

1. The Review Board has before it for consideration a joint request for approval of an agreement between TVue Associates, Inc. (TVue) and United Artists Broadcasting, Inc. (United).[1]

2. On March 7, 1963 and on March 22, 1963, TVue and United, respectively, filed applications for construction permits for a new television broadcast station to operate on Channel 23, Houston, Texas. The applications were designated for hearing by Order (FCC 63–1022) released November 5, 1963. The commencement date for the hearing, originally set for September 14, 1964, has been postponed.

3. TVue and United seek approval of an agreement which provides for the partial reimbursement by United of the expenses incurred by TVue in prosecuting its application, and, upon approval thereof, TVue will file a petition for leave to amend its application so as to "specify operation on a channel other than Channel 23, Houston, Texas, and will file simultaneously therewith said amendment and request that its application be removed from consolidated hearing herein." If the petition for leave to amend is not granted, the agreement provides that "TVue agrees to immediately petition the Commission to dismiss its application for a construction permit for a new television broadcast station in Houston, Texas." According to its reply pleading, TVue's petition for leave to amend would specify either Channel 68, which under proposed rule-making in Docket No. 14429 would be added to Houston, Texas, or Channel 17, which is assigned to nearby Rosenberg, Texas, or "Channel 29, Houston, Texas, if available." In attachments to the petition, it is stated by officers of both peti-

[1] Before the Review Board for consideration are (a) a joint request filed on July 31, 1964, by the two applicants in this proceeding; (b) Broadcast Bureau's opposition and comments, filed August 18, 1964; and (c) reply to Broadcast Bureau's opposition, filed September 9, 1964, by TVue and United.

tioners that approval of the agreement is in the public interest in that it will avoid a comparative hearing for Channel 23, and will result in bringing a new television service to Houston at an earlier date. As an additional public interest consideration, it is stated that approval of the agreement will avoid the cost of a comparative hearing for Channel 23, and that these savings can be used for the construction and operation of the Channel 23 station.

4. On the basis of the information presented, it cannot be determined whether the public interest considerations cited by the parties are valid. While approval of the agreement would eliminate the necessity of a comparative hearing with respect to Channel 23, the agreement does not necessarily assure the institution of early service on Channel 23; the hearing issues in the Channel 23 proceeding include issues which could disqualify United Artists, and the net effect of approval of the agreement might be that no service could be instituted on Channel 23 until the United Artist application has been denied and a new application by a qualified applicant has been filed for Channel 23.

5. For the reasons cited in the preceding paragraph, approval of the agreement will not necessarily have all of the beneficial effects in the Channel 23 proceeding which the petitioners rely upon in requesting approval of their agreement. Not considered by the petitioners is the fact that approval of the agreement might have adverse public interest effects which are at least equal to those which might be gained in the Channel 23 proceeding. Thus, should TVue seek to amend its application to specify Channel 29, for which two applications [2] have been filed but which have not as yet been designated for hearing, the Channel 29 proceeding would become more complex as a result of TVue's amendment. Whatever public interest advantages might result in the Channel 23 proceeding from approval of the agreement would thus be check-mated by further complications in the Channel 29 proceeding. Should TVue decide to wait for final Commission action in Docket No. 14429 with respect to Channel 68, approval of the agreement would leave TVue in the Channel 23 proceeding for an indefinite period, thus complicating the course of the Channel 23 proceeding; the uncertainties thus created negate to a substantial extent the advantageous public interest effects which the petitioners claim that approval of their agreement would have on the Channel 23 proceeding. Interwoven in both Channel 68 and Channel 29 amendments is the basic problem of whether such amendments may operate at cross-purposes with the public interest considerations underlying the Commission's Rule (Section 1.519) against repetitious applications. If, instead of amending to either of the Houston channels, TVue seeks to amend to Channel 17 in Rosenberg, an immediate problem would be presented by the fact that an application ostensibly designed to meet the needs of Houston would be prosecuted for Rosenberg; an agreement which looks to such result cannot be approved as being in the public interest.

6. In a footnote in their reply pleading, the petitioners state that TVue's amendment would be ruled upon by the Hearing Ex-

[2] BPCT-3220; BPCT-3302.

aminer. This is correct. However, this does not eliminate the necessity of the presentation to the Review Board of the amendment which would be sought where the amendment is inseparable from the agreement approval of which is requested. In this connection, see *Calhio Broadcasters,* FCC 64R–26, 1 RR 2d 943 (1964). Since the amendment has not been submitted, and since TVue has not as yet decided which channel it will seek, a determination as to whether the agreement before us is in the public interest cannot be made. TVue's contention that it does not desire to incur the expense of engineering studies, etc., to determine which of the channels it will seek until the Board has approved the agreement, does not either permit or require a conclusion other than that reached herein. While all of the adjudicatory branches of the Commission attempt to accommodate applicants in their efforts to minimize expenses, the private interests of the applicants cannot be permitted to override public interest considerations.

7. The Broadcast Bureau in its opposition objects to the amount of TVue's reimbursement under the petitioners' agreement. Since, for the reasons indicated, it cannot, on the basis of the information presented, be determined whether the approval of the agreement would in any event be in the public interest, no useful purpose would be served by a resolution of the conflicting contentions concerning the reasonableness of TVue's reimbursement. Should the parties decide to submit for Board approval a new agreement, together with all of the information that we have indicated is essential, it is assumed that they will attempt to cast the reimbursement aspects of their proposal in a form which, consistent with their own views as to what is proper, will minimize the Bureau's problems.

Accordingly, IT IS ORDERED, This 20th day of October, 1964, That the joint request for approval of agreement relating to withdrawal of application of TVue Associates, Inc., filed July 31, 1964, by TVue Associates, Inc. and United Artists Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*

F.C.C. 64R–493

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
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| SPANISH INTERNATIONAL TELEVISION CO., INC., PATERSON, N.J. | Docket No. 15089<br>File No. BPCT–3032 |
| BARTELL BROADCASTERS, INC., PATERSON, N.J. | Docket No. 15091<br>File No. BPCT–3103 |
| TRANS-TEL CORP., PATERSON, N.J. | Docket No. 15092 |
| For Construction Permits for New Television Broadcast Stations | File No. BPCT–3114 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

1. The Review Board has before it for consideration a motion to delete issues, filed September 14, 1964, by Trans-Tel Corp. (Trans-Tel), in which the movant seeks deletion of Issue 7 (as it applies to its application) and Issue 9 as designated in the Commission's Hearing Order (FCC 63–490, released June 3, 1963). Trans-Tel's motion is supported by the Broadcast Bureau in comments filed September 21, 1964, and is not opposed by any other party.

2. Issue 7 pertains to the feasibility of locating the proposed UHF antenna of Trans-Tel and Bartell Broadcasters, Inc. (Bartell)[1] on the Empire State Building. Trans-Tel notes that since designation of this issue, the Commission has determined in another proceeding that location of a UHF antenna system, of a specified type, on the Empire State Building, is feasible. *New Jersey Television Broadcasting Corporation,* FCC 64–296, 2 RR 2d 263 (1964). Having now amended its application[2] to specify the Empire State Building type-accepted antenna for its proposal, Trans-Tel submits that, since the Commission itself has made the determination called for by Issue 7, this issue is now moot as to its application and should be deleted. The Bureau supports Trans-Tel's position, but would delete Issue 7 in its entirety, since the Commission's determination is equally applicable to Bartell's proposal in this proceeding, inasmuch as Bartell has similarly amended its application. This motion does not involve an attempt to resolve a designated issue by way of interlocutory pleadings. Compare: *Geoffrey A. Lapping,* FCC 63R–349, 1 RR 2d 159 (1963). On the contrary, as Trans-Tel indicates, the feasibility question has been finally determined by the Commission in favor of the

[1] This issue also refers to a third application which has been dismissed.
[2] The amendment was accepted by Examiner's Order, FCC 64M–833, released September 4, 1964.

applicants' proposals. Issue 7 will therefore be deleted in its entirety.

3. Issue 9, which pertains only to Trans-Tel's proposal, relates to a possible violation of the Commission's multiple ownership rule (Section 73.636(a)(1)) by grant of Trans-Tel's application. At the time of designation of the applications for hearing there appeared to be an overlap of Trans-Tel's proposal with Station WHNB–TV, New Britain, Connecticut, in which Trans-Tel has a minority stock interest. Trans-Tel, states that it has amended its application so as to reduce its power to delete any possible overlap between its proposal and Station WHNB–TV. The Bureau states that Trans-Tel's amendment was in conformity with the Commission's directions contained in footnote 23 to the Report and Order concerning the recent amendment of Section 73.636 (FCC 64–445, released June 9, 1964), that pending applications be amended so as to eliminate possible overlap or be dismissed. The Bureau notes that Trans-Tel's amendment was proffered for the purpose of complying with the Commission's directive, and, since possible overlap has been eliminated, Issue 9 should be deleted. In view of the special circumstances noted by the Bureau, Trans-Tel's motion will also be granted as to Issue 9. Cf: *Edina Corp.*, FCC 62R–82, 24 RR 455 (1962).

Accordingly, IT IS ORDERED, This 21st day of October, 1964, That the motion to delete issues, filed September 14, 1964, by Trans-Tel Corp. IS GRANTED; and

IT IS FURTHER ORDERED, That Issues 7 and 9 presently designated in this proceeding ARE DELETED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–987

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of TRIANGLE BROADCASTING CO. (ASSIGNOR) and UNITED BROADCASTING CO., INC. (ASSIGNEE) For Consent to the Assignment of the Construction Permit of Station WJMY–TV, Allen Park, Mich. | File No. BAPCT–340 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT.

1. The Commission has before it for consideration (a) the above-captioned application for assignment of the construction permit for Station WJMY–TV; (b) "Petition for Stay," filed August 7, 1964, by Albert Vanden Bosch, a 15% shareholder of the assignor corporation, directed against the above-captioned application; (c) a "Petition for Reconsideration" of the above-captioned application, filed on August 7, 1964, by Albert Vanden Bosch; (d) an opposition to the "Petition for Stay," filed on September 8, 1964, by assignor, Triangle Broadcasting Company; (e) an opposition to the "Petition for Reconsideration," filed on September 8, 1964, by assignor, Triangle Broadcasting Company; (f) a reply to the opposition, filed on September 15, 1964, by Albert Vanden Bosch; (g) a petition for leave to file an affidavit and an attached affidavit by Richard Eaton, President of assignee, United Broadcasting Company, Inc., filed on September 23, 1964; and (h) a petition for leave to file an affidavit and an attached affidavit by Robert Spanos, a director of assignor corporation, filed by Triangle Broadcasting Company on October 2, 1964.

2. The "Petition for Stay" requests the Commission to stay the effectiveness of its consent to the above-captioned application pending its determination of the "Petition for Reconsideration" and by reference, incorporates the "Petition for Reconsideration" as cause therefor. Thus, our disposition of the "Petition for Reconsideration" herein, renders the "Petition for Stay" moot.[1]

3. The principal issues presented for decision may be summarized as follows: (a) In view of the fact that Albert Vanden Bosch failed to file a petition to deny pursuant to Section 1.580(i) of the Commission's Rules, in accordance with the provisions of Section

[1] The "Petition for Stay" was not acted upon prior to this date because of the extension granted for the filing of opposition pleadings. All parties consented to such extension, and the assignment was consummated on September 4, 1964, four days prior to the filing of the oppositions to the Petitions for Stay and Reconsideration. Additional pleadings were filed as late as October 2, 1964.

309(d) of the Communications Act of 1934, as amended, or an informal objection to the grant pursuant to Section 1.587 of the Commission's Rules, is he now precluded from filing the instant petition by virtue of Sections 1.106(b) and 1.106(c) of the Commission's Rules?[2] (b) Has petitioner advanced any matters of substance which require or merit setting aside our grant of July 8, 1964, and designating the assignment application for hearing?

4. Section 405 of the Communications Act as implemented by Sections 1.106(b) and 1.106(c) of the Commission's Rules requires, as a requisite to filing a petition for reconsideration, a showing of "good reason" why it was not possible for the petitioner to participate prior to the grant of the assignment application by pursuing its rights under Sections 1.580(i) and 1.587 of the Rules. In support of such "good reason," petitioner states that he was not aware that he was a shareholder of the assignor corporation until the last week of July 1964. He further avers that he has never been in possession of any shares, that the officers of the assignor corporation "have said that he owned 15% at times and at other times have said that he had no shares," and that it was only on July 31, 1964 that he found out from a former officer of Triangle that said officer had signed his name to 300 shares of Triangle stock.

5. The opposition to the Petition for Reconsideration and the affidavit of Roy O. Makela, President of Triangle, attached thereto, set forth the following details of the petitioner's status as a stockholder since the inception of the corporation. In consideration of $300, 300 shares of Triangle stock were acquired by petitioner on March 2, 1962. The stock certificate for such shares was delivered to petitioner's employer, Spanos Associates, since it had paid for the stock with the understanding that repayment would be made through payroll deductions. Such payroll deductions were not made, so that the $300 is still owed to Spanos Associates and accordingly the stock certificate is being held by it. In February 1963, it was decided to meet operating expenses for Station WJMY–TV with pro rata loans from the stockholders, and Mr. Vanden Bosch's share was $1500. He borrowed this amount from the Security Bank of Lincoln Park, Michigan, with the promissory note payable to the bank being co-signed by Messrs. Frank Larner and Henry Voetberg, also stockholders of Triangle. Mr. Vanden Bosch defaulted on this note, and Frank Larner made the payment.

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[2] Sections 1.106(b) and 1.106(c) read as follows:

"(b) Except where the Commission has denied an application for review without specifying reasons therefor, any party to the proceeding, or any other person aggrieved or whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which he is aggrieved or his interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

"(c) A petition for reconsideration which relies on facts which have not previously been presented to the Commission or to the designated authority, as the case may be, will be granted only under the following circumstances:

"(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;

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

"(3) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest."

There was an oral agreement that the 300 shares of stock were to be security for the co-signers and it is understood that Mr. Larner advised Mr. Vanden Bosch of his intent to claim such security. To date, however, Triangle Broadcasting Company has had no request from Albert Vanden Bosch or Frank Larner and Henry Voetberg for change of the ownership of the 300 shares, so that petitioner remains the stockholder of record. As the stockholder of record, Mr. Vanden Bosch was accorded all rights including notices of stockholders' meetings. He attended and voted at the stockholders' meetings of January 21, 1963, April 25, 1963, September 11, 1963, and January 24, 1964, in person, and was represented by proxy at the stockholders' meeting of January 3, 1964. The United offer was accepted at the stockholders' meeting of January 3, 1964. Further arrangements with United were reported at the January 24, 1964 meeting, which Mr. Vanden Bosch attended in person and voted at as a stockholder. The application for Commission consent to the assignment to United Broadcasting Company, Inc., was filed on February 14, 1964, and public notice of its acceptance for filing was issued on February 24, 1964.

6. In the "Petition for Reconsideration" and affidavit attached thereto, petitioner admits that he attended and voted at the January 24, 1964 stockholders' meeting. It is thus inconceivable that he was unaware that he was a stockholder at the time the assignment application was filed. Moreover, Commission records demonstrate that he has been a Triangle shareholder since March 2, 1962, and his signature appears on documents so indicating. Such records are available for public inspection, and if Mr. Vanden Bosch did have any doubt about his status as a Triangle shareholder, the information was readily ascertainable. We therefore conclude that petitioner has not demonstrated sufficient reason why it was not possible for him to participate in the earlier stages of the proceeding. Failure to raise the matter previously, or satisfactorily to justify this failure, as required by Sections 1.106(b) and 1.106(c) of the Rules, renders the "Petition for Reconsideration" defective, and it must therefore be dismissed. *Millers River Translators, Inc.*, 25 RR 516, affirmed, —— U. S. App. D. C., ——, 328 F.2d 186, 1 RR 2d 2083 (1964).

7. Notwithstanding the fact that the Commission has determined that the instant "Petition for Reconsideration" is defective, it has fully considered petitioner's substantive arguments directed to the merits of the assignment application. The substantive allegations are as follows: the officers and directors of the assignor corporation violated their fiduciary obligation to the other stockholders by causing the assignor corporation to enter into the United contract at a time when "other and better proposals" were available to the corporation; by approving said agreement over the objections of the minority, the majority stockholders committed fraud against the interests of the minority stockholders of the corporation; and, by soliciting and/or accepting $5,000 "for expenses incurred in arranging the deal," Robert Spanos, a director of Triangle, violated his fiduciary obligation to the stockholders of the corporation and improperly diverted part of the considera-

tion that they should receive from the sale of the corporate assets.

8. The opposition pleadings specifically deny the foregoing allegations and further assert that they are matters of private controversy to be determined by the local courts,[3] rather than in a Commission hearing which would delay the restitution of television service in Allen Park, Michigan.[4]

9. We have given careful consideration to the allegations set forth in the petition and have concluded that they do not demonstrate sufficient reason to warrant the setting aside of the Commission's grant and the resultant delay in the restitution of television service in Allen Park, Michigan. There has been no showing that the Commission's grant was improper or otherwise not in the public interest. Petitioner's charges of bad faith on the part of the assignor's officers and directors consist of general statements, conclusionary in nature, rather than specific allegations of fact. As we stated in *Stanmark, Inc.*, 18 RR 1002a (1960), "Although 'good faith and fair dealing' do have a bearing on the public interest, a mere allegation of bad faith *unsupported by facts,* is not a sufficient reason for the Commission to set aside a grant that it has found to be in the public interest." The remainder of the matters raised by petitioner relate to private transactions involving the exercise of business judgment, the resolution of which should be left to the appropriate forum having jurisdiction therefor, the local civil courts. *The Northern Pacific Radio Corp.*, 23 RR 186 (1962).

Accordingly, IT IS ORDERED, This 28th day of October, 1964, That the "Petition for Stay" and the "Petition for Reconsideration" filed by Albert Vanden Bosch ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[3] Petitioner has made identical allegations in a Complaint, filed on August 2, 1964, in the Circuit Court for the County of Wayne, Michigan. The Complaint seeks an accounting, the appointment of a receiver, and an injunction prohibiting Triangle Broadcasting Company and its officers and directors from transferring or encumbering the corporate assets. The assignment has been consummated, and to date, the court has not acted on the Complaint.

[4] Station WJMY-TV operated from October 12, 1962 until March 30, 1963. It has been silent since March 30, 1963 because of the assignor's financial inability to replace and repair fire damaged equipment.

F.C.C. 64–988

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of STEVENS BROADCASTING, INC. (ASSIGNOR) and FRED P. D'ANGELO, TRADING AS BANNING BROADCASTING CO. (ASSIGNEE) For Consent to the Voluntary Assignment of License of Station KPAS, Banning, Calif. | File No. BAL–4780 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: CHAIRMAN HENRY DISSENTING; COMMISSIONER BARTLEY ABSENT; COMMISSIONER FORD ABSTAINING VROM VOTING.

1. The Commission, on July 15, 1964, granted the above-captioned application. On August 21, 1964, the Commission granted a "Petition for Stay" of the grant thereof, filed by James Parr and Darwin Parr, applicants for the facilities of Station KPAS. The Commission now has before it the companion "Petition for Reconsideration" filed by the same petitioners on July 30, 1964, responsive pleadings thereto, and a cross-petition for reconsideration of the stay order filed on September 8, 1914, by Fred P. D'Angelo, tr/as Banning Broadcasting Company, the assignee of Station KPAS. The Messrs. Parr have filed an opposition to the latter pleading. No reply to the opposition has been filed.

2. The chronology of pertinent events follows. In February, 1962, Station KPAS went silent. In September, 1962, an application was filed for assignment of license of Station KPAS from Stevens Broadcasting, Inc. to Ray Andrew Fields. On November 30, 1962, the day before the expiration date of the license, Calvin Jasspon, controlling stockholder of the licensee of Station KPAS, filed the pending renewal application. Ray Andrew Fields dismissed his assignment application in March, 1963. On April 8, 1963, the subject assignment application (BAL–4780) was filed with the assignee being Henry Chester Darwin. Counsel for Mr. Darwin indicated to the staff in December of 1963 that a new buyer would probably be substituted in the assignment application. This was done on April 13, 1964, when the present assignee, Fred P. D'Angelo, d/b as Banning Broadcasting Company, was substituted by major amendment to the application. This amendment was accepted for filing by the Commission with the public notice of acceptance being released by the Commission on May 14, 1964. The required filing fee was paid and the requisite local publication

was effected by the parties. On July 15, 1964, the Commission granted the assignment of license in question with a condition requiring the filing of certain engineering information prior to the resumption of broadcasting. The renewal application was continued in a deferred status.

3. On July 17, 1964, two days after the grant of the assignment, petitioners filed an application for a construction permit for the facilities of Station KPAS. Public notice of the grant of the assignment was issued by the Commission on July 22, 1964. The petitions for stay and reconsideration of the assignment were filed July 30, 1964. The assignment was consummated on July 31, 1964. On August 19, 1964, engineering data was submitted to the Commission by the assignee on FCC Form 302 in accordance with the condition on the grant, and the Commission was informed by the assignee that he intended to commence broadcasting on Station KPAS no sooner than September 3, 1964. On August 21, 1964, we issued an order staying the effective date of the assignment pending the disposition of the petition for reconsideration. On September 3, 1964, the Commission issued a public notice stating that petitioners' application for the facilities of Station KPAS was mutually exclusive with the deferred renewal application for the station and a cut-off date was established as of the close of business on October 13, 1964, after which no other application would be considered for these facilities. No other competing application was filed.

4. On September 8, 1964, the assignee filed the cross-petition for reconsideration against the stay order. The opposition was filed on September 21, 1964. No reply pleading has been filed.

5. The Parrs' rely on two points in requesting the Commission to reconsider the assignment: (1) that the assignor had nothing to assign at the time of the grant since the renewal application was in a deferred status; and (2) that the Commission did not wait the required 30 days after the acceptance of the major amendment substituting Fred P. D'Angelo as the buyer before granting the assignment. The assignee maintains that it is within the Commission's discretion to grant the assignment while the renewal of license is in a deferred status. Concerning the required 30 day waiting period, assignee argues that the start of the waiting period commences on the date of the public notice by the Commission of the acceptance of the application for filing (May 14, 1964), rather than the date of the filing of the ratification by the assignor of the substitution of Mr. D'Angelo for Mr. Darwin as assignee (June 23, 1964). Since the assignment was granted on July 15, 1964, the starting date becomes significant.

6. The assignee's petition for reconsideration of the stay order details the steps taken by the assignee in consummating the assignment of license. The assignee pleads hardship if the stay is allowed to stand, in that he has expended various sums of money in readying Station KPAS for the resumption of broadcasting and in meeting his contractual obligations in purchasing the station. The opposition filed by the Parrs states quite simply that the assignee knew of the July 17th filing by the Parrs for the facilities of the

station when the assignee consummated the assignment of July 30th, and that the assignee probably was aware of the filing of the petition for stay and the petition for reconsideration by the Parrs prior to the consummation. The opposition argues that under all the circumstances, the assignee clearly assumed the risk of consummating the assignment and cannot be heard to complain.

7. Assuming, *arguendo*, that the Parrs have standing under Section 405 of the Communications Act to request reconsideration of the assignment, what of the merits of their arguments urging that the assignment be set aside? As to the contention that the required 30 day waiting period was not honored by the Commission before granting the assignment after the substitution of this assignee, we do not agree. The waiting period started on May 14, 1964, when the public notice was issued by the Commission of the acceptance for filing of the major amendment whereby the present assignee was substituted for Mr. Darwin. Section 1.578 (b), 1.580 (a) and (b) of the Rules. This amendment was actually tendered for filing on April 13, 1964. All the prerequisites for grant were complied with by the assignee, including the publication in local newspapers of the substitution of Mr. D'Angelo for Mr. Darwin, as required by Section 1.580 of the Rules. The purpose of the 30 day period is to allow any interested parties to file a pre-grant petition to deny. The ratification of this substitution by the filing on June 23, 1964 of the assignor's consent did not mark the commencement of the 30 day waiting period. Both the letter and spirit of the rule were satisfied by the use of the May 14, 1964 date as the start of the waiting period.

8. The petitioner also contends that there was nothing to assign since the renewal application had not been granted. The license of Station KPAS bore the expiration date of December 1, 1962, the end of its three year license period. Prior to that date, in February of 1962, the station had gone silent. Section 307 (d) of the Act provides for continued operation of the station by the licensee after that expiration date provided that an application for renewal is on file at that time. Such is the case here. This constitutes an authorization capable of being assigned while the renewal application is continued in a deferred status. Although our policy in the past has been to withhold action in most instances on requests for assignments of licenses where a renewal or other application has been deferred because of pending questions going to the character qualifications of the assignor, *National Broadcasting Co., Inc.*, 21 R.R. 524, 527 (1961); *National Broadcasting Co., Inc.*, (denial of reconsideration) FCC 64–900, September 30, 1964, 37 F.C.C. 705, 708, we note that in one case involving extraordinary circumstances, an assignment was involved, not withstanding a character question. *Martin R. Karig*, FCC 64–850, September 16, 1964. This case does not involve character issues such as presented in the above cited proceedings. In cases such as this one, the Commission, on a case-to-case basis, has the discretion in determining whether a grant of an assignment without the simultaneous grant of the renewal would serve the public interest, convenience and necessity. We had sound and valid reasons for granting the assignment on July 15, 1964, and deferring action on the renewal of license until the new

licensee had shown that the operation of the station when resumed (having in mind that it had been silent for two years) would be in accordance with the terms of its previous licensed operation. Our action of July 15, 1964, in granting the assignment of license of the silent station which was on deferred renewal was an attempt to expeditiously reestablish the only broadcast facility licensed to serve Banning, California, after an approximate two and one-half year period of silence. We had a qualified applicant (the assignee) with past broadcast experience who was willing and able to speedily place the station back in service. No objections had been voiced against such an assignment of license, either formally or informally. No competing applicant had formally or informally indicated to the Commission that it was interested in applying for the silent facilities, despite the fact that such an application could have been entertained by the Commission for at least one and a half years prior to our grant of the assignment to the assignee. Our grant of the assignment while holding the renewal application in a continued deferred status was an attempt to simplify the administrative process and eliminate the use of conditional grants of the renewal simultaneous with the grant of the assignment. However, the filing by the Parrs for the facilities two days after the grant of the assignment has resulted in their acquiring "Ashbacker" rights to a comparative hearing. *Ashbacker* v. *F.C.C.*, 326 U.S. 327 (1945).

9. While we have passed on the merits of the arguments contained in the petition for reconsideration, we do not find that filing an application which was mutually exclusive with the renewal application two days after a grant of the assignment gives the petitioner standing as a party in interest against the assignment application. The grant of the assignment being valid and having been made prior to the filing of the Parrs' application, the comparative hearing will, of course, be between the new assignee and the Parrs.

10. It follows that the reconsideration requested by the Parrs must be denied and the assignment allowed to stand. This also disposes of the assignee's petition for reconsideration of the stay order since the stay was only until the Parrs' petition for reconsideration had been considered. This will result in the prompt restoration of broadcasting by the only station licensed to serve Banning, California.

11. Accordingly, IT IS ORDERED, the petition for Reconsideration filed by James and Darwin Parr, on July 30, 1964 IS DENIED; the Stay Order issued on August 21, 1964, IS DISMISSED AS MOOT; and the Petition for Reconsideration of the Stay Order filed by the assignee on September 8, 1964, IS DISMISSED AS MOOT.

Adopted October 28, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–993

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of WICHITA TELEVISION CORP., INC., SALINA, KANS. For Construction Permit for New Television Broadcast Translator Station | File No. BPTT–985 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT; COMMISSIONER COX ABSTAINING FROM VOTING; COMMISSIONER LOEVINGER CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: (a) the above-captioned application filed by Wichita Television Corporation, Inc. (applicant), licensee of Television Broadcast Station KCKT, Channel 2, Great Bend, Kansas; (b) a "Petition to Deny" filed April 7, 1964, by Mid-America Broadcasting Company, Inc. (petitioner), permittee of Station KSLN–TV, Channel 34, Salina, Kansas, directed against a grant of the above-captioned application; (c) an "Opposition to 'Petition to Deny' " filed April 22, 1964, by the applicant directed against (b) above; (d) a "Reply to Opposition to Petition to Deny" filed May 4, 1964, by petitioner directed against (c) above; (e) an "Errata" filed May 8, 1964, by petitioner to correct (d) above; and (f) a "Motion for Leave to Lodge Affidavit" filed May 8, 1964, by the applicant [1].

2. On March 9, 1964, the applicant filed the above-captioned application for a construction permit for a new UHF television broadcast translator station to serve Salina, Kansas, with a power of 100 watts on Output Channel 74, rebroadcasting its Station KCKT–TV, Channel 2 (NBC), Great Bend, Kansas.

3. Petitioner alleges that the addition of the applicant's proposed UHF service to Salina would result in competitive injury to its UHF station. Accordingly, it is clear that the petitioner has standing as a "party in interest" within the meaning of Section 309(d) of the Communications Act, *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470. On the merits, petitioner claims that Salina has been a marginal market economically and that it should not be exposed to the possible competitive impact which would result from grant of the proposed translator.

4. On February 26, 1964, the Commission authorized the assign-

[1] The affidavit referred to is a denial directed to a matter first raised by petitioner in its "Reply to Opposition to Petition to Deny." Consequently, Wichita's motion is granted and its affidavit will be considered in this proceeding.

ment of Station KSLN–TV to the present permittee, which is also owner and operator of a community antenna system (CATV) in Salina, *Mid-America Broadcasting Company, Inc.*, FCC 64–158, 1 RR 2d 1001. As explained in that opinion, Station KSLN–TV was unable to survive under its previous ownership, and the Commission concluded that the special circumstances in Salina, in particular the interest in assuring resumption of local television, would justify permitting the assignment of the local television broadcast station to the local community antenna system. However, although it is clear that the previous owner of Station KSLN–TV was forced out by severe financial difficulties, it is not clear from this that the present permittee is unable to face whatever competition a translator could offer it. The petitioner has furnished no factual information to demonstrate that authorization of the proposed translator could adversely affect its operation to the point of injuring the public interest. In this regard, it is noted that Station KCKT–TV already places a predicted Grade B contour over Salina, and that the applicant simply wishes to improve its service there. To accomplish this, the applicant has arranged to have manufactured 5,000 UHF receiving antennas for sale in this area. In order to avoid disputes with the petitioner, the applicant states it has made sure that its antennas will be able to receive Station KSLN–TV as well as its translator. The applicant contends that its efforts to further the interests of its translator, by means of sales of receiving antennas, must at the same time benefit the petitioner. Finally, the applicant argues that the petitioner is basically trying to protect its CATV rather than Station KSLN–TV since the increased circulation of receiving antennas must benefit Station KSLN–TV [2].

5. The Commission has carefully considered the information furnished it by the parties but does not believe that the petitioner has demonstrated that operation of the proposed UHF translator is likely to have a substantial effect on Station KSLN–TV. In addition, the Commission notes that the only way in which Salina will be able to receive full NBC network programming off-the-air is over the proposed translator [3]. In the light of this consideration, the Commission believes that the importance of furnishing a choice of network service [4] to this area is sufficient to justify grant of the present application, *Video Utility Corp.* FCC 63–566, 25 RR 851, 854.

In view of the foregoing, the Commission finds that no substantial or material questions of fact have been raised and that the public interest, convenience, and necessity will be served by the grant of the application. Accordingly, it IS ORDERED that Mid-America Broadcasting Company, Inc.'s "Petition to Deny" IS

[2] Both parties have made various allegations regarding the petitioner's efforts to activate Station KSLN-TV compared with its efforts to sell subscriptions to its CATV. These allegations are not discussed at length since they do not appear relevant to the immediate issue of the potential competitive impact of the proposed translator.

[3] The Commission notes that Station KSLN-TV may carry some NBC programs. However, the applicant has offered to accept a grant upon an appropriate non-duplication condition and it will therefore be ordered. See *Frontier Broadcasting Co.*, FCC 63–760, 1 RR 2d 50.

[4] Aside from Station KSLN-TV and Station KCKT-TV, the only station to serve this area is Station KTVH, Channel 12 (CBS), Hutchinson, Kansas, which provides a predicted Grade A signal to Salina.

DENIED and the above-captioned application IS GRANTED in accordance with specifications to be issued, and subject to the condition that,

If the television broadcast translator station herein authorized operates in an area within the predicted Grade A contour of any television broadcast station in operation, or which subsequently comes into operation, the television broadcast translator station must not duplicate simultaneously, or 15 days prior or subsequent thereto, a program broadcast by such television broadcast station, provided the television broadcast translator station licensee has received at least 15 days advance notification from the television broadcast station licensee of the date of such broadcast.

Adopted October 28, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R-505

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| DONALD P. NELSON AND WILBUR E. NELSON, D.B.A. NELSON BROADCASTING CO., KINGSTON, N.Y. | Docket No. 15535<br>File No. BPH-4211 |
| UBIQUITOUS FREQUENCY MODULATION, INC., HYDE PARK, N.Y. | Docket No. 15536<br>File No. BPH-4312 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON CONCURRING IN PART.

1. The Review Board has before it for consideration petitions filed by Ubiquitous Frequency Modulation, Incorporated (Ubiquitous) and Nelson Broadcasting Company (Nelson), requesting that the issues in the above-captioned proceeding be enlarged in order to determine whether Nelson and Ubiquitous, respectively, are financially qualified to construct and operate their proposed FM stations at Kingston, New York, and Hyde Park, New York, respectively.[1]

2. In its application as amended, Nelson estimates that its construction costs for its Kingston proposal will amount to $20,847.20. Its operating expenses for the first three months are estimated at $7,941.00. The total construction and initial operating costs therefore amount to $28,788.20. To finance this proposal, Nelson relies in part upon a deferred payment agreement with its supplier, Gates Radio Equipment, in the amount of $12,560.00. Hence, a total of $16,228.20 must be raised from other sources to finance the Kingston proposal.

3. Nelson in its application form claims that it has assets of $48,971.00 to finance its proposal. It concedes, however, that not all of these assets are available to finance its Kingston proposal. Thus, in its application as amended, Nelson also makes reference to its application for a construction permit for a new frequency modulation station in Newburgh, New York (File No. BPH-4212, Docket No. 15591). In its amended application for the Newburgh

[1] The Review Board has before it for consideration the following pleadings: (1) petition to enlarge issues, filed July 29, 1964, by Ubiquitous Frequency Modulation, Incorporated; (2) opposition to (1), filed August 11, 1964, by Nelson Broadcasting Company; (3) opposition to (1), filed August 11, 1964, by the Broadcast Bureau; (4) reply to (2), filed August 21, 1964, by Ubiquitous; (5) petition to enlarge issues, filed July 29, 1964, by Nelson Broadcasting Company; (6) comments on (5), filed August 11, 1964, by the Broadcast Bureau; (7) opposition to (5), filed August 17, 1964, by Ubiquitous; (8) answer (Reply) to (7), filed August 7, 1964, by Nelson; (9) motion to strike (5), filed August 17, 1964, by Ubiquitous; and (10) motion to accept late filing, filed August 17, 1964, by Big River Broadcasting Corp.

proposal, Nelson estimates that its construction and initial operating costs for its Newburgh proposal will amount to $20,404.00, and that its operating expenses for the first three months will amount to $7,935.00. The total construction costs and operating expenses for the Newburgh proposal will therefore amount to $28,339.00. To finance this proposal, Nelson relies in part upon a deferred payment agreement with its supplier, Gates Radio Equipment, in the amount of $12,000.00. Hence, a total of $16,339.00 must be raised from other sources to finance the Newburgh proposal.

4. Neither in its amended application for Kingston, nor in its amended application for Newburgh, does Nelson earmark certain of its assets for one of the proposals and other assets for the other proposal. Instead, in both of the amended applications it lists the same $48,971.00 in assets as available for the two proposals. Under these circumstances, a determination of whether Nelson is financially qualifiied with respect to its Kingston proposal cannot be made without regard to the fact that, in connection with its Newburgh proposal, it has committed itself to raise $16,339.00. See *James V. Perry*, FCC 61–1130, 22 RR 81. A determination that Nelson is financially qualified with respect to its Kingston proposal can be made only if, after meeting its $16,339.00 commitment in connection with the Newburgh proposal, it has available assets of at least $16,228.20 to meet the costs of its Kingston proposal. If Nelson has sufficient assets available to meet the costs of both proposals, a total of $32,567.20, there is no need for a financial qualifications issue as to the Kingston proposal. If, however, the available assets are insufficient to meet the costs of both proposals, the addition of a financial qualifications issue is required.[2]

5. It is recognized that the analysis in paragraph 4 hereof could result in the addition of a financial qualification issue as to both the Kingston and Newburgh proposals, even though there may be sufficient available assets to meet the costs of one, but not both, of the proposals. This, however, is a problem of Nelson's own making, resulting from the fact that it neither (a) earmarked certain assets for one proposal and the remaining assets for the other proposal, nor (b) indicated which of the two proposals will have first call upon its available assets. If the seemingly anomalous result of a financial qualification issue with respect to both of Nelson's proposals is to be avoided notwithstanding the availability of sufficient assets to meet the costs of one of the two proposals, Nelson should seek to amend its applications by identifying which of its assets are to be used for which proposal, or by indicating which of the two proposals is to have first call upon its available assets. It is for Nelson, and not the Board or an Examiner, to make this choice. Unless such amendment is sought and granted, an assessment of Nelson's financial qualifications with respect to

[2] If the available assets are insufficient to meet the costs of both proposals, the addition of a financial qualification issue with respect to the Newburgh proposal would, of course, likewise be required. In a separate Memorandum Opinion and Order, in *Nelson Broadcasting Company*, FCC 64R-506, the Review Board added a financial qualifications issue as to Nelson's Newburgh proposal.

its Kingston proposal must be based upon the assumption that its available assets are reduced by the amount of its commitment with respect to its Newburgh proposal, and vice versa. Should one of the two applications be dismissed, or should there be a final denial of one of the applications while the other remains pending, the financial commitment which had been made with respect to the dismissed or denied application may, of course, be ignored in determining Nelson's financial qualifications with respect to the remaining application.

6. As has been indicated, Nelson claims available assets in the amount of $48,971.00, and the financial requirements of its two proposals, over and above the credit extended by the equipment supplier, amounts to $32,567.20. Included in its assets are commitments from each of two relatives of the principals of Nelson to lend $5,000, or a total of $10,000, to finance the two proposals. While each of the two relatives in an affidavit submitted with Nelson's application claimed "quick liquid assets in excess of $15,000 over and above all liabilities," this is insufficient to establish their financial ability to meet their commitment to Nelson. The information which a lender must supply must be "sufficiently detailed to permit a determination of current position and should be more than a mere statement of total assets and total liabilities or a statement of net worth." See *Publix Television Corp.*, FCC 59–643, 18 RR 762; *Continental Broadcasting Corp.*, FCC 59–676, 18 RR 826. Because of the insufficiency of the showing as to the financial status of the two relatives who would, under Nelson's proposal, lend a total of $10,000, the latter sum cannot be included among Nelson's available assets for the purpose of determining whether Nelson is financially qualified.

7. Nelson's available assets are thus reduced from $48,971.00 to $38,971.00. Included in the remaining assets which are listed by Nelson as having a total value of $38,971.00, are the homes owned by each of the principals. According to an appraiser's affidavits which Nelson submitted with its amended application, one of the homes has a market value of $24,500 and the other has a market value of $33,000. The $24,500 home is subject to a mortgage of $13,325.00, and the $33,000 home is subject to a mortgage of $15,270. After payment of the real estate commissions and retirement of the mortgages, Nelson claims that these two homes represent available assets of $25,455. This claim presupposes that the homes can be sold at their appraised prices. For purposes of determining Nelson's financial qualifications, this claim cannot be accepted at face value. While applicants have, under certain circumstances, been permitted to rely upon non-liquid assets as a source of funds for financing their proposals, in each instance the stated worth of the non-liquid asset was far in excess of the sum which the applicant needed to realize from the non-liquid asset. See *Massillon Broadcasting Co., Inc.*, FCC 61–1164, 22 RR 218; *Integrated Communication Systems, Inc., of Massachusetts*, FCC 64R–364, 3 RR 2d 557; *Garo W. Ray*, FCC 63R–103, ; *Springfield Television Broadcasting Corporation*, FCC 64R–243, 2 RR 2d 843; *Martin Karig*, 30 FCC 557,

21 RR 439. But where it has not been demonstrated by an applicant that the non-liquid assets will yield funds in the amount needed to finance the proposal, a financial qualification issue has been added. See *Kent-Ravenna Broadcasting Co.*, FCC 61–1219, 22 RR 230.

8. Only if the sales of the homes yield at least $19,051.20 (which is $6,403.81 less than the $25,455 which Nelson, in its financial showing, assumes they will yield) after payment of commissions and retirement of mortgages, would Nelson, on the basis of its own showing, have sufficient funds to meet the financial requirements of the two stations. It is the Board's view that the showing made by Nelson is insufficient to establish that the two homes will yield as much as $19,051.20. While the appraiser has appraised the two homes as having a total value of of $57,500, a 11.2% margin of error in the appraisal value could reduce the yield from the sale of the homes (after payment of commissions and retirement of mortgages) to less than $19,051.20, which would leave Nelson with insufficient funds to finance its two proposals. While an appraisal by a qualified appraiser is some evidence of value, it cannot be assumed that the homes will sell at the appraised prices. Appraisals are to some extent subjective, and will vary depending upon the appraiser. Moreover, the appraised value cannot be equated with cash; only if there is some concrete assurance that the house can be sold at the appraised price can full credit be given to the appraised value in determining the applicant's financial qualifications.

9. In this connection, it is noted that in Nelson's original application, filed November 5, 1963, it was stated that the home appraised at $33,000 is "on the market and an advertisement from an agent shows the selling price to be $32,900." It was further stated that whether the Kingston application is granted or not, the home will be sold. As of the time Nelson filed its opposition, on August 11, 1964, to the petition to enlarge issues, Nelson did not, either in its opposition or in an amendment to its application, indicate whether the home has been sold. Under the circumstances, the Board can only assume that the home has not been sold at the price at which it was offered. This bears out the views expressed herein that the appraised price cannot necessarily be equated with cash. Similarly, in the original application it was stated that arrangements were being made to sell the $24,500 home. No information has been supplied to indicate that the home has been sold, and, if so, at what price. If, after having been on the market for nine months, the homes have not been sold, it cannot be assumed, for purposes of determining Nelson's financial qualifications, that they will sell for their appraised prices. A reduction of 11.2% in the asking price of the homes after this period of time might well be necessary in order to assure their sale. As indicated above, such a reduction would leave Nelson with insufficient funds to finance its proposals.

10. Some of the other items relied upon by Nelson to finance its proposals are deserving of comment. Thus, in its application, as amended on February 10, 1964, by the submission of a new Exhibit

3, Nelson relies upon "securities" valued at $5,939.00, and "security" valued at $1,620.00. These items are not otherwise identified, and hence it cannot be determined whether they may reasonably be regarded as a source of funds in the amounts claimed. Accordingly, in the absence of further information concerning these securities, they must be disregarded in assessing Nelson's financial qualifications. It may be that the securities in question are those listed in Exhibit 3 of its original application—securities listed on the New York Stock Exchange. However, in its February 10, 1964, amendment, Nelson stated that it was supplying a new Exhibit 3, and hence the information supplied in the original Exhibit 3 has been superseded by that set forth in the new Exhibit 3. Under the circumstances, the Board cannot assume that Nelson, in its new Exhibit 3, had reference to the same securities listed in the original Exhibit 3. As was stated by the Board in *Paul Dean Ford,* FCC 64R–420, ,an applicant must present all relevant facts with its financial showing, and the Board will not speculate as to the showing that the applicant intended to make.

11. For the foregoing reasons, a financial qualification issue will be added. In addition to requesting a financial qualifications issue, petitioner maintains that the community of Kingston cannot, in view of the other stations presently assigned to it, support a frequency modulation station such as that proposed by Nelson. The petitioner does not, however, propose an issue which would require a determination as to whether Nelson's proposed station could survive. Nor does the petitioner allege any specific facts which would warrant the addition of an issue requiring such determination. Instead, petitioner merely expresses its own conclusionary view that Kingston cannot support the proposed Nelson station. The showing made by the petitioner is not comparable with the showing made in *William R. Ross,* FCC 62–791, 23 RR 992, in which the Commission designated an issue to determine whether the principal community could support the proposed station. The allegations—based upon the small profit shown by the existing standard broadcast stations in Kingston—made by the petitioner are insufficient to warrant an inquiry as to whether the Nelson proposal can survive.

12. A financial qualifications issue as to Ubiquitous will likewise be added, as requested by Nelson in its petition to enlarge issues. According to Ubiquitous' application, $7,200.00 will be required to finance its proposal. To secure this sum, Ubiquitous relies upon stock subscription agreements whereby three persons will purchase shares of stock worth $5,100.00, $1,900.00, and $900.00, respectively, or a total of $7,900.00. The only showing made by these three persons as to their ability to fulfill their stock subscription commitments are statements that their individual net worth exceeds $5,100.00, $3,000.00, and $2,000.00, respectively. In addition, they state that their individual annual net income after tax exceeds $6,000.00, $7,000.00, and $5,000.00, respectively. This showing is insufficient to establish the financial ability of the three stock subscribers to fulfill their commitments. See *Publix Television Corp.,* FCC 59–645, 18 RR 769.

13. The motion to strike Nelson's petition will be denied. While, as stated by Ubiquitous in its motion to strike, Nelson did not submit with its petition any affidavits in support of its allegations, the merits of Nelson's petition turn upon matters of record, e.g., the stock subscription agreements and the financial showing made by Ubiquitous stock subscribers. Under the circumstances, no affidavit was required.

14. Nelson also requested, in its petition to enlarge issues, that a financial qualifications issue be added as to Big River Broadcasting Corporation. The latter's application for Kingston, New York, had been consolidated for hearing in this proceeding, but subsequent to the filing of Nelson's petition the Big River application was dismissed by Order released September 22, 1964 (FCC 64M–925). Accordingly, Nelson's petition will be dismissed as moot to the extent that it seeks enlargement of the issues as to Big River Broadcasting Corporation. Similarly, the latter's motion for an extension of time to file an opposition will likewise be dismissed as moot.

Accordingly, IT IS ORDERED, This 30th day of October, 1964, That the petition to enlarge issues, filed July 29, 1964, by Donald P. Nelson and Wilbur E. Nelson, d/b as Nelson Broadcasting Company, IS GRANTED insofar as it concerns the addition of an issue relating to the financial qualifications of Ubiquitous Frequency Modulation, Incorporated, and IS DISMISSED as moot insofar as it requests enlargement of the issues against Big River Broadcasting Corporation; that the motion of Big River Broadcasting Corporation to accept late filing of an opposition, filed August 17, 1964, IS DISMISSED as moot; that the petition to enlarge issues, filed July 29, 1964, by Ubiquitous Frequency Modulation, Incorporated IS GRANTED; that the motion to strike, filed August 17, 1964, by Ubiquitous Frequency Modulation, Incorporated IS DENIED; and that the issues in this proceeding ARE ENLARGED by the addition of the following issues:

To determine whether Ubiquitous Frequency Modulation, Incorporated, is financially qualified to construct, own, and operate the proposed FM station at Hyde Park, New York.

To determine whether Nelson Broadcasting Company is financially qualified to construct, own, and operate the proposed FM station at Kingston, New York.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1102

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
LIABILITY OF TELE-BROADCASTERS OF CALIFORNIA, INC., LICENSEE OF RADIO STATION KALI, SAN GABRIEL, CALIF., AND REQUEST FOR WAIVER OF SECTION 73.30 OF THE RULES

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER HYDE ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated July 1, 1964, addressed to Tele-Broadcasters of California, Inc., licensee of Radio Station KALI, San Gabriel, California; (2) a letter from licensee dated July 16, 1964 requesting waiver of Section 73.30 of the Rules; (3) a response to the Notice of Apparent Liability filed September 11, 1964; and (4) other matters concerning the operation of Station KALI.

2. The Notice of Apparent Liability was issued because of willful and repeated failure to observe Section 73.30(a)[1] of Commission's Rules in that the station, which is not a network affiliate, did not originate a majority of its programs from the transmitter site or from its main studio. The Notice provided that pursuant to Section 503(b)(1)(B) of the Communications Act of 1934, as amended, the licensee was subject to a forfeiture of four thousand dollars ($4,000.00).

3. The material facts leading to issuance of the Notice of Apparent Liability are as follows: Station KALI is licensed for operation in San Gabriel, California which is located about ten miles northeast of the center of Los Angeles. On March 13, 1964, Station KALI was inspected. The operator on duty at the transmitter site stated that no programs had been originated from the transmitter site during the three-year period that he had been employed. Next, an unsuccessful attempt was made to inspect the main studio at 320 South Mission Drive, San Gabriel, California. This studio was discovered to be a leased room or rooms

[1] Section 73.30 Station location and program origination.
"(a) Except as provided in paragraph (b) of this section, each standard broadcast station will be licensed to serve primarily a particular city, town, political subdivision, or community which will be specified in the station license and the station will be considered to be located in such place. Unless licensed as synchronous amplifier transmitter, each station shall maintain a studio, which will be known as the main studio, in the place where the station is located provided that the main studio may be located at the transmitter site whether or not the transmitter site is in the place where the station is located. A majority (computed on the basis of duration and not number) of a station's programs or in the case of a station affiliated with a network 2/3 of such station's non-network programs, whichever is smaller, shall originate from the main studio or from the other studios or remote points situated in the place where the station is located.

located in the San Gabriel Civic Auditorium, but was locked at the time of the inspection, Finally, the business office at 5723 Melrose Avenue, Los Angeles, California, was visited, where very elaborate studios were maintained. Interviews with employees and examination of the logs for 1964 revealed that all programming since January 1 had originated from the Melrose Avenue studio or from other locations in Los Angeles.

4. After receiving the Notice of Apparent Liability the licensee filed a request for waiver of Section 73.30(a) of the Rules, dated July 16, 1964, and a response to the Notice of Apparent Liability, which was filed on September 11, 1964. We shall consider first the response to the Notice of Apparent Liability.

5. The licensee denies that it willfully and repeatedly failed to observe the provisions of Section 73.30(a) and asserts that in any event, the peculiar circumstances of its case make imposition of a $4,000 forfeiture "improper, unjust and unwarranted." The licensee states that it operates on a regional frequency and specializes in Spanish language programming; that by far the majority of Spanish-speaking persons in the station's service area do not live in San Gabriel, and that the greatest concentration resides in Los Angeles proper; that the great majority of the station's talent and the persons who appear on its public service programs also reside not in San Gabriel but at great distances from the station's main San Gabriel studio, and that in order to accommodate the needs of its audience and those who appear on its programs, the station presents a substantial number of its programs by remote broadcasting. The licensee claims that the Commission has always been aware of the fact that a substantial portion of the station's broadcasting was presented on a remote basis because (a) the program logs submitted with the 1962 renewal application clearly indicated which programs were presented on a remote basis and (b) the station has been inspected on numerous occasions by inspectors "who at all times were apprised and aware of the nature of our operation, and at no time was this subject ever brought up or discussed by an inspector." Licensee states it has always believed that remote broadcasts transmitted by wire to its San Gabriel transmitter site were considered part of its San Gabriel originations in compliance with Section 73.30(a) and that this "perhaps erroneous" belief was reinforced by the failure of the Commission to raise any question about its operation although "the Commission has always been aware of the manner in which these broadcasts were presented." In this connection, the licensee cites *Mary Carter Paint Co. v. Federal Trade Commission,* 333 F2d 654, as establishing "that where persons follow a course of conduct which has been validated either by agency rule or practice, the agency cannot suddenly change its ruling without some prior notice since persons have a 'right to rely' on the prior practice." The licensee further asserts that had it taped all of its remote programs and sent the tapes to the transmitter to be played back there, the station would have been in complete compliance with the rules, and "The station can see no difference between physically sending tapes of these performances to the transmitter site

and transmitting the performances by wire." Finally, the licensee asserts that the violations, if they occurred, were neither willful nor repeated because (a) there was no *mens rea* or conscious intent to violate the rules and (b) the offense was, at most, "a continuous, single offense," and not repeated. The licensee concludes by contending that if, despite its arguments, the Commission nevertheless determines that KALI is subject to a fine, "it is clear that the sum of $4,000 is clearly oppressive in the circumstances shown here."

6. The licensee may, as it claims, be providing a valuable broadcast service to Spanish-speaking listeners in the Los Angeles metropolitan area, but its first obligation is to ascertain and to satisfy the tastes, needs and desires of the community it is primarily licensed to serve—San Gabriel.[2] KALI is the only broadcast station of any class licensed to San Gabriel, and when the licensee in 1957 sought permission to move from Pasadena to San Gabriel and to operate with unlimited hours instead of daytime only it was able to obtain a construction permit for fulltime operation only because it proposed to provide the first local nighttime service to San Gabriel, thereby coming within an exception to the then-existing "ten per cent rule"—Section 3.28(c). We note that although all or almost all of KALI's programs are broadcast in Spanish, the 1960 census revealed that only 3,363 of San Gabriel's population of 22,561 had Spanish surnames. As we stated in adopting Section 73.30 of the Rules in substantially its present form,

> A requirement that a station maintain studios and originate a substantial portion of its programs in the city which it is licensed to serve could hardly be considered an unreasonable burden, since it would simply require the station to carry out the proposal which it made to the Commission when it asked for its license.[3]

7. The contention that the Commission has always been aware "of the nature of its operation" is untenable if this statement is read in the context in which it is advanced; i.e., that the Commission was aware that the licensee was not originating the majority of its programs in accordance with the Rules. It is true that the licensee submitted program logs for the composite week in connection with its 1962 renewal application which indicated that many programs were presented on a remote basis, but the logs gave no indication that the points of origin were outside San Gabriel or that the licensee was therefore in violation of the Rules. Nor did our inspectors learn through routine pre-renewal inspections that KALI was in violation of Section 73.30(a). Because of manpower limitations, our Field Engineering Bureau's normal inspections are limited to certain technical aspects of operation and do not include an investigation of whether remote broadcasts indicated on the program log originate outside the limits of the principal city or whether, if so, such broadcasts comprise as much as 50 per cent of the weekly programming. Therefore, it cannot be contended that the Commission's "silence . . . constituted . . . a

[2] See Report and Statement of Policy, Network Programming Inquiry, July 29, 1960. (FCC 60-790).
[3] Report and Order (Docket No. 8747) released December 7, 1950.

holding that these prior activities were proper." Further, the *Mary Carter Paint Co.* case is not in point, in that the court there held that the FTC had by its actions reversed its own long established policies as to what constituted deceptive trade practices and that its ruling in *Mary Carter* was inconsistent with previous rulings on similar facts. As for the argument that in order for a violation to be willful under Section 503(b) of the Communications Act there must exist "*mens rea* or . . . conscious intent to violate the Rules," the Commission has stated many times that a finding of willfulness requires only that the licensee knew that it was performing the act in question.[4] The Commission expects its licensees to acquaint themselves with the rules and to comply therewith. The licensee's claim that it believed that "remote programming transmitted by wire" direct to the transmitter "fell within the intent of Section 73.30(a)" stretches credibility in view of the plain language of the rule and the Commission's published reasons for its adoption. Nor are we impressed with the licensee's argument that since taping the remote programs and transporting the tapes to the transmitter for broadcast would have constituted compliance, therefore transmitting the programs by wire also should be considered as constituting compliance. Although physically sending the tapes to the transmitter might have constituted technical compliance with Section 73.30(a), such a practice, if it involved the majority of the station's programs, would clearly be inconsistent with the obligations set forth by the Commission in its *Programming Statement* of July 29, 1960.

8. Licensee's claim that the violations were not repeated because the offense was "continuous," must likewise fail because, as Section 503(b)(1) of the Act states, "Each day during which such violation occurs shall constitute a separate offense."

9. No other conclusion can be reached but that Section 73.30(a) of the Rules has been not only repeatedly violated but that the violations herein are the result of disregard for the Rules and are willful. The inspection on March 13, 1964, from interview of employees and examination of the logs, clearly revealed that the station had failed to originate a majority of programs from San Gabriel for months, and this has not been denied.

10. We have been asked either to reduce or not to impose the forfeiture. We find no mitigating circumstances in this case. This violation has been continued for months, and the licensee has never signified, even yet, that it has taken steps to comply with Section 73.30(a) of the Rules.

11. In view of the foregoing, IT IS ORDERED, this 25th day of November, 1964, that Tele-Broadcasters of California, Inc. licensee of Radio Station KALI, San Gabriel, California, FORFEIT to the United States the sum of four thousand dollars ($4,000.00) for willful and repeated failure to observe Section 73.30(a) of Commission's Rules. Payment of said forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to the provisions of Section 504(b) of the Communica-

[4] See Midwest Radio-Television, Inc., FCC 63–1024.

tions Act of 1934, as amended, and Section 1.621 of Commission Rules, an application for mitigation or remission of forfeiture may be filed within 30 days of receipt of this Memorandum Opinion and Order.

12. The licensee's request for waiver of Section 73.30(a) of the Rules asks that the station be permitted to broadcast 17.4 per cent of its programs from either the main studio in San Gabriel or the transmitter site, 57 per cent from remote points (apparently outside San Gabriel) and 25.6 per cent from its present studio in Los Angeles. In support of this request, the licensee makes substantially the same contentions it made in its response to the Notice of Apparent Liability, which are summarized in Paragraph 5 above, and also asserts, in support of its proposal to continue to originate substantial amounts of programming from its Los Angeles studio, that this studio is located far closer to the bulk of Latin-American population than is its main studio in San Gabriel. Finally, the licensee contends that the Commission has granted waivers of this Rule in similar situations, citing *In re William G. Forrest*, 7 RR 932b in support of this contention. However, an examination of this case reveals that the facts were far different. The station's service area was almost entirely rural and it was necessary to originate programs from a number of cities because no single city could supply a majority of the program material. The facts in the present case, however, are similar to those *In re Application of Rounsaville of Miami Beach, Inc.*, (Docket No. 14747), in which the licensee's application to relocate its main studio was designated for hearing, whereupon the licensee requested dismissal.

13. We have considered carefully the arguments set forth by the licensee in its request for waiver, including its assertion that its audience "does not reside within the city limits of San Gabriel or South San Gabriel," but to the south and west, principally in Los Angeles itself. Although, as stated above, the licensee may indeed be providing a valuable program service to the audience to which it is now directing its programs, we note that the special circumstances cited in support of its request for waiver are all predicated upon the assumption that it does not serve, either day or night, the city to which it is licensed and for which it proposed to provide the first local nighttime service in order to qualify for fulltime operation. Although the licensee has in previous applications indicated its intention to program predominantly for the Spanish-speaking or Negro population of the greater Los Angeles area, it has not in these applications negated an intention to provide a substantial service to its principal city. Moreover, the fact that the licensee apparently has for a number of years failed to provide substantial service to San Gabriel does not estop the Commission, now that it has learned the facts, from enforcing its Rules or requiring the licensee in the future to ascertain and to satisfy the tastes, needs and desires of the community it is licensed to serve.

14. In our opinion, no meaningful determination can be made as to a waiver of Section 73.30(a) of the Rules in this case until we first ascertain the extent to which the licensee proposes to serve

the tastes, needs and desires of its principal city. Only after we have such information can we decide the extent to which a grant of the waiver would be consistent with the licensee's obligations as set forth in our July 1960 Programming Statement and as implied in its 1957 application for fulltime operation in San Gabriel.

15. Therefore, we shall defer further consideration of the request for waiver until the licensee sets forth the basis upon which and the extent to which it proposes hereafter to serve San Gabriel. Until such time as we rule upon its request for waiver, we shall expect the licensee to comply fully with the Rules and Regulations.

16. 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 Tele-Broadcasters of California, Inc., licensee of Station KALI, San Gabriel, California.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1103

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
LIABILITY OF DUBUQUE BROADCASTING CO.
LICENSEE OF RADIO STATION WDBQ
DUBUQUE, IOWA
For Forfeiture

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER HYDE ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated July 22, 1964, addressed to the Dubuque Broadcasting Company, licensee of Radio Station WDBQ, Dubuque, Iowa, and (2) the response to the Notice of Apparent Liability filed September 22, 1964.

2. The Notice of Apparent Liability was issued for willful or repeated failure to observe Section 73.93 of Commission Rules in that an unlicensed operator was on duty in charge of the transmitting apparatus and for willfully or repeatedly failing to operate substantially as set forth in the station license by failing to reduce power at the required times. The Notice provided that pursuant to Sections 503(b)(1)(A) and 503(b)(1)(B) of the Communications Act of 1934, as amended, the licensee was subject to a forfeiture of two thousand dollars ($2,000.00).

3. The material facts leading to issuance of the Notice of Apparent Liability are as follows: Station WDBQ was inspected on October 18 and 19, 1963, to determine whether power was being reduced at local sunset.[1] The station was monitored on October 18, 1963, at a point several miles west of Dubuque from approximately 5:25 P.M. to 5:35 P.M. CST. (In accordance with the station license sunset is 5:30 P.M. CST in October.) No change of field intensity was noted during this time, and at 6:00 P.M. a field intensity measurement of 160 millivolts was obtained in the City of Dubuque. Later at 8:30 P.M. a reading of 110 millivolts was noted, indicating that power had been reduced sometime between 6:00 and 8:30 P.M.

4. The operating log was examined at the station on October 19, 1963, and it contained an entry indicating that power was reduced at 5:30 P.M. on October 18, 1963. However, the operator who was on duty on the evening of October 18 admitted that power was not reduced until some time between 6:00 and 6:30 P.M. The operat-

[1] Station WDBQ is licensed for operation with a power of 1000 watts daytime and 250 watts at night and must reduce power at sunset, which times are specified in the station license as average hours Central Standard Time.

ing log was reviewed for a period from April 1, 1963, to the date of inspection, and it disclosed that power was reduced at required times except as follows:

September 1, 1963 7:00 P.M. CST rather than 6:15 P.M.
August 5, 1963 8:15 P.M. CST rather than 7:00 P.M.

5. While the inspection was being conducted on October 19, 1963, the sole operator on duty was Lawrence E. Cremer. Cremer had no operator license and both he and the assistant manager of WDBQ were advised that under these conditions Cremer's operation of the station was in violation of Commission's Rules. Nevertheless, he continued to operate the station until relieved at noon, and at 2:00 P.M. he resumed operation. At about 4:30 P.M. Cremer was again notified that his operation of the station was in violation of the Commission's Rules. The operating log indicated that Cremer had operated the station on nine other days from September 22, 1963, to October 19, 1963. However, it was not until October 22, 1963, that Cremer obtained a restricted radiotelephone operator permit.

6. In reply to the Notice of Apparent Liability, licensee admitted the violations but offered mitigating circumstances which it believed sufficient to relieve the station of liability entirely or at least substantially reduce the amount of the forfeiture. The violations were described as isolated incidents resulting from human error and in no way willful or continuing. It was stated that Cremer was on duty alone on October 19, 1963, only because the employee scheduled to be on duty had been injured in an automobile accident and that in these circumstances Cremer "was asked by the Program Director (forgetting the lack of license) to work the early shift on October 19." It is further explained that at other times Cremer, although signing logs, had been operating under the immediate supervision of a properly licensed operator. Licensee attributed the failure to reduce power at the proper time to human error on the part of the operator on duty. Licensee also assured the Commission that measures had been taken to avoid repetitions of the violations, and that the station had been operated in accordance with the Rules since the inspection.

7. By way of mitigation, it was stated that the station, under present ownership, had been cited only once previously for generally minor matters. Licensee continued that in connection with errors on the part of employees it should be noted that it has a difficult time in obtaining highly competent personnel. Licensee believed the forfeiture high in light of station profits and other forfeitures assessed by the Commission. Further, the licensee stated that the station has been active in public service broadcast operations.

8. From the admitted facts in this case the licensee has repeatedly failed to reduce power in violation of the terms of the station license, a serious offense since the use of excessive power will cause extensive interference to other stations. The time for power reduction, local sunset, is specified on the face of the license, and this violation could have been avoided through minimal effort on the part of employees. Accordingly, the argument that it is diffi-

cult to obtain competent employees has little merit, and in any case, licensees are expected to supervise their employees adequately. In regard to the other violation, licensee explains that Cremer, although signing the logs, acted under the supervision of a licensed operator at all times except on October 19, 1963 when because of an emergency Cremer was placed on duty without proper supervision in violation of Section 73.93 of the Rules and Regulations.

9. We believe that if proper supervision had been exercised these violations would have been avoided. Considering all the circumstances of this case, including those cited by the licensee in mitigation, we conclude that a forfeiture of $1,500.00 would be appropriate.

10. In view of the foregoing, IT IS ORDERED, this 25th day of November, 1964, that Dubuque Broadcasting Company, licensee of Radio Station WDBQ, Dubuque, Iowa, FORFEIT to the United States the sum of one thousand five hundred dollars ($1,500.00) for willful and repeated failure to observe Section 73.93 of the Commission's Rules and for willful and repeated failure to operate substantially as set forth in the station license. Payment of said forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to the provisions of Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of Commission Rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the receipt of this Memorandum Opinion and Order.

11. 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 Dubuque Broadcasting Company, licensee of Radio Station WDBQ, Dubuque, Iowa.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–990

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of<br>DAVID F. STEVENS, JR., TRADING AS TRI-CITIES BROADCASTING CO., COZAD, NEBR.<br>Requests: 1580 kc., 1 kw., Day, Class II | Docket No. 15679<br>File No. BP–15052 |
| DAWSON COUNTY BROADCASTING CORP., COZAD, NEBR.<br>Requests: 1580 kc., 1 kw., Day, Class II<br>For Construction Permits | Docket No. 15680<br>File No. BP–15679 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT.

1. The Commission has before it for consideration (a) the above-captioned applications; (b) a "Petition for Reconsideration", filed July 15, 1964, by Stevens directed against the Commission's Order of May 13, 1964 (FCC 64–433) accepting the Dawson County application for filing;[1] (c) pleadings related to (b), above;[2] (d) a "Petition to Deny" the Stevens application, filed December 10, 1962, by Dawson County; and (e) pleadings in response to the latter petition.[3] There is also before us another set of pleadings [4] pertinent to the above applications. However, for the reasons stated herein, it will not be necessary to make specific findings relevant to these pleadings.

2. In view of the fact that the Commission's acceptance of the mutually exclusive Dawson County application has presently fore-

[1] After listing eight tendered proposals which were mutually exclusive with applications already accepted for filing, the Order stated in pertinent part:

"IT FURTHERING APPEARING, That the United States Court of Appeals for the District of Columbia Circuit issued its decision in the case of *Kessler* v. *F.C.C.*, 1 RR 2d 2061 (1963) in which it ordered that applications which are, or become, in fact mutually exclusive with an application pending May 11, 1962, (the effective date of the freeze on standard broadcast applications as set forth in the NOTE to Section 1.571 of the Commission's Rules) or one accepted for filing since that date, are entitled to a comparative hearing under the case of *Ashbacker Radio Corp.* v. *F.C.C.* 326 U.S. 327 (1945) with the mutually exclusive application on file, if the tendered mutually exclusive applications were timely and rejected solely because of the freeze on new applications.

"Accordingly, IT IS ORDERED, That the above-captioned applications ARE ACCEPTED for filing."

[2] (a) "Opposition to Petition for Reconsideration" by Dawson County, filed June 30, 1964; (b) "Reply to Opposition to Petition for Reconsideration", filed July 8, 1964, by Stevens; (c) "Motion to Strike" by Dawson County, filed July 10, 1964; (d) "Opposition to Motion to Strike", filed July 17, 1964, by Stevens; (e) "Motion to Accept Pleading" by Stevens, also filed July 17, 1964; and (f) "Reply to Opposition to Motion to Strike and Statement Regarding Motion to Accept Pleading" by Dawson County, filed July 27, 1964.

[3] (a) "Motion to Strike" by Stevens, filed December 21, 1962; (b) "Opposition to Motion to Strike", filed January 9, 1963, by Dawson County; (c) "Reply to Opposition to Motion to Strike" by Stevens, filed January 21, 1963.

[4] (a) "Petition for Extraordinary Relief", by Dawson County, filed December 10, 1962; (b) "Opposition to Petition for Extraordinary Relief", filed December 27, 1962, by Stevens; (c) "Reply to Opposition to Petition for Extraordinary Relief" by Dawson County, filed January 9, 1963; (d) "Petition for Leave to File Additional Pleading", filed January 22, 1963, by Stevens; and (e) "Comments Concerning Reply to Opposition to Petition for Extraordinary Relief" by Stevens also filed January 22, 1963.

closed the possibility of a grant of the Stevens application without hearing, we find that the latter is a "person aggrieved or whose interests are adversely affected" within the meaning of Section 405 of the Communications Act of 1934, as amended, and that, accordingly, he has standing to file the present petition for reconsideration.

3. In the motion to strike, Dawson County points out that the reply to its opposition was filed one day late by Stevens and that accordingly the pleading is patently defective under Section 1.106(h) of the Rules. Stevens in his opposition to the motion and in the motion requesting acceptance of the pleading, attributes his tardiness to the fact that Dawson County's opposition to the petition for reconsideration, as distinguished from other pleadings previously exchanged by the parties, was served by hand and that counsel for Stevens inadvertently computed the time within which a reply was due as if the opposition had been served by mail.

4. Notwithstanding the fact that Stevens has not shown good cause for the late filing, we find that since there has been substantial compliance with the Rules we will waive the provisions of Section 1.106(h) to the extent necessary to permit consideration of the pleading on its merits.

5. Set forth below is a brief chronology of the events which precipitated the petition for reconsideration now at hand:

a. August 17, 1961—Stevens' application accepted for filing, BP–15052.

b. May 10, 1962—A.M. freeze imposed.

c. July 26, 1962—Dawson County application first tendered for filing.

d. October 17, 1962—Dawson County application returned as inconsistent with freeze.

e. December 10, 1962—Dawson County application re-tendered together with petition for extraordinary relief requesting waiver of the freeze for the first time. Dawson County also petitions to deny the Stevens application.

f. December 11, 1962—Stevens' application "cut-off" date.

g. December 20, 1963—Decision by Court of Appeals in *Kessler* v. *F.C.C.* 1 RR 2d 2061.

h. May 13, 1964—Dawson County application accepted for filing *nunc pro tunc*.

6. Stevens, in requesting the Commission to rescind its acceptance of the Dawson County application, maintains that the Court in *Kessler, supra,* while upholding the validity of the freeze, at the same time extended *Ashbacker* [5] rights only to those parties who sought administrative or judicial review of their respective rejections and that Dawson County abandoned its rights by seeking neither. Moreover, according to Stevens, whatever rights accrued at the time the application was initially tendered were waived when the application was re-tendered and Dawson County, instead of attacking the Commission's action as erroneous, merely sought a waiver [6] of the freeze on public interest grounds.[7]

[5] *Ashbacker Radio Corp.* v. *F.C.C.* 326 U.S. 327 (1945).

[6] No request for waiver accompanied the first tender.

[7] A grant to Stevens would have placed Cozad's only radio station in the hands of the publisher of its only newspaper.

7. In opposition, Dawson County asserts that the Stevens interpretation of the *Kessler* decision is too narrow; that Stevens' contention that *Ashbacker* rights were "waived" is frivolous since mutual exclusivity was obvious; and that it chose to stress public interest considerations rather than rely on the *Ashbacker* case because the Commission had ruled only two months before [8] that the freeze was not violative of *Ashbacker*. In reply, Stevens reiterates his claim that Dawson County's reliance on public interest considerations constituted a waiver of any *Ashbacker* rights and that the Commission erred in accepting the application for filing.

8. We find that Dawson County is entitled to comparative consideration and that this finding is fully consistent with the Court's rationale in *Kessler*. The Court was most concerned with the possibility that the freeze might result in grants without hearing to applicants against whom timely and mutually exclusive applications had been tendered. According to the Court, such action would have had the deleterious effect of freezing new applicants "permanently out of a right of substance . . ." Nor did the potential harm to the public inherent in such an event escape the Court's attention:

> We hardly need add that if a grant of a pending application is to be considered under existing standards, the public interest would demand that mutually exclusive applications timely tendered be also considered in a comparative hearing designed to ascertain the applicant best qualified to provide the broadcasting service involved.[9]

The Court went on to state [10] that the Commission had the option of proceeding with comparative hearings or postponing the hearing "pending conclusion of the rule making and the filing thereafter of new applications by appellants and *others*". [Underscoring added] Thus, while the Commission was empowered to use its discretion in determining when and under what set of rules hearings would be held, the mandate of the Court was explicit. No application can be granted without the right to a comparative hearing being afforded to an applicant who tendered a timely, mutually exclusive application.

9. We now turn to the question of whether Dawson County failed to preserve its rights by not seeking administrative or judicial review of the rejection of its application. Firstly, there is no doubt that by December 10, 1962, i.e., the date of re-tender, the 30 day time period for the filing of a petition for reconsideration or an appeal under Sections 405 or 402, respectively, of the Act had expired. Had the Commission considered and denied the application after hearing, Dawson County, under Section 1.519(a) of the Rules, would have been precluded from filing a similar application within one year of the denial. But the latter Rule is not here applicable. The original Dawson County application was dismissed for the sole reason that it did not comply with the criteria then governing the acceptability of applications. Neither the Act nor the Rules promulgated thereunder prohibit an applicant from re-tendering

[8] Memorandum Opinion and Order, FCC 62-1052, released October 15, 1962.
[9] At page 2077, 1 R.R. 2d.
[10] Ibid.

an application [11] which for one reason or another was not accepted for filing. Dawson County was free to revive, as it were, the rights it had lost in failing to appeal the rejection within the specified time. We were then, in effect, faced with an entirely new application. Had the Commission upon re-tender dismissed the proposal during the pendency of the *Kessler* case little would have been accomplished from a standpoint of orderly administrative practice. For while it is true that a second rejection would have placed on Dawson County the burden of promptly seeking administrative or judicial review of the Commission's action, it would not have cleared the way for a grant of the Stevens application, since dispositive action on applications filed prior to the freeze—against whom competing proposals had been filed—was being withheld pending the outcome in *Kessler*. For this reason the Commission determined that the most practical and equitable course of action was to postpone ruling on acceptability, thus permitting Dawson County to maintain its status as a timely tendered applicant until the rights of post-freeze applicants were finally adjudicated.[12] As a result Dawson County's *Ashbacker* rights, as subsequently determined by the Court, were preserved. Thus, we will deny the petition for reconsideration. In view of this finding it will not be necessary for us to make specific findings with respect to Dawson County's petition for extraordinary relief and accordingly, it will be dismissed as moot.

10. We now turn to Dawson County's petition to deny the Stevens application. The petition was filed concurrently with the re-tendered application and the petition for extraordinary relief one day prior to Stevens' "cut-off" date. Standing was predicated on the fact that acceptance of the application for filing would confer on Dawson County, as a competing applicant, the status of a "party in interest" entitled to file a pre-grant petition under Section 309(d) of the Act and Section 1.580(i) of the Rules. In its motion to strike, Stevens contended that Dawson County lacked standing since its status was one of a "would-be-applicant".[13] Whatever merit might have attached to this argument at the time no longer exists. The Dawson County petition was tendered prior to Stevens' acquisition of protected status under the "cut-off" procedure and the Commission's *nunc pro tunc* acceptance of the application confers upon Dawson County the status of a timely filed competing applicant. As such Dawson County is a "party in interest" under Section 309(d) of the Act.

11. In its motion to strike, Stevens also asserts, as a threshhold matter of procedure, that the petition to deny is fatally defective [14] because of improper service in that a copy of the petition was mailed to an engineer rather than to the applicant or his attorney. Dawson County, by way of explanation, claims that it acted upon reasonable appearances under the circumstances. Section 1, page

[11] Provided, of course, that it is re-tendered prior to the effective "cut-off" date of any competing application.
[12] After entry of the appeal in Kessler the Commission, as a matter of policy, withheld action on applications similarly situated.
[13] Citing *Cal-Coast Broadcasters*, 20 RR 910, affirmed *sub nom. Ranger* et al (*Radio Cabrillo*) v. *F.C.C.* 111 U.S. App. D.C. 294 F.2d 240, 21 RR 2030.
[14] Citing *In re Tribune Building Co.*, 18 R.R. 689.

2, of FCC Form 301 requires the applicant to list the names and addresses of engineering and/or legal counsel, if any. In response the names of two individuals, A and B, were listed. On the same page A was credited with the preparation of certain engineering data. Dawson County assumed that B was the legal counsel (actually both A and B were engineers) and mailed a copy of the petition to him.[15] Dawson County argues that the defects, if any, were corrected by virtue of the fact that Tri-Cities received actual notice of the petition.

12. We find that although the service was technically improper no fatal defect exists. In *Tribune Building Co., supra* note 14, no attempt was made to serve the adverse party nor did the pleading contain the proof of service required by the Rules. It should also be noted that there the Commission found that the protestant lacked standing under *Sanders* [16] since no direct and immediate economic injury was shown. Here there was a bonafide effort made to adhere to the requirements of the rule and although the petition was misdirected the mailing did, in fact, ultimately result in actual notice to Stevens. Thus, it may be said that there was substantial compliance with the rule which in no way prejudiced Stevens' rights.

13. The primary ground upon which Dawson County bases its contentions in the petition is the allegation that a grant of the Stevens proposal would create a "monopoly" of the only two communications facilities in Cozad, the local newspaper and the local radio station. The applicant publishes the semi-weekly *Cozad Local*, circulation 3,200, and the monthly *Platte Valley Farmer* which is directed specifically to the surrounding rural population and is circulated to approximately 18,000 persons. The only other publication in Cozad (population 3,184) is an advertising tabloid called *The Free Press Shopping Guide*. At the time the petition was filed the latter carried no news or editorial matter. In a supplemental pleading,[17] Stevens submitted a copy of the January 9, 1963 edition of the paper containing an announcement that it was the publisher's intention to "make a newspaper of the Free Press again." The announcement also stated that news space should be "rigidly curtailed" by advertising requirements and, for this reason, each article would be limited to approximately five column inches. On the basis of this submission, Stevens contends that there are now two newspapers in Cozad and, for this reason, no possibility of a communications monopoly exists. On February 20, 1963, the Stevens application was amended to include a statement and a showing regarding the numerous other broadcast stations and newspapers providing some degree of service to the Cozad area. The application was further amended on April 4, 1963. In this amendment a statement was submitted to the effect that there would be no joint rates as between the *Cozad Local* and the proposed new station and

[15] Section 1.47(d) of the Commission Rules is as follows:
"Documents may be served upon a party, his attorney, or other duly constituted agent by delivering a copy to the last known address. When a party is represented by an attorney of record in a formal proceeding, service shall be made upon such attorney."

[16] *F.C.C.* v. *Sanders Bros.* 309 U.S. 470 (1940).

[17] Accompanied by a petition for leave to file an additional pleading Stevens on January 22, 1963, submitted "Comments Concerning Reply to Opposition to Petition for Extraordinary Relief". Since the latter pleading brings forth information not available at the time Stevens filed his Opposition, the Commission has accepted the additional pleading and considered the matters therein as they relate to the petition to deny.

that, with the exception of the newspaper's sports editor, there would be no joint staffing.

14. The issue of whether or not a publisher should be awarded a broadcast facility in the same town served by his newspaper has often been contested within the context of comparative hearings. On some occasions the potential cross-ownership of newspaper and broadcast interests have been found to be the deciding factor.[18] The Commission, in *Miami Broadcasting*, designated for hearing [19] an application seeking approval of the sale of a town's only radio station to the publisher of its only local newspaper for the sole purpose of determining whether a grant "would create a concentration of control of the media of mass communications". In that case the Commission set forth certain guidelines which the Broadcast Bureau could follow in adducing evidence pertinent to the public interest question presented:

> There can be a thorough exploration of such relevant factors as the number of other broadcast services and newspapers reaching the community in question from other communities and the audience or circulation of such outside sources; the extent to which such outside sources deal with local problems in the community in question; and such other factors as would tend to demonstrate that there would or would not be a concentration of control of mass communications media contrary to the public interest.

While there appears to be some dispute as to whether the *Cozad Local* is the only bona fide newspaper in the town, the Commission finds, under the circumstances presented, that Dawson County has alleged facts which raise substantial and material questions concerning a potential concentration of control of communications media in Cozad. Accordingly, a specific issue to that effect will be included and the opportunity presented for examination of the factors listed above.

15. Dawson County also challenges Stevens' financial qualifications and cast doubts on his ability to effectuate the programming proposal with the number of potential employees listed in the application. Subsequent amendments, however, have resolved whatever deficiencies may have existed regarding finances and staffing and we find that no substantial questions remain concerning Stevens' qualifications in these areas.

16. According to Dawson County, approximately $32,544 will be needed to cover the estimated construction costs and three months working capital for its proposed station. The financing plan is to secure the needed funds through the sale of capital stock to 15 stockholders and through loans. Thus far the corporation has issued 160 shares of stock for which it has received $4,000. Another 1040 shares have been subscribed for at $25 per share ($26,000). This means that receipts, as presently contemplated, from both issued and subscribed stock will total only $30,000. Furthermore, examination of the application discloses that as of July 16, 1964, $3,704 of this amount has been used to pay for expenses incurred in preparation and prosecution of the application. In addition, the loan commitment from stockholder D. L. Dodds fails

[18] *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 89 U.S. App. D.C. 13, 189 F.2d 677; *McClatchy Broadcasting Co.* v. *F.C.C.*, 99 U.S. App. D.C. 195, 239 F.2d 15.

[19] *In re Miami Broadcasting Company*, released August 6, 1963, (FCC 63-774), 1 R.R. 2d 43.

to show the terms of payment and security for the loan; nor does his balance sheet appear to show cash and/or liquid assets available to make the loan. It is also noted that the bank letter submitted does not, on its face, constitute a firm loan commitment. Therefore, on the basis of the information contained in the application, it cannot be concluded that Dawson County has adequate cash and/or liquid assets available in the amount required to finance the construction and operation of the proposed station for a reasonable period of time.

17. In addition, since it has not yet been determined whether or not the Dawson County antenna tower would constitute a hazard to air navigation, an issue with respect thereto will be included and the Federal Aviation Agency will be made a party to the proceeding ordered below.

18. Except as indicated by the issues below, the applicants are legally, technically, and otherwise qualified to construct and operate as proposed; Stevens is financially qualified, but it appears that Dawson County may not be financially qualified and an appropriate issue will be included. However, in view of the fact that the applications are mutually exclusive they must be designated for hearing in a consolidated proceeding on the issues set forth below.

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

1. To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary service to such areas and populations.

2. To determine whether a grant of the application of David F. Stevens, Jr. would create a concentration of control of the media of mass communication in Cozad, Nebraska, contrary to the public interest.

3. To determine whether Dawson County is financially qualified to construct and operate its proposed station.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by Dawson County would constitute a menace to air navigation.

5. To determine, on a comparative basis, which of the proposals would better serve the public interest, convenience and necessity in light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:

(a) The background and experience of each having a bearing on the applicant's ability to own and operate its proposed station.

(b) The proposals of each of the applicants with respect to the management and operation of the proposed station.

(c) The programming service proposed in each of the said applications.

6. To determine, in the light of the evidence adduced pursuant to the foregoing issues which of the applications should be granted.

IT IS FURTHER ORDERED, That, the Federal Aviation Agency IS MADE A PARTY to the proceeding.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration", filed by David F. Stevens, Jr., IS DENIED; that the "Motion to Strike", by Dawson County, IS DENIED; that the "Motion to Accept Pleading", by David F. Stevens, Jr., IS GRANTED; that the "Petition to Deny", by Dawson County, IS GRANTED to the extent indicated above and IS DENIED in all other respects; that the "Motion to Strike", by David F. Stevens, Jr., IS DENIED; that the "Petition for Extraordinary Relief", by Dawson County IS DISMISSSED; that the "Petition for Leave to File Additional Pleading", filed by David F. Stevens, Jr. IS GRANTED.

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

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

IT IS FURTHER ORDERED, That, the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

Adopted October 28, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1008

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>HUDSON VALLEY BROADCASTING CORP. (WE-OK), POUGHKEEPSIE, N.Y.<br>For Construction Permit | Docket No. 14733<br>File No. BP–14590 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE, COX, AND LOEVINGER NOT PARTICIPATING; COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT.

1. This proceeding involves the application of Hudson Valley Broadcasting Corp. (hereinafter WEOK), which presently operates as a Class III station on 1390 kilocycles with 5000 watts power, daytime only, employing a directional antenna at Poughkeepsie, New York, for a construction permit to change its transmitter site, continue its daytime operation from the new site, and add a five tower, directionalized nighttime operation with 1000 watts power. WEOK's application was designated for hearing by our Order (FCC 62–840, released July 31, 1962), principally on the question of whether a waiver of Section 73.28(d) (3) of our Rules is warranted, WEOK receiving interference affecting 38.5% of the population and 79% of the area within its proposed normally protected 4.0 mv/m nighttime contour. Dutchess County Broadcasting Corporation (hereinafter WKIP), licensee of Station WKIP at Poughkeepsie, New York, was made a party on the basis of its allegations of economic injury.

2. The Initial Decision of Hearing Examiner Walther W. Guenther (FCC 63D–98, released August 21, 1963) proposed to grant the application. Exceptions were filed by all of the parties and an oral argument was held before a panel of the Review Board on February 4, 1964. By its Decision (36 FCC 461, released March 9, 1964), the Review Board reversed the Hearing Examiner and denied WEOK's application. Subsequently WEOK filed an application for review of the Board's Decision, which was opposed by WKIP and by the Broadcast Bureau. By our Order (FCC 64–542, released June 18, 1964) we granted WEOK's application for review to the extent of (a) permitting the parties to file supplemental briefs, and (b) scheduling oral argument. Briefs were filed by all parties and oral argument was held before the Commission, *en banc*, on October 15, 1964.

3. In light of the facts concerning WEOK's proposal, particularly as reflected in paragraphs 4 and 5 of the Board's Decision, we agree with the Board that WEOK has not demonstrated the unusual cir-

cumstances which would require the exceptional action of waiver of our 10% rule. Therefore, we conclude (a) that the public interest, convenience, and necessity will not be served by a grant of WEOK's application, and (b) that the Review Board's Decision is affirmed. Additionally, on September 8, 1964, WKIP filed a request for official notice of facts concerning the proposed sale of WEOK–AM and FM which may be dismissed as moot since we have concluded that WEOK's application must be denied.[1]

Accordingly, IT IS ORDERED, This 4th day of November 1964, That the application of Hudson Valley Broadcasting Corp. for change of facilities of Station WEOK, Poughkeepsie, New York (BP–14590), IS DENIED; and

IT IS FURTHER ORDERED, That the request for official notice filed September 8, 1964, by Dutchess County Broadcasting Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. The applicant has made an uncontroverted showing that no nighttime use of the frequency would be precluded by its proposal. Therefore, I would waive the rule and grant the application.

[1] Also pending before us is a motion to correct the transcript of oral argument herein which was filed by WKIP on October 30, 1964. It appearing that the corrections sought should be made, IT IS ORDERED, that the foregoing motion IS GRANTED and that the transcript of oral argument IS CORRECTED as requested.

F.C.C. 64–1017

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application Tendered for Filing by AUSTIN A. HARRISON, BOSTON, MASS. For Construction Permit

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration an application tendered for filing by Austin A. Harrison, an individual, requesting a construction permit for a new television broadcast station to operate on Channel 25, Boston, Massachusetts. In order to place our decision in proper perspective and because of the novel question presented for our determination, a brief history of this matter appears appropriate.

2. On August 15, 1962, WGBH Educational Foundation, licensee of Television Broadcast tation WGBH–TV, Channel *2, Boston, Massachusetts, filed a Petition for Rule Making (RM–356) requesting the reservation of Channel 44, Boston, Massachusetts, for noncommercial educational use. At that time, Channel 44 was allocated to Boston for commercial use [1] and Channel 25 was allocated for commercial use to Barnstable, Massachusetts. On March 21, 1963, an application (BPCT–3167) was filed by Integrated Communication Systems, Inc. of Massachusetts for a construction permit for a commercial television station to operate on Channel 44 in Boston, and on March 25, 1963, a mutually exclusive application (BPCT–3169) was filed for Channel 44 by United Artists Broadcasting, Inc. While these two applications were being processed, the Commission, on October 28, 1963, released a "Further Notice of Proposed Rule Making" in Docket No. 14229 (FCC 63–975) which proposed a revision of the television Table of Assignments (Section 73.606 of the Commission's Rules) including the addition of over 400 new UHF channels to the existing Table of Assignments. It was proposed, *inter alia*, to retain Channel 44 in Boston for commercial use and to delete Channel 25 from Barnstable and to move it to Boston as a reserved channel for noncommercial educational use. The Commission stated that petitions for rule making which were then pending for changes in UHF television allocations (such as that filed by WGBH Educational Foundation) would be considered as comments in the proposed rule making in Docket No. 14229. In December 1963, WGBH Educational Foundation

[1] The term "commercial channel" as used herein refers to unreserved channels in the Table of Assignments. These channels are, of course, available for application by noncommercial educational entities as well.

filed an application (BPCT–3277) for Channel 44, making it the third applicant for that channel.

3. On January 2, 1964, the three applicants for Channel 44 filed a "Joint Statement" urging that Channel 25 be moved to Boston for commercial use and Channel 44 be reserved for noncommercial educational use. Thereafter, on February 12, 1964, the Commission released its Order (FCC 64–96) designating the three applications for comparative hearing (Docket Nos. 15323–15325). In its Order of designation, the Commission recognized that the pending proceeding in Docket No. 14229 could result in the substitution of another UHF channel for Channel 44 or otherwise operate to make Channel 44 available for commercial use in Boston, and provided that the grant of any of the three applications would be made subject to the condition that the Commission might, without further proceedings, substitute for Channel 44 in Boston such other commercial channel as might be assigned to Boston in lieu of Channel 44 in the rule making proceeding in Docket No. 14229.

4. While the three applications were in hearing status in Docket Nos. 15323–15325, the Commission on July 10, 1964, released its "Third Report and Order" in Docket No. 14229 (FCC 64–635) which, insofar as this matter is concerned, deleted Channel 25 from Barnstable, Massachusetts, moved it to Boston as a commercial channel, and reserved Channel 44 in Boston for noncommercial educational use, effective August 18, 1964. In the appendix (Paragraph 9) to the "Third Report and Order", the Commission indicated that the reservation of Channel *44 would enable WGBH Educational Foundation, upon a grant of its application, to begin early construction and operation of its second educational television station and that the availability of Channel 25 in Boston for commercial use would permit the two remaining applicants to amend their applications to specify Channel 25. Both of the commercial applicants for Channel 44 have now amended their applications to specify Channel 25.[2]

5. On August 18, 1964, the day the "Third Report and Order" changes became effective, Austin A. Harrison, an individual, tendered for filing an application for a construction permit for a new television broadcast station to operate on Channel 25, Boston, purporting to be mutually exclusive with the two commercial applications. Since the Harrison application was not tendered until after the "Third Report and Order" was issued, the situation here differs from that involved in *Peoples Broadcasting Company* v. *United States,* 209 F. 2d 286 (C.A. D.C.), and *Zenith Radio Corp.* v. *Federal Communications Commission,* 211 F. 2d 629 (C.A. D.C.). Both *Peoples* and *Zenith* concerned applications which were pending prior to the rule making action and *Ashbacker* rights (*Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327) were brought into operation. The principle involved in this matter is not *Ashbacker,* but rather the threshold question of whether Channel 25 is available for application by new applicants by virtue of having been substituted for a channel which had become unavail-

[2] The Commission, on October 21, 1964, granted without hearing the application of WGBH Educational Foundation for a construction permit for a new noncommercial educational television broadcast station to operate on Channel *44, Boston (FCC 64–952, released October 23, 1964)

able to applicants already in comparative hearing status. Thus, the Commission is presented with the question of whether this application is acceptable for filing in the light of the provisions of Section 1.572(e) of the Commission's Rules which provides, in pertinent part, that:

In order to be considered mutually exclusive with a lower file number application, the higher file number application must have been accepted for filing at least one day before the lower file number application has been acted upon by the Commission.

6. In its Order designating the applications for Channel 44 for comparative hearing, the Commission said:

In view of the fact that the proposed Rule Making proceeding could result in the *substitution* of another UHF commercial channel in Boston *in lieu* of Channel 44, or otherwise operate to make Channel 44 unavailable for commercial use in Boston, the Commission is of the opinion that a grant of any of the instant applications must be made subject to the condition that the Commission may, without further proceedings, *substitute* for Channel 44 such other commercial channel as may be assigned to Boston, Massachusetts, *instead of* Channel 44, in the Rule Making proceeding proposed in Docket No. 14229. (Emphasis supplied.)

In issuing its Order, the Commission further ordered that:

. . . in the event of a grant of any of the above-captioned applications, such grant shall be made subject to the condition that the Commission may, without further proceedings, specify operation by the permittee on such other commercial channel as may be assigned to Boston, Massachusetts, *in lieu of Channel 44*, in the Rule Making proceeding proposed in Docket No. 14229. (Emphasis supplied.)

We think that it is clear, from the foregoing emphasized portions of the Commission's Order, read in context, that the Commission contemplated and intended that Channel 25 would be made available for commercial use in Boston as a substitute for Channel 44. The Commission did not intend to add a new commercial assignment to Boston, but rather acted to provide a commercial channel to replace that which it had removed from Boston by reserving Channel 44 for noncommercial educational use. The Commission's avowed purpose in making the substitution, as set forth in the "Third Report and Order" in Docket No. 14229, was to "make it possible for the present applicants for Channel 44 to amend their applications to specify Channel 25." The Commission also stated that, "Because of the pending applications for commercial operation on Channel 44, we proposed *to move* Channel 25 from Barnstable, Mass. to Boston and reserve it for educational use *instead of* Channel 44 as requested by WGBH." The reservation of Channel 44 for noncommercial educational use instead of Channel 25 was considered to be in the public interest because Channel 44 could be used as an educational channel at the new site proposed by the educational applicant and meet all spacing requirements, whereas Channel 25 would not have met the spacing requirements at the contemplated site. Again, the emphasized portions indicate clearly that the assignment of Channel 25 was intended only as a substitute for Channel 44, and was occasioned by the comparative hearing in progress for that channel.

7. Prospective applicants for a new UHF television broadcast station to serve Boston had constructive notice of the pendency of

the Integrated and United Artists applications since March 1963, and knew that the Commission could designate these applications for comparative hearing at any time after April 25, 1963. Channel 44 was the only channel available for application by persons interested in constructing a new commercial television station in Boston. Harrison, if he had such an interest, had nearly a year within which to file a competing application. Notwithstanding the filing of the WGBH application in December 1963, and the additional public notice which was given in connection therewith, Harrison still did not file an application for the only available commercial channel in Boston.

8. In order to permit the orderly dispatch of the Commission's business, the Commission promulgated certain rules designed to foreclose the filing of competing applications at a specific point in time, and to enable comparative consideration to be accorded mutually exclusive applications in an orderly manner. These objectives are manifested by Sections 1.227(b)(1), 1.227(b)(4), and 1.572(e) of the Commission's Rules.[3] The designation of mutually exclusive applications for comparative consideration accords to the applicants a "protected status",[4] which Integrated and United Artists achieved on February 5, 1964. Acceptance of the Harrison application for filing would not only be inconsistent with the Commission's Rules, but would be disruptive of the Commission's processes and would seriously interfere with the orderly dispatch of the Commission's business. The Boston hearing process has been under way for more than eight months during which time there have been proceedings before the Review Board and before the Commission itself. Acceptance of the Harrison application, in addition to causing delay of authorization of a new television station to serve Boston, would raise complicated procedural and substantive questions. For example, questions would arise with respect to the effect on stipulations between the present applicants on rulings already made by the Hearing Examiner, on agreements relating to procedural matters, and as to the right of a new party to inject himself into consideration of the many documents which have already been filed in the proceeding. Much of the time and effort already expended by the Commission and parties to the proceeding would probably be wasted, and it is evident that the present parties would be required to revise their plans and preparations for trial, thus, putting them to an additional expense and burden which would have been, in large part, avoided if the Harrison application had been timely tendered. The Court of Appeals for the District of Columbia Circuit, in the *Ranger* case, *supra*, described

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[3] Section 1.227(b) of the Commission's Rules provides:

"(1) In broadcast cases, no application will be consolidated for hearing with a previously filed application or applications unless such application . . . is substantially complete and tendered for filing by whichever date is earlier: (i) The close of business on the day preceding the day the previously filed application or one of the previously filed applications is designated for hearing. . . .

"(4) Any mutually exclusive application filed after the date prescribed in subparagraphs (1), (2), or (3) of this paragraph will be dismissed without prejudice and will be eligible for refiling only after a final decision is rendered by the Commission with respect to the prior application or applications or after such application or applications are dismissed or removed from the hearing docket."

[4] *Ranger et al.* v. *Federal Communications Commission*, 111 U.S. App. D.C. 44, F. 2d 240, 21 RR 2030. In the processing of television applications, the close of business on the day preceding the day the Commission acts on an application is the equivalent of the "cut-off" date for which the Rules provide in the processing of standard radio broadcast station applications.

the nature of the administrative difficulties which are encountered with respect to late-filed competing applications (see also *Century Broadcasting Corp.* v. *Federal Communications Commission*, 114 U.S. App. D.C. 59, 310 F. 2d 864, 24 RR 2042). Moreover, the acceptance of the Harrison application at this stage would require the present comparative proceeding to begin anew and would cause a substantial delay in the inauguration of the new UHF television service at a critical juncture in the development of UHF television.

9. When the Commission, in July 1962, issued its Report and Order in the so-called "Springfield Deintermixture" case (FCC 62–798, 23 RR 1579) in Docket No. 14267, it declined to accept for filing the tendered application of Fort Harrison Telecasting Company for a new television broadcast station to operate on Channel 2, Terre Haute, Indiana, on the grounds that Fort Harrison had had an opportunity to file a competing application in 1957 and had not done so prior to the designation of the other mutually exclusive applications for comparative hearing. The Court of Appeals remanded the case to the Commission (*Fort Harrison Telecasting Corporation* v. *Federal Communications Commission*, 116 U.S. App. D.C. 347, 324 F. 2d 379, 25 RR 2109) on the basis of the Court's previous decision in *Sangamon Valley Television Corp.* v. *United States*, 111 U.S. App. D.C. 113, 294 F. 2d 742, 21 RR 2112, which directed the Commission to conduct an entirely new proceeding with respect to where and to whom Channel 2 should be assigned. In the *Fort Harrison* case, the Court stated:

> Though we recognize the force of the reasons advanced by the Commission, we think its ruling was erroneous, *in the light of our decision in* [*the Sangamon Valley case*]. (Emphasis supplied.)

In a footnote, the Court further observed:

> The Commission argues that since Fort Harrison did not file a timely application for the Channel with the Commission, it is now barred from applying,... *Whatever the force of this contention in ordinary circumstances*, we think that our decision in the 1961 Sangamon case forecloses it here. (Citations omitted, emphasis supplied.)

Thus, the Court's remand of the Commission's refusal to accept the Fort Harrison application was predicated upon the Court's requirement in the *Sangamon* case that an entirely new proceeding be conducted and indicated that, under other circumstances, the Commission's action might be appropriate. Our reasons for refusing to accept the Fort Harrison application apply with equal force in the matter now before us and these reasons are not foreclosed because of a prior Court decision.

10. The substitution of another television channel for one which has been made unavailable to applicants in hearing status is not without precedent. For example, in the Paterson, New Jersey, proceeding (Docket Nos. 15089–15092) for Channel 37, the Commission had reserved Channel 37 for a period of 10 years (Report and Order, Docket No. 15022, October 4, 1963, FCC 63–901, 1 RR 2d 1501) for radioastronomy use. Four applicants had been designated for comparative hearing for Channel 37, the only available commercial television broadcast channel in Paterson. When the Commission adopted its "Further Notice of Proposed Rule Making"

in Docket No. 14229 proposing a revision of the UHF television Table of Assignments (FCC 63–975), we stated (paragraph 31 (4)) that Channel 66 would be assigned to Paterson, and that the four applicants would be afforded an opportunity to amend their applications to specify Channel 66 or such other channel as may be allocated to Paterson in lieu of Channel 37. We further stated that, "thereafter, the hearing may proceed with respect to those applicants indicating their willingness to amend their applications as above mentioned." Just as the "protected status" of these applicants should not, for obvious reasons of administrative necessity and public interest, be disturbed, neither should the "protected status" of the Boston applicants be disturbed. Moreover, it cannot be seriously contended that if a grant had been made in the Boston or Paterson proceedings prior to the unavailability of Channels 44 and 37, respectively, further applications would have to be accepted for the substituted channels.

11. In view of the foregoing, we conclude that the application of Austin A. Harrison for a construction permit for a new commercial television broadcast station to serve Boston, Massachusetts, is untimely filed; that it is not acceptable for filing because it is inconsistent with the Commission's Rules; that the acceptance of the application would disrupt the orderly administration of the Commission's procedures and would delay the inauguration of a new UHF television service, all to the detriment of the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, this 4th day of November, 1964, that the application of Austin A. Harrison, tendered for filing August 18, 1964, for a construction permit for a new television broadcast station to operate on Channel 25, Boston, Massachusetts, BE RETURNED TO THE APPLICANT AS UNACCEPTABLE FOR FILING, pursuant to the provisions of Sections 1.227(b) (1), 1.227 (b) (4), and 1.572(e) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1025

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of<br>PETITIONS OF MITCHELL BROADCASTING CO. AND E. WEAKS MCKINNEY-SMITH<br>To amend Section 73.93 of the Commission Rules and Regulations to Relax the Operator Requirements for Standard Broadcast Stations Employing Directional Antennas | RM–413; RM–433 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. On February 1, 1963, Mitchell Broadcasting Company, licensee of KGRN, Grinnell, Iowa, and KNIA, Knoxville, Iowa, filed a petition (RM–413) requesting that the Commission amend Section 3.93 (now Section 73.93) of its rules to eliminate the requirement that an operator holding a first-class radiotelephone operator license be on duty at all times when a station employing a directional transmitting antenna is in operation. As a pre-requisite, the licensee would have to show that its antenna system was stable and dependable. A petition (RM–433) requesting similar relief was filed April 4, 1963, by E. Weaks McKinney-Smith, licensee of WDXR, Paducah, Kentucky. Suffolk Broadcasting Corporation, licensee of WLPM, Suffolk, Virginia, filed a petition supporting the Mitchell petition, on March 1, 1963.

2. The Mitchell petition called attention to the fact that certain recent actions by the Commission indicated a concern with the economic problems affecting stations which are unequal in terms of operating costs and potential revenues. They cited the then outstanding proceedings in Docket No. 14419 concerning limited hours for daytime stations and Docket No. 14746 to relax the operator requirements for non-directional radio stations employing less than 10 kilowatts. The petitioner then goes on to recite the difficulties in finding competent announcer-operators possessing first-class radiotelephone operator licenses who are willing to work in small communities at wages that a small station can afford to pay. The petitioner further argues that the operator on duty has no control over the directional antenna system other than to make minor adjustments in order to maintain the antenna currents and phases within the limits required by the Commission rules. It is claimed that the average first-class radiotelephone operator may not be qualified even to make such minor adjustments and that it is common practice for station chief engineers to instruct the operator

on duty not to touch the controls of the phasing unit under any circumstances, but to simply shut down the transmitter and call the chief engineer if the phases and currents vary beyond the required tolerances. Reference is also made to stations operated by remote control where the operator at the control point cannot make such adjustments without going to the transmitter which may be several miles away.

3. The remainder of the petition suggests that a non-technical radiotelephone third-class operator or restricted radiotelephone permit holder could be instructed to recognize abnormal deviations of the phase and current meters and could close down the transmitter until the chief engineer could arrive and make the necessary adjustments. This would allow the station to select personnel for their ability as announcers and studio operators instead of their ability to pass the first-class radiotelephone operator examination and thereby accomplish a substantial saving which could be used to provide better service to the public. The supporting petition of WLPM follows the same line as the Mitchell petition. The WDXR petition merely argues that its directional array has proven to be stable, that no one except the chief engineer is allowed to make any adjustments, and therefore, the present operator requirement is no longer necessary for it or other similar stations. Relaxation of the requirement will result in substantial financial relief.

4. We are disturbed by a growing tendency on the part of station licensees to invert the emphasis in our operator rules. Early rules required that an operator be employed for the sole purpose of operating, maintaining, and repairing the transmitter. As broadcasting equipment became more dependable, we were sympathetic to requests that the operator on duty be allowed to perform other tasks which could be done without interfering with his primary responsibility, i.e., to supervise the operation of the transmitter. The rules were amended in that respect and that provision is carried in our present rules. This privilege led to the practice of employing so-called "combination men" who would supervise the operation of the transmitter, act as a disc jockey, and make station announcements. This relaxation, however, was not intended to imply that the proper technical operation of the station could be considered of secondary importance.

5. The requirement that a technically qualified operator perform certain duties at a radio station is designed to assure that one licensee's use of a frequency will not infringe on the rights of other users because of malfunctioning of the equipment. While we recognize that transmitting equipment and antenna systems have been brought to a high degree of reliability, none are capable of completely unattended operation. Although licensees may realize their responsibility to close down a malfunctioning transmitter or antenna until it can be restored to proper operation, there is great reluctance to interrupt a broadcast schedule. If stations were equipped with fool-proof detecting devices which would turn off the transmitter whenever malfunctioning occurred which could result in interference to other licensees, consideration could be given to unsupervised operation. We have been willing to risk the con-

sequences of allowing operation of relatively simple installations to be under the supervision of technically unskilled persons. In those cases where maintenance of proper operation is more critical and where the results of malfunctioning could be more serious, we must insist upon supervision by technically qualified operators.

6. We find the argument that holders of radiotelephone first-class operator licenses are not always qualified to adjust directional transmitting antennas, without merit. It is true that the adjustment of a particular directional array, which may be required at any time, usually calls for special instructions. An understanding of basic technical principles is necessary if such instructions are to be understood and executed properly. A holder of a radiotelephone first-class operator license has demonstrated possession of this basic technical knowledge by successfully passing the examination. Operators of lower grade do not necessarily have such knowledge. We realize that there is no guarantee that the first-class operator will perform the required duties competently or conscientiously. The calibre of personnel employed at a station is the responsibility of the licensee.

7. In the light of the foregoing, IT IS ORDERED, That the petitions of Mitchell Broadcasting Company (RM–413) and E. Weaks McKinney-Smith (RM–433) ARE DENIED.

Adopted November 4, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1010

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>CHARLES SMITHGALL AND LESSIE B. SMITHGALL, D.B.A. NORTH ATLANTA BROADCASTING CO., NORTH ATLANTA, GA.<br>For Construction Permit | Docket No. 14835<br>File No. BP–12837 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING; COMMISSIONER COX NOT PARTICIPATING.

1. This proceeding involves the application of Charles Smithgall and Lessie B. Smithgall, d/b as North Atlanta Broadcasting Company (hereinafter Smithgall), for a construction permit for a new Class II–B standard broadcast station to operate on 680 kilocycles, with 5000 watts power, unlimited time, employing a directional antenna, at North Atlanta, Georgia. Following an Initial Decision, (36 FCC 1519, released December 23, 1963) which recommended denial of nighttime operation but grant of the daytime proposal, the Review Board issued a Decision (36 FCC 1513, released June 2, 1964) which affirmed the Initial Decision with respect to the nighttime proposal and denied daytime only operation because of Smithgall's failure to make a commitment to proceed with construction under such a partial grant. Subsequently, Smithgall filed a petition for reconsideration stating that it is now willing to construct and operate the proposed facility in North Atlanta on a daytime only basis. This petition was denied by the Review Board.

2. Smithgall has now filed an application for review [1] asking us to review the Board's action insofar as it failed to consider and grant the daytime portion of its proposal for North Atlanta. The Review Board denied Smithgall's petition for reconsideration and request for partial grant on the grounds (1) that Smithgall had failed to avail itself of several opportunities to make a commitment to construct and operate under a partial grant of its application, (2) that the necessity of administrative finality precludes the use of a petition for reconsideration to recoup losses arising from a final decision, and (3) that there is no merit in the contention, urged by Smithgall, that an admission of intention to build pursuant to a daytime only grant would be an abandonment of its nighttime

[1] Smithgall filed its application for review on September 17, 1964. Oppositions have been filed by the Chief, Broadcast Bureau, on October 1, 1964, and by Jupiter Broadcasting of Georgia, Inc. (WQXI), on October 2, 1964. Smithgall filed a reply on October 7, 1964. Pursuant to our grant of assignment application BAPL–316, Jupiter became the successor in interest of Esquire, Inc., the former licensee of WQXI and a respondent in this proceeding. Jupiter filed a petition on September 17, 1964, requesting that it be substituted for Esquire as a party respondent. Jupiter's petition is unopposed and accordingly will be granted.

proposal. The Broadcast Bureau and Jupiter Broadcasting of Georgia, Inc. (WQXI), support the Board's reasoning and urge denial of Smithgall's application for review.

3. Without respect to the Review Board's consideration of Smithgall's petition for reconsideration, we are convinced that the Board should have determined, in its Decision, whether a partial grant of Smithgall's application would have been appropriate in light of the designated issues in this proceeding. The applicant's consent to such a partial grant, though it may be deemed desirable, is not a prerequisite to the authority of the Commission and the Review Board to consider and determine whether a partial grant of the applicant's proposal would serve the public interest. (*Cf.* Section 1.110 of our Rules which provides, in substance, that upon a partial grant without hearing, the applicant may within 30 days accept or reject that partial grant.) Likewise, where a hearing has been held, and the evidence establishes that the public interest will be served by only a partial grant of the applicant's proposal, the applicant may either accept or reject such grant.

4. We, therefore, conclude that the applicant's failure to indicate its willingness to accept a partial grant until the filing of its petition for reconsideration does not constitute a bar to a grant of the daytime portion of its application. Since the Review Board in its Decision did not resolve the issue concerning Smithgall's compliance with Section 73.35(a) and (b) of our Rules, we will grant Smithgall's application for review for the limited purpose of remanding this entire proceeding to the Review Board for such further action as may be required to determine whether a partial grant of Smithgall's proposal, authorizing daytime only operation, would serve the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, This 4th day of November, 1964, That the application for review filed September 17, 1964, by North Atlanta Broadcasting Company IS GRANTED for the limited purpose of REMANDING this entire proceeding to the Review Board for further action consistent with this Memorandum Opinion and Order; and

IT IS FURTHER ORDERED, That the petition to substitute Jupiter Broadcasting of Georgia, Inc. (WQXI), as a party respondent, filed September 17, 1964, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1037

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
AMENDMENT OF PART 1, RULES OF PRACTICE AND PROCEDURE } Docket No. 14867

### REPORT AND ORDER

BY THE COMMISSION: COMMISSIONERS LEE AND FORD ABSENT.

1. On November 30, 1962, the Commission issued a Notice of Proposed Rule Making looking towards the adoption of a rule which would make express the implicit obligation of applicants to keep the Commission informed as to material changes in the information set forth in applications and in any other significant circumstances which might affect the Commission's decision.[1] Although prior notice of rule making was not required by law, since the proposed rule is procedural in nature and merely restates well established Commission policy, we believed it appropriate to afford interested persons an opportunity to submit constructive suggestions and comments with respect to the detailed provisions which such a rule should contain, and the procedural implications.

2. Comments have been received from Meredith Broadcasting Company (Meredith), the law firm of Dow, Lohnes and Albertson (Dow, Lohnes), the American Broadcasting Company (ABC), and Westinghouse Broadcasting Company (Westinghouse). With the exception of Meredith, all those commenting favor the proposed rule in principle but urge that the wording is ambiguous in the various respects discussed below. Meredith asserts that the implicit obligation is so clear that there is no need for an explicit provision in the Commission's Rules of Practice and Procedure. However, since the rule making proposal was occasioned by a number of recent cases where applicants have failed to apprise the Commission of material changes in the status of an application,[2] it is our judgment that an express statement of the applicant's responsibility will be helpful in avoiding future incidents of this nature. There would appear to be considerable merit, however, in Meredith's suggestion that the duty to keep information up-to-date should be stated on the application forms themselves. Accordingly, in addition to the rule adopted herein, we shall give careful consideration to such a requirement when the forms are next revised.[3]

[1] FCC 62–1247 (Mimeo No. 27753), published in the Federal Register December 5, 1962, 27 F.R. 11999.

[2] See, e.g., *Huntington-Montauk*, 24 Pike & Fischer, R.R. 195; *Tidewater Teleradio, Inc.*, 24 Pike & Fischer, R.R. 653.

[3] It would not suffice merely to include a statement on the application forms since the proposed rule goes to changes in other material circumstances which may affect the Commission's decision on an application as well as to changes in the information actually set forth in the application itself.

3. The principal objection stated in the comments is that the proposed rule does not set forth a clear and precise standard to guide applicants as to exactly what changes should be reported. The proposed rule reads in pertinent part as follows:

> The applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving the pending application. Whenever it appears to any applicant that the information furnished in his pending application is no longer accurate and complete in all material respects, he shall promptly amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever it appears to any applicant that there has been a material change as to any matter of decisional significance in a Commission proceeding involving the pending application, he shall promptly submit a statement furnishing such additional or corrected information as may be appropriate.

The commenting parties point to the fact that every statement in an application is "material" and assert further that an applicant is not in a position to know what is a "matter of decisional significance" among the many matters which may be involved in a proceeding on an application. They express a fear that the result of the rule may be either over-compliance by cautious applicants reporting a felter of minute details or the imposition of a penalty under Section 502 of the Act, 47 U.S.C. 502, for an honest mistake in judgment.

4. Since it is impossible to catalogue or even foresee in advance the precise information which may be material to differing applications or the myriad changed circumstances which may arise, a rule of this nature must necessarily state the applicant's responsibility in general terms. However, in view of the objections expressed in the comments, we will undertake to clarify the intent of the rule and the general character of the information to be reported In addition, we have also made two revisions in the wording of the rule in an effort to avoid the reporting of unimportant minute details of little or no significance to the public interest judgment. The second sentence in the rule has been revised by substituting "the information furnished in the pending application is no longer substantially accurate and complete in all *significant* respects" in place of the proposed language reading "the information furnished in his pending application is no longer accurate and complete in all material respects." In the third sentence, the words "there has been a *substantial* change as to any other matter which may be of decisional significance" have replaced the words "there has been a material change as to any matter of decisional significance."

5. The rule is thus intended to apply (i) where there has been a substantial change and (ii) where that substantial change may be significant to the Commission's consideration of an application and determination of the public interest. The information contained in the application itself is definite and the obligation to keep it substantially accurate and complete is akin to the duty of avoiding an initial misrepresentation or lack of candor. Moreover, the public interest factors pertinent to consideration of applications are either fairly well established or should be obvious in the case of a particular application involving special or novel circumstances. While appreciative of the fact that an applicant cannot always predict the exact basis of a Commission decision or the weight to be

accorded any particular factor by the Commission, we do not anticipate that applicants will experience difficulty in recognizing the kinds of matters which may be decisionally significant. Indeed, most applicants are already complying with obligation here made express by rule.

6. As requested by Dow, Lohnes, we will give a series of examples to illustrate the intended application of the rule. Such examples have been selected at random; they are not to be viewed as exhaustive or as raising any implication that other changes need not be reported. In general, applicants should report any substantial change in circumstances pertaining to basic qualifications (legal, technical, financial, character), matters affecting service to the public or the nature of the proposed operations and factors urged as a basis for a grant or a comparative preference. In broadcast cases, for example, it is clear that an applicant should report any substantial change in ownership or legal status, such as a corporate merger (*Huntington-Montauk,* 24 R.R. 195); the death of a principal who is important to an application either as a ground for preference (*Southland Television Co.* v. *Federal Communications Commission,* 266 F. 2d 686, 687 (C.A.D.C.); *Tidewater Teleradio, Inc.,* 24 Pike & Fischer, R.R. 653) or as a basis for demerit (*Fleming* v. *Federal Communications Commission,* 225 F. 2d 523 (C.A.D.C.)); a substantial change in plans as to program proposals, studio facilities or integration of ownership with management (*Butterfield Theatres, Inc.* v. *Federal Communications Commission,* 237 F. 2d 552 (C.A.D.C.); *Tidewater Teleradio, Inc.,* 24 Pike and Fischer, R.R. 653); or a change of circumstances affecting the diversification factor or sufficiently altering the financial status of an applicant as to be pertinent to financial qualifications (*Enterprise Company* v. *Federal Communications Commission,* 231 F. 2d 708 (C.A.D.C.)).

7. The rule is not intended to require the reporting of minor changes which would have no significance in the Commission's consideration of an application under the public interest standard. We recognize that some material matters may normally fluctuate on a day-by-day basis, such as the financial position of an applicant, the current business interests of its principals, etc. The rule does not contemplate the reporting of normal, foreseeable everyday changes unless they are substantial and might have a significant impact on the status of an application. The changes to be reported are those which are major or out of the ordinary—those which may make a difference from the standpoint of the public interest, and those which the Commission should be aware of in order to reach a realistic decision. See *Eugene Ketring,* 1 Pike & Fischer, R.R. 2d 71; *Walter Gaines,* 17 Pike & Fischer, R.R. 163.[4]

8. Where the change is with respect to material set forth in the application, it should be reported by means of an amendment to, or request to amend, the application. Any other pertinent change should be reported by submission of a statement. As stated in the Notice of Proposed Rule Making, by requiring the filing of a

[4] In view of the foregoing discussion, (and see particularly par. 5) we do not believe that there is any merit to the argument advanced that penalties will be imposed under Section 502 for honest mistakes in judgment as to the applicability of this rule.

request to amend an application in hearing status to reflect a changed circumstance with respect to material contained in the application, we are not in any way indicating whether such request will be granted. Our determination as to grant or denial would, of course, depend on the facts of the particular case. The proposed rule does not affect the rules governing amendment of applications in hearing status and is not intended as a means for applicants to improve their comparative positions vis-a-vis other applicants.

9. Meredith asserts that there is no need to require service of a statement furnishing additional or corrected information upon other parties of record to the proceeding, since the rules already require service of any petition to amend an application. We have decided to retain the service requirement because the statement might concern matters not set forth in the application. Where the report is in the form of a petition to amend the application, service of the petition will suffice to meet the service requirement.

10. Nor do we find substance in Meredith's objection that the requirement for service on the Commission's General Counsel where the matter is before any court for review constitutes an encroachment on the judicial jurisdiction. Service on the General Counsel does not affect the jurisdiction of the reviewing court or alter the record on appeal. Where the Commission believes that a changed circumstance affects the validity of a decision on appeal or should be incorporated in the certified record, it will seek a remand for this purpose or file some other appropriate pleading with the court. See *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364, 373-374.

11. Westinghouse challenges as ambiguous the provision for amending or requesting amendment "promptly" and urges substitution of a fixed time period, such as thirty days after knowledge of the change. We think the suggestion has merit and have accordingly provided in the rule that amendments, requests for amendments and statements shall be filed within thirty days unless good cause is shown. However, it is expected that changes will be reported as promptly as possible, and that applicants will not await the full thirty-day period where time is of the essence and the change is of a nature which can and should be reported without delay, particularly where a grant or denial of an application is about to become final.

12. The Notice of Proposed Rule Making looked toward the addition of this rule as paragraph (c) of section 1.304 (now 1.514). Section 1.514 applies only to broadcast application proceedings. Since the obligation to apprise the Commission as to changed circumstances pertains to all applicants and not merely to applicants for broadcast facilities, we consider it more appropriate to add the new provision as section 1.65, under the heading, "General Application Procedures."

In view of the foregoing and pursuant to authority contained in sections 4(i), 303(r) and 308 of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 303(r) and 308, IT IS ORDERED, effective December 22, 1964, That Part 1, Rules of Practice and Procedure, IS AMENDED as set forth in the attached Appendix.

Adopted November 12, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

NOTE: Rules changes herein will be covered by T.S. I(63)-5.

APPENDIX

Section 1.65 is added to read as follows:

§ 1.65 *Substantial and significant changes in information furnished by applicants to the Commission.*

Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate,which shall be served upon parties of record in accordance with § 1.47 of this chapter. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

F.C.C. 64–1050

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of MIDCONTINENT BROADCASTING CO., WAUSAU, WIS. For Modification of Construction Permit | File No. BMPCT–5955 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND COX DISSENTING; COMMISSIONERS LEE AND FORD ABSENT.

1. The Commission has before it for consideration: (a) the above-captioned application of Midcontinent Broadcasting Company, permittee of Television Broadcast Station WAOW–TV (formerly WCWT), Channel 9, Wausau, Wisconsin, filed March 17, 1964; (b) objections filed April 29, 1964, by the Association of Maximum Service Telecasters, Inc. (MST) against (a), above; and (c) Opposition filed May 12, 1964, by the applicant, to (b), above. The applicant is authorized under an outstanding construction permit to operate with effective radiated visual power of 316 kw and antenna height above average terrain of 1,020 feet from a site 3.3 miles north northeast of Kalinke, Wisconsin (approximately 15 miles northeast of the center of Wausau, Wisconsin). Operating from its authorized site, the applicant would meet all of the mileage separation requirements of the Commission's Rules. By its application, the applicant seeks modification of its construction permit to authorize it to change the site of its transmitter to Rib Mountain, 4 miles southwest of Wausau, and approximately 19 miles southwest of its authorized site. The applicant proposes an increase of antenna height above average terrain to 990 feet, but no change in maximum radiated power is proposed.

2. A grant of the application would result in authorization of a site which would be 175.8 miles from the site of Television Broadcast Station KMSP–TV, the co-channel station in Minneapolis, Minnesota. Section 73.610(b) (1) of the Commission's Rules provides that the minimum separation between co-channel stations operating in the VHF band in Zone II, in which both stations are located, shall be 190 miles. Operating as proposed, therefore, the applicant would be 13.2 miles short to the *present* site of the Minneapolis co-channel station. The licensee of Station KMSP–TV, United Television, Inc., has, however, filed an application (BPCT–3293) to relocate the site of the transmitter of Station KMSP–TV to a point approximately 9 miles northeast of its pres-

however, will continue to receive the Grade B signals of the three Green Bay, Wisconsin, television broadcast stations. In addition to the "white area", there will also be an area of 647 square miles ent site and in the general direction of the present and proposed sites of the Wausau station. The separation between the *proposed* site of Station WAOW–TV and the *proposed* site of Station KMSP–TV would be 168.6 miles, resulting in a co-channel shortage of 21.4 miles. Both stations recognize that increased co-channel interference could be expected to result from a grant of either or both applications [1] and the applicant has, therefore, proposed to provide "equivalent protection" to Station KMSP–TV by suppressing radiation in the direction of that station in sufficient amount to assure that Station KMSP–TV would not be required to receive more interference as a result of the proposed operation of WAOW–TV than it would be required to receive if the applicant were operating at standard spacing. Station KMSP–TV has indicated to the Commission its willingness to accept interference from the applicant's proposed operation and the "equivalent protection" which the applicant proposes will, therefore, limit the interference area to that which the co-channel station would be required to accept if the applicant were to operate at standard spacing [2]. The objector, MST, has filed objections in both proceedings and opposes the proposed co-channel mileage separation shortages.

3. MST does not allege standing as a "party in interest" within the meaning of Section 309(d) of the Communications Act of 1934, as amended, but merely claims the status of an objector pursuant to the provisions of Section 1.587 of the Commission's Rules. As such, its participation in this proceeding will be limited to the consideration herewith given.

4. Station WAOW–TV has not been constructed and the Commission, by a decision released July 28, 1964 (37 FCC 257, Docket Nos. 14933–14934), granted the permittee an extension of time of six months within which to complete construction. At the present time, therefore, any discussion of present and proposed coverage areas and gains and losses of populations and areas in connection with the proposed move are entirely theoretical since no actual television coverage is being provided by the applicant. With this in mind, we turn to a consideration of the effect of a grant of the application.

5. Operating as proposed, there would be an area in the northeastern portion of applicant's present predicted Grade B coverage area which would not be within the proposed Grade B coverage area. This area, 2,815 square miles, contains 40,422 persons. Within this "loss area" is an area of 1,187 square miles, containing 8,468 persons, which is presently within the applicant's predicted Grade B coverage area but would be outside the Grade B coverage area of any television broadcast station, in the event of a grant of this application. The remainder of the "loss area",

[1] The distance between the Station WAOW–TV *present* site and the Station KMSP–TV *proposed* site is 183.7 miles, so that if the United Television application were granted and the Wausau application were not, there would still be a mileage separation shortage of 6.3 miles.

[2] The applicant has indicated its willingness to accept a grant conditioned upon its providing "equivalent protection" to Station KMSP–TV, as defined in Docket No. 13340.

containing 4,906 people which is contiguous to the "white area" and which will be left with Grade B coverage from only Station WSAU–TV, Channel 7, Wausau. The applicant proposes to directionalize its antenna to suppress radiation in the direction of Minneapolis to afford Station KMSP–TV protection from co-channel interference equivalent to that which Station KMSP–TV would be entitled under the Commission's Rules if the applicant were operating at standard spacing. There will, therefore, be no losses in service as a result of increased co-channel interference because of the proposed short-spaced operation.

6. Despite the fact that the applicant has never commenced operation, we are, nevertheless, required to balance any losses against concomitant factors to determine whether such losses may be offset by such other factors [3] although it is apparent that in the situation now before us, the impact of the losses will be considerably less significant than in the case of an operating station.

7. The proposed site on Rib Mountain, applicant states, will provide optimum coverage and represents the closest site to Wausau which, with respect to aeronautical safety considerations, will permit the tower height proposed. The proposed site would result in the concentration of television towers in the Wausau area at a single location, a situation which is supported by the Federal Aviation Agency and the Wisconsin State Aeronautics Commission. In connection with the proposal before us, the Federal Aviation Agency has stated:

> This Agency wholeheartedly supports the move as proposed by this company. It is in keeping with our policy to group all tall towers serving a single geographical area to localize their effect on the use of navigable airspace. This proposal would substantially increase future aeronautical safety in the Wausau area, since the abandonment of the Kalinke site would return that portion of the Wausau area to unobstructed use by aircraft.

The Wisconsin State Aeronautics Commission, in like vein, has stated:

> A long-time objective of the Wisconsin State Aeronautics Commission has been the encouragement and support of proposals which would bring about the location of TV broadcasting antennas at Wausau in a single area, and preferably on a single tower on Rib Mountain. This arrangement will provide the TV broadcasting activities authorized for the area with a site on the highest natural elevation in the area and very close to the City of Wausau and environs. The arrangement will also allow the development of an airport to serve the City of Wausau in its close proximity and eliminate the necessity for other extremely tall structures in the Wausau area, and which constitute obstructions to air navigation.

In addition, because the applicant proposes to move its transmitter to a site which will be 11 miles closer to Wausau than the present authorized site, a significant improvement in the strength of the applicant's signal over Wausau could be expected. Moreover, the concentration of television towers at a single location would eliminate the problem of receiver orientation.

8. A further result of a grant of this application would be the introduction of a second competitive television service to areas of

[3] *Hall et al.* v. *Federal Communications Commission*, 99 U.S. App. D.C. 86, 237 F. 2d 567, 14 RR 2009; *American Colonial Broadcasting Corporation*, FCC 64–12, released January 13, 1964.

substantial population. Wausau is a city of 31,943 people (1960 Census) which presently has only one local television broadcast station (Station WSAU–TV, Channel 7). When we determined to allocate Channel 9 to Wausau, Wisconsin, (Report and Order, Docket No. 12040, FCC 57–1027, 15 RR 1741), we found that the assignment of the channel to Wausau ". . . would provide a much-needed second local outlet to a significant number of persons . . ." and that such an assignment would advance our interim objective of improving opportunities for more effective competition among a greater number of stations. In addition, the present proposal would provide a principal city signal to Marshfield (12,934 persons), which is presently outside of applicant's predicted Grade A contour. It should be noted that the present authorized site of Station WAOW–TV is one which was selected by the applicant's predecessor (Central Wisconsin Television, Inc.) and the proposal in this respect represents the first opportunity for the applicant to choose a site which, in the applicant's judgment, will enable it to provide optimum television service to its proposed coverage area and to compete effectively with the other station in Wausau.

9. The sole question presented by this application is whether there are public interest considerations favoring a grant which are sufficient to override the disadvantages inherent in a short-spaced operation, and the theoretical losses of television service. We believe that the air safety factors and the position of the Federal Aviation Agency and the Wisconsin State Aeronautics Commission with respect thereto are entitled to great weight. The Communications Act imposes upon us the duty to take such action as will, in our judgment, serve the public interest, convenience and necessity. Air safety is a vital public interest consideration which must be weighed by the Commission in any matter in which it is a factor. The steady increase in authorizations of new broadcast stations and increases in tower heights of existing stations have required the Commission to devote more attention to the problem of air safety, and to attempt to reduce the number of potential hazards to air navigation, where feasible. The matter now before us presents a compelling case for exercising our judgment in favor of the reduction of potential hazards to air navigation. Taken as a whole, the advantages to the public interest of the concentration of television towers at a single location in the Wausau area seems to us to outweigh those advantages inherent in the theoretical loss of television broadcast service which would result from a grant of this application. Against these theoretical losses, we also weigh the concomitant gains in areas and populations which will receive improved television service. While the facts in this case present a close question, we are persuaded, upon balance, that the public interest would be best served by a waiver of Section 73.610 of the Commission's Rules and a grant of the application. We find that the applicant is legally, financially, technically and otherwise qualified to construct and operate as proposed, and that a grant of the application would serve the public interest, convenience and necessity.

10. The technical proposal of the applicant contemplates loca-

tion of the antenna in close proximity to the existing antenna system of Station WSAU–FM. Since undesirable interaction between the two antenna systems could result from the proposed operation of Station WAOW–TV, we will so condition the grant as to impose upon the applicant responsibility for taking such measures as may be necessary to correct any such undesirable interaction. In order to guarantee the applicant's performance in accordance with its undertaking to provide "equivalent protection" to Station KMSP–TV, we will further condition the grant so as to assure applicant's compliance therewith. This grant is made without prejudice to such action as the Commission may consider appropriate in connection with the pending application (BPCT–3293) of United Television, Inc., for authority to relocate the transmitter of Station KMSP–TV.

Accordingly, IT IS ORDERED, That Section 73.610(a) of the Commission's Rules IS HEREBY WAIVED.

IT IS FURTHER ORDERED, That the Objections filed herein by The Association of Maximum Service Telecasters, Inc., ARE DENIED and the application (BMPCT–5955) of Midcontinent Broadcasting Company IS GRANTED, subject to conditions and specifications to be issued.

Adopted November 12, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–521

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| J. R. EARNEST AND JOHN A. FLACHE, D.B.A. LA FIESTA BROADCASTING CO., LUBBOCK, TEX. | Docket No. 14411<br>File No. BP–14116 |
| MID-CITIES BROADCASTING CORP., LUBBOCK, TEX. | Docket No. 14412<br>File No. BP–15073 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER SLONE NOT PARTICIPATING.

1. The Review Board has before it for consideration appeals of (1) Western Broadcasting Company (KDAV) and (2) Broadcast Bureau, from an Examiner's Memorandum Opinion and Order, both of which were filed on September 4, 1964.[1]

2. This proceeding involves the applications of La Fiesta and Mid-Cities for a construction permit for a new standard broadcast station in Lubbock, Texas. Each application specifies operation on 1420 kc, with 500 watts power, non-directional antenna, daytime only (Class III). The applications were designated for hearing by Order (FCC 61–1420), released December 4, 1961, on issues concerning areas and populations to receive primary service, and interference to Station KTJS, Hobart, Oklahoma; and on a standard comparative issue. On April 19, 1963, in an Initial Decision (FCC 63D–46), the Examiner proposed a grant of the Mid-Cities application. Said grant was not based upon the strength of the Mid-Cities proposal but upon the "inherent infirmity" of that of La Fiesta. The Examiner's conclusion that the public interest would be served better by a primarily English-speaking station, having about two hours per day of Spanish-language programming, as proposed by Mid-Cities, than by an all-Spanish language station, as proposed by La Fiesta, was based upon a Texas statute which requires all teaching in its public schools to be in English and whose alleged "obvious purpose is to make English generally spoken and understood" and to "foster inter-communication among its citizens." The Examiner believed that a federally authorized deprecation of the importance of knowing English would counter

[1] Also before the Review Board are: (a) Opposition of Radio KBUY, Inc. to (2), filed September 17, 1964; (b) Opposition of Grayson Enterprises, Inc. to (2), filed September 24, 1964; (c) Response by La Fiesta Broadcasting Company (La Fiesta) to (2), filed September 25, 1964; (d) Opposition to (1), filed by Mid-Cities Broadcasting Corporation (Mid-Cities) on September 25, 1964; (e) Opposition of La Fiesta to (1), filed September 25, 1964; (f) Broadcast Bureau's opposition to (1), filed September 25, 1964; (g) Broadcast Bureau's reply to (a), (b), and (c), filed October 1, 1964; and (h) KDAV's reply to (d), (e), and (f), filed on October 7, 1964.

the expressed state public policy, and that an all Spanish station, "which would only confirm the lack of necessity to learn English," would not aid in narrowing the division between Spanish and English speaking peoples. Exceptions to the Initial Decision were filed by Alfred Ray Fuchs (licensee of Station KTJS), by La Fiesta, by Mid-Cities, and by the Broadcast Bureau. Oral argument was held before the Review Board on November 26, 1963.

3. By Memorandum Opinion and Order (FCC 63R–550), released December 17, 1963, the Review Board remanded this proceeding for further hearing and added the following issue:

> To determine the type and character of the program services to be offered by La Fiesta Broadcasting Company and by Mid-Cities Broadcasting Corporation; whether such program services would meet the requirements of the populations and areas which would gain service upon grant of these proposals; and the extent to which the programming of other existing stations meets the requirements of the populations and areas to be served.

The Review Board stated:

> [E]vidence of the programming of existing stations is "essential"[2] to a determination whether foreign language programming would serve the public interest.... [E]vidence of the extent to which existing stations are meeting any need which is deemed to exist for [Spanish-language] programming must be adduced before a decision can be reached as to either application.... Each applicant must, pursuant to the issues added herein, demonstrate a need for his proposed service. Failure to do so would bar an applicant (either or both) from further consideration.

4. By Memorandum Opinion and Order (FCC 64M–166), released February 27, 1964, the Chief Hearing Examiner denied a motion of La Fiesta for a field hearing and gave the following reasons for doing so:

> Petitioner has not sufficiently demonstrated that a departure from the policy of the Commission that generally *only* renewal and revocation hearings will be held in the field, is warranted.... [A]ll that is presented herein is an effort by the two applicants to establish a new broadcast facility in the same community. ... Nor has any effort been made by the petitioner to utilize the various procedural devices available to it under the Commission's hearing process, *e.g.*, depositions, written interrogatories, affidavits, stipulations, etc., in order to establish the pertinent facts. Moreover, petitioner has not shown that any credibility or 'good faith' factor is likely to arise which would require [a field hearing]....

La Fiesta's petition for review of the Chief Hearing Examiner's Order was denied by the Commission (Order, FCC 64–353, released April 24, 1964).

5. Written interrogatories were mailed by the above-captioned applicants and by the Broadcast Bureau on May 8, 1964, to twenty licensees who serve 50% or more of the proposed service areas of said applicants. Nine licensees voluntarily responded, and two others filed objections, which, by Order (FCC 64M–496), released June 4, 1964, were dismissed by the Examiner, who stated that "answering the interrogatories is a mere courtesy on the part of their recipients" and that, at that time, he had no jurisdiction with

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[2] In a footnote at this point the Review Board cited *Rollins Broadcasting, Inc.*, FCC 61–165, 20 RR 978 (1961), in which the Commission stated "In determining whether existing facilities already are meeting the needs which [the specialized applicant] proposes to demonstrate, evidence as to the programming of all such stations would be not only relevant but essential...."

respect to the interrogatories, which had no "binding or legal effect upon the recipients." Motions to take depositions by means of written interrogatories were filed on June 23, and June 26, 1964, by Mid-Cities and La Fiesta, respectively. On July 16, 1964, the Broadcast Bureau filed a motion to propound cross-interrogatories. In response to each of the aforesaid motions KDAV filed motions to quash on July 2, July 8, and July 27, 1964, respectively.

*The Interrogatories of Mid-Cities and La Fiesta*

6. To the extent pertinent to the present appeal, Mid-Cities proposed the following questions:

1. State the name of the licensee or permittee, the call letters and location of the station, its frequency or channel, its power and its hours of operation.
2. List the principal communities served by your station.
3. (a) Does your station regularly broadcast or telecast any programs in the Spanish language, or has it done so within the past three years.
(b) If so, state the periods of time when it has broadcast such programs, and on what days of the week and at what hours.
(c) If so, briefly explain the format of these programs.
4. (a) List those presently broadcast programs designed to fulfill the agricultural needs of your service area.
(b) Give the time and frequency of broadcast of these programs.
(c) Briefly explain the format of these programs.

* * * * * * *

[(d)] List and detail as in (a), (b) [and] (c)... above those agricultural programs broadcast one year ago. Where the program time [and] content... were the same a simple notation to this effect will suffice.
5. (a) List those presently broadcast programs designed to fulfill the religious needs of your service area.
(b) Give the time and frequency of broadcast of these programs.
(c) Briefly explain the format of these programs.

* * * * * * *

[(d)] List and detail as in (a), (b) [and] (c)... above those religious programs broadcast one year ago. Where the program time [and] content... were the same a simple notation to this effect will suffice.
6. (a) List those presently broadcast programs designed to fulfill the needs of the Negro members of your service area.
(b) Give the time and frequency of broadcast of these programs.
(c) Briefly explain the format of these programs.

* * * * * * *

[(d)] List and detail as in (a), (b) [and] (c) ... above those programs designed to fulfill the needs of the Negro members of your service area broadcast one year ago. Where the program time [and] content... were the same a simple notation to this effect will suffice.

To the extent relevant herein La Fiesta proposed the following interrogatories:

1. State the name of the licensee or permitee, the call letters and location of the station, its frequency or channel, its power and its hours of operation.
2. List the principal communities served by your station.

* * * * * * *

3. (a) Does your station regularly broadcast or telecast any programs in the Spanish language, or has it done so within the past three years?
(b) If so, state the periods of time when it has broadcast such programs, and on what days of the week and at what hours.
(c) If so, briefly explain the format of these programs.

* * * * * * *

[4.] (a) Are your programs in English designed in whole or in part to serve the needs of people in your service area for religious programs, agricultural programs and other programs, without regard to whether they are white or Negro [?]...

(b) Do you have any programs specifically directed at Negroes?

(c) If the answer to (b) is yes, describe these programs, state how long they have been carried and give the days of the week and hours on which they are broadcast.

* * * * * * *

By Memorandum Opinion and Order (FCC 64M–795), released August 20, 1964, the Examiner ordered, among other things, that "the motions of Western (KDAV) are granted insofar as [certain] deletions . . . are subsumed under general requests to quash, and are denied in all other respects." The interrogatories, in the form approved by the Examiner, are stated above.

7. KDAV now requests that the Review Board reverse the decision of the Examiner in accordance with the following prayers: (a) the requests for interrogatories and cross-interrogatories be quashed; (b) the interrogatories and cross-interrogatories be suppressed; and (c) paragraph 9 of the decision be stricken as being a statement outside the scope of, and unnecessary to, the decision, and as argumentative and unjustified criticism. KDAV objects to the proposed interrogatories on the grounds that they inquire into "the intricate matter of program design [and] . . . philosophy"[3] and are being used for discovery purposes; that the applicants can find out the requested information by merely using the time and money to do so ("The stations are on the air every day") and that the applicants should not be permitted to shift the burden of meeting an issue from themselves to existing stations (The fact that the applicants might be inconvenienced in obtaining the required evidence, and that the existing stations might supply the information more easily and inexpensively, are alleged to be immaterial.); that answering the interrogatories would entail a hardship;[4] and that the answers to the interrogatories "would be inadmissible as irrelevant, immaterial, and in some instances incompetent." KDAV further states that "[t]he Examiner agreed that the objections raised by KDAV were sound and he added his own additional objection to the interrogatories, that of incompetency . . . . The Examiner has found the interrogatories objectionable. He cannot therefore, receive the answers in evidence, nor if received, could he consider them."[5]

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[3] KDAV states that "[t]hese matters are worked out by broadcasters, often by trial and error, and, often at great expense. It becomes important to some broadcasters to have certain types of music in cycles and often cycles within cycles; cycles of voice or talk contrasted; rules for giving announcements; time of broadcast of programming in certain categories and the time and manner of presenting news. Such programming philosophy has been considered in the nature of trade materials by the individuals developing them and are not given out generally." The aforesaid objection is stated ambiguously in KDAV's appeal and could be interpreted as a commentary on the Examiner's statement (paragraph 9) concerning KDAV's argument against disclosure of programming philosophy in answering the *Broadcast Bureau's* interrogatories.

[4] KDAV asserts that such answers would require research through records, letters, long distance calls, searching for employees no longer in the area, information from the records of others, possible further explanations at a later time, and skillful personnel to do the job. This assertion is not supported with any detailed factual allegations, and hence can be given no weight.

[5] KDAV has not raised the question of whether the Examiner has authority to order it, and other existing stations not parties to the proceeding, to respond to interrogatoraies. Since KDAV appears willing to respond to the interrogatories to the extent deemed necessary by the Review Board, we construe its pleadings as a waiver of any objection it might have to the Examiner's jurisdiction over it.

8. The Review Board cannot sustain any of KDAV's contentions. First, KDAV is in no position to request that paragraph 9 of the Examiner's Decision be stricken, for the Examiner did not criticize the operation of KDAV, but only its legal argument, and said criticism had no adverse legal effect upon KDAV in the decision's outcome. See footnote 3, *supra*. Second, the argument concerning the Examiner's "inconsistency" (in directing KDAV to answer some of the interrogatories and, at the same time, in agreeing with its objections) is based upon an inaccurate reading of the Examiner's opinion. When the Examiner stated that "he must reluctantly conclude that Western is technically justified in pleading lack of relevancy [6] (. . . [and that he] would also add competency) in all of the possible answers wherein the answers would go *beyond matter-of-fact descriptions of programming*" (emphasis added), he obviously was referring to the questions of the Broadcast Bureau and those of Mid-Cities and La Fiesta which have been deleted. Third, the questions in the authorized interrogatories, separately and *in toto*, do not call for answers which would divulge "the intricate matter of program design [and] . . . philosophy." Fourth, the use of the authorized interrogatories is not for discovery purposes in violation of Section 1.311 of the Rules, for their purpose is to secure evidence on a designated issue which has public interest significance, after the commencement of a hearing in which the recipients of the interrogatories are not adversaries. Fifth, weighing the hardships (*i.e.*, the burden on existing stations of answering the questions, and the burden on the applicants of securing the information by means other than interrogatories), we conclude that use of written interrogatories is in order in this proceeding because the desired information has a significant bearing upon the public interest and will be of assistance to the Commission in resolving the designated issue. There is no doubt that the existing stations, without going through the arduous process alleged by KDAV (see above, footnote 4), can more readily and easily supply more accurate information than the applicants. The simplicity and alacrity with which the questions can be answered is manifested by the questions themselves and by the fact that there were nine voluntary responses to the interrogatories of May 8, 1964. Moreover, if the information is supplied by the existing stations it unquestionably will be more precise and reliable than that which could be obtained by the applicants, and thus the issue added by the Review Board will be resolved in a more satisfactory manner. The benefits to be derived from upholding the authorized interrogatories clearly offset the slight burden which would be imposed upon the existing licensees. And, as the Examiner stressed, "[t]he recipients . . . are . . . assured that . . . nothing derogatory will be concluded if their answers should indicate they design no programming for special groups. Indeed, a derogatory conclusion would be far outside the meaning and scope of this proceeding. . . ." Sixth, the approved interrogatories are not irrelevant or immaterial; only by securing

[6] Note that the Examiner agreed only with the objection concerning relevancy.

matter-of-fact information as to the programming of existing stations, and by subsequent analysis of such information, can a determination be made as to the extent to which the existing stations are "meet[ing] the requirements of the populations and areas to be served."

*Broadcast Bureau's Cross-Interrogatories*

9. In its motion filed on July 16, 1964 (see above, paragraph 5), the Broadcast Bureau proposed the following cross-interrogatories:

1. If in your answers to La Fiesta and Mid-Cities' interrogatories you have responded that you do not broadcast or telecast programs in the Spanish language, programs designed specifically for Negro audiences, agricultural programs or religious programs, state what efforts you have made to ascertain the needs for such programs; and what you have ascertained regarding the needs for these programs.

2. If you do broadcast or telecast programs in the Spanish language, programs designed specifically for a Negro audience, agricultural programs, or religious programs, state the bases upon which you ascertained the needs for such programs.

By Memorandum Opinion and Order (FCC 64M–795), released August 20, 1964, (see above, para. 5), the Examiner ordered, among other things, that "the motion of the Broadcast Bureau . . . is denied *in toto* as binding upon the recipients." As is clear from the Examiner's decision (see above, para. 6, and the previous sentence), in general he sustained the validity of interrogatories designed to ascertain *what* is being broadcast by the recipients in the specified areas, but he held that the recipients could not be asked *why* they are, or are not, broadcasting certain programs, because such questions would impose an unfair burden on non-party licensees and are irrelevant and outside the scope of the issue framed by the Review Board.

10. In its appeal, the Broadcast Bureau argues that its cross-interrogatories do not impose an unreasonable burden;[7] that they are narrow in scope; that they are relevant in that the reasons specialized programs are, or are not, broadcast are significant in ascertaining whether programming "meets the requirements of the populations and areas;" and that, concerning competency, "[no one] is more competent than the broadcaster to testify about the reasons and the basis for his programs."

11. The cross-interrogatories of the Broadcast Bureau are beyond the scope of the designated hearing issue. Information from existing stations concerning what prior "efforts . . . [were] made to ascertain the needs for . . . [specialized] programs" and "what . . . [has been] ascertained regarding the needs for these programs" would be of no value in determining the extent to which the programming of existing stations meets the needs of the areas to be served.[8] Therefore, we also affirm that portion of the Ex-

[7] The Broadcast Bureau states that its proposed written questions would impose a lesser burden on the recipients than if they were asked to testify orally at a hearing session, in which case the "questions would have been relevant and . . . the licensees would have been competent to answer them."

[8] Whether the Broadcast Bureau's interrogatories ask for privileged confidential information in the form of trade secrets is not in issue here, for such a question was not raised in any of the pleadings in response to the Broadcast Bureau's appeal. *Cf. FCC v. Taft B. Schreiber* and *MCA, Inc.*, 329 F.2d 517 (1964).

aminer's Memorandum Opinion and Order which denies the Bureau's motion for cross-interrogatories.

Accordingly, IT IS ORDERED, This 17th day of November, 1964, That the Appeal from Decision of Hearing Examiner, filed September 4, 1964, by Western Broadcasting Company, and the Broadcast Bureau's Appeal from Examiner's Order, filed September 4, 1964, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–523

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of | |
| MARION MOORE (NEW), JOSHUA TREE, CAL. | Docket No. 15618 |
| For Construction Permit | File No. BP–14358 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration a motion to enlarge issues, filed October 1, 1964, by Hi-Desert Broadcasting Corporation (KDHI), a party respondent in the above-titled proceeding.[1] Marion Moore (Mrs. Moore) seeks authorization to construct and operate a standard broadcast facility at Joshua Tree, California. KDHI seeks to enlarge the issues beyond those designated by Commission Order, FCC 64–882, released September 8, 1964, to determine whether the proposal of Mrs. Moore would serve a particular "city, town, political subdivision, or community" as contemplated by Section 73.30(a) of the Commission's Rules and whether the applicant is financially qualified to construct and operate the proposed station.

2. *Separate Community Issue.* In support of its request, KDHI contends that Mrs. Moore does not meet the requirements of Section 73.30(a) of the Rules, requiring that an applicant for a new station must establish that the location it has applied for is a particular "city, town, political subdivision, or community." KDHI states that its investigation reveals that Joshua Tree has no local governmental offices or services, banks or hospitals and must depend upon nearby Twentynine Palms for its normal community services and functions. Further, KDHI states that Joshua Tree has a population of 831 people, is unincorporated, and is not classified as a community or place by the United States Census Bureau.

3. In opposition Mrs. Moore argues that KDHI's motion should be dismissed on its merits and for non-compliance with the Commission's procedural rules. The applicant contends that the cases relied upon by the movant are not relevant to the instant proceeding. *Denbigh Broadcasting Company,* 28 FCC 393, 18 RR 449 (1960) and *Mercer Broadcasting Co.,* 22 FCC 1009, 13 RR 891 (1957) were both cases in which the "separate community" issue arose in a comparative hearing under 307(b). In *Denbigh, supra,* the Commission found that the community in question was *in fact* part of the city of Newport News. In *Mercer, supra,* the Commis-

[1] The pleadings before the Board are: (1) motion to enlarge issues, filed October 1, 1964, by Hi-Desert Broadcasting Corporation; (2) opposition, filed October 14, 1964, by Marion Moore; (3) petition to accept late filing, filed October 16, 1964, by the Broadcast Bureau; and (4) comments, filed October 16, 1964, by the Broadcast Bureau.

sion said there is no hard and fast rule for defining what comprises a "community". The third case relied upon by the petitioner is *Verne Miller*, FCC 64R–196, 2 RR 2d 276, which is distinguishable in that the applicant therein acknowledged that the community in question was primarily a summer resort community, comprised mainly of motels.

4. We agree with Mrs. Moore and the Broadcast Bureau that the separate community issue under Section 73.30(a), requested by the movant, should not be added. The fact that a station location is an unincorporated village does not require specification of an issue as to compliance with Section 73.30(a). *North Atlanta Broadcasting Co.*, FCC 63R–450, 1 RR 2d 275. Nowhere in his motion does the petitioner allege that the community of Joshua Tree is an integral part of any other city or town, including Twentynine Palms. In *Five Cities Broadcasting Co., Inc.*, 1 RR 2d 279, 283 (1963) the Commission said that the criteria to be used under Section 73.30(a) was "that to qualify as a 'city, town, political subdivision or community' a place of station location must be an identifiable population grouping separate and apart from all others and that it must not enclose within its geographic boundries areas or populations more logically identified as or associated with some other location." Under the criteria enunciated by the Commission, the petitioner's motion alleges no facts upon which a separate community issue under Section 73.30(a) of the Rules could be added in the instant proceeding. The petitioner's major contention seems to be that Joshua Tree is too small to meet the requirements of 73.30(a) of the Rules. In this respect, it is noteworthy that the community of Twentynine Palms, which is the site of KDHI, is similarly unlisted by the United States Census Bureau, as it has a population of less than 1,000 persons and it too is unincorporated. In *Musical Heights, Inc.*, FCC 60–797, 19 RR 49 (1960), the Commission found Braddock Heights, an unincorporated community, 5 miles west of Frederick, Maryland with a population of 660 people, qualified to be the site of a radio station. In view of our disposition of this question on its merits, the Board will not discuss the procedural irregularities of KDHI alleged by the applicant.

5. *Financial Qualifications Issue.* Movant, KDHI, requests that a financial qualifications issue be added to this proceeding, because Mrs. Moore has not submitted a personal balance sheet since she was substituted as a party, in place of her deceased husband, by Commission Memorandum Opinion and Order, FCC 63–175, released February 26, 1963. KDHI and the Broadcast Bureau contend that it is impossible to ascertain, from the information available, whether or not Mrs. Moore is financially able to construct and operate the proposed broadcast facility. Further, the movant asserts that the applicant's financial condition cannot be assumed on the basis of the bare assertion that Mrs. Moore is financially qualified due to the operation of the community property law of the State of California.

6. In her opposition, Mrs. Moore contends that KDHI's motion for the addition of a financial qualifications issue should not be considered by the Board because of the movant's failure to raise this issue at an earlier time. It is asserted that KDHI has been aware

of the fact that Mrs. Moore submitted no new balance sheet at the time she was substituted as a party, FCC 63–175, released February 26, 1963, or anytime thereafter. The applicant contends that KDHI did not raise a question concerning Mrs. Moore's financial ability in it's opposition to Mrs. Moore's motion to be substituted as a party in place of her deceased husband, Col. E. Moore, 21 months before the filing of the present motion, and should be precluded from doing so now. In addition, Mrs. Moore argues that KDHI has not alleged that she is unable to construct and operate the proposed station and in the absence of such allegation no issue can be added. Further, she contends that her financial capability is adequately established by the balance sheet submitted by her deceased husband, Col. Edmound Moore, as part of his application, filed September 8, 1960. Mrs. Moore asserts that under the community property laws of California, she is entitled to one-half the real property of her husband situated within the state of California and all personal property wherever situated, acquired during the marriage.

7. We agree with KDHI and the Broadcast Bureau that a financial qualification issue should be added. The balance sheet relied upon by Mrs. Moore shows assets of approximately $104,500. This figure represents $32,700 cash deposits in various banks and slightly less than $72,000 in other assets. Under Mrs. Moore's assertion, she would be entitled only to the personal property acquired during the marriage. There is no indication given by the applicant as to how much of the personal property included in Col. Moore's balance sheet was so acquired. Further, there is no indication of the length of the marriage, or the existence or non-existence of any will by which Col. Moore provided for a contrary testamentary disposition of said personal property. Absent such a showing we cannot attribute to Mrs. Moore, the cash, trust deed, and stocks totalling $46,000, listed on her deceased husband's balance sheet. Moreover, Col. Moore showed real estate valued at approximately $58,500. Under Mrs. Moore's theory she would be entitled to at least one-half of such real estate located in California, but there is no indication as to how much of such real property is located in California. Nowhere in the information submitted by the applicant is there any indication of the nature of the real property, i.e., liquid or non-liquid. In the absence of such relevant data, a determination that an applicant is financially qualified can be based only upon speculation and surmise. Therefore, so that all the relevant facts may be secured a financial qualification issue will be added.

8. While it may be true that KDHI was aware of the fact that Mrs. Moore submitted no new financial information at the time of her substitution as a party or thereafter and did not raise a financial qualification issue at an earlier time, it is not now precluded from raising the issue. Under Section 1.229(b) of the Commission's Rules a party may file a motion to enlarge issues "not later than 15 days after the issues in the hearing have first been published in the Federal Register." After the aforementioned 15 days Section 1.229 provides that any person desiring to file a motion to enlarge issues "must set forth the reason why it was not possible

to file the petition within the prescribed 15 days. Unless good cause is shown for delay in filing, the motion will not be granted." The designated issues in the instant proceeding were first published in the Federal Register on September 16, 1964 (29 FR–12986); the instant motion to enlarge was filed on October 1, 1964, bringing it within the 15 days prescribed by Section 1.229(b) of the Rules; therefore, there is no need for the movant to show good cause for not raising this issue at an earlier time. Moreover, it is noted that in her motion to be substituted as a party, Mrs. Moore offered to submit additional financial information if such was requested; no such supplemental information was submitted. Had such information been submitted in response to the instant petition, the necessity of adding a financial qualification issue might have been avoided. See *Musical Heights, Inc.*, FCC 58–1198, 17 RR 1104(a). While Mrs. Moore complains that the petitioner has unconscionably delayed raising the financial issue and that the addition of a financial issue will serve to delay final action on her application, this complaint is not well-founded. As has been indicated, she could have avoided the necessity of an inquiry into her financial qualifications by filing, in response to the petition to enlarge issues, a balance sheet showing that she is financially qualified.

9. Movant further contends that a financial qualification issue should be added because the applicant has grossly underestimated the cost of construction and initial operation. Since a standard financial qualifications issue is being added, inquiry into the question of sufficiency of funds is, in any event, permitted. *Rhinelander Television Cable Corporation,* FCC 63R–249, 25 RR 476.

10. The Broadcast Bureau's motion to accept its late filed pleading will be granted inasmuch as Bureau counsel was not served with a copy of the petition.

Accordingly, IT IS ORDERED, This 18th day of November, 1964, That the motion to accept late filed pleading, filed by the Broadcast Bureau on October 16, 1964, IS GRANTED; and the pleading is accepted; and

IT IS FURTHER ORDERED, That the motion to enlarge issues, filed October 1, 1964, by Hi-Desert Broadcasting Corporation, IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and the issues in this proceeding ARE ENLARGED by the addition of the following issue:

> To determine whether Marion Moore is financially qualified to construct and operate the proposed facility at Joshua Tree, California.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1074

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of K–SIX TELEVISION, INC., LAREDO, TEX. For Construction Permit for New Television Broadcast Station | File No. BPCT–3304 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX DISSENTING.

1. The Commission has before it for consideration the above-captioned application, filed February 17, 1964, and pleadings filed in connection therewith.[1] The applicant requests authority to construct a new television broadcast station to operate on Channel 13, Laredo, Texas. The applicant is the licensee of Television Broadcast Station KZTV, Channel 10, Corpus Christi, Texas, a CBS affiliate, and plans to rebroadcast a substantial portion of the programming of Station KZTV. The petitioner is the licensee of Television Broadcast Station KGNS–TV, Channel 8, Laredo, Texas, and, as the only television station in Laredo, broadcasts programs of all three national networks. The applicant proposes to locate its main studio at its transmitter site which is outside the corporate limits of the City of Laredo. The applicant has, accordingly, requested a waiver of Section 73.613(a) of the Commission's Rules, and the petitioner has interposed no objection to a waiver. On the basis of good cause shown, we find that a waiver is warranted.

2. Petitioner alleges standing as a "party in interest" in this proceeding on the basis that a grant of the application would result in the diversion of advertising revenues from Station KGNS–TV and would cause economic injury to the petitioner. The applicant concedes that it will solicit advertising revenues in the Laredo market and we find, accordingly, that the petitioner has standing as a "party in interest" within the meaning of Section 309(d) of the Communications Act of 1934, as amended. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S.Ct. 693, 9 RR 2008.

3. Petitioner seeks the designation of the application on several issues. Petitioner contends that a grant of the application would be inconsistent with Section 307(b) of the Communications Act with respect to a "fair, efficient and equitable" use of the channel because the applicant proposes a "satellite" operation in Laredo.

[1] The Commission also has under consideration: (a) Petition to Deny filed March 27, 1964, by Southwestern Operating Company; (b) Opposition filed May 21, 1964, by applicant against (a), above; and (c) Reply filed June 23, 1964, by petitioner against (b), above. The parties have each requested and been granted extensions of time within which to file their various pleadings.

Petitioner further requests a *Suburban* issue [2] to determine the efforts, if any, made by the applicant to ascertain the programming tastes, needs and interests of the area it proposes to serve. Petitioner also alleges that the applicant is not financially qualified to construct, own and operate the proposed television broadcast station. The main thrust of petitioner's opposition, however, is its contention that Laredo cannot support a second television broadcast station, thus raising directly a *Carroll* question.[3]

4. Petitioner's contention that the applicant proposes a "satellite" operation in Laredo, thus raising a question as to whether such a use constitutes an efficient use of the channel, is disputed by the applicant. The applicant concedes that its programming will consist mainly of programs rebroadcast from applicant's Station KZTV, Corpus Christi, Texas, but the applicant points out that it will broadcast 6.12% live programming locally originated, and it will have an independent studio in Laredo equipped for such local originations. Of the 110 hours and 20 minutes per week which the applicant proposes to broadcast, approximately 6 hours and 45 minutes will be locally originated live programming. This compares with 5.57%, or approximately 5 hours and 40 minutes, of local live programming which the petitioner proposed in its application for renewal of its license in May 1962. The applicant states that, as the proposed station progresses, local originations will be increased. Under these circumstances, we are not prepared to say that the operation which the applicant proposes is a "satellite" operation, *KAKE–TV and Radio, Inc.*, FCC 64–412, 2 RR 2d 688. Furthermore, an examination of the applicant's proposed Grade B contour compared with that of the petitioner's station reveals that the applicant's proposed Grade B coverage area far exceeds that of the petitioner's station and, in fact, the applicant's proposed Grade A contour is nearly conterminous with the petitioner's predicted Grade B contour. Additionally, operating as proposed, the applicant would bring a first television broadcast signal to 2,800 persons. It is clear, therefore, that the facts alleged by the petitioner do not support a conclusion that the operation proposed would not be an efficient one within the meaning of Section 307(b) of the Communications Act. The petitioner has made no other allegations to support its request for a 307(b) issue and we are not persuaded that such an issue would be warranted.

5. Petitioner alleges that the applicant has failed to show that it has made efforts to ascertain the programming tastes, needs and interests of the area which it proposes to serve. The applicant, however, states that it has visited, studied, and analyzed the needs of its proposed coverage area and that it has conducted detailed interviews with at least thirty-five leaders of the Laredo community. The applicant further states that its efforts have confirmed the validity of its programming proposal. On the basis of this showing, we conclude that a *Suburban* issue would not be warranted.

6. Petitioner's challenge of the applicant's financial qualifica-

[2] *Suburban Broadcasters*, 30 FCC 1021, 20 RR 951; affirmed *sub nom Suburban Broadcasters* v. *Federal Communications Commission*, 112 U.S. App. D.C. 257, 302 F. 2d 191, 23 RR 2016.
[3] *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 F. 2d 440, 17 RR 2066.

tions is based, in large part, on the applicant's estimate of $37,000 for first-year operating expenses and the applicant's assumption that it can operate for the first year without any revenues. The applicant, however, has demonstrated that it has sufficient funds available to construct, own and operate the station as proposed, and the petitioner has subsequently conceded the adequacy of this showing. We think that the applicant has taken a realistic view in basing its financial showing on an ability to operate for the first year without revenues. Although its estimate of operating expenses for the first year may be low, the applicant has stated that it will furnish such additional funds as may be required and it has demonstrated, to our satisfaction, its ability to do so. The petitioner has stated that operating costs for the proposed new station would probably be close to $80,000 for the first year, and the applicant has stated that it is willing to have its financial qualifications judged on this basis. Total costs of construction will be $241,000. To meet the costs of construction, the applicant shows that it has equipment on hand valued at $100,000, deferred credit available from General Electric Company of $150,000, cash in excess of $300,000 and that it will make available to the new station such profits from the operation of the existing station as may be needed. In view of the foregoing, it is apparent that the applicant is financially qualified to construct, own and operate the proposed new television broadcast station. Petitioner has also raised certain questions, allegedly connected with the applicant's financial proposal, concerning the applicant's plans with respect to selling time in Laredo, rates, and the origin of the commercial and non-commercial spot announcements which the applicant proposes to broadcast. In our view, these questions bear no relationship to the applicant's financial proposal and they are neither relevant nor material to a consideration of the matters with which we are here concerned. Moreover, in raising these questions for the first time in its reply to the applicant's "Opposition", the petitioner has failed to comply with the provisions of Section 1.45(b) of the Commission's Rules, which limits the reply to matters raised in the opposition.

7. The petitioner has raised certain ancillary questions relating to the applicant's reasons for filing the application, the size of the staff proposed as related to the applicant's estimate of first-year operating expenses, and the effect of a grant on the petitioner's affiliation with the CBS network. The petitioner suggests that the applicant was motivated more by a desire to protect its competitive position in Corpus Christi than to provide a means of local self-expression to the people of Laredo. No facts are alleged in support of this assertion and, as pure conjecture, it must be rejected. Petitioner's question concerning the size of the staff proposed by the applicant is related to the petitioner's estimate of first-year operating expenses and, perforce, to the applicant's financial qualifications. The petitioner has not raised any question with respect to the adequacy of the staff proposed to effectuate the type of operation proposed. In view of our determination as to the applicant's financial qualifications, however, the question raised by the petitioner is moot. The petitioner also alleges that a grant of the

application may result in the loss of the petitioner's CBS affiliation because Station KZTV is a CBS affiliate and the applicant would rebroadcast the network programming of Station KZTV. Petitioner, however, has alleged no facts to support its conclusions in this respect and, even if true, no showing has been made that it would adversely affect the public interest. We note, in this connection, that the petitioner's station broadcasts the programming of all three national networks. Moreover, if a grant of the application were to result in the loss of petitioner's CBS affiliation, such a development would not necessarily be inconsistent with the public interest, but might very well enhance the public interest by bringing to Laredo a full line of CBS network programming, and enabling the petitioner's station to increase its ABC and NBC network offerings.

8. Finally, the petitioner requests that the application be designed for hearing on a *Carroll* issue, alleging that the economy of Laredo is such that it could not support a second television station without diminution or loss of television service to the public. The facts alleged by the petitioner to support its request for a *Carroll* issue, however, were too generally stated, speculative, and not sufficiently related to the conclusions drawn by the petitioner to enable the Commission to determine whether a *Carroll* issue would be warranted. Accordingly, by letter dated August 18, 1964, the Commission afforded the petitioner an opportunity to submit the type of information which we have stated that we consider necessary to support a *Carroll* issue.[4] By letter dated October 19, 1964, however, the petitioner advised the Commission that it "will not submit additional information". Consequently, we find that, in the absence of such information, a *Carroll* issue is not warranted.

In view of the foregoing, we find that the petitioner has failed to raise substantial and material questions of fact. We further find that the applicant is legally, financially, technically and otherwise qualified to construct, own and operate the proposed new television broadcast station and that a grant of the application would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the Petition to Deny filed herein by Southwestern Operating Company IS DENIED, and the application (BPCT–3304) of K–SIX Television, Inc., IS GRANTED, in accordance with specifications to be issued.

IT IS FURTHER ORDERED, That Section 73.613(a) of the Commission's Rules IS HEREBY WAIVED.

Adopted November 18, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

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[4] *Trec Broadcasting Co.*, 63-673, 1 RR 2d 15; *KXO-TV, Inc.*, FCC 63-759, 1 RR 2d 125; affirmed *sub nom Valley Telecasting Co., Inc., v. Federal Communications Commission*, ——, U.S. App. D.C. ——, —— F. 2d ——, 2 RR 2d 2064; *Missouri-Illinois Broadcasting Company* (KZIM), FCC 63-650, 1 RR 2d 1; remanded *sub nom KGMO Radio-Television, Inc. v. Federal Communications Commission.*

F.C.C. 64–1071

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of<br>MIDWEST TELEVISION, INC. (KFMB), SAN DIEGO, CALIF.<br>Has: 540 kc., 5 kw., DA–N, U, Class II<br>Requests: 760 kc., 5 kw., DA–N, U, Class II<br>For Modification of Construction Permit | File No. BMP–9905 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE ABSTAINING FROM VOTING; COMMISSIONER FORD ABSENT.

1. The Commission has before it for consideration (a) the above-captioned and described application, filed on October 30, 1961, by Marietta Broadcasting, Inc. ("Marietta"), then licensee of Station KFMB, San Diego, California; (b) a "Request for Public Hearing," filed November 30, 1961, by John Poole Broadcasting Company, Inc. ("Poole"), licensee of Station KGLM (then KBIG), Avalon, California; (c) an "Opposition to Request for Public Hearing", filed December 8, 1961, by Marietta and (d) a "Reply" filed December 18, 1961, by Poole. Marietta was succeeded as licensee of KFMB first by Transcontinent Televisions Corporation and then, on April 1, 1964, by the present licensee, Midwest Television, Inc. ("Midwest").[1]

2. Poole asks for a hearing on the ground that a grant of the KFMB proposal would result in interference, two-channels removed, to KGLM within its normally protected 0.5 mv/m contour and hence would constitute a modification of the KGLM license, and that, accordingly, KGLM is entitled, under Section 316 of the Communications Act of 1934, as amended, to a hearing to show cause why an order for such grant should not be issued.[2]

[1] By virtue of the following facts, several pleadings filed by The Goodwill Stations, Inc., then licensee of Station WJR, Detroit, Michigan, in opposition to the KFMB application, and pleadings filed in response thereto by KFMB's successive licensees, have been removed from consideration herein: (a) Goodwill Stations is no longer the licensee of Station WJR. On September 9, 1964 (pursuant to Commission approval granted July 29, 1964), the WJR broadcast license was assigned to Capital Cities Broadcasting Corporation. (b) On July 14, 1964, in connection with its application for assignment of the WJR license, Capital Cities filed a pleading ("Response . . . to Petition of Midwest Television, Inc., to Defer or to Grant on Condition") in which it stated to the Commission that, "Should the above-entitled [WJR] assignment application be granted and should Capital Cities acquire ownership of station WJR prior to final action by the Commission on the pending 760kc application of KFMB, Capital Cities has no intention of opposing the grant of such application."

[2] On July 1, 1964, the Commission adopted a Report and Order in Docket No. 15084 (on AM station assignment standards et al.) which, inter alia, deleted from the Rules the "1:30 second adjacent channel interference ratio" as an acceptable measure of interference, and thereby eliminated interference, two-channels removed, as a factor to be considered in evaluation of standard broadcast applications. Nonetheless, we will consider the application and petition herein in the light of the Rules in effect prior to the adoption of that Report and Order.

3. The application before us, for a change in the KFMB frequency from 540kc to 760kc, was not filed primarily upon the initiative of KFMB's principals. In September 1961 the Commission concluded, in its Report and Order in the "Clear Channel" proceeding,[3] (a) that because of Mexico's preemption of Class I–A operation on 540kc under the terms of its 1961 radio broadcasting agreement with the United States, KFMB would have to be moved from 540kc to a new channel; (b) that of the alternatives considered by the Commission, the channel reassignment of that station that would least disturb other broadcast operations while being fair to KFMB, would be to 760kc; and (c) that KFMB would therefore be moved to that frequency. To achieve that purpose, the Commission amended the Rules (at Section 3.25(d), now 73.25(d)(3)) to authorize the assignment, "on the channel 760kc/s, [of] an unlimited time Class II station located at San Diego, California." The KFMB application now before us was filed, pursuant to that Commission decision, approximately one month later, on October 30, 1961.

4. Poole participated vigorously in the KFMB aspect of the "Clear Channel" proceeding, and the Commission gave serious consideration to its proposal of another frequency for KFMB. Having exhaustively studied the question of an appropriate "home" for KFMB, however, it decided in favor of 760kc. In reaching that decision, the Commission was fully aware that assignment of KFMB to 760kc pursuant to the amended rule would involve some two-channels-removed interference by KFMB to Poole's station KGLM (then KBIG). Both Poole and KFMB's then licensee, Marietta, had asserted quite clearly in their pleadings in connection with the "Clear Channel" proceeding that such interference would occur.[4 5] Moreover, at paragraph 79 of the above-cited Report and Order, the Commission expressly declared: "[We] recognize that an authorization under this rule will require waiver of § 3.37 [now 73.37] of our rules because of a 2 mv/m and 25 mv/m overlap with Station KBIG"—notwithstanding the fact that an overlap of the 2 and 25 mv/m contours of two stations two channels apart was normally associated with mutual interference between those stations.

5. Following the Commission's release of its "Clear Channel" Report and Order in September 1961, the John Poole Broadcasting Company, Inc., along with certain other affected broadcast licensees, petitioned the Commission for reconsideration of its "Clear Channel" proceeding decisions. On November 28, 1962, the Com-

[3] See paragraphs 77 through 81 of the Commission's Report and Order in Docket No. 6741, FCC 61–1106, 31 FCC 656, 26 FR 8886, 21 RR 1801 (adopted September 13, 1961).

[4] (1) Affidavit by Robert L. Hammett, engineering consultant, accompanying "Comments of Marietta Broadcasting, Inc., and Request for Issuance of Order to Show Cause," filed April 1, 1960.

(2) "Reply Comments of John Poole Broadcasting Co., Inc.," filed June 1, 1960, at paragraphs 7, 9, and 11.

(3) "Petition for Reconsideration, for Hearing, and for Stay," filed October 20, 1961, by Poole, at paragraph 5.

[5] An engineering statement submitted on November 28, 1962, by KFMB as an amendment to the application states (on the basis of a count of houses, house trailers, and apartments within the "interference area") that interference from the KFMB proposal would affect a maximum of 10,160 persons, less that 0.13 percent of the total population of some 8,000,000 residing within the KGLM primary service area. Poole has not since that date contested the KFMB-submitted figure.

mission issued, in response to those petitions, a Memorandum Opinion and Order (24 RR 1595) reaffirming its earlier Report and Order—including (at paragraphs 38 through 40) that portion of it which dealt with reassignment of KFMB to 760kc. Thus, it is clear that when the Commission on February 27, 1963, renewed Poole's license to operate Station KGLM, Poole accepted that renewal with actual knowledge of the Commission's publicly announced intention to move KFMB to 760kc notwithstanding the fact that such a move would involve an overlap of the 2 and 25 mv/m contours of KFMB and KGLB, and a concommitant likelihood of interference to the latter station.

6. In view of the foregoing, it is clear that the KGLM license renewal granted to the John Poole Broadcasting Company, Inc., on February 27, 1963, was issued subject to the implicit condition that at some time during the term of the renewal KGLM might have to accept whatever two-channels-removed interference would result from reassignment of KFMB to the 760kc channel. This conclusion is reinforced by Section 2(c) of the Administrative Procedure Act, which in part defines a "rule" as "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."

7. For the reasons discussed above, Poole's contention that it is entitled to a hearing under Section 316 because of the above-described interference to KGLM, must be rejected. We further find that the applicant is fully qualified, legally, technically, financially, and otherwise, to operate Station KFMB as proposed, and that a grant of the application would serve the public interest, convenience, and necessity. Poole's petition to deny will therefore be denied.

8. In order to facilitate a grant of the application, and in accordance with Commission's previously expressed conclusion (see paragraph 5, *supra*), the provision of Section 73.37 of the Rules concerning overlap of 2 and 25 mv/m contours will be waived.

Accordingly, IT IS ORDERED, That the provisions of Section 73.37 of the Commission's Rules which would be contravened by an overlap of the 2 and 25 mv/m contours of the KFMB proposal and Station KGLM, Avalon, California, ARE WAIVED.

IT IS FURTHER ORDERED, That the petition to deny filed by John Poole Broadcasting Company, Inc. IS DENIED, and that the above-captioned and described application by Midwest Telesion, Inc., licensee of Station KFMB, San Diego, California, IS GRANTED, subject to the conditions and specifications set forth in the construction permit.

Adopted November 18, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1064

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>ALABAMA MICROWAVE, INC.<br>For a Construction Permit To Establish Additional Facilities at Licensed Station KJJ57, a Facility in the Domestic Public Point-to-Point Microwave Radio Service at Capshaw Mountain, Ala.<br>For a Construction Permit To Establish a New Radio Station in the Domestic Public Point-to-Point Microwave Radio Service Near Rogersville, Ala. | File No. 5404–C1–P–64<br>File No. 5405–C1–P–64 |

ORDER

BY THE COMMISSION: COMMISSIONER FORD NOT PARTICIPATING.

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 18th day of November, 1964;

The Commission, having before it for consideration (a) the above-captioned applications for new common carrier microwave radio facilities; (b) the "Petition to Deny Applications" filed on July 17, 1964, by North Alabama Broadcasters, Inc., licensee of television station WHNT–TV, Channel 19, Huntsville, Alabama;[1] (c) an opposition to the petition filed on July 30, 1964, by Television Muscle Shoals, Inc., licensee of television station WOWL–TV, Channel 15, Florence, Alabama; (d) a reply by WHNT–TV to the aforementioned oppositions; and (e) a "Supplement to Petitions to Deny" filed by WHNT–TV on November 10, 1964;

IT APPEARING, That the above-captioned applications are for the purpose of providing the signals of two Nashville, Tennessee television broadcast stations to the Muscle Shoals TV Cable Company, the operator of the CATV system located in Florence, Alabama, for distribution on such system, and to provide the signals of a third Nashville television station, WSM–TV, to television station WOWL–TV, Florence, for rebroadcast;

IT FURTHER APPEARING, That the matters raised by the petitioner are related only to the proposal to furnish service to the CATV system, and the petitioner has raised no issues directly related to, and does not oppose, that part of the applicant's proposal

[1] WHNT–TV also filed a petition to deny against an application filed by H & B Microwave Corporation (File No. 221-C1-P-65). This application has since been withdrawn.

that relates to providing the signal of Station WSM–TV, Nashville, to Station WOWL–TV for rebroadcast;

IT FURTHER APPEARING, That the applicant has already constructed the facilities to provide service to Station WOWL–TV, Florence, pursuant to a temporary authorization issued under Section 309(f) of the Communications Act, and that the public interest would be served by permitting utilization of these facilities pending a final determination by the Commission on the petitions filed by WHNT–TV;

IT FURTHER APPEARING, That action should be withheld on the above-captioned applications and that they should be held in pending status insofar as they request authority to provide service to the Florence CATV system to permit the filing of opposition pleadings to the supplemental petition filed by WHNT–TV on November 10, 1964;

IT IS ORDERED, That the above-captioned applications of Alabama Microwave, Inc. ARE PARTIALLY GRANTED to the extent necessary to permit the provision of the signals of television station WSM–TV, Nashville, Tennessee, to television station WOWL–TV, Florence, Alabama, or any other television broadcast station, for rebroadcast by such station, subject to the condition that the facilities authorized herein shall not be used to relay television broadcast signals to community antenna television systems except pursuant to the further order of the Commission, and subject to specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–522

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| CHARLES COUNTY BROADCASTING CO., INC., LA PLATA, MD. | Docket No. 14748<br>File No. BP–14748 |
| DORLEN BROADCASTERS, INC., WALDORF, MD. For Construction Permits | Docket No. 14749<br>File No. BP–15287 |
| DORLEN BROADCASTERS, INC., WALDORF, MD. For Renewal of License of Station WSMD (FM) | Docket No. 15202<br>File No. BRH–1209 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration a joint request for approval of an agreement between Charles County Broadcasting Co., Inc. (Charles County) and Dorlen Broadcasters, Inc. (Dorlen), and also a petition for severance and grant of the Dorlen FM application.[1]

2. This proceeding involves the mutually-exclusive applications of Charles County and Dorlen, filed March 20, 1961, and January 3, 1962, respectively, for construction permits for new Maryland, Class II, standard broadcast stations on 1560 kc, daytime only, with 250 watts power in La Plata, and 1 kilowatt power in Waldorf, respectively. It also involves the application of Dorlen, filed September 24, 1963, for the renewal of its license for WSMD–FM, Waldorf. La Plata and Waldorf both are located in Charles County and are some eight miles apart. The applications for construction permits were designated for consolidated hearing on, among other matters, a 307(b) issue, by Order (FCC 62–890), released August 6, 1962.[2] The issues were subsequently modified and enlarged by Review Board actions, FCC 62R–81, released October 19, 1962, and FCC 63R–76, released February 12, 1963. By Memorandum Opinion and Order (FCC 63–821), released September 16, 1963, Dorlen's renewal application was consolidated

[1] Before the Review Board are: (1) joint request for approval of agreement and dismissal of application, filed September 21, 1964, by Charles County and Dorlen; (2) opposition to (1), filed October 5, 1964, by WPGC, Inc.; (3) comments on (1), filed October 6, 1964, by Broadcast Bureau; (4) joint reply to (2) and (3), filed October 19, 1964, by Charles County and Dorlen; (5) petition to accept late filing, filed October 19, 1964, by Charles County; (6) petition for severance and grant or in the alternative severance and separate consideration, filed September 28, 1964, by Dorlen; and (7) comments on (6), filed October 13, 1964, by Broadcast Bureau.

[2] The aforesaid designation Order consolidated for hearing in this proceeding the application of Charles C. Heaton and Jane W. Heaton, d/b as Radio Vienna, Vienna, Virginia; this application was dismissed by Order (FCC 62M–1336), released October 9, 1962. Also by the designation Order, Interstate Broadcasting Co., Inc., New York, New York, and WPGC, Inc., Morningside, Maryland, were made parties respondent to the proceeding.

for hearing with the other applications in this proceeding,[3] and the issues were again amended and modified. The following issues, and a 307(b) question, were among those finally designated:

1. To determine whether there are adequate revenues to support a standard broadcast station in Charles County, Maryland, as proposed by Charles County Broadcasting Co., and Dorlen Broadcasters, Inc., without loss or degradation of FM service to the detriment of the public interest in Charles County, Maryland, and surrounding areas.

10. To determine whether the application of Dorlen Broadcasters, Inc., was filed for the principle or incidental purpose of obstructing or delaying the establishment of a standard broadcast facility at La Plata, Maryland, and whether in the light of the facts adduced, a grant of the application of Dorlen Broadcasters, Inc., would serve the public interest, convenience and necessity.

3. The record was closed on November 21, 1963. Proposed findings of fact and conclusions of law were submitted on January 24, 1964. Thereafter, by Order (FCC 64R–207), released April 14, 1964, the Review Board enlarged the issues to include a contingent standard comparative issue, stating that a decision might, or might not, be able to be based on the 307(b) issue alone. The Hearing Examiner, by Order (FCC 64M–318), released April 16, 1964, ordered a further hearing upon the new issue. He said:

[T]he Review Board authorized the Hearing Examiner to receive evidence under a standard comparative issue in this proceeding if, in his judgment, a choice under the 307(b) issue would be inappropriate.... [T]he parties have already stated their positions on the 307(b) issue in their proposed findings of fact... [and] the facts considered in the light of pertinent precedents do not dictate a clear 307(b) superiority for either applicant. Under these circumstances, the Hearing Examiner is of the opinion that the public interest would be better served by the receipt of evidence under the comparative issue.

On August 19, 1964, the parties filed with the Commission an agreement executed August 1, 1964, concerning the dismissal of Dorlen's application for a construction permit in return for reimbursement of expenses. Also submitted was a letter from the applicants which stated that because of the illness of one of the principals, strict compliance with the time requirements of Section 1.525(a) of the Rules [4] was impossible and that a formal request for approval would be filed at the earliest possible date.

4. The instant joint request seeks approval of an agreement which provides for dismissal of Dorlen's application for a construction permit in return for reimbursement to Dorlen by Charles County of not more than $17,000 for the legitimate, reasonable, and prudent expenses incurred in preparing and prosecuting the Dorlen AM application. Three attachments to the request show that the expenses incurred by Dorlen in the prosecution of its application for a construction permit amounted to a total of $13,445.76. The request further seeks a waiver of the five-day filing provision of Section 1.525 of the Rules. The parties state

[3] In so doing the Commission stated: "... that the public interest would be better served by consolidation of the renewal application for WSMD-FM with this proceeding to permit a determination of whether the existing or proposed service would better serve the public interest, if it is found that the Charles County area will not support one of the proposed stations without loss or degradation of the existing service to the detriment of the public interest."

[4] Rule 1.525(a) requires that within 5 days after entering into such an agreement, all parties thereto file with the Commission a joint request for approval of such agreement, and that a copy of the agreement accompany the request.

that approval of the agreement is in the public interest in that dismissal of the Dorlen AM application:

> ... will make possible a grant of Charles County's application without a further hearing and without additional and unnecessary expense to Charles County, and will provide the first standard broadcast station and transmission service to Charles County, Maryland, at least a year and perhaps even two years earlier than would be the case if the hearing is continued. In addition, the licensee of the station will not have been required to dissipate its resources in litigation.

The request also refers to a second agreement (also executed August 1, 1964) providing for the transfer of the outstanding stock, and hence control, of Dorlen (and its FM station) to Charles County. In an attachment to the request an officer of Dorlen indicates that the consideration for the stock would be $80,000.

5. The parties have stated sufficient reasons to justify waiver of the five-day filing provision of Section 1.525(a) of the Rules in this instance, and we thus accept the agreement for consideration. A satisfactory affidavit by the president of Charles County, attached to the joint reply,[5] has rendered moot the Broadcast Bureau's objection that the joint request does not include an affidavit from a responsible officer of Charles County. Moreover, the aforesaid affidavit has dispelled certain doubts concerning Dorlen's reimbursement, for the former states that reimbursement will be $13,445.76, the amount actually expended, rather than "an amount up to $17,000.00." We are not satisfied, however, with the contentions that publication, pursuant to 1.525(b) of the Rules, is not required because withdrawal of the Waldorf standard broadcast application would not unduly impede achievement of a fair, efficient, and equitable distribution of radio service. All parties have failed to submit the customary showing in this regard and such a finding cannot be made in its absence. Furthermore, the single statement of Dorlen's vice-president in an affidavit attached to the joint reply, in explanation as to the $80,000 purchase price of Dorlen, is not sufficient to dispel the doubts that such sum is in part an additional payment to Dorlen for the dismissal of its AM application. At the least, corroborating statements from those evaluators of the property Dorlen's vice-president quotes is required, as well as affidavits from the purchasers. Thus, the information called for must be presented before future consideration can be given to the agreement.

6. Without regard to the foregoing, the Review Board cannot now approve the present agreement as being in the public interest nor can it grant the petition for severance. Although the Broadcast Bureau and Charles County have concluded that Dorlen filed its application in good faith [6] the question has not been resolved formally by the Examiner. See *Eastern Broadcasting System, Inc.*, FCC 63R–75, 24 RR 1122, released February 12, 1963. Fur-

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[5] Charles County has satisfactorily established, for the purposes of this proceeding, sufficient reasons for acceptance of the late filed joint reply and accordingly its unopposed petition to accept late filing will be granted.

[6] In their proposed findings, filed January 24, 1964, see para. 3, *supra*, all of the parties, including Charles County (at page 29) and Broadcast Bureau (at page 23), concluded that Dorlen's standard broadcast application was not filed for the purpose of obstructing or delaying the application of Charles County.

thermore, it is the Board's view that the Examiner must first resolve the economic issue before any action can be taken on the request to sever Dorlen's FM renewal application; the economic issue involves a matter affecting the public interest. Such is a fundamental function of his office; he presided at the hearing in which the evidence was adduced; and he is thus in a better position to initially weigh the evidence. We also note in this regard that the parties have not effectively addressed themselves to this question; there are insufficient record citations to support the factual arguments, and thus the Board is in no position to resolve the matter on its merits. In any event, it is for the Examiner, and not the Board, to resolve these matters in the first instance. We are cited to the record where the Examiner stated: "In response to [a request for an informal ruling] . . . it is ruled that if Dorlen Broadcasters, Inc., fails to carry their burden of proof under Issue 1, the presumption will be that adequate revenues exist to support either proposed AM station without loss or degradation of existing FM service in the area." (Tr. 332). We do not equate this preliminary ruling with a reasoned decision on the matter with all the evidence in, and it is not sufficient as a basis for our resolving the issue now. Thus, we must conclude that the best procedure to follow is to direct the Examiner to issue a partial Initial Decision on the two issues and certify it to the Board. Until that time, Review Board action upon the instant pleadings will be held in abeyance. Should any of the parties have any objections to either the findings or conclusions of the Hearing Examiner, exceptions may be filed with the Review Board.

Accordingly, IT IS ORDERED, This 18th day of November, 1964, That the petition to accept late filing of the joint reply, filed October 19, 1964, by Charles County Broadcasting Co., Inc., IS GRANTED and the joint reply IS ACCEPTED; and that the Hearing Examiner herein will proceed to resolution of Issues 1 and 10 and prepare a partial Initial Decision on those matters which Decision will then be transmitted to the Board and all parties wishing to file exceptions to that Decision must do so with the Board within 30 days after release of the partial Initial Decision.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–539

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| DOVER BROADCASTING CO., INC., DOVER-NEW PHILADELPHIA, OHIO | Docket No. 15429<br>File No. BPH–3560 |
| THE TUSCARAWAS BROADCASTING CO., NEW PHILADELPHIA, OHIO | Docket No. 15430<br>File No. BPH–4196 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Dover Broadcasting Company, Inc. (Dover) requests addition of issues [1] as to The Tuscarawas Broadcasting Company's (Tuscarawas) financial qualifications and its efforts to discover and meet the programming needs of its proposed service area.[2]

2. The mutually exclusive applications of Dover and Tuscarawas were set for hearing by Commission Order (FCC 64–358) released April 27, 1964. Both applicants were found to be financially qualified; the Examiner was authorized to add an issue as to sufficiency of funds; and issues were designated as to the following: determination of areas and populations to be served by each of the proposals and the availability of FM service thereto; whether the Dover proposal would violate Section 73.240(a) of the Commission's Rules with respect to multiple ownership of FM stations; whether the Dover proposal is consistent with Section 73.210(b) of the Rules to warrant an authorization for dual-city operation; and the standard comparative issue.

3. In May, 1964, Dover sought an extension of time for the filing of the instant motion, in view of difficulties involved in organization of a new law firm by its counsel contemporaneously with somewhat extensive investigations in connection with the motion.

[1] Before the Review Board are: petition for acceptance of late filing of motion to enlarge issues, filed June 9, 1964, by Dover; motion to enlarge issues, filed June 9, 1964, by Dover; comments, filed July 16, 1964, by the Broadcast Bureau; reply to motion, filed July 16, 1964, by The Tuscarawas Broadcasting Company (Tuscarawas); reply, filed July 24, 1964, by Dover. Two extensions of time for the filing of opposition pleadings were granted. On July 28, 1964, predicated on Tuscarawas' failure to file with its opposition the affidavit required by Rule 1.229. Broadcast Bureau; reply to opposition, filed August 10, 1964, by Dover. The motion to strike was having subsequently been filed, the Bureau's comments correctly point out that no reason remains to entertain the motion. Accordingly, Dover's motion to strike is denied, and Tuscarawas' opposition pleading and late filed affidavit will be considered.
The affidavit prepared by James Natoli, allegedly omitted from the pleading by inadvertence, Tuscarawas filed a document entitled "reply to Broadcast Bureau's comments," which is not authorized by the Rules and will not, therefore, be considered. Also before the Board are: motion to strike Tuscarawas' "reply to motion to enlarge issues," filed July 24, 1964, by Dover; reply to motion to strike, filed July 31, 1964, by Tuscarawas; comment, filed August 3, 1964, by the

[2] FAA approval of Tuscarawas' antenna proposal, filed with the Commission on November 8, 1963, led Dover to withdraw its request for an issue to determine whether the proposed antenna would constitute a menace to air navigation.

The request was denied (FCC 64R–299, released May 13, 1964) on the ground that the appropriate course in such cases is to plead good cause at the time of late filing. Dover has now filed such a motion in conformance with the requirements of Rule 1.229 and the Board is of the view that sufficient cause has been demonstrated, in view of the fact that no delay or prejudice has been occasioned thereby.

4. Tuscarawas' application proposes to duplicate the programming of its daytime only AM station, WBTC, now operating under program test authority in Uhrichsville, Ohio, seven miles from New Philadelphia. WBTC applied on December 5, 1963, for a license, but did not at that time file a corporate balance sheet. Subsequently a transfer of control of the applicant corporation was effected and James Natoli, Jr., became a 93.4% stockholder.[3] Tuscarawas' financial qualification in the instant proceeding is contingent upon Natoli's commitment to lend the corporation $28,000. No balance sheet has been filed by Natoli since October, 1963, before the transfer was effected. Dover requests addition of a financial qualifications issue in view of the uncertainty of the financial positions of both the corporation and its principal shareholder, Natoli. Tuscarawas has now filed a corporate balance sheet and has asserted the continuing accuracy of Natoli's original balance sheet as indicating his ability to meet the loan commitment.

5. In October, 1963, when Natoli drew his balance sheet, he was credited with 10 shares of Tuscarawas stock at $100, and his balance sheet showed no liabilities and liquid assets of $28,328.30, consisting wholly of cash and marketable stocks and bonds. While he has received 89 more shares at $500 since that time, and Tuscarawas' present corporate balance sheet reflects receipt of the $44,500, the source of the funds expended by Natoli for this acquisition is unexplained. Tuscarawas merely asserts that: "Natoli's net worth as reflected on the FM application is intact and he is in a position to lend the corporation $28,000.00 for the purpose of constructing and operating the FM station." In view of the fact that Natoli represented his assets as $28,328.30 in 1963, and now alleges that, after intervening expenditure of $44,500, he still retains a balance of $28,328.30, the Board is of the view that his financial position is sufficiently unclear that addition of the requested issue is required. See *Burlington Broadcasting Company* v. *FCC*, Case No. 17988, 2 RR 2d 2005 (decided March 19, 1964).

6. In requesting addition of an issue to determine Tuscarawas' efforts to discover and serve the programming needs of its proposed community (*Suburban* issue), Dover argues that no showing has been made of an independent investigation to determine the needs and interests of New Philadelphia, where Tuscarawas proposes duplication for the community's first local FM outlet[4] of "all" the programs of its Uhrichsville AM facility, WBTC. Dover also asserts that differences between Uhrichsville and New Phila-

[3] An amendment reflecting this change in Tuscarawas' corporate structure has been allowed by the Hearing Examiner. FCC 64M–1096, released November 4, 1964.

[4] New Philadelphia has one AM station, WJER, owned and operated by Dover.

delphia suggest separate and distinct needs: according to 1960 Census figures New Philadelphia's population (14,241) is more than double Uhrichsville's (6,201); New Philadelphia has a fairly large percentage of residents of foreign origin (one in seven), whereas only one in every thirty persons in Uhrichsville is of foreign origin; and the communities' schools, public services and governments are entirely separate.

7. The Broadcast Bureau would support Dover's petition only if Tuscarawas fails to offer in its responsive pleading "an affirmative showing that it in fact made a *bona fide* effort to determine the needs of New Philadelphia for its first FM broadcast outlet." The Bureau also points out that Tuscarawas originally designated Uhrichsville as its principal community "but subsequently amended to designate New Philadelphia *without* in any way amending its programming."

8. In its opposition pleading Tuscarawas cites Natoli's familiarity with Uhrichsville, of which he is a lifelong resident and states that he listens to all the nearby stations and that he has "ample knowledge of the listening habits, needs and desires of the area residents." Tuscarawas further states that prior to filing its AM application for Uhrichsville, a programming investigation had been made and a site selected in New Philadelphia, the plan being abandoned because the site had already been chosen by Dover for Station WJER. Tuscarawas then selected a site in Uhrichsville intended to serve the combined area, since the "basic programming interests" of the two communities were found "to be almost identical," with "no great dissimilarity between the two areas." Because of Uhrichsville's foreign population, WBTC carries a weekly one hour Italian language music program.

9. Tuscarawas points out that these contacts, some of which are listed,[5] plus Natoli's knowledge of the area, obviated the necessity for inquiry limited only to the FM application. Tuscarawas refers to Exhibit III attached to its original AM application, citing its "policy with respect to making time available for the discussion of public issues," which would allow for a flexible schedule with frequent public service drop-ins of news and community features. The pleading then details the local public service activities of the Uhrichsville station. Two employees of WBTC from Dover and two from New Philadelphia are relied upon to keep the station abreast of that community's needs. WBTC's Sports Director is also Sports Editor of the New Philadelphia Daily Times. Tuscarawas has not only kept abreast of its original New Philadelphia contacts, but also has made numerous new ones in connection with the operation of WBTC. Among these contacts are a number of prominent New Philadelphia area residents who have appeared on WBTC programs: the mayor and police chief of New Philadelphia; the Sergeant in charge of the New Philadelphia Post of the State Highway Patrol; the Sheriff of Tuscarawas County; the county engineer; the county Executive Director of the Boy Scouts of

[5] Secretary of Chamber of Commerce; Daily Times; Manager of New Philadelphia Airport; one R.L. Dible of Ohio Tower Company; East Ohio Gas Company; Court House; Head Librarian of New Philadelphia; ministers of various churches; mayors of Dover and of New Philadelphia; and head of New Philadelphia Farm Bureau Coop.

America; a registered nurse from the Tuscarawas County Tuberculosis Association and one from the County Health Department; the Executive Director of the Health Department; the President of the New Philadelphia Junior Chamber of Commerce; the county Agricultural Agent; and members of the New Philadelphia-based county Little Theatre. Various programs have also been keyed specifically to recognized needs and interests of New Philadelphia residents. For example: the wife of a former manager of WJER appeared on a program which ran over an hour to discuss a subject "she felt was important to the residents of New Philadelphia;" the volume of responsive mail from New Philadelphia to a "Community Bulletins-Trading Post" program led WBTC to expand the length of the program; and listener requests from the community resulted in a local live organ music program. The station also expects its New Philadelphia staff to "bring ideas to the station relative to topics of interest" from the city and "they themselves have more than cooperated by doing so on their own" as does the station's News Director. Free public service time is constantly available on request to town officials and "a constant effort is being made to make daily contacts to determine the public interest, convenience and necessity of the people" in the town.

10. The demonstrated long term personal familiarity of the Tuscarawas staff with the community; the survey taken in connection with its standard broadcast application; and the continuing efforts of Tuscarawas' standard broadcast operation not only to investigate but also to represent in programming the unique needs of New Philadelphia, are sufficient indicia of the applicant's familiarity with the needs of the proposed community, and obviate the necessity for inclusion of a *Suburban* issue in this case.

Accordingly, IT IS ORDERED, This 25th day of November, 1964, That the motion to enlarge issues, filed June 9, 1964, by Dover Broadcasting Company, Inc., IS GRANTED to the extent reflected herein and IS DENIED in all other respects, and that the issues in this proceeding ARE ENLARGED by addition of the following:

> To determine whether The Tuscarawas Broadcasting Company is financially qualified to construct and operate the proposed facility at New Philadelphia, Ohio.

IT IS FURTHER ORDERED, That the motion to strike, filed July 24, 1964, by Dover Broadcasting Company, Inc., IS DENIED, and that the petition for acceptance of late filing of motion to enlarge issues, filed June 9, 1964, by Dover Broadcasting Company, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–540

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>TRIAD STATIONS, INC., MARSHALL, MICH. | Docket No. 15548<br>File No. BPH–4131 |
| MARSHALL BROADCASTING CO., MARSHALL, MICH. | Docket No. 15614<br>File No. BPH–4327 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Before the Review Board for consideration is a petition to enlarge issues, filed October 1, 1964, by Triad Stations, Inc. (Triad) urging the Board to add as to Marshall Broadcasting Company (Marshall): a financial qualifications, a lack of candor, and a "strike" issue.[1] Triad and Marshall are mutually exclusive applicants for an FM broadcast station in Marshall, Michigan.[2]

*Financial Qualifications*

2. Triad's bases for the requested financial issue are three-fold. First, Triad shows that a large part of Marshall's financial plan is a $15,000 line of credit from the Hastings City Bank; that the letter from the bank relies on a pro forma financial statement and speaks of security for the loan; and that the financial statement is not submitted nor is the security identified, both of which Triad alleges to be defects in Marshall's financial showing. Second, Triad alleges that Marshall's financial position has changed drastically since its application was filed. Specifically, Triad relies on Marshall's balance sheet of July 27, 1964,[3] filed by Marshall on August 14, 1964, as part of an application for a license to cover a construction permit for a standard broadcast station (WMRR) in Marshall, Michigan.[4] Triad alleges that this balance sheet shows that Marshall no longer has enough cash on hand and that there are not enough unmortgaged assets to use as security for the $15,000 bank loan. Further, Triad asserts that the first few months of operation of WMRR will drain Marshall's finances even more. Triad's third basis for a financial issue is that Marshall indicated in its August 14, 1964, license application that unexpected construction costs for WMRR would be met by the sale of additional stock in Marshall ($10,000 worth) and Triad alleges

[1] Also before the Board are: comments, filed October 14, 1964, by Broadcast Bureau; opposition, filed October 26, 1964, by Marshall; and reply, filed November 12, 1964, by Triad.
[2] Designation Order, FCC 64–820, released September 8, 1964.
[3] The balance sheet filed with Marshall's instant application is as of November 30, 1963.
[4] This AM construction permit was granted in November, 1963.

that the ability of Marshall's stockholders to purchase this additional stock has not been established. Triad illustrates this with a May 30, 1964, balance sheet for Barry Broadcasting Co. (Barry),[5] a 56.14% stockholder in Marshall, which Triad asserts shows no excess of current assets over current liabilities.

3. Marshall's instant application indicates the construction and initial operation costs to be $20,514.58, consisting of $16,014.58 for construction costs and $4,500 for the first three months of operation.[6] This was to be financed by a $15,000 loan from the Hastings City Bank, Hastings, Michigan, and Marshall's own current assets of over $8,000 in cash. Since that time a new balance sheet has been submitted to the Commission in connection with Marshall's AM application. This most recent information shows that Marshall no longer has an excess of current assets over current liabilities, thus leaving only the $15,000 bank loan to apply toward the needed $20,514.58. Triad's attack on the bank loan has no merit. There is no basis for assuming that the bank has not seen the same financial statements that the Commission has, and as to the security, the bank letter is a firm offer and Triad's concern over adequate security is merely speculation. See *Sunbeam Television Corporation*, FCC 64R–27, released January 20, 1964. But, even with the bank loan, the above facts show Marshall's resources to be $5,514.58 short of its needs.

4. Marshall comes forward in its opposition with a letter from RCA offering 75% deferred credit on equipment purchases of about $15,000 and a loan commitment of $10,000 from one of Marshall's stockholders. These two items might be adequate to satisfy Marshall's financial needs if they were part of its proposal, but the two items are offered for the first time in Marshall's opposition. They are more properly subjects for an amendment. The Board must decide whether a financial issue is warranted on the basis of the proposal of record, and the record shows Marshall to be some $5,500 short, thus requiring the addition of an issue.

*Lack of Candor*

5. Triad asserts that the changes in Marshall's financial position are significant, and therefore should have been reported to the Commission. It states that the later balance sheet doesn't cure Marshall's omission because it was submitted in another proceeding.

6. This allegation of Triad's is without merit. It is true that Marshall did not file a more current balance sheet in this proceedings, but it did file one with the Commission. Thus, there was no intent to deceive, only an error of omission.[7]

*"Strike" Issue*

7. Triad alleges that Marshall filed its FM application for Marshall, Michigan, solely or in part to delay or obstruct the grant

[5] This balance sheet was submitted by Barry with its application for renewal of the license of Station WBCH, Hastings, Michigan.

[6] The application actually states the total cost to be $19,519.58 specifying $15,014.58 for construction but addition of the component construction figures totals $16,014.58.

[7] Marshall's opposition accuses Triad of "lack of candor" in financial matters. No disposition of this allegation is necessary since an issue can not be requested in a responsive pleading.

of Triad's application. First, Triad alleges that Marshall and Barry are essentially the same since Barry holds 56.14% of Marshall's stock and the rest of Marshall's stockholders (10) hold 99.2% of Barry. Triad then shows how Barry sought to obtain and keep an FM channel assigned to Hastings, Michigan, where it has an AM station. Since the towns of Hastings and Marshall are the same size, and since Barry has been operating an AM station in Hastings for some time and is therefore established, Triad concludes that Hastings would be the better place to file for an FM station, but Barry has not yet done so. From the foregoing, Triad concludes that Barry and Marshall consciously decided to apply for Marshall, Michigan, only after and because Triad had filed (Marshall filed 3-½ months after Triad). Triad also cites the economic benefit to be derived by Marshall's new AM station if Triad's application is delayed or defeated. Triad cites *Charles County Broadcasting Co., Inc.*, FCC 63–821, 25 RR 903.

8. Assuming *arguendo* that Marshall and Barry are one and the same, the fact that Marshall-Barry decided to apply for Marshall, Michigan, before it applied for Hastings, Michigan, does not prove that the Marshall application is a "strike" application. Any implication of this sort from the above fact is speculative. This leaves the order of filing and economic benefit arguments outstanding against Marshall. Without more, these arguments are insufficient. Marshall filed after Triad but it certainly filed within the permitted time, and the economic benefit to be gained by obtaining an FM station to protect an existing AM station is far less than the economic benefits to be gained by seeking an AM station to protect an FM station, as was the case in *Charles County, supra.* On the positive side, Marshall avers that it desires the FM grant so that its AM station will have an affiliate.

Accordingly, IT IS ORDERED, This 27th day of November, 1964, That the petition to enlarge issues, filed by Triad Stations, Inc., on October 1, 1964, IS GRANTED to the extent indicated herein, and DENIED in all other respects, and the issues in this proceeding ARE ENLARGED by the addition of the following issue:

> To determine whether Marshall Broadcasting Company is financially qualified to construct and operate the proposed FM station at Marshall, Michigan.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1096

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application of
JOHN F. PIDCOCK AND ROY F. ZESS D.B.A.
RADIO STATION WMGA, MOULTRIE, GA.
Has: 1400 kc., 250 w., 1 kw.–LS, U
Requests: 1130 kc., 250 w., 10 kw.–LS,
10 kw.–DA(CH), DA–N, U
For Construction Permit

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY ABSTAINING FROM VOTING.

1. The Commission has before it for consideration a Petition For Reconsideration, filed October 23, 1964, by Radio Station WMGA, directed against the Commission's action of September 23, 1964 returning the above-captioned application.

2. The WMGA application was tendered for filing August 3, 1964 accompanied by a request for waiver of Section 1.569(b) (2) (i) of our Rules. This section is designed to preclude assignments which would prejudice future consideration of the 12 unduplicated Class I–A channels and/or possible conflict with the contemplated Class II–A assignments on the other Class I–A channels. The proposed operation of WMGA is in contravention of this section of our rules since the station is outside a 500 mile extension of the 0.5—50% nighttime contour of Class I–A Station KSL operating on 1160 kilocycles at Salt Lake City, Utah.

3. The petitioner alleges that a Class II–A operation on 1160 kilocycles in the Moultrie, Georgia area would have a nighttime limitation of 24.8 millivolts per meter and, accordingly, would represent an inefficient utilization of the channel. Thus, petitioner concludes that the proposed operation would not prejudice future consideration of Class I–A channel, 1160 kilocycles.

4. The prospective nighttime interference a hypothetical Class II–A facility might suffer would, of course, be a significant factor relevant to the allocation of any future II–A channel in the Moultrie area. However, the basic question of whether a given proposal would be an efficient utilization of the channel turns on a number of other factors, such as the area to be served; the extent of other services available; the effect on the channel at other locations; and, whether service to the proposed area originates locally or from a remote point. Accordingly, the degree of nighttime in-

terference received by a proposal is related to the question of efficient utilization of a channel only as it affects these other basic considerations.

5. An additional factor which the Commission has considered is that the high RSS nighttime limitation, occuring in the Moultrie, Georgia area on 1160 kilocycles, does not occur during much of the nighttime period since it results from the operation of Station WJJD, Chicago, Illinois which operates only until sunset at Salt Lake City, Utah.

6. Since the petitioner has failed to establish that in the area a Class II–A facility would be infeasible, the Commission finds that it has not been clearly shown that this proposal would not effect future consideration of Class II–A channel, 1160 kilocycles.

Accordingly, IT IS ORDERED that the Petition for Reconsideration, filed by the above applicant on October 23, 1964, IS DENIED and that the application be returned.

Adopted November 25, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–551

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| UNITED ARTISTS BROADCASTING, INC., LORAIN, OHIO | Docket No. 15248<br>File No. BPCT–3168 |
| OHIO RADIO, INC., LORAIN, OHIO | Docket No. 15626 |
| For Construction Permit for New Television Broadcast Station | File No. BPCT–3348 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration a motion to enlarge issues, filed October 8, 1964, by Ohio Radio, Incorporated (Ohio).[1] Ohio seeks to enlarge issues beyond those designated by Commission Order, FCC 64–860, released September 18, 1964, by the addition of five issues as to United Artists Broadcasting, Inc. (United Artists):

(1) To determine the efforts made by United Artists Broadcasting, Inc. to ascertain the programming needs and interests of the area to be served, and the manner in which it proposes to meet such needs and interests.

(2) To determine whether in light of the evidence adduced in connection with the "Suburban" issue, whether United Artists Broadcasting, Inc., can be relied upon to carry out its program proposal.

(3) To determine whether the application of United Artists Broadcasting, Inc. should be denied because of conflict with the requirements of Section 73.613 of the Rules.

(4) To determine whether the proposal of United Artists Broadcasting, Inc. is consistent with Section 307(b) of the Communications Act and the policies reflected therein, and Sections 73.606 and 73.607 of the Commission's Rules and the policies reflected therein.

(5) To determine whether United Artists Broadcasting, Inc., is financially qualified to construct, own and operate the proposed television broadcast station.

These requested issues will be discussed in order.

2. United Artists originally filed an application for Channel 65, Cleveland, Ohio, on March 25, 1963; that application was designated for comparative hearing with two competing applications on De-

[1] Pleadings before the Review Board are: (1) Motion to enlarge issues, filed October 8, 1964, by Ohio Radio, Inc.; (2) comments, filed October 21, 1964, by the Broadcast Bureau; (3) opposition, filed October 21, 1964, by United Artists Broadcasting, Inc.; and (4) reply, filed November 2, 1964, by Ohio Radio, Inc.

cember 23, 1963 (FCC 63–1161). An amendment offered by United Artists was granted on April 1, 1964 (FCC 64M–275) permitting withdrawal of United Artists from the Channel 65 proceeding and allowing an amendment of its application to specify Channel 31, Lorain, Ohio. On May 26, 1964, Ohio filed an application for Channel 31, Lorain. At the time of United Artists' Channel 31 amendment, a rule making proceeding was in progress (Docket No. 14229), to consider a proposal for the transfer of Channel 31 from Lorain to Cleveland. That proceeding is still pending.

3. *Requested Issues 1 and 2.* Ohio alleges that United Artists' amended application, although it specifies Lorain as its principal city, made no change in the programming which had been proposed for Cleveland. Movant contends that the similarities in United Artists' program proposals for Cleveland and Lorain raise a question as to whether the proposal for Lorain has been tailored to meet the needs of the area to be served. Ohio further contends that in similar situations the Commission and the Board have inquired into an applicant's proposal. It cites *Suburban Broadcasters*, FCC 60–559, 20 RR 52 (1960) and *Geoffrey Lapping*, FCC 63R–348, 1 RR 2d 153 (1963). Ohio asserts that a "Suburban" issue is necessary in that Lorain and Cleveland are in separate standard metropolitan statistical areas and the city of Lorain is not otherwise identified with the Cleveland Urbanized Area. In addition, Ohio alleges that United Artists' failure to amend its program schedule indicates that the applicant did not make a study of the program needs of Lorain and did not prepare its program proposal on the basis of such inquiry or investigation.

4. The Broadcast Bureau supports Ohio's request for Issue 1 and cites the retention of the "Cleveland" program titles in United Artists' proposed Channel 31 schedule, as indicating the need for a "Suburban" issue. The Bureau further contends that simply because Lorain is located in the service area of United Artists' Channel 65 proposal, it does not follow that a program proposal for Cleveland will serve the local needs and interests of Lorain or that United Artists' present Channel 31 proposal will serve as a local outlet for Lorain. The Bureau's position is that absent a bona fide attempt by United Artists to ascertain local needs and interests of Lorain a "Suburban" issue should be added. United Artists opposes the addition of this issue, contending that the instant case is not a "Suburban-type" case because its application does not involve identical program schedules for completely different communities or factual allegations that the applicant has no familiarity with program needs, interests, and tastes of the public to be served. United Artists contends that Lorain is part of the Cleveland "metropolitan complex" and that its proposals for Channels 65 and 31 would serve substantially the same areas and populations. Moreover, United Artists asserts that the ultimate assignment of Channel 31 is uncertain due to the pending rule making proceeding and it would be "artificial" to file a revised program proposal at this time. Finally, United Artists contends an inquiry into its program proposal can be made under the existing standard comparative issue.

5. The Board and the Commission have indicated that an applicant has the responsibility of ascertaining the needs of the community which he proposes to serve and to program to meet such needs. *Springfield Telecasting Co.*, FCC 64R–471, 3 RR 2d 727; *Community Telecasting Corp.*, FCC 62–523, 32 FCC 933, 24 RR 1; *Suburban Broadcasting Co.*, FCC 60–559 20 RR 52; *Radio Tifton*, 11 RR 1167 (1955). Where an applicant's program proposal is the same as that which he has proposed for another community, a "Suburban" issue will be added, absent a showing by the applicant that he is familiar with the needs of the community he proposes to serve. Consequently, the fact that United Artists' signal encompasses both Cleveland and Lorain does not serve to absolve the applicant of its responsibility to ascertain the needs and interests of its principal community, Lorain. There is no showing of any bona fide attempt on United Artists' part to ascertain the needs and interests of Lorain, either through investigation of those needs or through any allegation of familiarity with the area. See *Bootheel Broadcasting Co.*, FCC 64R–47, 24 RR 292 (1962). Further, the assertion that Lorain is a Cleveland suburb has no basis in fact. Lorain is classified by the United States Census Bureau as part of the Lorain-Elyria Standard Metropolitan Statistical Area (SMSA), which is separate from the Cleveland SMSA. Lorain is not classified as part of the Cleveland Urbanized Area. Lorain is the 12th largest city in Ohio. Absent a specific showing, the Board cannot assume that the programming needs and interests of Lorain are identical with those of Cleveland. Accordingly, a "Suburban" issue will be added. The basis of Ohio's further request for an issue inquiring into United Artists' reliability in carrying out its proposed program schedule "in light of the evidence adduced in connection with the Suburban issue" is not explained, and the request for Issue 2 will, therefore, be denied. *Cumberland Publishing Company*, FCC 64R–467, released October 1, 1964.

6. *Requested Issues 3 and 4.* Ohio asserts that an issue to determine whether United Artists' proposal complies with Section 73.613 of the Commission's Rules [2] is necessary because the applicant has not indicated that its main studio will be located in the principal community to be served, nor has it requested waiver of the rule. To illustrate the need for the addition of Issue 3 Ohio cites the applicant's contradictory statements. In United Artists' application (Section V–C) Lorain is specified as the location of the main studios but in Exhibit I attached to the application the following statement is made: ". . . United Artists is unable to determine whether to locate its main studios at Lorain, or at Cleveland requesting a waiver of Section 73.613 of the Rules. A final determination will be made with respect thereto upon resolution of the proposal to transfer Channel 31 from Lorain to Cleveland." Ohio alleges that United Artists is attempting to subvert Rule

[2] 73.613(a) requires that the main studio of a television broadcast station must be located in the principal community to be served. Where the principal community is a city, such studio shall be located within the corporate boundaries of such city. Pursuant to subsection (b), subsection (a) may be waived by the Commission if such waiver is not inconsistent with the operation of the station in the public interest and upon a showing of good cause.

73.606 (Table of Assignments) and Rule 73.607 [3], inconsistent with the Commission's determination pursuant to Section 307(b) of the Communications Act that Lorain should have its own local television service. The allegation made by Ohio is that United Artists, in reality, is applying for a Cleveland station.

7. The Broadcast Bureau agrees that United Artists' statements as to its main studio location are ambiguous; it therefore supports Ohio's request for Issue 3. However, the Bureau opposes the addition of Issue 4 on the theory that evidence adduced under the "Suburban" issue and a 73.613 issue (main studio location) will disclose any violation of Rules 73.606, 73.607 and/or Section 307(b) of the Communications Act. In a responsive pleading United Artists states that it will locate its main studio in Lorain unless the assignment of Channel 31 is changed to Cleveland, in which case it will locate in Cleveland.

8. Ohio's request for an issue to determine United Artists' compliance with Section 73.613 of the Rules will be granted. The question to be determined is what location United Artists has indicated for its main studio. The statement made by United Artists in its responsive pleading does not obviate the need for inquiry, since the fact remains that the statements in its application are ambiguous and United Artists has not clarified them. United Artists relies upon the pending rule-making proceeding (Docket No. 14229) to explain all the uncertainties of its proposal. At the present time Channel 31 is assigned to Lorain, United Artists has applied for that Channel, and therefore has applied for a Lorain facility; compliance with Section 73.613 must, therefore, be determined in the light of such facts. For the aforementioned reasons we will enlarge the issues to determine whether United Artists proposes to locate its main studios in Lorain and, if it intends to locate outside of Lorain, whether circumstances exist which would warrant waiver of Rule 73.613(a).

9. Ohio's request for separate issues to determine whether United Artists is attempting to subvert Sections 73.606 and 73.607 of the Commission's Rules and is acting inconsistently with the Commission's determination under Section 307(b) of the Communications Act will be denied. Ohio's request is based on the following circumstances: it is not discernible whether United Artists' program proposal reflects the needs and interests of Lorain; it is unclear whether United Artists proposes to locate its main studio in Cleveland or Lorain; United Artists will locate its transmitter in Cleveland;[4] and United Artists' proposal will cover the entire city of Cleveland, as well as Lorain, with a city grade (80 dbu) signal. Although the sum of these allegations may well raise a substantial question as to United Artists' intent

[3] Rule 73.607(a): "Subject to (b) applications may be filed to construct television broadcast stations only on the channels assigned in the Table of Assignments (73.606(b)) and only in the communities listed therein." (b): "A channel assigned to a community listed in the Table of Assignments is available upon application in any unlisted community which is located within 15 miles of the listed community."

[4] There is no requirement, under our present Rules, that a television transmitter be located within the principal city. At present the only requirement is contained in Rule 73.685(a), which provides that, "[t]he transmitter location shall be so chosen so that, . . . the following minimum field intensity [specified for given channels] shall be provided over the entire principal community to be served."

to comply with the Commission's Section 307(b) determination (that Lorain should have a local UHF facility), we do not think the addition of a specific issue is necessary. United Artists is already under a burden to come forward with evidence showing its proper intention on two of these matters (whether its program proposal reflects the needs and interests of Lorain and the location of its main studio) by the addition of a "Suburban" issue (Issue 1) and a Rule 73.613 issue (Issue 3). If United Artists were to fail to satisfy its burden under either of these issues it would be disqualified as an applicant in this proceeding, thereby obviating any need for a Section 307(b) issue. If United Artists were to sustain its burden on each of these two issues the remaining circumstances cited would not warrant a Section 307(b) determination under existing Commission rules and policies.

10. *Requested Issue 5.* The last issue that Ohio requests is a standard financial issue against United Artists. The allegations upon which Ohio bases its request are that United Artists' resources are "thin and non-liquid"; that their financial showing is out-of-date; that United Artists' parent company, United Artists Corporation (United Corp.), has not properly evidenced its ability to fulfill a commitment to lend $350,000 to United Artists; and that United Artists' proposal is dependent upon such commitment. To support the above allegations Ohio asserts that the balance sheet submitted by United Corp. lists $62,000,000 in current liabilities and only $9,000,000 in liquid assets. These figures, Ohio contends, leave United Corp. $53,000,000 below the Commission's normal financial standard of liquid assets sufficient in amount to meet current liabilities and in addition, proposed commitments. Further, Ohio finds additional support for its request in that United Corp. pays only stock dividends and has previously committed itself to lend its wholly-owned subsidiary (United Artists) $700,000 to finance proposals for UHF facilities in Houston and Boston.

11. The Broadcast Bureau and United Artists oppose the addition of a financial issue. Their oppositions are based on the following assertions: The $9,000,000 referred to by Ohio represents the "cash" listed, by United Corp., on its balance sheet; United Corp. lists other current assets totalling $120,000,000; the Commission has found United Corp. financially qualified four times within the last two years on the basis of the same balance sheet now in question; and Ohio presents no new facts to support its instant request.

12. Ohio's request for a financial qualifications issue will be denied. United Corp. has committed itself to lend United Artists $350,000 to finance the instant proposal. The latest balance sheet submitted by United Corp. shows $152,000,000 in total assets and total liabilities of $100,000,000. Where a small amount of money must be obtained from a large amount of non-liquid assets the Board will not add a financial qualifications issue. See *Springfield Television Broadcasting Corporation,* FCC 64R–234, 2 RR 2d 841; *Garo W. Ray,* FCC 63R–103, 25 RR 286; and *Massillon Broadcasting Co., Inc.,* FCC 61–1164, 22 RR 218. In view of United Corp.'s

substantial assets and net worth, we believe its ability to honor its $350,000 commitment to United Artists is sufficiently established so that there is no need for a financial qualifications issue. The fact that United Corp. pays only stock dividends is not relevant to the present question and we do not think that its commitment of an additional $700,000 to United Artists for two other UHF facilities materially changes United Corp.'s financial position.

Accordingly, IT IS ORDERED, This 7th day of December, 1964, That the motion to enlarge issues, filed October 8, 1964, by Ohio Radio, Incorporated, IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and the issues in this proceeding ARE ENLARGED by the addition of the following:

1. To determine the efforts made by United Artists Broadcasting, Inc. to ascertain the programming needs and interests of the area to be served, and the manner in which it proposes to meet such needs and interests.

2. To determine where United Artists Broadcasting, Inc. proposes to locate its main studio and if such location is outside the corporate city limits of the city of Lorain, whether circumstances exist which would warrant a waiver of Section 73.613(a) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1133

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>WILLIAM S. HALPERN AND LOUIS N. SELTZER, D.B.A. BURLINGTON BROADCASTING CO., BURLINGTON, N.J. | Docket No. 13931<br>File No. BP–12580 |
| MOUNT HOLLY-BURLINGTON BROADCASTING CO., INC., MOUNT HOLLY, N.J.<br>For Construction Permit | Docket No. 13933<br>File No. BP–13952 |

APPEARANCES

*Philip Bergson* and *Arthur Scheiner* for Burlington Broadcasting Company; *Benito Gaguine, Herbert M. Schulkind* and *Joseph J. Kessler* for Mount Holly-Burlington Broadcasting Company, Inc.; *Arthur W. Scharfeld* and *Theodore Baron* for John C. Giordano, Receiver; and *Ernest Nash* and *Irwin S. Elyn* for Chief, Broadcast Bureau, Federal Communications Commission.

REPORT AND RECOMMENDATION

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING AND VOTING TO GRANT NIGTHTIME OPERATION TO HALPERN AND SELTZER: COMMISSIONER LEE ABSENT; COMMISSIONER COX NOT PARTICIPATING.

*The Background of the Proceeding*

1. By decision of June 12, 1963 in this proceeding,[1] the Commission granted the application of John J. Farina, tr/as Mount Holly-Burlington Broadcasting Company, for a construction permit for a new standard broadcast station at Mount Holly, New Jersey (Docket No. 13933). The same decision denied the mutually exclusive applications of (a) William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company, for Burlington, New Jersey (Docket No. 13931), and (b) Burlington County Broadcasting Company, for Mount Holly, New Jersey (Docket No. 13932). Although the latter was the applicant preferred by the Hearing Examiner in the Initial Decision, it sought neither reconsideration of the Commission's decision nor judicial review thereof, and has expressed no interest in the further prosecution of its application.

2. Halpern and Seltzer appealed the Commission's decision to

[1] The decision was released on June 14, 1963, 34 F.C.C. 1135, 25 R.R. 633. A petition (by Farina) seeking partial reconsideration of the decision was denied by the Commission by Memorandum Opinion and Order of September 25, 1963, 35 F.C.C. 456, 1 R.R.2d 297. A petition (by Halpern and Seltzer) seeking a reopening of the record and rehearing was denied by the Commission by Memorandum Opinion and Order of December 11, 1963, 35 F.C.C. 758, 1 R.R. 2d 728.

the United States Court of Appeals for the District of Columbia Circuit. Prior to a decision by the Court, the Commission approved (effective November 27, 1963) an assignment of the construction permit from Farina to Mount Holly-Burlington Broadcasting Company, Inc. (hereinafter, Mount Holly-Burlington),[2] and issued program test authority to the assignee corporation. Pursuant to the latter authority, the station (WJJZ) has been operating since December 13, 1963. A license application (BL–10433) was filed by Mount Holly-Burlington on December 3, 1963, but that application has not as yet been disposed of by the Commission.

3. The Court acted upon the appeal on March 19, 1964, and remanded the case to the Commission "for the development of a more adequate record", the Court retaining jurisdiction of the case.[3] Pursuant to the judicial mandate, the Commission remanded the proceeding to the Hearing Examiner for further hearing on six evidentiary issues, relating to Farina's and Mount Holly-Burlington's finances, and to the interviews claimed by Farina in connection with his surveys as to community needs.[4]

4. The further hearing was scheduled for July 13, 1964, and the record was duly opened on that date.[5] On July 10, 1964, alleging that he had been advised that a creditor (The National State Bank of Elizabeth, New Jersey) had secured a court-appointed trustee or receiver "to take over the corporation to conserve the assets", Farina advised the Commission that "he was withdrawing from the further prosecution of the matter", and that he would not participate in the further hearing. On the same day, the Superior Court of New Jersey, Chancery Division, Burlington County, on a petition by the creditor bank alleging advice from Farina "that he does not intend, because he cannot afford the legal expenses, to proceed with the said hearing", appointed John C. Giordano as receiver of the assets of Mount Holly-Burlington.[6]

5. At the hearing session of July 13, 1964, counsel for Farina and the successor corporation indicated that he was not entering an appearance, and that neither Farina nor the corporation would submit evidence in any respect. The Examiner held Mount Holly-Burlington in default, and subsequently recommended cancellation of the authorizations heretofore issued to Farina and his corporation, as well as a denial of the corporation's license application. See Initial Report and Recommendation of Hearing Examiner Jay A. Kyle, released July 17, 1964 (FCC 64M–676). Receiver Giordano and an attorney for the creditor bank were present during the hearing session, and each was denied a continuance on the ground that he was not a party to the proceeding.

6. On July 16, 1964, the receiver tendered for filing an applica-

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[2] Of the corporation's stock, Farina owns all but single qualifying shares held by members of his family. The corporate name has been substituted in the caption of the proceeding.

[3] *Halpern and Seltzer* v. *F.C.C.*, —— U.S. App. D.C. ——, 331 F.2d 774, 2 R.R.2d 2005; *motion for recall denied* July 8, 1964; *cert. denied* October 12, 1964 *sub nom. Mount Holly-Burlington Broadcasting Company, Inc.* v. *Halpern and Seltzer*, —— U.S. —— (Case No. 190).

[4] The Commission's remand order was released on May 1, 1964 (FCC 64–373).

[5] Requests by Mount Holly-Burlington for a continuance were denied by the Hearing Examiner, the Commission's Review Board, and the Commission. See order herein of July 8, 1964, released July 13, 1964 (FCC 64–629).

[6] Giordano is a receiver for the benefit of the bank, Mount Holly-Burlington's largest creditor, and is not a general receiver for the benefit of all creditors. The continued operation of the station has been under the receiver's direction.

tion for Commission consent to the involuntary assignment of the construction permit from Mount Holly-Burlington to the receiver. On July 23, 1964, the receiver petitioned the Commission for intervention in the instant proceeding, averring that, were he permitted to intervene, he would "either (1) go forward to meet the issues pursuant to the Court's remand and the Commission's order of designation of the further hearing, or (2) propose other action compatible with the requirements of the Communications Act and the terms of his receivership." The petition was opposed by Halpern and Seltzer and the Commission's Broadcast Bureau, the oppositions raising the questions of how intervention by the receiver would aid the Commission in the resolution of the case, and how he could properly substitute for a defaulted applicant in a comparative hearing. In the foregoing connection, the Broadcast Bureau stressed that, in light of the Court's holding that the original award to Farina was not adequately supported by the record, Mount Holly-Burlington's status in the remanded proceeding has been that of an applicant and nothing more, even though the station has been built and program tests authorized.

7. Although the Commission recognized the merit of the oppositions, it did not believe that the receiver should be turned away without an opportunity to submit more fully his views on the questions raised therein. The fact that innocent persons stood to suffer substantial losses as a result of Mount Holly-Burlington's default provided, in the Commission's opinion, an equitable basis upon which such limited intervention could be rested. Accordingly, it extended permission to the receiver to file a brief setting forth his position as to why the substance of the Examiner's report should not be given effect, and as to the procedures to be followed were such report to be set aside by the Commission.[7]

8. On September 15, 1964, prior to the due-date of the receiver's brief, there was tendered to the Commission an application by West Jersey Broadcasting Company (hereinafter, West Jersey) for a construction permit for a new standard broadcast station at Mount Holly, New Jersey, the station to utilize the same frequency and facilities specified in the authorizations issued to Farina and his corporation. The application was accompanied by a petition seeking waiver of Section 1.227(b)(1) of the Commission's Rules to permit acceptance of the application.[8] Halpern and Seltzer filed an opposition to the petition on September 28, 1964; West Jersey filed a reply to the opposition on October 7, 1964; and the Broadcast Bureau filed a statement in response to the reply on October 12, 1964. The West Jersey stockholders consist of five staff-members of WJJZ (owning a total of 75% of West Jersey's stock) and five other local residents, including the Mayor of Burlington, (own-

[7] See Memorandum Opinion and Order released in this proceeding on September 4, 1964, FCC 64-805, 3 R.R.2d 260. So much of the petition for intervention as requested postponement of the effective date of the Examiner's report was granted by the Commission by order released August 10, 1964 (FCC 64-782).

[8] The petition states that West Jersey is aware that "the Court of Appeals has maintained jurisdiction over the proceedings", and that "under the provisions of Section 402(h) [of the Communications Act], the Court of Appeals would have to consent to the acceptance of the application". Accordingly, West Jersey requests that the Commission seek permission from the Court to accept the tendered application, or inform the Court that it has no objection to such an acceptance.

ing a total of 25% of the stock). Among the staff members is Dr. Henry H. Bisbee (appointed by the receiver as sales manager for the station on July 10, 1964), with whom Farina once lived, and who owns the Burlington building in which WJJZ leases space for its auxiliary studios.[9]

9. As grounds for acceptance of its application, West Jersey alleges, in substance, as follows: (a) the Halpern and Seltzer application is "a very mediocre" one, "preferred by neither the Examiner nor the Commission"; (b) were the Halpern and Seltzer application now being filed, it would be denied because of recent changes in the Commission's multiple ownership rule;[10] (c) just as would be the case were the authorizations involved being revoked, West Jersey and other applicants should be permitted to file for the frequency to be vacated; (d) under the *Pottsville* case,[11] the Commission has discretion to make the frequency available for new applications; (e) WJJZ, as presently operated, is rendering "a highly meritorious service" to the public in the Mount Holly-Burlington area; and (f) "consideration should be given to the equities of the employees who are now threatened with loss of their positions."[12] The Broadcast Bureau takes no position on the question of whether the West Jersey application should be accepted, but Halpern and Seltzer vigorously oppose acceptance, urging, among other things, that the situation here is not at all comparable to one involving revocation, and that the prime equitable consideration is that Halpern and Seltzer have been six years in the prosecution of their application, expending considerable money and effort in the process. (See, also, note 9, *supra*.)

10. The receiver's brief was filed with the Commission on September 18, 1964, and responses thereto were filed by Halpern and Seltzer and the Broadcast Bureau on September 25, 1964. In its brief, receiver states that "Farina will not testify voluntarily in any further hearing in this proceeding", and acknowledges that Mount Holly-Burlington cannot now be the ultimate recipient of the WJJZ license. He also acknowledges that the Halpern and Seltzer application can be granted on the basis of the present hearing record, but suggests that in light of "weaknesses" in such application, a better course would be to grant West Jersey "or any other applicant willing to make whole the creditors of Mount Holly-

[9] Halpern and Seltzer allege that "Dr. Bisbee conspired with Farina to withhold disclosure to the Commission of Dr. Bisbee's guarantee of a $50,000 loan from the Burlington Bank and Trust Company." In an affidavit attached to West Jersey's reply, Dr. Bisbee denies participation in a conspiracy, and states that, although he had once agreed to guarantee a $70-to-80,000 loan by the latter bank to Farina in the amount by which the loan exceeded $50,000, the loan was never consummated. The Broadcast Bureau's statement is to the effect that Dr. Bisbee admitted to Bureau counsel that he and his wife had agreed to guarantee a loan of $50,000. In light of the Commission's proposed dispositions of the West Jersey application and petition, the factual questions presented by the conflicting allegations need not be resolved.

[10] Section 73.35(a) of the Commission's Rules now precludes the licensing of a station whose 1 mv/m groundwave contour would overlap that contour of an existing station owned, operated or controlled by the license-applicant. The Halpern and Seltzer proposal for Burlington would involve such overlap with WNJH, a Hammonton, New Jersey station licensed to Halpern and Seltzer. The new rule does not apply to the Burlington application, since there was an Initial Decision with respect thereto prior to June 9, 1964. See *Applicability of New Broadcast "Duopoly" Rules*, FCC 64-636, released July 9, 1964. Additionally, on August 26, 1964, the Commission approved an assignment of the WNJH license to a different entity; although West Jersey argues that the transfer might never be consummated, the argument is speculative, and also irrelevant, in view of the exemption provided for in FCC 64-636.

[11] *F.C.C.* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 60 S. Ct. 437 (1940).

[12] Additionally, West Jersey indicates that, in the event of grant, it would assume the liabilities incurred by Farina.

Burlington." (See note 12, *supra.*) In connection with the foregoing, the receiver states that he has been in negotiation with both Halpern and Seltzer and West Jersey in an effort to sell the assets of Mount Holly-Burlington on a contingent, non-exclusive basis; and that, although no formal agreements exist, "such an agreement will be finalized in the near future with the West Jersey Broadcasting Company upon terms which will be advantageous to the Bank and all other creditors of Mount Holly, with the exception of Mr. Farina." [13] Additionally, the receiver requests that his pending assignment application (see para, 6, *supra*) be granted, and that he be permitted to operate the station until the ultimate permittee is ready to commence operation. He states that continued operation by him will not only serve the populations of Mount Holly and Burlington, but will also enable the ultimate permittee to take over a going concern (after a purchase of the assets of the corporation) already established from the audience and advertiser standpoints.

11. Halpern and Seltzer resist the receiver's requests to the extent that they contemplate consideration of the West Jersey application, and to the extent that they envision continued operation of the station by the receiver. They also take issue with the characterization of the Elizabeth bank as an "innocent person", asserting that the bank's present difficulties have resulted from its "manifest failure to exercise due care" in making a loan to Farina. Noting that the receiver has abandoned its proposal "to go forward to meet the issues" in the remanded proceeding (see para. 6, *supra*), the Broadcast Bureau maintains that the Farina application is in default and subject to dismissal. It disputes any suggestions or implications that the Commission has an obligation to see that the bank is reimbursed, contending that "this proceeding cannot be converted into a medium for protecting a creditor's interest", and that the bank's remedy for any loss it may suffer "must necessarily rest with the laws of the state of New Jersey." The Broadcast Bureau sees no alternative but to give effect to the Examiner's report.

*The Commission's Views*

12. From the events which have transpired since the Commission's remand order, the conclusion is unavoidable that Farina's decision not to appear at the hearing was dictated solely by a conviction that he could not prevail under the remand issues, and not by an inability to afford the additional legal expense involved. It may be noted here that the bulk of the exhibits had already been prepared,[14] that Farina's counsel had anticipated that the hearing would consume no more than "a few days" (Tr. 2301), and that as late as July 6, 1964, such counsel was giving every indication of going forward with the case on July 13, 1964 (Tr. 2310). It cannot be believed that Farina's financial situation so worsened in the next four days as to cause him to abandon his existing investments

[13] Farina apparently has a claim against Mount Holly-Burlington in an amount exceeding $40,000, and the receiver states that he would seek a general receiver for Mount Holly-Burlington (who would, presumably, protect Farina's interests, as well as those of all of the other creditors —see note 6, *supra*) only if the Commission so conditions a grant of the relief requested by the receiver.

[14] See Initial Report and Recommendation, para. 10.

of time, efforts and monies. The more logical conclusion is that his tactics after the remand were with a view to delaying the hearing for as long as possible; and that his lack of success in securing a postponement [15] hastened his choice of abandonment as preferable to facing whatever truths would be disclosed at the hearing. Reinforcement for this view may be found in the fact that he has since indicated an unwillingness to testify in connection with the receiver's efforts to further prosecute the application.

13. But whether the abandonment was voluntary or involuntary, the fact remains that the Mount Holly-Burlington application is in default. The Court's remand opinion required that applicant to more fully establish its qualifications to hold the construction permit awarded to Farina in the Commission's decision of June 12, 1963, and this requirement has not been met. In the Commission's view, this circumstance requires a setting aside of the actions granting the Farina application, approving an assignment of the permit to Mount Holly-Burlington, and extending program test authority to the latter entity. Simultaneously, the Mount Holly-Burlington application should be dismissed for want of prosecution,[16] and the license application (see para. 2, *supra*) dismissed as moot. With the above actions, Mount Holly-Burlington would have nothing left to assign, and the receiver's assignment application (see para. 6, *supra*) would also have to be dismissed as moot.[17]

14. With a dismissal of the Mount Holly-Burlington application, and if the West Jersey or other new applications be not accepted, there would remain available for grant in this proceeding only the Halpern and Seltzer application. Notwithstanding West Jersey's and the receiver's characterizations of that application, Halpern and Seltzer have been found to be fully qualified to hold the permit they seek, and there is no impediment to a grant of their application. Their principal weakness is in terms of area familiarity, but the Commission does not require that the principals of an applicant be residents of the community proposed to be served.[18] In sum, the evidence received in this proceeding establishes that a grant of the Halpern and Seltzer application would serve the public interest, convenience and necessity, and a grant of their application is entirely in order. As to West Jersey's "duopoly" argument, even if WNJH is regarded as still chargeable to Halpern and Seltzer (see note 10, *supra*), the Commission's final pronouncement as to the applicability of the rules-change (FCC 64–636) specifically contemplates that applications such as that of Halpern and Seltzer will not be held to the new overlap standard. The *ex post facto* approach urged by West Jersey is manifestly inconsistent with that pronouncement.

15. Since a grant of the Halpern and Seltzer application would serve the public interest, there is no logical basis for a waiver of Section 1.227(b)(1) of the Rules to permit acceptance of the West

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[15] See note 5, *supra*.
[16] See Section 1.568(b) of the Commission's Rules.
[17] *Cf. WDUL Television Corp.*, 36 F.C.C. 497, 502, 2 R.R.2d 131, 140 (1964), and cases cited.
[18] Burlington County was adjudged to be superior to Halpern and Seltzer in terms of area familiarity. This was that applicant's only preference point, however, and Halpern and Seltzer substantially exceeded Burlington County under the broadcast experience and integration criteria. With Burlington County and Halpern and Seltzer equal under the preparation, planning, programming and diversification criteria, the latter made the better overall showing.

Jersey or other applications for the frequency in question. Halpern and Seltzer have been in contest for the frequency for approximately six years, and this circumstance far outweighs the principal equitable consideration advanced by West Jersey; namely, that employees who have worked at WJJZ for up to one year would be threatened with a loss of their positions. West Jersey's argument would have been completely irrelevant to the case had Mount Holly-Burlington gone forward with the adduction of evidence under the remand issues,[19] and the fact that the latter has defaulted cannot serve to increase the stature of the argument. Similarly irrelevant is the contention that WJJZ is currently rendering a meritorious service to the Mount Holly and Burlington communities, and it may also be noted that Halpern and Seltzer would serve virtually the same areas from their Burlington location, and that there is no reason to anticipate that they would provide other than a commendable service to the populations involved. Finally with respect to the West Jersey arguments, the situation is not at all similar to one involving a revocation of license. Halpern and Seltzer have been an applicant in this proceeding for nearly six years, and Mount Holly-Burlington returned to the proceeding (following the Court's remand) as a co-applicant and not as a permit-holder. Unlike the situation in a revocation proceeding, there has been continuously available in this proceeding an alternative grantee of proven qualifications, and if our cut-off rules are to be meaningful, Halpern and Seltzer must be afforded the protection offered and promised by them.[20] For the reasons stated above, the Commission believes that West Jersey's petition for waiver should be denied, and its application returned to it without acceptance.

16. The receiver agrees that the Halpern and Seltzer application may properly be granted. He appears to argue, however, that any grant to Halpern and Seltzer should be conditioned upon their amending their application to specify a Mount Holly rather than a Burlington location, and upon an agreement by Halpern and Seltzer to make whole the Elizabeth bank and the other of Mount Holly-Burlington's innocent creditors. These conditions the Commission deems unwarranted: if Halpern and Seltzer are entitled to a grant, they are entitled to a grant of the application which was prosecuted through the hearing,[21] and no equitable consideration present here demands that their bargaining position with respect to the Mount Holly-Burlington assets be weakened in favor of the receiver. As the Broadcast Bureau contends, this remanded proceeding should not be converted into a medium for the protection of creditors' interests; and, as sympathetic as the Commission is to the possible plight of such creditors, it must disclaim responsibility for their failure to demand co-signers or greater security for the materials and monies delivered to Farina and his corporation. Notwithstand-

[19] *Cf. Wrather Corp.*, FCC 64-656, 3 R.R.2d 291 (1964).

[20] Pursuant to what is now Section 1.571(c) of the Rules, the Commission announced by public notice of January 21, 1960 (FCC 60-52) that the Halpern and Seltzer application was ready and available for processing, and that, in order to be considered therewith, any application "must be substantially completed and tendered for filing" no later than the close of business on February 26, 1960.

[21] For reasons stated at para. 8 of the Commission's decision (see note 1, *supra*), the nighttime aspect of the Halpern and Seltzer application would not be granted.

ing the foregoing, however, the Commission would not refuse from Halpern and Seltzer an otherwise proper modification application, specifying a Mount Holly location, and offering a proposal for the taking over of the existing WJJZ facilities. In this connection, the Commission's decision (para. 10) determined that neither Halpern and Seltzer nor the two Mount Holly proposals were entitled to a preference out of considerations deriving from Section 307(b) of the Communications Act; accordingly, no disservice to Section 307(b) would result from a shift by Halpern and Seltzer to Mount Holly.

17. Remaining is the question of whether, notwithstanding the proposed denial of the receiver's assignment application (see para. 13, *supra*), the receiver should be allowed to operate the WJJZ facility in Mount Holly until such time as Halpern and Seltzer are ready to commence operations. The station was in operation at the time of the Court's remand of the proceeding, and the Commission believes that that situation may properly continue pending the Court's action with respect to this Report and Recommendation. At that time, and in the light of whatever decision Halpern and Seltzer may reach on the question of a taking-over of the Mount Holly facility,[22] the Commission will consider further requests with respect to a continuity of service on the frequency. Subject to the above, the receiver's request for permission to continue the operation of the station is denied.

## RECOMMENDATION

For the reasons stated above, the Commission recommends that the Court of Appeals now remand the instant cause to the Commission for the issuance of appropriate orders adopting this Report and Recommendation as the Commission's Supplemental Decision herein, and ordering the following actions:

(a) A setting-aside of the Commission's decision herein to the extent that it granted the application of John J. Farina, tr/as Mount Holly-Burlington Broadcasting Company, and denied the application of William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company.

(b) A setting-aside of the Commission's actions approving an assignment of construction permit from Farina to Mount Holly-Burlington, and extending program test authority to the assignee corporation.

(c) A dismissal (for want of prosecution) of the Farina application, now pending *sub nom.* Mount Holly-Burlington Broadcasting Company, Inc.

(d) A dismissal (as moot) of the application for license, filed by Mount Holly-Burlington on December 3, 1963.

(e) A grant of the Halpern and Seltzer application to the extent that it seeks daytime operation, and a denial of the application in all other respects.

(f) A dismissal (as moot) of the assignment application, filed by Receiver John C. Giordano on July 16, 1964.

[22] Assuming approval by the Court of the Commission's proposed disposition of this proceeding.

(g) A denial of the petition for waiver of the rules, filed by West Jersey Broadcasting Company on September 15, 1964, and a return of that entity's application of the same day for a new station at Mount Holly, New Jersey.

(h) Such other actions as are not inconsistent with the instant Report and Recommendation.

It is directed that the General Counsel of the Commission transmit to the Court of Appeals this Report and Recommendation together with the record in this proceeding.

Adopted December 9, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

Briefly, our purpose is to prevent undue concentration of control

F.C.C. 64–1171

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

COMMISSION TO DESIGNATE FOR HEARING APPLICATIONS TO ACQUIRE INTERESTS IN A SECOND VHF STATION IN MAJOR MARKETS } Public Notice

BY THE COMMISSION: COMMISSIONER HYDE DISSENTING AND ISSUING A STATEMENT; COMMISSIONER FORD ABSENT.

For many years the Commission has been concerned about the ownership or control of large numbers of broadcast facilities by a single person or entity. The reasons for this concern have been set forth many times, and need not be detailed at length here. in the broadcasting industry, and to encourage the development of the greatest diversity and variety in the presentation of information, opinion, and broadcast material generally. In our actions in this area, we are guided by the Congressional policy against monopoly in the communications field (e.g., as expressed in Section 313 of the Communications Act), and the concept (recognized by the courts) that the broadcasting business is, and should be, one of free competition. In the light of these considerations, in 1954 we adopted the present numerical limitations on broadcast holdings permitted a single individual or group—7 AM stations, 7 FM stations, and 7 television stations of which no more than 5 may be VHF stations.

In recent years, however, there has been a marked increase in the extent of multiple ownership, especially in television. This has been particularly true in the VHF, the older and more extensive service on which the great majority of the nation's viewers rely. Particularly evident is the concentration of such multiple ownership in the largest markets where the numbers of viewers reached are greatest and where diversity of interests and viewpoints should be maximized. Overall, the number of multiple TV station owners increased from 81 to 134 between 1956 and 1964, representing 23.3% and 40.9%, respectively, of all station owners. The number of TV stations owned by multiple owners increased from 203 to 372 during the same period, or from 43.4% to 65.7% of all stations, while the number of individually owned stations declined (265 to 194). There was an increase in the number of owners of six stations (3 to 5), of five stations (4 to 11), of 4 stations (5 to 20), of 3 stations (22 to 32), and of two stations (46 to 65).

The congealing of multiple ownership interests in the major centers can be summarized as follows:

The top 10 markets include almost 40 percent of all TV households (roughly 20 million homes). Within these markets are 40 VHF stations, of which 37 are held by multiple owners and the remaining 3 are licensed to companies owning daily newspapers in the same cities. Similarly, the top 50 markets include almost 75 percent of all TV homes: Within these markets are 156 VHF stations, of which 111 (71 percent) are licensed to multiple ownership interests while 17 of the remaining 45 stations have joint interests with daily newspapers in the same markets. Moreover, there is a clearly discernible pattern of the largest multiple owners concentrating their holdings in the largest markets. Thus, the eight multiple owners holding the maximum allowable number of 5 VHF stations have 40 VHF stations, of which 22 are located in the top 10 markets, 32 in the top 25 markets, and 38 in the top 50 markets.

We do not believe that this degree of multiple ownership concentration in the largest population centers is desirable. While we do not now propose a divestiture of existing interests, we have determined that the trend toward concentration in the VHF service is sufficiently serious to require the immediate adoption of an interim policy. We are presently conducting an overall review of the problem of concentration and diversification of the broadcast media and of allied interests in other public opinion media. Pending the formulation of more comprehensive proposals, we are today adopting the following policy with respect to VHF stations:

Absent a compelling affirmative showing, we will designate for hearing any application filed after December 18, 1964 for the acquisition of a VHF station in one of the top 50 television markets, if the applicant or any party thereto already owns or has interests in one or more VHF stations in the top 50 markets; we shall treat likewise any application to acquire interests in two or more VHF stations in these markets if the applicant now has no interests in VHF stations in these 50 markets. We are adopting this policy because, under presently existing circumstances, we cannot normally make the required finding that grant of an application for a second VHF station in the top 50 markets will serve the public interest without giving the proposal the detailed scrutiny of a hearing.

In listing the largest 50 markets (See Att. 1) we have used the 1963 American Research Bureau ranking based on net weekly circulation.[1] Any party believing that this ranking describes his particular circumstances inaccurately, or wishing to suggest another ranking, may do so and such suggestions will be considered on their merits.

In emphasizing one particular aspect of the concentration problem, we do not mean to suggest lack of concern about others. We shall continue to give close examination to other applications presenting substantial multiple ownership considerations.

FEDERAL COMMUNICATIONS COMMISSION.

BEN F. WAPLE, *Secretary.*

[1] Based on the circulation of the largest station in each market, the net weekly circulation in these markets ranges from over 5 million to 332,000 homes; assuming 3.3 persons per household, the 332,000 homes would include about 1 million persons.

ATTACHMENT 1

*Top 50 Television Markets*

1. New York, N.Y.
2. Los Angeles, Calif.
3. Chicago, Ill.
4. Philadelphia, Pa.
5. Boston, Mass.
6. Detroit, Mich.
7. San Francisco, Calif.
8. Cleveland, Ohio
9. Pittsburgh, Pa.
10. Washington, D.C.
11. Providence, R.I.
12. St. Louis, Mo.
13. Hartford-New Haven, Conn.
14. Dallas-Ft. Worth, Tex.
15. Cincinnati, Ohio
16. Minneapolis-St. Paul, Minn.
17. Baltimore, Md.
18. Indianapolis, Ind.
19. Kansas City, Mo.
20. Seattle-Tacoma, Wash.
21. Milwaukee, Wis.
22. Buffalo, N.Y.
23. Atlanta, Ga.
24. Miami, Fla.
25. Wheeling, W. Va.-Steubenville, Ohio
26. Houston, Tex.
27. Dayton, Ohio
28. Harrisburg-Lancaster-Lebanon-York, Pa.
29. Charlotte, N.C.
30. Sacramento-Stockton, Calif.
31. Columbus, Ohio
32. Portland, Oreg.
33. Toledo, Ohio
34. Grand Rapids-Kalamazoo, Mich.
35. Birmingham, Ala.
36. Memphis, Tenn.
37. Lansing, Mich.
38. Johnstown-Altoona, Pa.
39. Albany-Schenectady-Troy, N.Y.
40. Tampa-St. Petersburg, Fla.
41. Syracuse, N.Y.
42. Nashville, Tenn.
43. Louisville, Ky.
44. Charleston-Huntington, W. Va.
45. New Orleans, La.
46. Saginaw-Bay City-Flint, Mich.
47. Denver, Colo.
48. Greenville-Asheville, N.C.-Spartanburg, S.C.
49. Oklahoma City, Okla.
50. Greensboro-Winston Salem, N.C.

DISSENTING STATEMENT OF COMMISSIONER ROSEL H. HYDE

I dissent to the issuance of Public Notice No. 60894. The stated purpose of the notice is to prevent undue concentration of control in the broadcast industry and to encourage the development of diversity and variety in presentation of information. I am concerned that the impact of the proposed new policy will have just the opposite effect.

The issues raised will, of course, be subject to further consideration in the light of the information and arguments submitted in response to a Notice of Proposed Rule Making which presumably will be issued. However, on the basis of present information it would appear that the new approach would tend to limit the effectiveness of the competition of other broadcast interests as against the national networks, the dominant forces in the industry. I see no reason why the Commission should feel that larger units should not be permitted to compete in the larger markets where the number of facilities is the greatest and the competition is the strongest. If the percentage of population theory now being advanced is to be followed to its logical conclusion, how can national networks, national publications, and other national services be justified?

I believe that there are serious questions which should receive further consideration before adoption of a policy to designate for hearing all applications for acquisition of VHF stations in the top 50 TV markets where the applicant or any party thereto already owns or has interest in one or more TV stations in the top 50 markets. I think the effect of this pronouncement is to establish

what in operation will constitute a freeze against timely consideration of applications filed in accordance with substantive rules and policy.

F.C.C. 64–1137

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| SUNBEAM TELEVISION CORP., MIAMI, FLA. | Docket No. 15185 |
| For Renewal of License of Television Station WCKT | File No. BRCT–540 |
| COMMUNITY BROADCASTING CORP., MIAMI, FLA. | Docket No. 15186 |
| For Construction Permit for New VHF Television Broadcast Station | File No. BPCT–3206 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE ABSENT; COMMISSIONER COX DISSENTING.

1. The Commission has for consideration the following interlocutory matters in the above-styled proceeding: (1) a motion by Community Broadcasting Corporation, filed on October 9, 1964, for acceptance of its brief in support of exceptions; (2) a motion by Sunbeam Television Corporation (WCKT) for leave to file a reply brief exceeding fifty pages filed on November 17, 1964; and (3) a request by Sunbeam for authority to file a reply to responses to its motion for leave to file a reply brief exceeding fifty pages, filed on December 1, 1964. Community's motion is unopposed; Sunbeam's motions are opposed by Community and opposed in part by the Broadcast Bureau.

2. The subject pleadings stem from exceptions filed to the Initial Decision released in this comparative proceeding on July 31, 1964 (FCC 64D–45) proposing to grant Sunbeam's renewal application for WCKT (Channel 7) and to deny Community's competing application for new facilities on that channel. Community's brief submitted in support of its exceptions consists of 73 letter-size pages and Sunbeam has submitted a reply brief consisting of 78 letter-size pages plus another 80 pages of appendices and attachments, extending its total pleading to 158 pages. Both documents exceed the 50 page limit for briefs imposed by Section 1.277(c) of the Commission's Rules.

3. Community's motion for acceptance of its brief shows that if legal size paper and regular size print had been used, its brief would not have unreasonably exceeded the 50 page limit. In view of these considerations, we believe that Section 1.277(c) of the Rules should be waived with respect to Community's brief and that that brief should be accepted for filing and consideration.

4. We have examined Sunbeam's brief with appendices and at-

tachments. On the basis thereof, we agree with the Bureau's observation that the appendices contain in large measure arguments and discussions that should more appropriately be a part of the brief proper. Altogether, Sunbeam's reply brief more than triples the paginal limitation prescribed by our Rules and we find such excess, under the circumstances, to be unreasonable. For this reason, we shall not accept Sunbeam's brief. However, we will allow Sunbeam additional time after release of this Memorandum Opinion and Order within which to submit a new brief in accordance with our Rules. In view of this determination, the motion of Sunbeam for permission to respond to the pleadings of Community and the Bureau relating to the Sunbeam motion for leave to file a reply brief exceeding fifty pages shall be dismissed.

Accordingly, IT IS ORDERED, This 9th day of December, 1964, That the motion of Community Broadcasting Corporation for acceptance of its brief exceeding fifty pages, filed on October 9, 1964, IS GRANTED, and that said brief tendered therewith IS ACCEPTED;

IT IS FURTHER ORDERED, That the motion of Sunbeam Television Corporation (WCKT) for leave to file a reply brief in excess of fifty pages, filed on November 17, 1964, IS DENIED;

IT IS FURTHER ORDERED, on the Commission's own motion, that Sunbeam Television Corporation IS GRANTED TWO WEEKS from the release date of this Memorandum Opinion and Order within which to submit a new reply brief in accordance with our Rules;

IT IS FURTHER ORDERED, That the request of Sunbeam Television Corporation for authority to file a reply to the responses of its motion for leave to file a reply brief of more than fifty pages, filed on December 1, 1964, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64–1140

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>GEORGE E. CAMERON, JR., COMMUNICATIONS & BROADCASTERS OF BURBANK, INC., A PARTNERSHIP D.B.A. RADIO STATION KBLA (KBLA), BURBANK, CAL.<br>License: 1490 kc., 250 w., U<br>Has CP: 1500 kc., 10 kw., DA–2, U<br>Requests: 1500 kc., 1 kw., 10 kw.–LS, DA–2, U<br>For Construction Permit | File No. BP–16304 |
| GEORGE E. CAMERON, JR., COMMUNICATIONS & BROADCASTERS OF BURBANK, INC., A PARTNERSHIP D.B.A. RADIO STATION KBLA (KBLA), BURBANK, CAL.<br>For Modification of Construction Permit (BP–10321) as modified) for Extension of Completion Date | File No. BMP–11332 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING; COMMISSIONER LOEVINGER NOT PARTICIPATING.

1. The Commission has before it (a) the above-captioned and described applications; (b) a letter of August 24, 1964, from Hubbard Broadcasting, Inc. (KSTP), licensee of standard broadcast Station KSTP, St. Paul, Minnesota (1500kc, 50kw, DA–2, U, I–B; CP: 1500kc, 50kw, DA–N, U); (c) the applicant's response thereto filed on September 4, 1964; (d) a "Petition to Deny" filed on October 12, 1964, by KSTP; (e) the applicant's opposition to KSTP's petition filed on October 22, 1964; and (f) KSTP's reply to the applicant's opposition filed on November 3, 1964.

2. KSTP's letter of August 24, 1964, requested that the KBLA application for construction permit here under consideration be rejected and renews this request in its "Petition to Deny". Therefore, the letter and petition will be considered together. KSTP requests that the application for construction permit be dismissed or designated for hearing; that the application for extension of completion date be designated for hearing and that the licensee of KSTP be made a party to the proceeding. KSTP claims standing to oppose the proposed operation of KBLA, as it has on previous occasions [1], because of the objectionable interference which KSTP

[1] *Broadcasters of Burbank, Inc. (KBLA)*, 17 R.R. 746 (1958); *Radio Station KBLA (KBLA)*, 21 R.R. 913 (1961).

would likely suffer from the proposed nighttime operation of KBLA. KSTP continues to urge that, because of the rugged terrain surrounding the KBLA transmitter site and the mountain-top location of the site, the KBLA antenna could not be adjusted to provide the suppression required to protect KSTP from co-channel interference and that accurate measurements could not be taken in the rugged, mountainous terrain for a correct proof of performance which would establish the required suppression in the direction of KSTP.

3. KSTP has vigorously opposed KBLA's efforts to obtain authorizations to operate on 1500 kilocycles since 1956. 17 R.R. 746, 747. In every instance, KSTP has urged substantially the same grounds as those now urged. Both the Commission and KBLA recognized then, as now, that KBLA was faced with difficulties because of the nature of the terrain in the Burbank area. In view of those difficulties, the Commission imposed stringent conditions on KBLA to assure the operation of the station as proposed when it authorized construction looking toward operation on 1500 kilocycles. KBLA must establish that the conditions are fully met before the station is licensed to operate on 1500 kilocycles. The Commission has previously determined that the operation of KBLA on 1500 kilocycles with a power of 10 kilowatts would not cause objectionable nighttime interference to KSTP when KBLA establishes, in accordance with long-standing procedures, that the station has been constructed and capable of operation in accordance with the specifications contemplated by the application for construction permit. *Broadcasters of Burbank, Inc., Radio Station KBLA, supra.* KBLA now seeks authority to commence operation on the assigned frequency (1500 kilocycles) with a power of 10 kilowatts for daytime operation and one kilowatt for nighttime operation. KSTP now claims that the one-kilowatt nighttime operation "would likely" cause objectionable nighttime interference to KSTP as would the ten-kilowatt operation on speculative grounds substantially similar to those rejected by the Commission in 1958 and 1961. The short answer to KSTP's present objection is that, if KBLA is not able to file with its application for license the necessary data to establish that the proposed operation of KBLA will be in accordance with the proposal in the application for a construction permit, KBLA will not get a license. The Commission has previously determined that KSTP has not established that the proposed ten-kilowatt operation of KBLA, *as authorized,* will cause objectionable interference to KSTP. *A fortiori,* KSTP's speculative fears do not establish that the one-kilowatt nighttime operation of KBLA, *as proposed,* which does not increase radiation toward KSTP, would cause objectionable interference to KSTP. Therefore, KSTP again fails to establish that it has standing to object to the operation of KBLA as now proposed. The petition will therefore be dismissed.

4. KSTP asserts that KBLA's construction-permit application should not have been accepted because, it is alleged, the applicant represents a "gross violation" of Section 73.24(b)(3) of the

Rules. KBLA contends that Section 73.24(b) (3) is not applicable and that Section 73.24(b) (4) should apply.[2] Section 73.24 governs the showing required in support of a request for an authorization for a new standard broadcast station or increase in facilities of an existing station. The provisions of this section were not intended to apply to a situation where an applicant seeks authority to operate with a nighttime power less than that authorized where conditions under which the original authorization was accepted and granted are not being circumvented. It may reasonably be anticipated that a grant of the authorization here sought by KBLA will permit the early establishment of improved service by KBLA, and there is no provision of the rules to forbid it. This is particularly true since KSTP has failed to show that its authorization will prejudice any rights which KSTP may have.

5. KSTP charges the Commission with violating Section 1.520 [3] of its Rules in accepting the application for construction permit which specifies a nighttime power of one kilowatt and at the same time accepting an application for an extension of completion date to permit the continuation of the work on the proof of performance of the nighttime ten-kilowatt operation. KSTP misconceives the applicability of Section 1.520. KBLA requests no new or additional facilities by its pending applications. In order to establish an improved service by KBLA, it submitted an application specifying a nighttime power less than that presently authorized but otherwise specifying facilities for which it now holds a permit. The construction permit requests of "new or additional" facilities. The request for an extension of the completion date for the ten-kilowatt nighttime operation is only for the purpose of continuing the proof-of-performance required by the permit which KBLA now holds. Neither request involves "new or additional facilities". Therefore, the provisions of Section 1.520 do not prohibit the acceptance and consideration on the merits of KBLA's applications.

6. KSTP makes repeated reference to measurements in its petition and reply. It complains that KBLA has measurement data but has not submitted them in support of the proposed one-kilowatt operation. It alleges that KBLA has not submitted measurements to establish that the proposed operation would meet the requirements for nighttime service to Burbank. It claims that measurements are required to establish that adequate protection will be provided to KSTP's operation. It brands as unorthodox the suggestion that measurements will be submitted at a later

[2] The cited provisions of Section 73.24 are as follows:
"An authorization for a new standard broadcast station or increased facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

* * * * * * *

"(3) That a proposed new nighttime operation or change in frequency of an existing nighttime operation . . . would (i) not cause objectionable interference to any existing station (see § 73.180(o)); and (ii) provide a first primary AM service to at least 25 percent of the area within the proposed interference-free nighttime service area.
"(4) That a proposed change in nighttime facilities (other than a change in frequency) would not cause objectionable interference to any other station (see § 73.182(o))."

[3] Section 1.520 provides as follows:
"Multiple applications.
"Where there is one application for new or additional facilities pending, no other application for new or additional facilities, for a station of the same class to serve the same community, may be filed by the same applicant, or his successor or assignee, or on behalf or for the benefit of the original parties in interest. Multiple applications may not be filed simultaneously."

time. KSTP concedes in its reply to the applicant's opposition (paragraph 1):

> The outstanding construction permit held by KBLA includes conditions specifically designed to protect KSTP from objectionable electrical interference. The problems which led to the inclusion of such protective conditions still remain and must be resolved by KBLA.

KBLA's showing in support of its one-kilowatt nighttime proposal is in full accord with the requirements of Section V–A of FCC Form 301, and there is no occasion to submit measurements at this time. The application fully establishes that the coverage required by Section 73.188(b)(1) and (2) of the Rules would be met. As KSTP concedes, KBLA must establish by a satisfactory proof-of-performance that the proposed directional antenna array will operate as proposed. That proposal has been found adequate for full protection to the operation of KSTP. KBLA clearly indicates that the data which it has is that compiled to meet the requirements of the conditions set forth in the outstanding construction permit. The filing of that data will be required at the appropriate time. We must observe that KSTP's implication that the Commission's long-standing requirement that proof-of-performance data be submitted prior to the filing of an application for license is unorthodox procedure completely contrary to the Commission's Rules and the Communications Act of 1934, as amended, and a gross violation of KSTP's rights is, to say the least, novel. It has long been standard practice for the proof data to be submitted with the application for license and not before. Thus, we do not agree with KSTP that the established procedure is either unorthodox or that it places a greater burden on KSTP. The burden of proving the satisfactory operation of the authorized facilities is entirely upon KBLA.

7. With regard to the application for extension of completion date, the Commission finds it entirely reasonable to provide an additional period for meeting the conditions attached to KBLA's authorization in view of difficulties involved and with which KSTP is entirely aware. KBLA's outstanding authorization will therefore be extended for a period expiring on June 19, 1965, to permit KBLA to prove its ten-kilowatt full-time operation.

Accordingly, the Commission finds that the pleadings filed by Hubbard Broadcasting, Inc., raise no substantial or material questions of fact which would require a hearing and that the applicant is legally, technically, financially and otherwise qualified to construct and operate KBLA as proposed.

IT IS ORDERED, This 9th day of December, 1964, that pursuant to Section 309(d)(2) of the Communications Act of 1934, as amended, the above-captioned application of George E. Cameron, Jr., Communications and Broadcasters of Burbank, Inc., a Partnership d/b as Radio Station KBLA (File No. BP–16304) IS HEREBY GRANTED subject to the following conditions:

Existing antenna obstruction markings apply.

The installation of a properly designed phase monitor in the transmitter room as a means of continuously and correctly

indicating the amplitude and phase of currents in the several elements of the directional antenna system.

Field measuring equipment being available at all times and, after commencement of operation, the field intensity at each of the monitoring points being measured at least once every seven days and an appropriate record kept of all measurements so made.

A complete nondirectional proof of performance, in addition to the required proof on the directional antenna system, being submitted before program tests are authorized.

Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission Rules are not extended to this authorization, and such operation is precluded.

IT IS FURTHER ORDERED, That the application of George E. Cameron, Jr., Communications and Broadcasters of Burbank, Inc., a Partnership d/b as Radio Station KBLA for extension of completion date (File No. BMP–11332) IS HEREBY GRANTED to and including June 19, 1965.

IT IS FURTHER ORDERED, That the request of Hubbard Broadcasting, Inc., made in its letter of August 24, 1964, IS HEREBY DENIED and that the "Petition to Deny" filed by Hubbard Broadcasting, Inc., IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–554

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of | |
| WHDH, INC., BOSTON, MASS. | Docket No. 8739<br>File No. BPCT–248 |
| GREATER BOSTON TELEVISION CORP., BOSTON, MASS. | Docket No. 11070<br>File No. BPCT–1657 |
| For Construction Permits for New Television Stations (Channel 5) | |
| In Re Application of | |
| WHDH, INC. (WHDH–TV), BOSTON, MASS. | Docket No. 15204 |
| For Renewal of License | File No. BRCT–530 |
| CHARLES RIVER CIVIC TELEVISION, INC., BOSTON, MASS. | Docket No. 15205<br>File No. BPCT–3164 |
| BOSTON BROADCASTERS, INC., BOSTON, MASS. | Docket No. 15206<br>File No. BPCT–3170 |
| GREATER BOSTON TV CO., INC., BOSTON, MASS. | Docket No. 15207<br>File No. BPCT–3171 |
| For Construction Permits for New VHF Television Broadcast Stations | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it for consideration a petition, filed November 3, 1964, by Boston Broadcasters, Inc. (BBI), to reverse the rulings of the Hearing Examiner [1] made at the October 27, 1964, hearing session.

2. On November 18, 1963, Charles River Civic Television, Inc. filed a petition to add, among other issues, a legal qualifications issue as to WHDH, Inc. (WHDH). In Memorandum Opinion and Order (FCC 64R–128), released March 12, 1964, after noting that WHDH had filed FCC Form 303 for renewal of license, the unusual history of the proceeding, and that three new applications had been consolidated with that of WHDH, the Review Board stated that the "situation is more closely analogous to a hearing with all new applicants," and that WHDH could not be treated as

[1] Also before the Review Board are: (a) Opposition to petition to review adverse rulings of the Hearing Examiner, filed November 16, 1964, by WHDH, Inc.; (b) Comments of Charles River Civic Television, Inc. in support of Boston Broadcasters' petition to review adverse rulings of the Hearing Examiner, filed November 16, 1964; (c) Broadcast Bureau's Opposition to petition to review adverse ruling, filed November 16, 1964; (d) Motion to Strike Or For Other Relief, filed November 20, 1964, by WHDH, Inc.; (e) Reply to Oppositions to petition to review adverse rulings of the Hearing Examiner, filed November 27, 1964, by BBI; and (f) Motion to Strike or For Leave to File Answer to Reply, filed December 4, 1964, by WHDH, Inc. In light of the disposition of BBI's petition, there is no need to consider the motion to strike filed by WHDH, Inc., and said motions will, accordingly, be dismissed.

an ordinary renewal applicant. Accordingly, the following issue was added to these proceedings:

> To determine, with respect to the stockholders, directors, and officers of WHDH, Inc.'s parent corporation, the Boston Herald-Traveler Corp., the information required by Section II of FCC Form 301, and, in light of the evidence adduced, to determine whether WHDH, Inc., is legally qualified.

On June 3, 1964, WHDH submitted to the other parties in the proceedings its Exhibit 7 in response to the above-quoted issue.[2] Exhibit 7 contains information concerning the Boston Herald-Traveler Corp. which is pertinent to paragraphs 11 through 15 of Section II of Form 301, but it does not contain information concerning this corporation in response to Question 10 of said section.[3] The exhibit shows in a footnote at 7B–1 that Greater Boston Distributors, Inc. owns and has deposited 58,003 shares of Boston Herald-Traveler Corp. stock in a voting trust (which, according to the exhibit, consists of 64,565 shares of stock in the latter corporation); thus, Greater Boston Distributors, Inc. is equitable owner of more than ten percent of the stock of the Boston Herald-Traveler Corp. and is the largest single stockholder of said corporation. The exhibit gives no further information regarding Greater Boston Distributors, Inc. When the exhibit was admitted into evidence on October 27, 1964, BBI raised questions as to the failure of WHDH to supply answers to Question 10 with respect to the stockholders of its parent corporation, the Boston Herald-Traveler Corp., and as to its failure to supply full information concerning the officers, directors, and stockholders of Greater Boston Distributors, Inc. The Examiner thereupon ruled with respect to both questions that further information was not required of WHDH as part of its direct case in order to meet its burden of proof under the aforesaid issue (Tr. 11,361, 11,401, and 11,406–407).

3. BBI now asserts that the Review Board, by its Memorandum Opinion and Order of March 12, 1964, required that Question 10 of Section II of Form 301, must be answered with respect to the shareholders of the Boston Herald-Traveler Corp. because the issue in question really calls for the legal qualification of WHDH in light of the *individuals* and not the *corporations* controlling it. It further asserts that Question 15 of the aforesaid section requires further information concerning Greater Boston Distributors, Inc. Charles River Civic Television, Inc. supports BBI's petition on substantially similar grounds; WHDH and the Broadcast Bureau oppose said petition essentially on the ground that Exhibit 7 has complied with the wording of both the issue and the aforesaid section.

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[2] In a motion to clarify the aforesaid issue, filed July 31, 1964, BBI urged that the Review Board affirm that the issue requires the submission of information concerning the officers, directors, and stockholders of the Boston Herald-Traveler Corp. in response to Question 10 of Section II of Form 301. By Memorandum Opinion and Order (FCC 64R–480), released October 15, 1964, the Review Board held that there was, and would be, no occasion for a ruling by it on the question raised by BBI until WHDH's exhibits, in response to the issues in the proceeding, were submitted into evidence and accepted, and until the direct case of WHDH was a matter of record.

[3] Question 10 asks if the applicant or any party to the application has had a station license revoked by order or decree of any Federal Court or has been found guilty by a court of various enumerated violations of the law which primarily concern unlawful restraints of trade but also concern any felony or crime involving moral turpitude.

4. The wording of the issue added by the Review Board, when viewed with Section II of Form 301, does not support BBI's position. Since WHDH is controlled by the Boston Herald-Traveler Corp., Question 15(a) of aforesaid section—"Is applicant corporation, directly or indirectly, controlled by another corporation . . .?—would be answered in the affirmative; and therefore 15(c)[4] directs WHDH to submit a statement concerning the extent of such control, and with respect to the controlling corporation, a statement answering paragraphs 11 to 15, inclusive, and the information requested in Tables I and II. Thus, 15(c) specifically states what information is required of WHDH concerning the Boston Herald-Traveler Corp., and under it WHDH clearly is not required to respond to paragraph 10 with respect to said corporation.

5. In answering paragraphs 11 through 15 with regard to its parent, WHDH was not, by virtue of Question 15(b)—"Is 10 percent or more of the stock of the *applicant* corporation owned by another corporation. . .?" (Emphasis added)—required to respond to paragraph 15(c) (see footnote 4) with respect to Greater Boston Distributors, Inc. For 15(b) refers only to the stock of an applicant and not to that of an applicant's parent; if the language of 15(b) were construed otherwise, and if 15(c) were thus to be answered with respect to ten percent or greater shareholders of parent corporations, an applicant might be required to supply information concerning many holding companies which affect considerably less than one percent of the applicant's stock. Thus, 15(c) does not require as to shareholder-corporations, owning ten percent or more of an applicant's parent corporation, the same information it requires as to the parent itself. It is clear that WHDH has supplied the information called for by the aforesaid issue in light of Question 15.

Accordingly, IT IS ORDERED, This 9th day of December, 1964, That the petition to review adverse rulings of the Hearing Examiner, filed November 3, 1964, by Boston Broadcasters, Inc., IS DENIED, and that the motions to strike or for other relief, filed on November 20, 1964, and December 4, 1964, by WHDH, Inc., ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[4] Paragraph 15(c) states: "If the answer to any of the foregoing parts of this paragraph [15(a) and (b)] is 'Yes', state . . . the name of such other corporation . . ., and submit as Exhibit No. — (a) a statement of how such control, if any, exists and the extent thereof, and (b) with respect to such other corporation . . ., a statement answering paragraphs 11 to 15, inclusive and the information requested in Tables I and II of this section."

F.C.C. 64–1154

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
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| I. GULF COAST RADIO, INC. (ASSIGNOR); AND ROBERT D. SIDWELL, RECEIVER (ASSIGNEE) For Involuntary Assignment of License Station WTHR, Panama City Beach, Fla. | File No. BAL–4529 |
| II. ROBERT D. SIDWELL, RECEIVER (ASSIGNOR); AND RADIO GULF, INC. (ASSIGNEE) For Voluntary Assignment of License of Station WTHR, Panama City Beach, Fla. | File No. BAL–4652 |
| III. ROBERT D. SIDWELL, RECEIVER FOR GULF COAST RADIO, INC. For Renewal of License of Station WTHR, Panama City Beach, Fla. | File No. BR–3466 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING.

1. The Commission has before it for consideration: (a) the above-captioned applications; (b) a petition to deny the above application for involuntary assignment of license to Robert D. Sidwell, Receiver, filed on June 18, 1962 by WSCM Broadcasting, Inc., licensee of Station WSCM, Panama City Beach, Florida (hereinafter called WSCM or petitioner); (c) an opposition thereto filed on August 31, 1962 by the Receiver; and (d) petition to deny the above application for renewal of license filed on February 12, 1964 by WSCM.

2. Station WTHR ceased operation on April 5, 1962, for financial reasons. On April 9, 1962, the Circuit Court in and for the 14th Judicial Circuit, Bay County, Florida, appointed Robert D. Sidwell as Receiver in a mortgage foreclosure proceeding involving all the station property, for the purpose of making a preliminary survey and report to the Court. On May 7, 1962, the Receiver was authorized and ordered to take charge of and preserve all the corporate property and assets, and to act "with all other usual powers and duties of a Receiver". The Receiver was also ordered and authorized to take necessary action to have the station license assigned to him, and to place the station in operation if possible, all subject to the approval and consent of the Commission. Pursuant to this authority, the Receiver on May 15, 1962, filed the above application for involuntary assignment of license to him.

3. In its petition to deny the involuntary assignment application, WSCM claimed standing on the ground that it competed with WTHR for revenues, listeners and program service, and requested that the application be designated for hearing to determine (1) whether a grant would be consistent with the overlap provisions of Section 73.35 (a) and (b) of the Commissions Rules since the Receiver was the owner of Station WJOE, Port Saint Joe, Florida, and the two stations would have an overlap of the 0.5 mv/m contours; (2) whether the Receiver was financially and technically qualified and whether the proposed programs would serve the public interest; and (3) whether there was a reasonable likelihood that the Receiver would operate the station in a profitable manner, and, if not, whether the service of WTHR to the public would be impaired. In his opposition, the Receiver contended that WSCM had no right under Section 309 (c) (2) (B) of the Communications Act and Section 1.359 (a) (2) (now Section 1.580 (a) (2)) of the Commission's Rules to file a pre-grant objection to an application for involuntary assignment since such applications are specifically exempted from the pre-grant procedures providing for petitions to deny; (2) that the Receiver did not plan to place the station in operation and operate it and, therefore, the questions relating to his financial, technical and programming qualifications and the question of overlap were irrelevant; and (3) that the assignment of license was requested to protect creditor rights pursuant to Court order. On November 2, 1962, the Receiver filed the above application for voluntary assignment of license to Radio Gulf, Inc., a new Florida corporation, whose principals purchased all the physical assets of the station from the successful bidder at a foreclosure sale and were granted title by Court Order of September 22, 1962. WSCM did not file a petition to deny the voluntary assignment application.

4. Since Section 309 (c) (2) (B) of the Act and Section 1.580 (a) (2) of the Commissions Rules [1] expressly except involuntary assignment applications from those applications against which petitions to deny may be filed, WSCM's petition to deny the above application for involuntary assignment of the WTHR license must be dismissed. The questions raised concerning the Receiver's financial, technical and programming qualifications and the question of overlap require no detailed consideration in any event since the Receiver has not operated the station and does not propose to operate it. The grant of a license to a Receiver by its very nature is a temporary measure, and in this case the license is being simultaneously reassigned to the ultimate assignee who has been found to be legally, technically, financially and otherwise qualified to be a licensee.

5. The WTHR license had an expiration date of February 1, 1964, but an application for renewal thereof was timely filed by the Re-

[1] Section 1.580 of the Commissions Rules which implements Section 309 of the Act provides as follows:

"Sec. 1.580 *Local notice of filing; public notice of acceptance for filing; petitions to deny.*

"(a) All applications for instruments of authorization in the broadcast service . . . are subject to the provisions of this section except applications for:

* * * * * * *

"(2) consent to an involuntary assignment or transfer under section 310 (b) of the Communications Act of 1934, as amended . . .".

ceiver on December 31, 1963. With regard to the financial, technical and program information required by the renewal application, appropriate references were made therein to the information on file in the above voluntary assignment application which contained detailed data concerning the proposed licensee's legal, technical, financial and programming qualifications. In accordance with our policy regarding renewal applications filed by receivers and trustees, action on the application for renewal of license was deferred until the qualifications of the proposed licensee could be considered.[2] In its petition to deny the renewal application, WSCM claimed standing as a party in interest on the ground of competition and contended that the application was defective because it had not been signed by an officer of the licensee corporation. WSCM also urged that the renewal should be denied so that the facilities could be made available for disposition in accordance with the new rules proposed in Docket No. 15084 regarding AM station assignment standards. Additionally, it requested that in any hearing on the renewal application, the Commission permit inquiry into the extent to which WTHR has operated in the past and the need for the proposed service. WSCM did not claim that the Panama City Beach area could not support an additional station or that WSCM's program service would be curtailed in any respect detrimental to the public interest, or otherwise, as the result of the resumption of operation of WTHR.

6. In view of the fact that the Receiver was authorized to act with all the usual powers and duties of a receiver and was specifically charged with the duty of preserving the assets and perfecting assignment of the license, we hold that he had adequate legal authority to execute and file the application for renewal of station license. We cannot accept the suggestion that the renewal application should be denied so that the facilities could be made available for disposition in accordance with our new AM station assignment standards (FCC 64–609). These new standards were not designed to apply to authorized facilities. Based on a careful review of all of WSCM's allegations and requests, we are of the view that it has advanced no valid reasons requiring or justifying designation of the renewal application for hearing.

7. WSCM did not file a petition to deny the above application for voluntary assignment of license from the Receiver to Radio Gulf, Inc., and no substantial or material questions of fact concerning it have been raised. We have, however, carefully examined and considered the application and all relevant factors in order to make our public interest determination. We find that the proposed licensee is legally, technically, financially and otherwise qualified to be a licensee and that a grant of the application would serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, That the petition of WSCM Broadcasting, Inc., to deny the involuntary assignment of license of WTHR to the Receiver IS DISMISSED; that the petition of WSCM Broadcasting, Inc., to deny the WTHR renewal application IS DENIED and the above-captioned applications for assignment

[2] See Memorandum Opinion and Order, in re *Harry Wallerstein, Receiver (KSHO-TV)*, FCC 64–899, released October 1, 1964.

of license and renewal of license ARE GRANTED with the renewal subject to the condition that the assignment be consummated within 20 days and the station placed in operation within 90 days and that equipment performance measurements be prepared and submitted within 30 days after commencement of operation.

Adopted December 16, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 64R–570

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of<br>REVOCATION OF LICENSE OF RADIO STATION WTIF, INC.<br>For Standard Broadcast Station WTIF<br>Tifton, Ga. | Docket No. 15176 |
| In Re Applications of<br>WDMG, INC.<br>For Renewal of License of Standard Broadcast Station WDMG, Douglas, Ga. | Docket No. 15177<br>File No. BR–1709 |
| WMEN, INC.<br>For Renewal of License of Standard Broadcast Station WMEN, Tallahassee, Fla. | Docket No. 15274<br>File No. BR–3030 |
| B. F. J. TIMM, JACKSONVILLE, FLA.<br>For Construction Permit | Docket No. 15275<br>File No. BP–13649 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER BERKMEYER CONCURRING AND ISSUING A STATEMENT; BOARD MEMBER NELSON NOT PARTICIPATING.

1. B. F. J. Timm and WDMG, Inc. (Timm) appeal to the Review Board [1] from the Hearing Examiner's Order of October 14, 1964, on the hearing record (Tr. 2131–32) pursuant to Section 1.353 of the Rules [2] that Timm produce:

those portions of the profit and loss statements, balance sheets, auditors' work sheets, minute books, books of account, payroll records, capital account books and corporate income tax returns of WDMG, Inc., for the years of 1955 to 1962, inclusive; and the personal income tax returns of B.F.J. Timm and Beth L. Timm for the years of 1953[3] to 1962 which show their salaries, commissions, bonuses, directors' fees, dividends and other forms of compensation received, as an officer, director, stockholder, employee or personally during the aforesaid years from WDMG, Inc.

2. The background of this proceeding, which involves revocation of the license of Station WTIF, Tifton, Georgia; renewal applications of Stations WDMG, Douglas, Georgia, and WMEN, Talla-

[1] Before the Review Board are: petition for review of Hearing Examiner's adverse ruling, filed October 21, 1964, by B.F.J. Timm and WDMG, Inc.; opposition, filed October 30, 1964, by the Broadcast Bureau; reply, filed November 9, 1964, by Timm.

[2] Section 1.353 reads: "At any stage of a hearing, the presiding officer may call for further evidence upon any issue and may require such evidence to be submitted by any party to the proceeding."

[3] Transcript reads "1963", which is obviously an error. Presumably 1953 was intended, inasmuch as that is the year specified in the subpoena duces tecum referred to in paragraph 2 herein and the Bureau, in its opposition to the instant appeal, also specifies 1953.

hassee, Florida; and application for a construction permit for a new standard broadcast station at Jacksonville, Florida, appears in some detail in *Radio Station WTIF, Inc.*, FCC 64R–434, 3 RR 2d 585, released August 21, 1964. That Memorandum Opinion and Order granted Timm's appeal from an adverse ruling of the Hearing Examiner on Timm's motion to quash a subpoena duces tecum requested by the Broadcast Bureau, which read exactly like the instant order (quoted *supra*, para. 1) except that the initial words "Those portions of," did not appear. In granting Timm's appeal, the Board concluded that the Bureau's request was lacking in specificity, and that much of the material sought by the Bureau was not shown to be relevant to the hearing issues. The Board also pointed out that its ruling did not foreclose the Bureau from making further requests for subpoenas duces tecum which meet the requirements of the Commission's rule (Section 1.333(b) of the Rules) governing the issuance of such subpoenas.

3. Instead of filing with the Hearing Examiner a new request for a subpoena duces tecum, the Bureau filed with the Hearing Examiner a memorandum requesting him to issue, pursuant to his authority under Section 1.353 of the Rules, the Order quoted in paragraph 1 herein. The Bureau's memorandum was apparently not made a part of the record. In granting the Bureau's request, the Examiner ruled as follows (Tr. 2134):

> As I think I stated several times in this and other cases, the powers of the Examiner are extremely limited. I don't believe this rule is as broad as it may sound, because it presupposes on the part of the Examiner a knowledge of what the evidence is or at least an exact definition of the items requested.
>
> In view of the fact, however, that [Bureau counsel] has been specific in this memorandum, I hereby direct the respondents to produce the same. I cannot make any guarantee of protection of any kind. I am making this ruling, among other reasons, to find out just what the law is—how far I can go. I am sure it will be appealed. And we will all be happy to know how to act in the future.

4. The Bureau contends that the addition of the words "those portions of" to the original subpoena duces tecum serves to achieve the specificity found by the Board to be lacking in the original subpoena duces tecum. It also contends that the Examiner's authority under Section 1.353 of the Rules is in no way limited by the provisions of the rules governing the issuance of subpoenas duces tecum. The appellants, on the other hand, contend that the Hearing Examiner does not have the authority to require, at the request of a party to the proceeding, the production of documents; they submit that the subpoena procedure specified in Section 1.333 of the Rules must be followed by any party desiring the production of documents by another party to the proceeding.

5. The order which the Hearing Examiner issued at the Bureau's request is too imprecise to permit a determination as to whether it limits the production of information which is relevant to the hearing issues. It is noted that the order, like the original subpoena, is divided by a single semi-colon, and it is therefore unclear whether the addition of the words "those portions of" serves to restrict the corporate records to be produced to those which show what has been paid to the Timms. It is likewise unclear whether the words "those portions of" are intended to limit the informa-

tion to be made available from Timm's income tax returns, or whether the entire income tax returns are to be made available. Hence, the problems of relevance and lack of specificity remain, and the shortcomings of the original subpoena duces tecum are compounded by the introduction of a substantial element of uncertainty as to the scope of the order.

6. Had the language of the Examiner's order been incorporated in a subpoena duces tecum, the defects noted in the preceding paragraph would require that such subpoena be set aside. The Bureau argues, however, that Section 1.353 of the Rules must be interpreted independent of the rules governing the issuance of subpoenas. We agree with this position to the extent that the Examiner's authority under Section 1.353 is not limited by the procedural requirements of Section 1.333 of the Rules governing the issuance of subpoenas duces tecum, e.g., that requests must be in writing, etc.[4] We are not, however, of the view that the Hearing Examiner's authority under Section 1.353 of the Rules is co-extensive with the literal terms of that rule and not subject to limitations of reasonableness such as those governing the issuance of subpoenas duces tecum. This rule does not authorize the Examiner to act unreasonably, e.g., to require the production of evidence which is not relevant to the hearing issues, or which is merely cumulative, nor can it be construed as permitting the Examiner to issue an order under this rule which would be unduly burdensome on the person against whom it is directed, or which is so lacking in clarity as to create uncertainty as to what evidence is to be produced. Nor do we think that this rule is intended to vest in the Examiner the authority to use it as an investigatory tool and undertake a "fishing expedition". The very Commission action [5] which the Bureau mistakenly relies upon in support of its position illustrates that any action upon the part of the Examiner under Section 1.353 is subject to the general requirement of reasonableness.

7. In view of the inherent, though unstated, limitations upon the Examiner's authority under Section 1.353 of the Rules, the instant appeal will be granted and the Examiner's order set aside. As pointed out above, the Examiner's order suffers from the same defects as the subpoena duces tecum which the Board previously quashed, and, as also pointed out above, the addition of the words "those portions of" not only does not cure these defects but creates uncertainty as to the scope of the order.

8. The Hearing Examiner did not explain the factual basis for his order, either on the record or in a formal Memorandum Opinion and Order. When an Examiner orders the production of documents, either on his own motion or upon the request of the parties, and objections to the order are raised either by the proponent of the order, or by the person against whom the order is issued or by any other party to the proceeding, the Examiner should, either on the hearing record or in a formal Memorandum Opinion and Order,

[4] The appellants' argument that the Examiner may not, at the request of a party to the proceeding, exercise the authority delegated to him by Section 1.333 is without merit. Whether this authority is exercised by the Examiner pursuant to his own motion, or following a request by one of the parties, is immaterial; in either case, it is for the Examiner to determine whether additional evidence or testimony is necessary.

[5] *Times-World Corp.*, 11 RR 334 (1957).

explain the factual and legal basis for his action and also resolve the objections raised to the order. In this connection, see *Triangle Publications, Inc.*, FCC 62M–775, 23 RR 817, as an illustration of an Examiner's careful explanation of the reasons underlying his disposition of a request for an order to produce documents. It has been the practice of the Commission, in ruling on appeals from Examiner's Orders requiring the production of documents, to give careful consideration to the arguments of the parties and to explain its ultimate ruling on appeal. See *Times-World Corp., supra.* This same practice should be followed by Examiners. Strict adherence by Examiners to such practice might well serve to eliminate appeals, or limit their scope, and would serve to sharpen the factual and legal issues in the event an appeal is taken from their orders.

Accordingly, IT IS ORDERED, This 28th day of December, 1964, That the petition for review of Hearing Examiner's adverse ruling, filed October 21, 1964, by B. F. J. Timm and WDMG, Inc., IS GRANTED; and

IT IS FURTHER ORDERED, That the Hearing Examiner's Order of October 14, 1964, that B. F. J. Timm, and WDMG, Inc., produce various documents relating to corporate and general finances, IS SET ASIDE.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF BOARD MEMBER BERKEMEYER

I concur in the result, for I am not convinced that 1.353 and 1.333 are alternative means of securing the production of specific items of documentary evidence. Section 1.353 empowers the Examiner to "call for further evidence" but it does not empower him to specify what the items of that evidence will be. *Times-World Corp.*, cited by the majority, does not hold otherwise for the Examiner's order there in question apparently did not order the production of designated documents as the means for supplying additional information. Moreover, it is not clear to me that the Examiner's action in that case was taken pursuant to Section 1.353. While the distinction I draw may be a narrow one, it seems to me to be essential if confusion in the application of the two rules is to be avoided. If a party wishes to obtain the production of documents, the route designated by Section 1.333 is the one to follow.

F.C.C. 64–1162

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of WEST MICHIGAN TELECASTERS, INC., GRAND RAPIDS, MICH. For License and Request for Program Test Authority | File No. BLCT–1364 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS LEE AND COX NOT PARTICIPATING; COMMISSIONER FORD ABSENT.

1. The Commission has before it for consideration the above-captioned application of West Michigan Telecasters, Inc., for a license to cover construction permit (BPCT–2956) granted April 22, 1964, (Docket No. 14469), applicant's request for program test authority, and various pleadings filed in connection therewith.[1]

2. A brief summary of the history of this proceeding may be helpful in placing our decision in this matter in proper perspective. West Michigan Telecasters, Inc. (WMT), MKO Broadcasting Corporation (MKO), Grand Broadcasting Company (Grand), and the Peninsular Broadcasting Company (Peninsular) filed mutually exclusive applications for a construction permit for a new television broadcast station to operate on Channel 13 Grand Rapids, Michigan. The four applications were designated for comparative hearing and the applicants formed a corporation, Channel 13 Grand Rapids, Inc., for the purpose of applying for authority to construct and operate an interim station. On July 25, 1962, the Commission granted the application (BPCTI–4) of the interim corporation for a construction permit, but the construction permit was made subject to the condition:

> That any operation authorized pursuant to the construction permit will terminate when the successful applicant in the comparative hearing in Docket No. 14407 *et al.*, for Channel 13, Grand Rapids, commences operation under the terms of a regular authorization.

Construction of the interim station was completed on October 31, 1962, and the interim permittee filed an application (BLCTI–3) for a license to cover the construction permit. On November 21, 1962, the Commission granted program test authority to the in-

[1] The Commission also has before it for consideration: (a) Motion to Dismiss Applications, filed May 15, 1964, by MKO Broadcasting Corporation; (b) Motion to Dismiss or Return License Application, filed May 18, 1964, by Grand Broadcasting Company; (c) Opposition to Motions to Dismiss, filed May 21, 1964, by West Michigan Telecasters, Inc., against (a) and (b), above; (d) Statement, filed May 27, 1964, by Channel 13 Grand Rapids, Inc.; (e) Reply, filed June 2, 1964, by Peninsular Broadcasting Company, against (c), above; (f) Reply, filed June 1, 1964, by MKO to (c), above; (g) Reply, filed June 1, 1964, by Grand, to (c), above; and (h), Comment, filed June 8, 1964, by West Michigan. Pleadings filed in opposition to a grant of the application were also directed against grant of program test authority.

terim permittee. The station began operation and has operated continuously since that time pursuant to the program test authority. The call letters WZZM–TV were assigned to the interim station.

3. After an extensive comparative hearing, the Commission, on April 22, 1964, granted the application of West Michigan Telecasters, Inc. (FCC 64–348, 36 FCC 925, Docket No. 14469). The three unsuccessful applicants thereupon filed petitions for reconsideration and the Commission, by Memorandum Opinion and Order released October 29, 1964 (FCC 64–986, 37 FCC 803), denied reconsideration. On May 6, 1964, WMT filed the above-captioned application for a license and request for program test authority. Petitioners, on November 27, 1964, filed appeals in the United States Court of Appeals for the District of Columbia Circuit (Case Nos. 19,026, 19,027, and 19,032) from the Commission's action granting the WMT application. They also petitioned the Commission for a stay of the Commission's grant, pending resolution of the Court proceedings. By Memorandum Opinion and Order released December 10, 1964 (FCC 64–1132), the Commission denied the stay [2].

4. Petitioners, in this proceeding, oppose a grant of program test authority and a grant of the license application. With the exception of permanent main studios in Grand Rapids, the facility is complete and conforms to the specifications in WMT's construction permit. WMT has promised to begin early construction of permanent main studios in Grand Rapids and auxiliary studios in Muskegon, Michigan. The essence of the dispute is the question of when and how the successful applicant will take over the assets and physical facilities of the interim corporation and commence operation of the station pursuant to the construction permit granted to the applicant. The parties disagree as to the interpretation of the interim agreement under which the interim corporation was formed and the station operated, the petitioners contending that WMT is not entitled to assume operation of the station until a "regular authorization" has been issued to it and the court appeal resolved. Petitioners assert that, until WMT has completed construction of its permanent studios, construction of the station is not complete and program test authority may not be granted. WMT, however, insists that it is entitled to take over the operation of the station immediately, including the interim studios, until permanent studio facilities can be built.

5. There is no authority conferred by the Communications Act of 1934, as amended, or the Commission's Rules, to file pleadings in opposition to a grant of a license application. Section 309(c) of the Communications Act and Section 1.580(a)(3) of the Commission's Rules expressly except license applications from the provisions of the law which permit the filing of petitions to deny, and Section 1.587 of the Commission's Rules makes a similar exception in connection with informal objections. These petitions must fail, therefore, for lack of any right of the petitioners to file them. We

[2] Petitioners, in connection with their request for stay, filed a "Reply to Oppositions to Petition for Stay" on November 24, 1964. Paragraphs 23 and 24 of this document are addressed to applicant's request for operating authority with which we are here concerned. No matters are raised therein which are not contained in pleadings filed in this proceeding directed specifically to the applicant's request for program test authority.

will, nevertheless, consider the matters raised by the petitioners on the merits, because we believe that the questions thus raised require immediate resolution.

6. Whatever may be the proper interpretation of the provisions of the interim agreement, our decision in this matter must rest on considerations of public interest. WMT is the successful applicant for Channel 13, Grand Rapids, Michigan, and in making a grant, the Commission found the applicant to be fully qualified to construct, own and operate the proposed television broadcast station and that a grant of the application would serve the public interest, convenience, and necessity. The action granting the WMT application was a final action of the Commission. The petitioners have been accorded all of the rights to which they are entitled under law, including a full evidentiary hearing, Commission consideration of their petitions for reconsideration, and Commission consideration of their requests for a stay. As a permittee, WMT is entitled to request and, upon a showing that it has complied with the requirements of Section 73.629 of the Commission's Rules [3], to receive program test authority. The interim studios are available and presently in use and the permittee has promised to construct permanent studios expeditiously. In any situation where an interim operation has been authorized, it is understood that the successful applicant may not have available to it permanent studios from which it may begin to broadcast immediately upon grant of its construction permit. Where, as here, studios are available for use so that the permittee is, in fact, prepared to commence broadcasting upon grant of a regular authorization, i.e., program test authority, we consider construction complete in accordance with the terms of the construction permit. The location of main studios at a specific address is not an essential part of the construction permit, the sole requirement of the Rules with respect to main studios being that they be located within the corporate limits of the principal community [4]. Permittees or licensees may change main studio location at will and the Rules do not require that they secure Commission approval, so long as the new location is within the corporate limits of the principal community. Furthermore, it is not uncommon for the Commission to grant a construction permit to an applicant who proposed to construct studios within the limits of its principal community at a location "to be determined". Accordingly, for the purposes of program test authority, we believe that it is sufficient that studios

[3] Section 73.629(a) provides:
"Upon completion of construction of a television broadcast station in accordance with the terms of the construction permit, the technical provisions of the application therefor, and the rules and regulations, and when an application for station license has been filed showing the station to be in satisfactory operating condition, the permittee may request authority to conduct program tests: *Provided*, That such request shall be filed with the Commission at least ten (10) days prior to the date on which it is desired to begin such operation and that the Engineer in Charge of the radio district in which the station is located is notified. (All data necessary to show compliance with the terms and conditions of the construction permit must be filed with the license application.)"

[4] Section 73.613(a) provides:
"The main studio of a television broadcast station shall be located in the principal community to be served. Where the principal community to be served is a city, town, village or other political subdivision, the main studio shall be located within the corporate boundaries of such city, town, village or other political subdivision. Where the principal community to be served does not have specifically defined political boundaries, applications will be considered on a case-to-case basis in the light of the particular facts involved to determine whether the main studio is located within the principal community to be served."

are available for the permittee's use within the principal community, and we find no reason to withhold such authority because these studios are not permanent. The authorization of an interim operation to competing applicants envisions the termination of the interim operation and the assumption of operation by the successful applicant upon grant of "regular" operating authority. This was the explicit purpose of the condition attached to the grant of the interim construction permit. We think that it is clear that the permittee is now entitled to commence operation of the station pursuant to such operating authority.

7. Finally, the petitioners' argument that the grant of authority to WMT to commence sole operation of Station WZZM–TV would prejudice the outcome of their appeal was fully considered when we denied stay [5]. We there said, "The administrative proceedings have been concluded and the possible commencement or the pendency of a judicial review proceeding has not been considered a sufficient reason for staying the Commission's decision in these circumstances." By the same token, the pendency of judicial review proceedings does not constitute sufficient reason to withhold grant of operating authority to a qualified permittee and we, therefore, again reject petitioners' argument. We conclude that petitioners have not shown any valid reason why we should not grant WMT the operating authority it seeks, and we will, therefore, grant program test authority and terminate the program test authority which we granted to the interim corporation, consistent with the conditions of the grant. We believe that a reasonable time should be permitted for the interim corporation to terminate operation of Station WZZM–TV under the program test authority granted to it and for this purpose, we consider thirty days adequate. We think it appropriate, however, in view of WMT's expressed undertaking to construct its permanent main studios immediately, to withhold grant of the license application pending completion of such studios.

Accordingly, IT IS ORDERED, That the pleadings filed herein by MKO Broadcasting Corporation, Grand Broadcasting Company, and Peninsular Broadcasting Company, ARE DISMISSED.

IT IS FURTHER ORDERED, That, action on the above-captioned license application of West Michigan Telecasters, Inc., BE WITHHELD.

IT IS FURTHER ORDERED, That, pursuant to the provisions of Section 73.629(a) of the Commission's Rules, PROGRAM TEST AUTHORITY IS HEREBY GRANTED to West Michigan Telecasters, Inc., effective January 18, 1965.

IT IS FURTHER ORDERED, That, consistent with the conditions of the grant to Channel 13 Grand Rapids, Inc., and effective 3:00 A.M., January 18, 1965, the program test authority granted to Channel 13 Grand Rapids, Inc., IS TERMINATED.

Adopted December 16, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[5] *Grand Broadcasting Company et al.*, FCC 64–1132, released December 10, 1964.

F.C.C. 64–1160

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of ROCK RIVER TELEVISION CORP., FREEPORT, ILL. For Construction Permit for New Television Broadcast Station | File No. BPCT–3395 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration a "Petition to Delete Construction Permit", filed November 13, 1964, by Triad Stations, Inc., licensee of Standard Radio Broadcast Station WFRL, Freeport, Illinois, requesting reconsideration of the final action of the Commission, by the Chief, Broadcast Bureau, pursuant to delegated authority, granting the above-captioned application for a construction permit for a new television broadcast station to operate on Channel 23, Freeport, Illinois. On November 25, 1964, the permittee filed a letter in response to the "petition", urging the Commission to dismiss the "petition". On December 8, 1964, petitioner filed a letter in response to the permittee's letter of November 25, 1964. The application was filed July 16, 1964, and was granted October 12, 1964.

2. Public notice of the grant of the application was issued by the Commission on October 13, 1964 (Report No. 5260, Mimeo #58176) and petitioner's pleading was filed November 13, 1964, thirty-one days after public notice was given by the Commission. Section 405 of the Communications Act provides, in pertinent part, that:

> A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.

It is apparent, therefore, that the "petition" was not timely filed.

3. Furthermore, the petitioner filed no pre-grant objection to the application; it has not stated with particularity the manner in which it is aggrieved nor has it shown good reason why it was not possible for it to participate in the earlier stages of the proceeding, as required by Section 1.106(b) of the Commission's Rules. The application was on file nearly three months during which time the petitioner could have made known any objections it might have had. The only reason now offered by the petitioner for its failure is that "Triad did not expect the Commission to grant this applica-

tion with the 'Move Petition'[1] pending (RM–515) and Docket No. 14229 also pending." Persons who speculate as to the time when an application may be acted upon by the Commission do so at their peril and we think that it is abundantly clear that the petitioner's statement does not constitute the showing of good reason which our Rules require. The petition is, therefore, fatally defective [2].

In view of the foregoing, IT IS ORDERED, That the "Petition to Delete Construction Permit", filed herein by Triad Stations, Inc., IS DISMISSED.

Adopted December 18, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[1] A petition for Rule Making (RM-515) was filed October 28, 1963, by Rock River Television Corporation "to move" Channel 23 from Freeport, Illinois, to Rockford, Illinois, and to allocate Channel 51 to Freeport in lieu of Channel 23. The Commission, in its "Further Notice of Proposed Rule Making" in Docket No. 14229 (FCC 63–975, released October 28, 1963), indicated that such petitions would be considered as comments in the pending proceeding in Docket No. 14229. Docket No. 14229 proposed no change in the allocation of Channel 23 to Freeport.

[2] *Millers River Translators, Inc.*, FCC 63–504, 25 RR 516; affirmed *sub nom Springfield Television Broadcasting Corporation* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 328 F. 2d 186, 1 RR 2d 2083; *Valley Telecasting Co., Inc.* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 336 F. 2d 914, 2 RR 2d 2064.

F.C.C. 65R–21

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| FREDERICK B. LIVINGSTON AND THOMAS L. DAVIS D.B.A. CHICAGOLAND TV CO., CHICAGO, ILL. | Docket No. 15668<br>File No. BPCT–3116 |
| WARNER BROS. PICTURES, INC., CHICAGO, ILL. | Docket No. 15669<br>File No. BPCT–3271 |
| CHICAGO FEDERATION OF LABOR AND INDUSTRIAL UNION COUNCIL, CHICAGO, ILL. | Docket No. 15708<br>File No. BPCT–3439 |
| For Construction Permit for New Television Broadcast Station | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Chicago Federation of Labor and Industrial Union Council (WCFL) petitions the Review Board to enlarge issues in this comparative proceeding to include five issues with respect to Frederick B. Livingston and Thomas L. Davis, d/b as Chicagoland TV Company (Chicagoland) and two issues with respect to Warner Bros. Pictures, Inc. (Warner Bros.).[1]

2. The mutually-exclusive applications of Kaiser Industries Corporation,[2] Chicagoland, and Warner Bros., which requested a construction permit for a new UHF television broadcast station to operate on Channel 38, Chicago, Illinois, were originally designated for hearing by the Commission in an Order (FCC 64–961), released October 23, 1964. The designation Order specified issues which included: (1) a determination of whether Kaiser and Warner Bros. are, or can be, authorized to do business in the State of Illinois; (2) a determination of whether a grant of the Warner Bros. application would be consistent with Section 310(a) (4) of the Communications Act and with Section 73.636 of the Commission's Rules; (3) a determination of whether Warner Bros. has the requisite qualifications to be a broadcast licensee in light of its past conduct; and (4) the standard comparative issue. In a subsequent Order (FCC 64–1076)), released November 20, 1964, the Commission again designated the aforementioned applications but included the application of Chicago Federation of Labor and Industrial Union Council (WCFL). The Commission noted therein that

[1] The pleadings before the Review Board include: (1) Petition to enlarge issues, filed November 12, 1964, by WCFL; (2) Opposition, filed November 25, 1964, by Warner Bros.; (3) Opposition, filed November 25, 1964, by Chicagoland; (4) Comments, filed November 25, 1964, by the Broadcast Bureau; (5) Petition for leave to file reply comments, filed December 7, 1964, by Chicagoland; (6) Reply to (4), filed December 7, 1964, by Chicagoland; and (7) Comments on (5), filed December 16, 1964, by the Broadcast Bureau.

[2] The application of Kaiser Industries Corporation was dismissed by the Hearing Examiner in a Memorandum Opinion and Order (FCC 64M–1278), released December 23, 1964.

the WCFL application was substantially complete and accepted for filing on the day preceding the date on which the prior applications were designated for hearing and that it therefore was entitled to comparative consideration therewith.[3] The Commission ordered that the specification of issues in the Order released November 20, 1964, superseded the prior specification of issues; however, the same issues were retained.

*Chicagoland Issues*

3. WCFL initially questions the financial qualifications of Chicagoland to construct and operate its proposed station. It specifically questions the ability of a Chicagoland partner, Thomas L. Davis, to meet his financial commitment to the partnership in the amount of $17,500. According to petitioner, Davis' balance sheet (as of September 30, 1962) indicates current liquid assets of only $12,400 (consisting of $4,400 in cash and $8,000 in "life insurance equity") and liabilities of $22,300. The liabilities are not shown to be non-current liabilities. WCFL challenges the availability and reliability of a first mortgage loan on Davis' residence on the grounds that the statement of a mortgage company to the effect that a savings and loan association will make such a loan is not a commitment and there is no showing that the Davis residence has a value in excess of (or even equal to) the amount of the present mortgage on the property. Petitioner also discounts the availability of an unsecured bank loan of $10,000 to Davis in the absence of any indication of established bank credit and in the light of the proposed increased mortgage. Chicagoland, in its opposition, submits Davis' revised balance sheet (as of November 25, 1964) which lists current assets of $4,550 in cash, $1,850 in war bonds (face value) and $9,800 in life insurance equity and current liabilities of $1,800 (current bills and insurance loan). In addition to net current assets of $14,400, Chicagoland adequately demonstrates the availability of an unsecured $10,000 loan for six months (with renewals thereafter) with an attached statement of the Warrenville State Bank of Warrenville, Illinois. The loan is based on Davis' general credit standing alone and the bank expressly takes account of the proposed increase in Davis' mortgage. The Chicagoland opposition also includes a first mortgage loan commitment of $35,000 from Bell Savings and Loan Association of Chicago which will satisfy the present first mortgage and will also net an additional $17,000 in available funds. Thus, with a demonstrated total of over $41,000 in available funds, Davis satisfactorily supports his partnership commitment. Therefore, the Board will deny WCFL's request for a financial qualifications issue against Chicagoland.

4. Petitioner next requests an issue to determine whether Chicagoland has been candid with the Commission in respect to Davis' participation in the operations of the proposed station or has attempted to mislead and deceive the Commission in this regard. In

[3] On the date of filing the instant petition to enlarge issues, WCFL had not been designated a party to this proceeding although WCFL had filed a petition for leave to intervene. In view of the Commission's subsequent designation of the WCFL application for consolidated hearing in this proceeding, any objections concerning WCFL's status to file such a petition are now moot and the Board will consider said petition on the merits.

support, WCFL points to the Chicagoland application and to an attached partnership agreement of October 27, 1962, which provides that Davis shall devote full time to the proposed station as its General Manager. In contrast to this declaration, petitioner notes an amendment to the Chicagoland application, filed May 13, 1963, which shows that Davis has become a 50% partner in ownership of standard broadcast Station KLEE, Ottumwa, Iowa, and a vice-president of Corn Belt Publishers, Inc., licensee of standard broadcast Station WAAF, Chicago, Illinois. On the basis that the Chicagoland application has not been further amended to reflect how Davis can maintain these additional broadcast interests and still fulfill his commitment to the proposed station, petitioner makes its present request. As pointed out by the Broadcast Bureau, however, at the time of filing of the Chicagoland application, Davis was general manager of WAAF and that the cited amendment reflects his withdrawal from that capacity and his termination of two other broadcast interests. These changes in Davis' interests do not indicate an intent by Davis to evade his commitment to Chicagoland. Thus, we will deny petitioner's request for a misrepresentation issue.[4] We agree with the Bureau that in view of Davis' positive commitment to devote full time to the proposed station, together with the absence of any evidence that he does not intend, in the event of a grant, either to divest himself of his other broadcast interests or to make arrangements so that their demands would not interfere with his commitment, there is no basis for adding an issue as to candor.

5. WCFL also proposes the addition of an issue to determine whether Chicagoland "has provided adequate funds to construct and operate the proposed station for a reasonable period of time, and to give reasonable assurance of continued operation of the station." Petitioner contends that the Chicagoland application reflects a *prima facie* instance of an under-financed UHF proposal. Specifically, it is alleged that Chicagoland's initial expenses, before commencement of operations, will include the following:

| | |
|---|---|
| Miscellaneous: e.g., legal, engineering, furniture, and taxes | $30,000 |
| Remodeling | 20,000 |
| Downpayment to equipment manufacturer | 78,972 |
| Total | 128,972 |

With total initial costs of $128,972 and available funds of $235,000 ($35,000 partners' contributions and $200,000 loan), Chicagoland will have $107,000 working capital, according to petitioner.[5] Assuming annual operating costs of $250,000 and debt obligations of $79,229 per year plus interest of approximately $70,000 for the first year, WCFL contends that Chicagoland's fixed obligations will total $349,000 the first year, *before* depreciation.[6] With first year expenses of $349,000 and available funds of only $307,000 (con-

[4] In its opposition, Chicagoland states that Davis will give up some or all of his present interests. As both Chicagoland and the Bureau suggest, the question of Davis' ability to meet his partnership commitment can be explored at the hearing under the already-specified issues.

[5] These figures would indicate a working capital of approximately $106,000 rather than the figure arrived at by petitioner.

[6] Again, petitioner makes no attempt to explain an alleged figure which, according to its own estimates, should be much higher. It should be noted that WCFL also disputes Chicagoland's estimates of actual construction and operating costs. However, no factual allegations are made to support WCFL's claims in this regard.

sisting of $107,000 in working capital plus $200,000 in estimated revenues), WCFL claims that Chicagoland's station can be expected to achieve insolvency by about the eleventh month of operation.

6. The Broadcast Bureau states that Chicagoland's proposal satisfies present Commission financial requirements in that it has sufficient funds to construct and operate its station for an initial three month period without regard to expected revenues. However, the Bureau urges the Board to defer its ruling on the requested issue pending the Commission's determination of matters raised in a consolidated oral argument held before the Commission *en banc* on September 21, 1964, in Docket Nos. 15249, *et al.*, Docket Nos. 15254, *et al.*, and Docket Nos. 15323, *et al.* See Commission Order (FCC 64–828), released September 8, 1964. The Bureau recommends a new standard in cases where an applicant proposes a UHF television station in markets already having 3 or more commercial VHF stations. To determine the adequacy of available funds, the Bureau would require a showing of available funds, over and above the initial construction outlay, sufficient to provide operating capital for three months as well as to satisfy fixed installment payments and interest for one year, without consideration of expected revenues. The Bureau argues that Chicagoland fails to demonstrate adequate available funds under its proposed test.

7. The Board cannot agree with the Bureau's recommendation to defer final consideration of the instant request pending a Commission decision in regard to a new financial standard. To delay action on such a basis would not only disrupt those UHF applications now in hearing status, but would also be inconsistent with the Commission's finding that Chicagoland is financially qualified (the designation Order herein was released after the oral argument referred to above). Under these circumstances, the Board finds that Chicagoland adequately demonstrates the availability of $235,000 to meet the following initial costs of construction and operation:

| | |
|---|---|
| Downpayment to equipment manufacturer | $78,972 |
| Remodeling expenses | 20,000 |
| Miscellaneous expenses | 30,000 |
| Operating costs (3 months) | 62,500 |
| Approximate installment payment to equipment manufacturer plus interest (3 months) | 18,300 |
| | [7]209,772 |

In view of the Board's denial of the requested issue, Chicagoland's petition for leave to file a reply to the Bureau's comments and the reply, itself, will be dismissed.[8] The Bureau's related pleading, filed December 16, 1964, will also be dismissed.

8. WCFL next requests the addition of the following issue:

[7] According to the Chicagoland application, a partner, Frederick B. Livingston, has agreed to lend the partnership an amount up to $200,000 to construct and operate its proposed station. The loan would be for a five-year period with interest payable annually on the outstanding balance and calculated at current bank rates. Since the application is silent concerning the commencement of installment payments, such a figure has not been included in initial expenses; however, the Board would not expect such a figure to rise above $15,000 for a three-month period.

[8] In this reply, Chicagoland opposed the Bureau's suggestions and also attempted to demonstrate additional available funds to meet the Bureau's proposed financial standard. In the event the Bureau's standard is adopted by the Commission, Chicagoland would have an opportunity to amend its application to reflect increased funds available for its proposal.

To determine whether Frederick B. Livingston and Thomas L. Davis, d/b as Chicagoland TV have provided adequate funds, studios and equipment and an adequate staff to effectuate its program proposals.

In support of this issue, petitioner points to the Chicagoland proposal to devote 54% (37 hours) of its weekly program time to local live originations with an engineering department of 9 people and a program department of 11 people. According to WCFL, the average Chicagoland broadcast day contemplates 5 hours and 15 minutes of live programming, some of which is "back-to-back" and which is to be accomplished in studios to be remodeled for $20,000 and with equipment of $84,000. Petitioner's only allegation in support of its request is that the amount of time and personnel required for the preparation of live productions raise serious questions as to the adequacy of Chicagoland's proposal. To the extent that WCFL requests an "Evansville" issue (sufficiency of funds to effectuate program proposals), such a request should be addressed to the Hearing Examiner and it will be dismissed by the Board. See *Ultravision Broadcasting Company,* FCC 64R–192, 2 RR 2d 277 (1964). The remaining portion of the requested issue will not be added, since petitioner introduces no specific factual allegations to show how Chicagoland's proposals as to staff, studios, and equipment are inadequate. See Section 1.229(c) of the Rules. Although Chicagoland proposes extensive live programming, its application reflects a functional allocation of staff and an absence of elaborate production requirements. *Springfield Telecasting Co.,* FCC 64R–471, 3 RR 2d 727 (1964).[9]

9. Petitioner also proposes that an issue be added to determine whether Chicagoland's program proposal ". . . is specifically designed and would be expected to serve a specialized need and interest which is not being met by an existing station." According to WCFL, Chicagoland, in its application and in an amendment filed February 19, 1963, asserts that its original survey of the Chicago market has been confirmed in that there is a ". . . need for a specialized program service to meet the needs of minority groups." Petitioner points out that, since the filing of the Chicagoland application and the aforementioned amendment thereto, a new UHF station, WCIU–TV, Channel 26, has commenced operation in Chicago with a program policy designed to meet the needs of minority groups.[10] Since it would appear that Chicagoland proposes specialized programming that will "duplicate" existing UHF programming in Chicago, petitioner requests addition of the proposed issue. In its opposition, Chicagoland states that it is immaterial whether or not the requested issue is added since the same facts alleged by petitioner can be developed under the standard comparative issue and since Chicagoland intends to meet the burden of show-

[9] In its opposition, Chicagoland points out that its proposed staff (4 department heads and 26 employees) exceeds the average staff of UHF stations, as reported in the Commission's Public Notice on TV Broadcast Financial ata (Table 11)—1963, Mimeo No. 54732 (July 23, 1964). Chicagoland also asserts that "delayed programs," produced by the station on video tape or film, are classified "live" but do not create a manning problem when presented back-to-back with a studio program.

[10] WCFL refers to the television program section of a Chicago newspaper for the week of October 10–16, 1964, which lists several examples of the foreign language and minority group programming of WCIU-TV. Petitioner also asserts that the station carries many foreign films. While petitioner's assertions are not supported by affidavit, we note that Chicagoland does not in its opposition, dispute the veracity of these factual allegations.

ing a need for its proposed programming. The Bureau also suggests that the specific program proposals of Chicagoland can be tested within the framework of the existing comparative issue.

10. The Board notes that Chicagoland's proposed program plans refer to the "vital need for specialized programming" to serve the interests of minority groups in Chicago. Specifically, Chicagoland proposes to meet this need by presenting the following: educational and entertainment programs in foreign languages (including Spanish, Polish and German); a Negro talent show; foreign films with English sub-titles; etc., To the degree that Chicagoland claims a need for foreign language and minority group programming and an intent to serve that need, its proposed programming will apparently attempt to serve, to some extent, the same needs as are now being served by the new UHF station in Chicago. Such considerations demonstrate the relevance of evidence of existing programming to the ultimate determination of whether Chicagoland's proposals would serve the public interest. See *La Fiesta Broadcasting Company,* FCC 63R–550, 1 RR 2d 684 (1963). Since evidence of existing programming is not admissible under the present standard comparative issue (see *South Texas Telecasting Co., Inc.,* FCC 61–940, 22 RR 59 (1961)), the Board will enlarge the scope of the designated issues herein. In this regard, the Board notes that Chicagoland (and the Broadcast Bureau) apparently anticipate that evidence of existing programming and proposed programming would be adduced under the already-designated issues.

*Warner Bros. Issues*

11. In connection with Warner Bros.' application in this proceeding and its application for a new UHF television station on Channel 20 in Fort Worth, Texas (see *Trinity Broadcasting Company,* Docket No. 15714, *et al.* (FCC 64–1091, released December 1, 1964)), the Commission specified qualifications issues against Warner Bros. in light of its past conduct. In its designation Orders in these proceedings, the Commission noted that Warner Bros. is presently a defendant in a civil antitrust matter brought by the State of Washington (which charges practices in restraint of trade in the City of Seattle);[11] and that Warner Bros. has been involved in numerous antitrust actions brought by the United States and has been adjudged in violation of a federal court decree. Pursuant to its policy expressed in its *Report on Uniform Policy as to Violation by Applicants of Laws of United States* (*Report*) in Docket No. 9572, 1 RR (Part 3), 91:495 (1951), the Commission specified an issue to determine whether Warner Bros. has the requisite qualifications to be a broadcast licensee in light of its past conduct. This issue was common to both proceedings, and any grant of the Warner Bros.' applications was conditioned on such further action as may be appropriate as a result of the pending civil antitrust suit in Washington.

12. Petitioner now suggests that Warner Bros. occupies a unique position among the applicants in this proceeding since it produces and distributes motion pictures and since it also has a syndication

[11] *State of Washington v. Sterling Theatre Co., et al.,* filed June 20, 1963, Superior Court of the State of Washington for King County, Case No. 604074.

division which distributes series for television exhibition. Petitioner refers to Warner Bros.' 1963 Annual Report, submitted in an amendment to its application, which describes the highly profitable operations of its syndication division in the distribution of television series and feature motion pictures for first-run television. In view of these statements by Warner Bros. and the Commission's *Report, supra,* WCFL requests that the following issues be added to this proceeding:

To determine whether a grant to Warner Bros. Pictures, Inc. would violate the policies underlying the anti-trust laws and the Commission's policies pertaining thereto.

To determine whether a grant to Warner Bros. Pictures, Inc. would create a conflict of interest with its various divisions; inhibit competition for television programming, or in any manner constitute a restraint on trade.

13. Petitioner specifically refers to that section of the Commission's *Report, supra,* which concerns the relationship between an applicant's restrictive practices and its ability to operate a broadcast station in the public interest. However, WCFL makes no attempt to show how the operation of Warner Bros.' syndication division would interfere with its ability to be a broadcaster. The Board notes the absence of any specific facts to support petitioner's allegations of conflict of interest or restraint on trade. As the Bureau points out, the relationship between the proposed UHF station and the syndication division can be explored under the present standard comparative issues. Insofar as the requested issue anticipates an exploration of the past conduct of Warner Bros., such an issue is not needed since, as previously noted, Warner Bros.' antitrust history is already the subject of a specified hearing issue. For these reasons, the request for addition of issues against Warner Bros. will be denied.

Accordingly, IT IS ORDERED, This 21st day of January, 1965, That the petition to enlarge issues, filed November 12, 1964, by Chicago Federation of Labor and Industrial Union Council, IS GRANTED to the extent indicated herein, IS DISMISSED as to the request for an "Evansville" issue, and IS DENIED in all other respects; and that the issues in this proceeding ARE ENLARGED by the addition of the following issue:

> To determine whether the program proposal of Frederick B. Livingston and Thomas L. Davis, d/b as Chicagoland TV Company, is specifically designed and would be expected to serve a specialized programming need and/or interest which is not being met by an existing station.

IT IS FURTHER ORDERED, That the petition for leave to file reply comments and the reply pleading, filed December 7, 1964, by Frederick B. Livingston and Thomas L. Davis, d/b as Chicagoland TV Company, and the comments on said petition, filed December 16, 1964, by the Broadcast Bureau, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 63R–28

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| FREDERICK B. LIVINGSTON AND THOMAS L. DAVIS D.B.A. CHICAGOLAND TV CO., CHICAGO, ILL. | Docket No. 15668<br>File No. BPCT–3116 |
| WARNER BROS. PICTURES, INC. CHICAGO, ILL. | Docket No. 15669<br>File No. BPCT–3271 |
| CHICAGO FEDERATION OF LABOR AND INDUSTRIAL UNION COUNCIL, CHICAGO, ILL. | Docket No. 15708<br>File No. BPCT–3439 |
| For Construction Permit for New Television Broadcast Station | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it for consideration a petition to enlarge issues, filed on December 10, 1964, by Chicago Federation of Labor and Industrial Union Council (WCFL).[1]

2. By Commission Order (FCC 64–1076), released November 20, 1964, the above applications for a new television broadcast station to operate on Channel 38, Chicago, Illinois, were designated for comparative hearing on various issues, including a standard comparative issue. By its petition, WCFL seeks addition of comparative coverage issues to the instant proceeding. Attached to the petition is an engineering statement illustrating the differences in coverage areas and populations included within the City Grade, Grade A and Grade B contours of the proposals of the competing applicants. Petitioner asserts that its proposal will serve more people and land area within each of the aforementioned contours and submits the following figures of its coverage compared to that of Chicagoland and Warner Bros., respectively:

| Contour | WCFL exceeds Chicagoland by— Area (sq. mi.) | Population | WCFL exceeds Warner Bros. by— Area (sq. mi.) | Population |
|---|---|---|---|---|
| City Grade | 1,110 | 1,083,031 | 452 | 282,381 |
| Grade A | 1,908 | 963,980 | 789 | 279,096 |
| Grade B | 3,305 | 461,964 | 1,230 | 155,515 |

3. The Broadcast Bureau supports the request for enlargement of issues and submits that the petitioner has made a threshold showing of a substantial difference between the coverage offered by the three proposals. However, references to the City Grade

[1] Pleadings before the Board include: Petition to enlarge issues, filed December 10, 1964, by WCFL; comments, filed December 22, 1964, by the Broadcast Bureau; opposition, filed December 23, 1964, by Chicagoland TV Company; and reply, filed December 29, 1964, by WCFL.

and Grade A contours should be deleted, the Bureau asserts, as the comparative coverage issues should be limited to consideration of the Grade B contours exclusively. In support of this assertion, the Bureau cites *Springfield Telecasting Co.*, FCC 64R–471, 3 RR 2d 727. Chicagoland does not oppose the addition of comparative coverage issues to this proceeding, but requests that they be framed in the standard manner.

4. The petitioner has made the requisite showing of significant differences in the relative coverage areas and populations of the Grade A and Grade B contours involved. Contrary to the Bureau's assertion,[2] "it is entirely consistent with previously stated Board policy to add comparative coverage issues as to both Grade A and Grade B contours". *United Artists Broadcasting, Inc.*, FCC 64R–565, released December 22, 1964. However, we do agree with the Bureau's assertion that the differences in coverage within the City Grade contours should not be considered. Section 73.685 of the Rules requires that an applicant's proposal place a minimum field intensity signal over its principal community; each of the applicants in this proceeding meets that requirement. Therefore, this portion of the requested issue is unwarranted. See *Ultravision Broadcasting Company*, FCC 64R–192, 2 RR 2d 271; *Cleveland Broadcasting, Inc.*, FCC 64R–41, 1 RR 2d 949.

Accordingly, IT IS ORDERED, This 26th day of January, 1965, That the petition to enlarge issues, filed December 10, 1964, by Chicago Federation of Labor and Industrial Union Council, IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and that the issues in this proceeding ARE ENLARGED by the addition of the following:

(a) To determine the location of the proposed Grade A and Grade B contours of the applicants in this proceeding.

(b) To determine, on a comparative basis, the areas and populations of the respective Grade A and Grade B contours which may reasonably be expected to receive actual service from the applicants' proposed operations.

(c) In the event the proof under Issues (a) and (b) above shall establish that either applicant will bring actual service to areas and populations not served by its competitor, to determine the number of services, if any, presently available to such areas and populations.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] The Bureau's reliance on *Springfield Telecasting Co., supra*, is misplaced. In that case, the Board was presented with a showing as to the Grade B contours only.

F.C.C. 65R–25

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| FARRAGUT TELEVISION CORP., COLUMBUS, OHIO | Docket No. 15619<br>File No. BPCT–3319 |
| PEOPLES BROADCASTING CORP., COLUMBUS, OHIO | Docket No. 15620<br>File No. BPCT–3333 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it for consideration a motion, filed by Farragut Television Corporation (Farragut) on October 1, 1964,[1] requesting addition of the following issues to this proceeding:

(1) To determine whether a grant of the application of Peoples Broadcasting Corporation would be consistent with the provisions of Section 310(a)(5) of the Communications Act of 1934, as amended.

(2) To determine whether a grant of the application of Peoples Broadcasting Corporation would be consistent with the provisions of Section 73.636(a)(1) of the Commission's Rules and Regulations.

(3) To determine whether a grant of the application of People's Broadcasting Corporation would be consistent with the provisions of Section 73.636(a)(2) of the Commission's Rules and Regulations.

2. On May 13, 1964, Peoples Broadcasting Corporation (Peoples) applied for a construction permit for a new UHF television station to be operated on Channel 40, Columbus, Ohio. By Order (FCC Mimeo No. 56629), released September 10, 1964, and published in the Federal Register (29 F.R. 12986) on September 16, 1964, its application was designated with that of Farragut for consolidated hearing on the standard comparative issue, and the applicants were found to be "legally, financially, technically and otherwise qualified."

3. Peoples, all of whose officers and directors are United States

[1] Also before the Review Board are: (a) Broadcast Bureau's comments in support of Farragut's motion, filed October 29, 1964; (b) opposition to Farragut's motion, filed November 2, 1964, by Peoples Broadcasting Corporation; (c) reply to (a), filed November 6, 1964, by Peoples Broadcasting Corporation; (d) reply to (b), filed November 12, 1964, by Farragut; (e) petition for leave to file supplement to (b), filed November 24, 1964, by Peoples Broadcasting Corporation; (f) supplement to (b), filed November 24, 1964, by Peoples Broadcasting Corporation; (g) opposition to (e), filed December 3, 1964, by Farragut; and (h) reply to (g), filed December 15, 1964, by Peoples Broadcasting Corporation.

Peoples Broadcasting Corporation has shown good cause for grant of its petition for leave to file supplement, and said petition will accordingly be granted.

citizens, is presently the licensee of Television Station KVTV, Sioux City, Iowa; and of Radio Stations WGAR (AM and FM), Cleveland, Ohio; WNAX, Yankton, South Dakota; and WRFD (AM and FM), Columbus-Worthington, Ohio. Peoples is wholly owned by Nationwide Mutual Insurance Company (Nationwide), an Ohio-formed mutual company. The latter company, all of whose officers and directors are United States citizens, has never issued any stock or securities; purchase of insurance is the sole basis of membership. Thus, Nationwide's more than two-and-one-half million policyholders are the members of the company, each being entitled to one membership and one vote only.

4. Contending that the member/policyholders of Nationwide control it no less than shareholders control any corporation issuing capital stock, Farragut argues that since Peoples has made no showing concerning the percentage of the ownership of Nationwide held by United States citizens, or regarding other broadcast interests held by Nationwide or by its voting ownership, the addition of a Section 310(a)(5) of the Act issue, and of Section 73.636(a)(1) and (2) of the Rules issues, respectively, is required. In support of its position Farragut cites, among other cases, *TVue Associates, Inc.*, 2 RR 2d. 1 (1964); the Commission's Order in *Integrated Communication Systems, Inc. of Massachusetts* (FCC 64–96), released February 12, 1964; and *Kansas City Broadcasting Co.*, 5 RR 1057 (1952). The Broadcast Bureau supports Farragut's petition.

5. Peoples opposes the request, noting, with relation to Section 310(a)(5) of the Act,[2] that while a single alien shareholder could obtain a large percentage of ownership in a stock company, a single policyholder would be unable to do so in a mutual insurance company. It presents statistical information to support its contention that it is highly unlikely that the percentage of alien policyholders exceeds 25%. Thus, it points out that even if it is assumed that every alien is a Nationwide policyholder in those states in which the number of policyholders exceeds the number of aliens,[3] and that all of Nationwide's policyholders are aliens in those states in which the number of aliens exceeds the number of policyholders,[4] there would nevertheless be 1,701,530 policyholders who are United States citizens,[5] with a maximum of approximately 33% aliens among Nationwide's policyholders. These assumed figures presuppose that Nationwide's policyholders include less than 2% of all of the citizens in the United States, but include every alien in each state except the states in which the number of aliens exceeds the number of policyholders; in the latter states, all of the policyholders would be assumed to be aliens. Such

[5] The 1,701,530 figure was reached by (1) adding (a) 296,223, the total number of aliens in the states in which the number of Nationwide policyholders exceeds the number of aliens, and (b) 525,228, the total number of Nationwide policyholders in the states in which the number of aliens exceeds the number of policyholders; and (2) by subtracting said sum (821,451), which is the maximum number of alien policyholders which could possibly exist under the aforesaid rather far-reaching assumption, from the grand total of all Nationwide policyholders, 2,522,981.

[2] Section 310(a)(5) of the Communications Act precludes grant of a station license to any corporate applicant which is "directly or indirectly controlled by any other corporation of which . . . more than one-fourth of the capital stock is owned of record or voted . . . by aliens, their representative, or by a foreign government or representative thereof. . . ."

[3] *e.g.*, Alabama, Delaware, Kentucky, Maryland, Ohio, Pennsylvania.

[4] *e.g.*, Connecticut, Florida, Illinois, Michigan, Utah.

a disparity in the percentage of aliens who are policyholders as opposed to the percentage of citizens who are policyholders is so unlikely as to require an inference that the total percentage of aliens among Nationwide's stockholders is substantially less than 33%. A conclusion that 25% (630,475) of Nationwide's policyholders are aliens would require an assumption that Nationwide's policyholders include 75% of all of the aliens in each state in which its policyholders exceed the total number of aliens, and that in states in which the number of aliens exceeds the number of policyholders at least 75% of its policyholders in such states are aliens. There is nothing in the pleadings before us to suggest that Nationwide's business is alien-oriented, and, in the absence of a strong showing to that effect, the statistical probability that at least 25% of all of Nationwide's policyholders are aliens is so remote as to preclude the necessity of an evidentiary hearing on this matter. Accordingly, the request for a Section 310(a)(5) issue will be denied.

6. Farragut's request for issues to determine compliance with Section 73.636(a)[6] of the Commission's Rules will likewise be denied. Note 2 to this Rule reads as follows:

> In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

As indicated above, each policyholder has one vote, and as a result no policyholder has a 1% interest. A 1% interest in Nationwide would consist of the combined holdings of some 25,000 policyholders. No showing has been made that Nationwide's officers and directors hold or control other broadcast interests, nor has any showing been made that 1% of the policyholders—or a total of more than 25,000—as a group, or acting in privity with one another, have any other broadcast interests or control any other broadcast interests. The likelihood of such ownership or control by 25,000 persons is so remote as to eliminate the need for any further inquiry. The request for 73.636(a) issues will therefore be denied.

Accordingly, IT IS ORDERED, This 25th day of January, 1965, That the petition for leave to file a supplement to the moving petition, filed November 24, 1964, by Peoples Broadcasting Corporation IS GRANTED for good cause shown, and that it, together

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[6] Section 73.636(a) of the Commission's Rules and Regulations provides, in pertinent part:

"No license for a television broadcast station shall be granted to any party (including all parties under common control), if:

"(1) Such party directly or indirectly owns, operates, or controls one or more television broadcast stations and the grant of such license will result in overlap of the Grade B contours of the existing and proposed stations, computed in accordance with § 73.684.

"(2) Such party, or any stockholder, officer or director of such party directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station, if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of area served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience, or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band."

with responsive pleadings addressed thereto, ARE ACCEPTED; and

IT IS FURTHER ORDERED, That the motion to enlarge issues, filed October 1, 1964, by Farragut Television Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R-32

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| CLEVELAND TELECASTING CORP., CLEVELAND, OHIO | Docket No. 15249<br>File No. BPCT-3191 |
| THE SUPERIOR BROADCASTING CORP., CLEVELAND, OHIO | Docket No. 15250<br>File No. BPCT-3243 |
| For Construction Permits for New Television Broadcast Stations | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration an appeal from adverse ruling of the presiding examiner, filed November 20, 1964, by Cleveland Telecasting Corp. (Cleveland) and a motion to enlarge issues, filed November 9, 1964, by The Superior Broadcasting Corp. (Superior).[1]

2. Cleveland seeks reversal of the Hearing Examiner's Order [2] which denied a petition for leave to amend. The applications of Cleveland and Superior specifying UHF Channel 65, Cleveland, Ohio, were designated for comparative hearing by Commission Order, FCC 63-1161, released December 23, 1963. On January 13, 1964, Cleveland attempted to amend its application to reflect a massive corporate re-organization of stockholders, stockholdings, directors and personnel. This amendment (first amendment) was rejected by the Hearing Examiner (FCC 64M-158, released February 25, 1964) and that action was sustained by the Review Board.[3] In its Memorandum Opinion and Order the Board cited Cleveland's failure to demonstrate "good cause" as required by Section 1.522(b) of the Rules, "in view of Cleveland's failure to disclose the circumstances of the resignations and subsequent withdrawals"; the absence of affidavits of the withdrawing principals; and the possibility that the change in Cleveland's corporate structure might introduce a new basis for comparison.

3. A second petition for leave to amend, which is the subject of the instant appeal, was filed by Cleveland on September 25, 1964. By this amendment Cleveland sought to reflect the withdrawal of Independent Music Broadcasters, Inc. (IMB), a former corporate

[1] Pleadings before the Board include: (1) appeal from adverse ruling of presiding examiner, filed November 20, 1964, by Cleveland; (2) opposition, filed November 30, 1964, by Superior; (3) opposition, filed November 30, 1964, by the Broadcast Bureau; (4) reply, filed December 10, 1964, by Cleveland; (5) motion to enlarge issues, filed November 9, 1964, by Superior; (6) opposition, filed November 20, 1964, by the Broadcast Bureau; (7) opposition, filed November 23, 1964, by Cleveland; and (8) reply, filed December 2, 1964, by Superior.

[2] Memorandum Opinion and Order, FCC 64M-1046, 3 RR 2d 798, petition requesting leave to file petition for reconsideration of that ruling denied, FCC 64M-1144, released November 16, 1964.

[3] Memorandum Opinion and Order, FCC 64R-315, released June 10, 1964, review denied FCC 64-802, released September 4, 1964.

stockholder (31.33%), and IMB's representative Theodore Niarhos (former president, general manager, and director of Cleveland).[4] Petitioner asserted that good cause was evidenced by the following allegations: 1) the amendment was minor, reflecting only a single change in its application; 2) by this amendment Cleveland did not endeavor to substitute new principals (the attempted substitution was claimed to be the reason the Review Board rejected Cleveland's first amendment); 3) Cleveland acted with due diligence in notifying the Commission of changes in its corporate structure; 4) the actions which precipitated the need for this amendment were not unduly voluntary on the part of the applicant; and 5) the granting of the amendment would not disrupt the hearing procedure. On October 22, 1964, this second amendment was rejected by the Hearing Examiner (FCC 64M–1046) who held that Cleveland had "elected to rely principally upon the arguments previously urged and rejected" and had again failed to disclose facts necessary for the establishment of good cause relating to the withdrawal of its stockholders and officers. On November 16, 1964, the Examiner denied Cleveland's petition for leave to file a petition for reconsideration of that adverse ruling, and refused to consider the supplemental information offered therein because it was not newly discovered information of the circumstances relating to the withdrawals, but information known to Cleveland at the time it filed the second petition for leave to amend.

4. Cleveland requests that the Board reverse the Hearing Examiner's ruling because of the following alleged errors: the Examiner did not rule on the merits of Cleveland's allegations of due diligence; the finding that a comparative advantage would accrue to Cleveland as a result of this amendment is not supported; the Examiner refused to take cognizance of the supplemental information, including affidavits, concerning the circumstances surrounding the withdrawal of IMB and Niarhos which Cleveland submitted as part of its petition for reconsideration; the Examiner refused to grant leave to file petition for reconsideration; and the Examiner's conclusion that the facts surrounding the withdrawal and the re-enlistment of three other members of the corporation were elements necessary to the establishment of good cause for the withdrawal of IMB and Niarhos was in error. Cleveland contends that in order to find lack of due diligence the Examiner had to, but did not, find some unwarranted delay on the part of Cleveland. Cleveland also disputes the Examiner's characterization of its second amendment as "major" and asserts that in *Saul M. Miller*, FCC 64R–428, released August 18, 1964, the Board allowed an applicant to amend under more extreme circumstances than those of the instant case.

5. Superior argues that Cleveland's failure to supply necessary information until its request for leave to file a petition for reconsideration is fatal to this appeal. Further, Superior contends that the late filed affidavits still do not evidence the elements of good cause but merely raise additional questions as to the diligence and good faith of the applicant and its principals in dealing with the

[4] These two withdrawals previously comprised a portion of the first rejected amendment.

Commission.[5] Cleveland's first rejected amendment is relevant to a consideration of the instant amendment, Superior asserts, in that the former amendment indicates that Cleveland's present position is the result of voluntary actions of its principals, which must be imputed to the corporate applicant.

6. The Broadcast Bureau also opposes Cleveland's appeal and states that (1) the Examiner's ruling went solely to the merits of the amendment before her and was not intended to compel Cleveland to prosecute a fictitious proposal at the hearing; (2) the information upon which Cleveland relied in urging acceptance of the instant amendment was the same information found insufficient by the Review Board in its denial of Cleveland's appeal from the rejection of its first amendment and the attempt to cure this defect by offering supplemental information was properly disallowed; (3) if Cleveland's supplemental information were accepted it would only serve to raise additional questions; (4) the Examiner ruled correctly in requiring that Cleveland show the reasons for the return of the stockholders who had previously resigned as a component necessary to show "good cause" for this second amendment because, notwithstanding our rejection of the first amendment, the stockholders had left the corporation and no one, including the Commission, could force them to return; and (5) in not one of the several cases cited by Cleveland has the Commission considered the second version of a previously rejected amendment.

7. Contrary to Cleveland's assertion, the Review Board considers a post-designation amendment, such as that submitted by Cleveland, which reflects the withdrawal of a sizable stockholder (31.33%) and the chief corporate officer, the general manager, and a director, to be a substantial amendment. Cleveland has not shown the "good cause" which is required for such post-designation amendments under Section 1.522(b) of the Rules.[6] Thus, it has failed to demonstrate that it acted with due diligence in offering this amendment; it has not shown that its amendment was not necessitated by its voluntary act; and it has failed to show that no competitive advantage will accrue to it from the grant of this amendment. In essence, Cleveland is requesting that the Board reconsider the amendment which it previously rejected. In urging this amendment, Cleveland relied upon the very same allegations and information which the Board found insufficient to support the first proffered amendment. On the basis of this presentation the Examiner correctly denied the request for leave to amend. It was not until Cleveland requested permission to file a petition for reconsideration [7] that any additional information was offered. Even if Cleveland's additional information had been accepted, we would still be unable to find "good cause." Substantial questions remain as to when the applicant first became aware of the outside commitments

[5] This question is the subject of Superior's motion to enlarge issues, filed November 9, 1964, which is discussed below.

[6] See *Cleveland Broadcasting, Inc.*, FCC 64R-278, released May 21, 1964; *Sands Broadcasting Corp.*, FCC 61M-1218, 22 RR 106; *J. E. Willis*, FCC 59-596, 17 RR 107.

[7] Under Section 1.303 of the Rules, consent of the Examiner must be obtained before any party may file a petition for reconsideration of an Examiner's ruling. In the instant proceeding the Examiner properly declined to consent. We find no evidence of any abuse of discretion by the Examiner and in the absence of such we will not substitute our judgment for hers as to whether a petition for reconsideration should have been permitted.

of IMB and Niarhos; as to why and how Cleveland met with such notable success, between September 4, 1964 and September 25, 1964, in persuading other withdrawing stockholders to return and why it was unable to do so with IMB and Niarhos; the circumstances under which IMB and Niarhos became associated with the applicant; and full disclosure of the facts surrounding their withdrawal. Without knowledge of these facts we are unable to conclude that the applicant has shown due diligence or that this amendment was not necessitated by the voluntary act of the corporate applicant.

8. The fact that Cleveland notified the Commission of the changes in its corporate structure in a timely manner is not sufficient evidence, standing alone, of "due diligence." Aside from other deficiencies, Cleveland's request for leave to amend was properly denied because it would appear to permit Cleveland to improve its comparative position in the following respects: (1) the proposed replacement for Mr. Niarhos as president of the corporation is a local resident (this would result in an increase in the percentage and weight to be considered on the factor of local residence); (2) IMB's stock has been divided among existing stockholders (this would increase the percentage of local ownership); and (3) the replacement of Mr. Niarhos and the division of IMB's stock would provide further integration of local ownership and management. See *Cleveland Telecasting Corp.*, FCC 64R–315, 3 RR 2d 533. *Saul M. Miller, supra,* cited by Cleveland, is distinguishable from the instant case in that in *Miller*, the Board found that the granting of the amendment would not result in a possible comparative advantage for the petitioner, whereas in the instant case, such advantage may result.

9. In a separate petition (see note 1, *supra*), Superior requests the addition of an issue to determine whether Cleveland and its principals have exhibited complete candor and frankness in their dealings with the Commission during the course of this proceeding and, in light of such determination, whether Cleveland possesses the requisite character qualifications to be a licensee of the Commission. Superior's petition is based on the assertion that Cleveland has several times stated to the Commission that if its first amendment were not accepted, it would be forced to withdraw from this proceeding and that the four withdrawing stockholders were irrevocably lost to the applicant. These representations were not substantiated by subsequent events, Superior asserts: Cleveland has remained in the proceeding despite rejection of its first proffered amendment; and three of the four stockholders, "irrevocably lost" to the applicant, have attested to their desire to return and take an active part in the corporation.

10. The Board will deny Superior's request for an additional issue. Our failure to find good cause for Cleveland's proposed amendment does not imply that Cleveland has dealt with the Commission in bad faith. The statements upon which Superior bases its instant request were in the nature of a "makeweight" argument, perhaps made ill-advisedly, and could not be construed as a serious indication of Cleveland's future action.

Accordingly, IT IS ORDERED, This 27th day of January, 1965, That the appeal from adverse ruling of presiding examiner, filed by Cleveland Telecasting Corp., on November 20, 1964, IS DENIED; and

IT IS FURTHER ORDERED, That the motion to enlarge issues, filed by Superior Broadcasting Corp. on November 9, 1964, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–15

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of TELEVISION BROADCASTERS, INC., BEAUMONT, TEX. For Construction Permit | File No. BPCT–3266 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING; COMMISSIONER LEE DISSSENTING AND ISSUING A STATEMENT.

1. The Commission has before it for consideration the above-captioned application of Television Broadcasters, Inc. (KBMT), licensee of Television Broadcast Station KBMT, Channel 12, Beaumont, Texas, filed November 14, 1963, and various pleadings filed in connection therewith [1] The applicant is currently authorized to operate at maximum effective radiated visual power of 316 kw with antenna height above average terrain of 960 feet, from a site at Sabine Pass, 2 miles from the Gulf of Mexico and about 30 miles southeast of Beaumont, Texas. By its application, applicant seeks authority to move the site of its transmitter to a point 2 miles west of Mauriceville, Texas (about 15 miles northeast of Beaumont), a move of 33.5 miles due north of the present site, increase antenna height above average terrain to 1,000 feet, decrease average effective radiated visual power to 220 kw, and to make other changes in the facilities of Station KBMT. Operating as proposed, Station KBMT would be 171.2 miles from co-channel Station KSLA–TV, Shreveport, Louisiana, whereas Section 73.610(b) of the Commission's Rules requires a minimum mileage separation of 190 miles [2]. Station KBMT would, therefore, be short approximately 18.8 miles to the Shreveport co-channel station. The applicant proposes to directionalize its antenna to suppress radiation in the direction of the Shreveport station to provide "equivalent protection" to Station KSLA–TV. The applicant has requested a waiver of Section 73.610 of the Commission's Rules to permit the short-spaced operation proposed.

[1] The following pleadings have been filed in this proceeding: (a) Objections, filed December 20, 1963, by The Association of Maximum Service Telecasters, Inc. (MST), pursuant to Section 1.587 of the Commission's Rules; (b) Petition to Deny, filed December 20, 1963, by KSLA-TV, Inc. (KSLA), licensee of Television Broadcast Station KSLA-TV, Channel 12, Shreveport, Louisiana; (c) Petition to Deny, filed December 20, 1963, by Texas Goldcoast Television, Inc. (Texas Goldcoast), licensee of Television Broadcast Station KPAC-TV, Channel 4, Port Arthur, Texas; (d) Opposition, filed February 20, 1964, by applicant against (a), (b), and (c) above; (e) Further Objections, filed March 27, 1964, by MST; and (f) Reply, filed April 30, 1964, by Texas Goldcoast, against (d), above. The various parties requested, and were granted, extensions of time within which to file pleadings.

[2] Station KBMT is located in Zone III and Station KSLA-TV is located in Zone II. Section 73.610(b)(1) of the Commission's Rules establishes minimum mileage separation between VHF television co-channel stations in Zone III at 220 miles and in Zone II at 190 miles. Section 73.610(b)(2) of the Rules provides that, in such cases, the minimum separation shall be that of the zone requiring the lower separation or, in this case, 190 miles.

2. In support of its request for waiver and in justification of the proposed short-spaced operation, KBMT, an ABC affiliate, alleges that, operating from its present site, it is not able to compete effectively with Station KFDM–TV, Channel 6, Beaumont (CBS), and Station KPAC–TV, Channel 4, Port Arthur, Texas (NBC), the other two stations serving essentially the same area. Applicant alleges that it is now operating at a substantial loss and has been since it began operation. The applicant attributes its alleged inability to compete effectively to the location of its transmitter which, applicant states, results in a 40% waste of its signal over the Gulf of Mexico, and inability to deliver a competitively strong signal over Beaumont. The applicant also alleges that, because its transmitter is located southeast of Beaumont and the transmitters of the other two stations are located generally northeast of Beaumont, receiving antennas are oriented to receive maximum signals from those two stations. Additionally, the applicant complains that its location near the Gulf results in serious maintenance difficulties because of corrosion from salt water spray and vulnerability to damage from hurricanes, high water, and other extremes of weather. All of this, applicant alleges, results in high maintenance and repair costs, high insurance costs, and frequent power failure.

3. Operating as proposed, there would be a gain area within the proposed Grade B contour of 3,018 square miles and 45,022 persons. There would be, however, two areas on the eastern and western extremities of the present Station KBMT Grade A and Grade B coverage area which would lose applicant's service. The aggregate Grade B loss area would be approximately 232 square miles and would involve 9,246 persons. This would result in an overall net gain area within the proposed Grade B contour of 2,786 square miles and 35,776 persons. The applicant states that, within the loss areas, there is a minimum of four Grade B signals available. Although there will also be minor losses in Grade A coverage in the two loss areas, there would be a net Grade A gain of 1,697 square miles and approximately 150,000 persons. The significant net gain in population within the proposed Grade A contour is attributable principally to the fact that the applicant would, for the first time, place a Grade A signal over Lake Charles, Louisiana.

4. KSLA alleges standing in this proceeding on the basis of its contention that authorization of the proposed short-spaced operation would result in a modification of its license because, the petitioner states, it is entitled, under the Commission's Rules, to that protection from co-channel interference which is afforded by the Commission's mileage separation requirements. Texas Goldcoast (KPAC) alleges standing on the basis of the fact that it competes with the applicant in the Beaumont-Port Arthur area for advertising revenues and that a grant of the application would result in economic injury of a direct, tangible, and substantial nature [3]. MST does not claim standing as a "party in interest" within the meaning of Section 309(d)(1) of the Communications Act, but

[3] Citing *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S.St. 693, 9 RR 2008.

only claims status as an objector pursuant to the provisions of Section 1.587 of the Commission's Rules. The applicant concedes standing to Texas Goldcoast (KPAC), but disputes the standing of KSLA on the grounds that the "equivalent protection" which it offers will afford protection against interference equivalent to that to which the petitioner would be entitled if the applicant were to operate at standard spacing. Applicant's position in this respect is amply supported by our decisions in *New Orleans Television Corp.* (WVUA), FCC 62–853, 23 RR 1113; affirmed *sub nom Capitol Broadcasting Company* v. *Federal Communications Commission*, 116 U.S. App. D.C. 370, 324 F. 2d 402, 25 RR 2151, and *Peninsula Broadcasting Corporation* (WVEC–TV), FCC 64–763, 3 RR 2d 243. In those cases, it was held that a station's license was not modified where the station would not be required to receive a greater degree of interference from the applicant's station than if the applicant were operating at standard spacing with the full facilities to which it was entitled under the Commission's Rules [4]. We find that Texas Goldcoast (KPAC) has standing as a "party in interest" within the meaning of Section 309(d) of the Communications Act, but that neither KSLA nor MST has such standing. Nevertheless, we think that the matters raised by the pleadings deserve consideration on the merits.

5. Essentially, the applicant urges a grant of its application on the basis that Station KBMT and ABC are at a competitive disadvantage in the non-metropolitan areas of Beaumont and Port Arthur. Applicant alleges that a grant of its application would enhance its competitive position as well as that of ABC *vis-a-vis* the other stations and networks in the market and would provide to its coverage area a third truly competitive network television service; that the proposed move would result in a net gain in areas and populations; and that there is an abundance of other television service available in the loss areas. Applicant states that a move away from the Gulf is necessary if it is to improve the quality of its signals to its coverage area and to achieve competitive status. The applicant further states that it is willing to accept conditions requiring it to install equipment necessary to assure protection from interference to KSLA–TV.

6. Our examination of the facts presented by the pleadings and statistics otherwise available to the Commission convinces us that a serious competitive imbalance exists in the Beaumont-Port Arthur Market. For example, Station KBMT receives a much lower network hourly rate ($350) than either of its competitors ($500 for Station KFDM–TV and $510 for Station KPAC–TV) [5] and in 1963, Station KBMT delivered 16,900 homes as against 33,200 for Station KPAC–TV and 35,500 for Station KFDM–TV, at a cost per thousand homes of $5.18 as against $3.96 for Station KPAC–TV and $3.52 for Station KFDM–TV. Other comparative statistics disclose similar disparities and reveal the significant competitive inferiority of the applicant and ABC in the area.

[4] See also *WTEV Television, Inc.*, FCC 62–852, 23 RR 1050b; affirmed *sub nom Rhode Island Television Corporation et al.* v. *Federal Communications Commission*, 116 U.S. App. D.C. 40, 320 F. 2d 762, 25 RR 2103.

[5] Standard Rate and Data Service, May 10, 1964.

While it is neither our purpose nor function to assure competitive equality in any given market, we have a duty at least to take such actions as will create greater opportunities for more effective competition among the networks in major markets. *Peninsula Broadcasting Corporation,* FCC 64–763, 3 RR 2d 243. In the matter now before us, more than 45,000 persons will receive an additional Grade B television signal and more than 200,000 persons will receive a television signal of greater field intensity than that now being received. As against this, a total of slightly more than 9,000 persons will lose a predicted Grade B signal from Station KBMT, but in the loss areas, at least four other television signals are available, including ABC network programming. Additionally, it would appear that the proposed move would result in a more efficient use of the frequency by reducing the amount of water area over which Station KBMT now wastes its signal and increasing the populated land area over which its signal is provided. Finally, the Federal Aviation Agency has indicated its strong support for the proposed move on the grounds that it would result in the location of all three Beaumont-Port Arthur television towers in the same general area and would remove the existing obstruction on the coastline with commensurate advantage to the promotion of aeronautical safety. That agency has also indicated that an increase in the height of the existing structure would be undesirable and might occasion objections from aeronautical interests. In considering all of these factors, we conclude that a waiver of Section 73.610 of the Rules would be warranted [6], and would, on balance, be in the public interest.

7. With respect to the use of the "equivalent protection" technique to provide protection against interference, the Commission has, on previous occasions, authorized operation at less than standard spacing and the use of "equivalent protection" where, in the Commission's informed judgment, the public interest required it [7]. For example, the Commission's efforts to relieve competitive imbalance in situations where the public interest required it is well illustrated in *Fisher Broadcasting Co.,* FCC 63–595, 25 RR 746, where the Commission authorized short-spaced operation to permit comparable and more effective and healthy competition among a greater number of stations in the area. In the *New Orleans* case, *supra,* the Commission permitted short-spaced operation for the purpose of assuring the existence of a third truly competitive station in the market and thereby making available competitive facilities to the networks. We also found that protection against co-channel interference afforded by the use of the "equivalent protection" technique does not result in modification of a license. The Court of Appeals, in affirming the Commission's decision, said in part:

Equivalent protection from interference, which was thought to be adequate as

[6] *New Orleans Television Corp.* (*WVUA-TV*), FCC 62–853, 23 RR 1113; Memorandum Opinion and Order, Docket No. 14231, FCC 63–739, 25 RR 1780, authorizing short-spaced assignment of Enid, Oklahoma, station; *Peninsula Broadcasting Corporation,* FCC 64–763, 3 RR 2d 243.

[7] *Capital Cities Broadcasting Corp.* (*WTEN*), FCC 63–129, 24 RR 1067; *Van Curler Broadcasting Corp.* (*WAST*), FCC 63–130, 24 RR 1079; *St. Anthony Television Corporation* (*KHMA*), FCC 64–330, 2 RR 2d 348; *Peninsula Broadcasting Corporation* (*WVEC-TV*), *supra.*

of the present time, was afforded to Capitol. We can not say that these conclusions are without support and are erroneous.[8]

8. The petitioners and MST have raised other questions which we think require consideration. KPAC–TV states that applicant's "Opposition" is not supported by affidavit as required by Section 309(d)(1) of the Communications Act and Section 1.580(j) of the Commission's Rules. Although the "Opposition" itself is not verified, most of the exhibits and attachments thereto have been individually verified and, in our view, since it is conceivable that the entire "Opposition" could not be verified by a single individual, the verification is sufficient to satisfy the statute and our Rules. Moreover, those attachments and exhibits upon which the Commission has relied in its consideration of this matter are those which are properly supported by affidavit. MST points out that there will be a reduction of the strength of the signal provided over Port Arthur because the proposed move is *away* from Port Arthur. A similar allegation was made in the *Peninsula Broadcasting* case, *supra,* and there, as here, we found that a signal of sufficient strength to meet the requirements of our Rules was delivered over the city in question. In this case, however, since Beaumont, and not Port Arthur, is the principal community to be served, we require only that the applicant place a 77 dbu signal over Beaumont, and no question is raised with respect to the strength of the signal which the applicant proposes to provide to Beaumont.

9. Questions have also been raised by KPAC–TV respecting the applicant's financial qualifications and the applicant's programming performance compared with its programming promises. We have examined the facts presented with respect to these questions and we find no merit in them. The applicant's costs of construction are estimated to be less than $200,000 and, in addition to such other assets as may be available to it, the applicant has shown the availability of a line of bank credit of $300,000 and deferred credit from the equipment manufacturer of $160,000 with the first payment due in February 1967. With respect to whether the applicant has performed in accordance with its promises, we have examined the applicant's report of its programming during the past three years and we are satisfied that it comports substantially with the programming proposed in the original application. Petitioners have also suggested that applicant's staff is smaller than that originally proposed and while this is true, it appears that the applicant originally engaged a staff greater than that proposed, but because of inadequate revenues, it was compelled to reduce its staff in order to effect savings in operating costs. We consider this action to be entirely reasonable under the circumstances, and we believe that it serves to reinforce our conclusions with respect to the existence of competitive imbalance in the Beaumont-Port Arthur area.
we believe it appropriate to note that we have carefully weighed the gains and losses of predicted coverage to populations and areas which will result from a grant of the application. We find that

[8] *New Orleans Television Corp. (WVUA-TV),* FCC 62–853, 23 RR 1113; affirmed *sub nom Capitol Broadcasting Company* v. *Federal Communications Commission,* 116 U.S. App. D.C. 370, 324 F. 2d 402, 25 RR 2151.

10. KSLA–TV and KPAC–TV have also raised questions concerning the efforts made by the applicant to ascertain the programming needs and interests of the new area to be served, citing *KTBS–TV, Inc.*, FCC 63–359, 25 RR 301 (Petition for Reconsideration denied, FCC 64–35, 1 RR 2d 1054; appeal pending before U.S.C.A., D.C. Cir.). By letter dated July 29, 1964, the Commission afforded the applicant an opportunity to conduct any necessary surveys in its proposed new coverage area and to furnish, within 60 days, a programming submission describing the steps which the applicant has taken to accommodate the needs and interests of the new area. Within the time allotted, the applicant amended its application by submitting evidence of a comprehensive programming survey and effecting changes in its programming proposal to reflect the results of the information thus secured. In view of this submission, the petitioners' objections are now moot.

11. KSLA–TV alleges that a grant of the application would be inconsistent with the public interest because the applicant has not shown that it has made any efforts to ascertain whether another site is available from which it could operate in conformity with the Commission's separation requirements [9]. MST contends that such an area does exist along the Gulf Coast and that the applicant could achieve its objectives by locating within this area and still meet all of the spacing requirements. No facts have been furnished, however, to indicate whether a site in the suggested alternative area is, in fact, available. For example, MST has furnished no facts relating to air safety considerations, terrain, accessibility, zoning, geological factors, etc. Of paramount importance, however, is the fact that the petitioner and MST are urging that the Commission must order the applicant into hearing for the purpose of considering a hypothetical alternative for which the applicant has not applied. Carried to its logical conclusion, such a policy would result in requiring every applicant to defend in hearing its choice of site location, antenna height, proposed power, and, perhaps even the frequency for which it has applied, against hypothetical alternatives. The adoption of such a policy could only result in introducing chaos into the Commission's processes and would impose an almost impossible burden on the Commission. As we pointed out in *WKYR, Inc.* (FCC 63–893, 1 RR 2d 314), we are unwilling to hold that the Court's *per curiam* opinion in *Wometco* was intended to require the inclusion of an issue wherever a hypothetical alternative may be suggested by a petitioner, as KSLA–TV now urges. In *WKYR, Inc., supra,* we set forth the reasons we refused to consider the possible advantages of station locations not proposed by the applicant. Those reasons apply with equal force to the matter now before us and we, accordingly, reject consideration of alternatives not proposed by the applicant.

12. In view of the foregoing, the Commission finds that KSLA–TV and MST are without standing as "parties in interest" within the intent and meaning of Section 309(d)(1) of the Communica-

[9] Citing *Wometco Enterprises* v. *Federal Communications Commission*, 114 U.S. App. D.C. 261, 314 F. 2d 266, 24 RR 2073.

tions Act and Section 1.580(i) of the Commission's Rules and that, on the merits, no substantial and material questions of fact have been raised by KSLA–TV, KPAC–TV or MST. The Commission further finds that the applicant is legally, technically, financially and otherwise qualified to construct and operate as proposed, and that a grant of the application will serve the public interest, convenience and necessity.

13. We find that the applicant has shown good cause for a waiver of Section 73.610 of the Commission's Rules. In order to guarantee the applicant's performance in accordance with its proposal to provide "equivalent protection" to Station KSLA–TV, however, we will so condition the grant as to assure applicant's compliance therewith.

Accordingly, IT IS ORDERED, That the Petition to Deny, filed herein by KSLA–TV, Inc., and the objections filed by The Association of Maximum Service Telecasters, Inc., ARE DISMISSED, and that the Petition to Deny filed herein by Texas Goldcoast Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That Section 73.610 of the Commission's Rules IS HEREBY WAIVED.

IT IS FURTHER ORDERED, That the application (BPCT–3266) of Television Broadcasters, Inc., IS GRANTED, subject to specifications and conditions to be issued.

Adopted January 6, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

I dissent. It is my view that this case very clearly demonstrates the necessity for a hearing to ascertain all of the facts. Only in this way may the Commission determine, without conjecture, surmise, and guess, whether applicant's requested waiver of Section 73.610 of our Rules would or would not serve the public interest, convenience and necessity.

The majority's decision recites that applicant urges a grant of its application on the basis that its station KBMT and the ABC network are at a competitive disadvantage in the non-metropolitan areas of Beaumont-Port Arthur; that a grant would enhance its competitive position, as well as that of ABC, with the other stations and networks in the Market; that the proposed move would result in a net gain in area and population; that there is an abundance of other services in the loss areas; and finally, a move away from the Gulf is necessary if the station is to improve the quality of its signals to its coverage area and achieve competitive status. Upon consideration of the foregoing allegations, as well as "statistics otherwise available to the Commission", the majority takes the position that a serious competitive imbalance exists in the Beaumont-Port Arthur Market. One of the examples cited by the majority in support of its position is with respect to the disparity of the network hourly rates between KBMT and the other two television stations in the Beaumont-Port Arthur Market. The

there will be a substantial net gain in coverage as a result of the move. In addition, the entire area which will lose a predicted decision of the majority also goes on to say that "While it is neither our purpose nor function to assure competitive equality in any given market, we have a duty at least to take such actions as will create greater opportunities for more effective competition among the networks in major markets." Although I have no quarrel with the majority's recognition of its "duty" as stated above, I would have to add "provided, however, such actions are in accordance with the Commission's Rules and Regulations."

At this point it is pertinent to note that Section 73.610 (a) of our Rules provides, among other things, that ". . . all applications . . . for changes in the transmitter sites of existing stations will not be accepted for filing if they fail to comply with the requirements specified in paragraphs (b), (c), and (d) of this section." Since the application of KBMT does not comply with the requirements of paragraph (b) of Section 73.610, it should not have been accepted for filing. Certainly the application should not be granted in the absence of justifiable facts fully developed in a hearing. If the time is now at hand when our rules do not mean what they say, then I submit that we should initiate proceedings to change them to say and mean something else.

Of course I am aware of the fact that this is not the first time that a majority of the Commission has seen fit to waive Section 73.610 of the Rules by authorizing short-spaced operations. However, I believe this is the first time that such a grant would result in a loss of service to thousands of persons.

In the *Fisher* case, the majority found that ". . . it does not appear that any area should lose predicted signal as a result of the proposed move." In the *New Orleans* case, the majority said ". . . Grade B signal as a result of the move is swampland where few people reside." In the *Peninsula* case it was found that "No person in applicant's present service area will be deprived of service, but there will be significant gains and there will be a reduction in interference which Station WLVA–TV now receives."

Contrary to the findings in the aforementioned cases, the present case shows that while more than 45,000 persons will receive an additional Grade B signal, more than 9,000 persons will lose a predicted Grade B signal from KBMT. Although the majority cites as apparent justification for the loss of service to the fact that "at least four other television signals are available, including ABC network programming", it fails to mention the number of other television signals that are available in the gain area, including ABC programming.

Finally, it should be noted that the applicant KBMT was given a grant to use Channel 12 to serve Beaumont and Port Arthur after a comparative hearing with two other applicants. Each of the three applicants proposed antenna locations that met the minimum mileage requirements. I am confident that if the present applicant had proposed a short separation for KBMT and a waiver of Section 73.610 of the Rules at the time of the comparative hearing, its application would not have been granted.

F.C.C. 65–10

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of SOUTH EASTERN ALASKA BROADCASTERS, INC. For Additional Time To Construct Radio Station KECH, Ketchikan, Alaska | Docket No. 15777 File No. BMP–11131 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration (a) the above-captioned application; (b) Petition to Designate Application for Hearing, filed on April 23, 1964, by Midnight Sun Broadcasters, Inc., licensee of Station KTKN in Ketchikan, Alaska ("Midnight Sun" or "Petitioner" herein); (c) Informal requests for additional time to respond to the Petition, filed May 6, 1964 and May 27, 1964, on behalf of South Eastern Alaska Broadcasters, Inc., ("South Eastern" or "permittee" herein); (d) Midnight Sun's informal opposition to the second request for extension of time to respond; (e) South Eastern's "Opposition to Petition to Designate Application for Hearing," filed June 10, 1964; (f) Midnight Sun's Reply to South Eastern's Opposition, filed June 19, 1964; and (g) related correspondence.

2. Standing to file a petition to deny is governed by Section 309 (d) (1) of the Communications Act of 1934, as amended, which provides that a party in interest may file such a petition against any application to which Section 309(b) applies. Since Section 309(c) (2) (d) specifically provides that Section 309(b) does *not* apply to extension applications, it is clear that petitions to deny do not lie against extension applications and, that apart from this specific remedy, Commission actions on such applications have never been subject to challenge as a matter of right.[1] Under these circumstances, the petitioner lacks standing. Nonetheless, because of the public interest questions presented, we shall consider Midnight Sun's allegations on our own motion.

3. South Eastern's application (File No. BP–15148) for a new standard broadcast station in Ketchikan, Alaska (620kc, 1 kw day, 500 watts night, unlimited time) was granted on January 23, 1963, and the call letters KECH were subsequently assigned. South Eastern's first extension application (File No. BMP–10981), filed July 31, 1963, indicated that the transmitter was ordered and was "ready on demand", that other equipment had not been ordered, and that

[1] See Senate Report No. 44 on S. 658, 82d Cong., 1st Session.

the necessary land had been acquired. South Eastern explained that construction had not been completed because of the involvement of personnel with its other stations in Anchorage and Fairbanks. In addition, South Eastern stated that it had been reluctant to proceed until its staffing plans, which included giving an ownership interest to the manager of its new station, were effectuated. On the basis of these representations the permit was extended to December 31, 1963.

4. South Eastern's second (above-captioned) extension application was filed on December 24, 1963. From a review of the application it appeared that permittee's efforts to construct the station had been limited to making payments on the transmitter, obtaining a studio location and negotiating for a local manager. As a result, the Commission on January 20, 1964, wrote to South Eastern, pointing out that no construction had been begun, that the transmitter (although available on request) had not been delivered, that no explanation for the lack of further progress had been given, and concluded that under these circumstances permittee should, within forty days, supply a clear commitment that construction would proceed in an expeditious manner.

5. An untimely response was received from the permittee on March 9, 1964, with the explanation that the letter had not been mailed because of a secretary's illness. The response, written by permittee's president, J. Chester Gordon, emphasized the difficulty in obtaining employees, stating that he had "released" the manager of his Juneau station "on the strength of getting Bob Broadwater into my organization." He enclosed a letter to Mr. Broadwater dated February 20, 1964, inquiring as to when Broadwater's father-in-law would be able to help in obtaining credit, stating that of course nothing could be done in winter and a reply from Broadwater dated February 24, 1964, which indicated that the latter's father-in-law "would give me a hand this spring." In addition, Broadwater's letter stated that he had a verbal agreement to rent studio and office space from Western Auto (which would do necessary remodeling), and had talked to one Buzz Kyllonen about bulldozing holes for the tower blocks "as soon as the ground thaws." [2]

6. Essential to a grant of this application is a favorable resolution of the questions which have been raised concerning permittee's diligence. Even taking all of permittee's representations at face value, we are unable to conclude that it has met the requisite standard. As the matter now stands, no construction has begun, and except for the transmitter (delivery of which has not been requested), no equipment has been ordered. Again accepting permittee's statements, the only steps taken by it since the first extension was granted were the making of arrangements for a downtown studio and for bulldozing at the site. Permittee's sole explanation for this delay was its desire to obtain Mr. Broadwater as a

[2] By a series of affidavits submitted with its petition, Midnight Sun seeks to controvert permittee's allegations concerning, arrangements supposedly made by Broadwater on permittee's behalf, with Western Auto and Buzz Kyllonen, the severity of the winter in Ketchikan, and the circumstances surrounding the departure of permittee's former manager at Juneau. Midnight Sun has not shown that the representations made by Broadwater (who does not have an ownership or other interest in KECH) can be clearly attributed to permittee. Nor has it established that permittee's own statements are more than ambiguous and confusing. Consequently, Midnight Sun's allegations are insufficient to raise an issue concerning permittee's candor.

local manager, yet this same reason was given months before in the previous extension application, and no arrangement has yet been made. In fact, the arrangement appeared to be dependent on Broadwater's acquiring an ownership interest, although his ability to acquire the necessary funds was in doubt. Whether permittee could proceed without these funds or not, it has acknowledged that it would not do so. In addition, South Eastern has suggested that the weather, too, prevented construction, but it made no effort to demonstrate that the weather was so severe that it could not clear trees on the heavily wooded site it proposes to utilize.[3] Thus, if on the one hand, permittee chose not to proceed until Broadwater acquired an interest, a question concerning permittee's diligence necessarily arrises. If, on the other hand, the funds were indispensable, a question of diligence is likewise raised, for we have held that financial difficulties *per se* do not justify repeated extensions, especially if, as here, little or nothing has been done toward constructing the station—*S. George Webb* (WNRI) 4 FCC 359 (1937).

7. Under the circumstances, the application presents no substantial or material questions of fact requiring its designation for evidentiary hearing; rather, the reasons advanced by permittee for not proceeding with construction entitle it at most to an oral argument on the question of whether failure to complete was due to causes beyond its control or other matters sufficient under Section 319 of the Communications Act of 1934, as amended, or Section 1.534(a) of the Commission's Rules to warrant a grant of the application.

8. Except as indicated by the issue specified below, the applicant appears to be legally, technically, financially, and otherwise qualified to operate as proposed; however, the Commission is unable to make the statutory finding that a grant of the above-captioned application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for oral argument on the issue set forth below;

In view of the foregoing, IT IS ORDERED, this 6th day of January, 1965, that pursuant to Sections 5(d) and 319(b) of the Communications Act of 1934, as amended, the above-captioned application IS DESIGNATED FOR ORAL ARGUMENT before the Review Board in Washington, D.C., at a time to be specified by subsequent Order, upon the following issue:

> To determine whether the reasons advanced by the permittee in support of the above-captioned application constitute a showing that failure to commence or complete construction was due to causes beyond its control or other matters sufficient under Section 319 of the Communications Act of 1934, as amended, and Section 1. 534(a) of the Commission's Rules, to warrant further extension of the outstanding construction permit.

IT IS FURTHER ORDERED, That Midnight Sun Broadcasters, Inc. IS MADE A PARTY to this proceeding.

IT IS FURTHER ORDERED, That the relief requested in Mid-

[3] Although permittee has had almost a year since the above-captioned application was filed, it has failed to provide evidence of having taken any steps toward constructing the station during this period. Likewise, permittee has yet to provide the clear commitment of its intention to proceed expeditiously as requested by the January 20, 1964 Commission letter.

night Sun's "Petition to Designate Application for Hearing" filed April 23, 1964 IS GRANTED to the extent indicated and in all other respects IS DENIED.

IT IS FURTHER ORDERED, That South Eastern's request for additional time to reply and Midnight Sun's opposition to that request ARE DISMISSED AS MOOT.

IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicant and party respondent herein, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission an original and 19 copies of a written appearance stating an intention to appear on the date fixed for the oral argument and present evidence on the issue specified in this Order, and shall have until 10 days prior to oral argument to file briefs or memoranda of law.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–13

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| CHARLES COUNTY BROADCASTING CO., INC., LA PLATA, MD. | Docket No. 14748<br>File No. BP–14748 |
| DORLEN BROADCASTERS, INC., WALDORF, MD. | Docket No. 14749 |
| For Construction Permits | File No. BP–15287 |
| DORLEN BROADCASTERS, INC., WALDORF, MD. | Docket No. 15202<br>File No. BRH–1209 |
| For Renewal of License of Station WSMD (FM) | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. By Memorandum Opinion and Order, FCC 64R–522, released November 19, 1964, the Review Board held in abeyance action on a joint request for approval of an agreement between Charles County Broadcasting Co., Inc. (Charles County) and Dorlen Broadcasters, Inc. (Dorlen) and a petition for severance and grant of the Dorlen FM application.[1] Action was withheld pending release of a partial Initial Decision by the Hearing Examiner on certain issues and submission of further information by the parties. On November 24, 1964, the Hearing Examiner released a Partial Initial Decision (FCC 64D–78) resolving the specified issues. On December 21, 1964, Charles County and Dorlen presented additional information in support of their joint request.

2. Our earlier Order (paragraph 1, *supra*) directed the Examiner to resolve two designated issues: Issue 1 (the economic injury issue) and Issue 10 (the "strike" issue). On Issue 1, the Examiner concluded that, since no substantial evidence had been adduced concerning that issue, it can be assumed that sufficient revenues are available in Charles County, Maryland, to support a standard broadcast station without loss or degradation of FM broadcast service. On Issue 10, the Examiner concluded that there was sufficient evidence that Dorlen's application was not filed to obstruct or delay a grant of Charles County's application. No exceptions were taken to these conclusions and the Board concurs in the Examiner's disposition.[2]

[1] Before the Board for consideration are the pleadings referenced in footnote 1 of the cited Memorandum Opinion and Order and a supplement to the joint petition, filed by Charles County and Dorlen on December 21, 1964. On December 23, 1964, Dorlen filed a request to preserve right to take exceptions, but it withdrew said request by letter of January 5, 1965.

[2] The Examiner issued findings and conclusions with respect to all issues in the proceeding except the standard comparative issue and the ultimate issue. Among said issues was one to determine whether objectionable interference would be caused to WPCC, Morningside, Maryland and to WQXR, New York, New York. Both of these stations are respondents in this proceeding. This latter issue, as well as the others, was resolved favorably to Charles County. No exceptions or other objections have been filed by either respondent.

3. The Board also requested that the proposed payment by Charles County to Dorlen of $80,000 for purchase of control of Dorlen be supported by affidavits of the purchaser and verified as to the value of the stock involved. In compliance, Charles County and Dorlen have submitted affidavits and statements which clearly establish that the purchase of Dorlen's stock is not an additional payment in consideration for the dismissal of its AM application.

4. We also called upon the parties to show that withdrawal of the Dorlen application for Waldorf, Maryland, would not unduly impede achievement of a fair, efficient and equitable distribution of radio service under Section 307(b) of the Communications Act and that publication pursuant to Rule 1.525(b) is not necessary. Such a showing has now been made and we conclude that, in view of the proximity between the communities; their similarity in population; the fact that LaPlata is the county seat of Charles County; the fact that while Dorlen's proposal would serve more people, such population now receive a plethora of service; and the fact that Waldorf has an FM broadcast station assigned to it, we need not require the parties to publish notice of this agreement and dismissal of Dorlen's application.

5. In view of the above, no obstacles to approval of the agreement or dismissal of Dorlen's application remain. The Broadcast Bureau, in its comments concerning the petition for severance of Dorlen's renewal application, suggested that if the character issue were resolved in favor of Dorlen, the Review Board could grant both Dorlen's renewal application and Charles County's application. Inasmuch as there has been no opposition to said suggestion, and since the Examiner, in his partial Initial Decision, has resolved all issues concerning Charles County in its favor (except for the public interest issues, which were not before the Examiner for determination in the partial Initial Decision), the Review Board finds that a grant of Dorlen's and Charles County's applications would be in the public interest, and therefore will grant both Dorlen's renewal application and Charles County's application.

Accordingly, IT IS ORDERED, This 14th day of January, 1965, That the joint request for approval of agreement and dismissal of application, filed September 21, 1964, by Charles County Broadcasting Co., Inc., and Dorlen Broadcasters, Inc., IS GRANTED; that the agreement IS APPROVED; that the application (BP–15287) of Dorlen for a new standard broadcast station IS DISMISSED with prejudice; and that the application (BP–14748) of Charles County IS GRANTED subject to the following conditions:

> Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 3.87 of the Commission Rules are not extended to this authorization, and such operation is precluded.
>
> Permittee shall submit a non-directional proof-of-performance to establish that the antenna efficiency has been reduced to essentially 175 mv/m/kw, as proposed.

and;

IT IS FURTHER ORDERED, That the petition for severance and grant or in the alternative severance and separate considera-

tion, filed September 28, 1964, by Dorlen Broadcasters, Inc., IS GRANTED; and that the renewal application of Dorlen (BRH–1209) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–36

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of WILLIAM L. FOX, ATLANTIC CITY, N.J. For Construction Permit for a new VHF Television Broadcast Translator Station | File No. BPTTV–2271 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the above-captioned application and accompanying request for waiver of Section 74.732(e)(1) of the Commission's Rules; (b) a "Petition to Deny" filed August 21, 1964, by Francis J. Matrangola (petitioner), permittee of Station WCMC–TV, Channel 40, Wildwood, New Jersey, directed against a grant of (a) above; (c) an "Opposition to Petition to Deny" filed September 1, 1964, by William L. Fox (applicant), permittee of Station WIBF–TV, Channel 29, Philadelphia, Pennsylvania, and applicant herein, directed against (b) above; and (d) a "Reply to Opposition to Petition to Deny" filed September 11, 1964, by the petitioner directed against (c) above.

2. On June 15, 1964, the applicant filed the present application for a construction permit for a new VHF television broadcast translator station to serve Atlantic City and Ventnor-Margate, New Jersey, by rebroadcasting its Station WIBF–TV on Channel 8. Station WIBF–TV (which is not now on the air) does not furnish a predicted Grade B contour over the principal communities proposed for the translator.[1] As a result, the applicant has requested a waiver of Section 74.732(e)(1) of the Commission's Rules.[2]

3. Since the applicant urges that the Commission should waive the provisions of Section 74.732(e)(1) of the Rules, the Commission must first determine whether a grant of the requested waiver would be warranted. *United States* v. *Storer Broadcasting Corporation*, 351 U.S. 192, 13 R.R. 2161. The showing required in a waiver request has been described as follows:

> (T)he function of a request for waiver is not to change the general standard, a matter with respect to which the opportunity for general comment would be a prerequisite . . . but to justify an ad hoc exception to that standard on the

[1] The applicant states that its predicted Grade B contour falls approximately 17 miles short of Atlantic City.

[2] Section 74.732(e)(1) of the Rules provides that,

"(e) The licensee of permittee of a television broadcasting station, an applicant financially supported by such licensee of permittee, or any person associated with the licensee or permittee, either directly or indirectly, will not be authorized to operate a VHF translator under any of the following circumstances:

"(1) Where the proposed translator is intended to provide reception beyond the Grade B contour of the television broadcast station proposed to be rebroadcast."

ground that it works against the public interest in the particular case. We must judge the request before us in terms of the public, rather than a private, interest. (*Oregon Radio, Inc.*, 14 R.R. 742, 746–47.)

This is the test, therefore, which must be employed in determining whether the applicant's waiver request is justified.

4. In support of its waiver request, the applicant urges, in substance, as follows: that although its predicted Grade B contour falls approximately 17 miles short of Atlantic City, the predicted Grade B contours of the Philadelphia VHF stations (WCAU–TV, Channel 10; WFIL–TV, Channel 6; and WRCV–TV, Channel 3) extend beyond Atlantic City; that Atlantic City and the nearby communities of Ventnor and Margate are important parts of the service areas of Philadelphia television stations and it is essential for competitive reasons that Station WIBF–TV be able to have its program received by viewers in Atlantic City-Ventnor-Margate; that Section 74.732(e) (1) of the Rules was designed to prohibit television stations extending unduly into other competitive areas the signals of their stations, but that it was not designed to prohibit a UHF television station from extending its service by means of a translator in order to give it some hope of successful competition with VHF television stations in major markets; that Atlantic City-Ventnor-Margate does not have television stations in operation and the inhabitants of the area must view programs originating in Philadelphia stations; that two UHF channels are assigned to Atlantic City,[3] but that no station is on the air utilizing either of these channels at Atlantic City or nearby; that Station WHTO–TV, Channel 46, Atlantic City, New Jersey, commenced operation in 1952 but went off the air in 1954 due to its inability to compete effectively with the Philadelphia stations; and that, in view of the foregoing considerations, the Commission should waive Section 74.732(e) (1) of the Rules so as to enable it to compete on a fairer and more efficient basis with other television stations in Philadelphia.

5. Contrary to the applicant's argument, when the Commission added Section 74.732(e) (1) to its Rules it specifically considered the possible use of VHF translators to serve areas beyond a UHF television station's predicted Grade B contour for competitive reasons. *Report and Order in Docket No. 14184*, FCC 62–710, 23 R.R. 1565. The Commission stated the problem as follows:

12. [Various parties] also urge that ... in areas where a UHF station is in competition with a VHF station, the UHF licensee should be allowed to use VHF translators beyond its own Grade B contour in order to compete more effectively with the VHF station in communities served by the VHF station. (23 R.R. 1565, 1567.)

The Commission rejected such possible use stating that,

18. Nor will the UHF licensee be authorized to extend its service area beyond its predicted Grade B contour by means of a VHF translator. The Commission cannot see how these uses of the VHF translator would aid the development of UHF. The UHF licensee should seek to improve its service to the maximum extent possible. It has available to it UHF translators to extend its service area. We have recognized the possible need for and encouraged the supplementation of service from UHF stations through auxiliary repeater devices such as translators, but we believe it preferable to foster the use of *UHF* channels for translator use. (23 RR. 1565, 1569.)

[3] Channels 46 and 52.

6. The applicant has advanced no arguments which persuade us that our view was in error, or that some special circumstances exist in the Atlantic City area which would justify the requested ad hoc exception. In this regard, the enactment of All Channel Receiver legislation subsequent to the adoption of the above-cited Report and Order, which must eventually ensure the public use of receivers capable of receiving UHF signals, reinforces our quoted view that a UHF licensee should seek to improve its UHF service rather than rely on VHF translators. Accordingly, we do not believe that the applicant has supplied adequate justification for its request for waiver of Section 74.732(e) (1) of the Rules.

7. In view of the foregoing, IT IS ORDERED this day of January, 1965, that William L. Fox's request for waiver of Section 74.732(e) (1) of the Commission's Rules IS DENIED. IT IS FURTHER ORDERED that the above-captioned application IS DISMISSED for failure of the applicant to show compliance with Section 74.32(e) (1) of the Commission's Rules.

IT IS FURTHER ORDERED, That the pleadings listed in paragraph 1 above are DISMISSED AS MOOT.

Adopted January 13, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R-14

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| CHARLES VANDA, HENDERSON, NEV. | Docket No. 15705<br>File No. BPCT-3315 |
| BOULDER CITY TELEVISION, INC., BOULDER CITY, NEV. | Docket No. 15707<br>File No. BPCT-3327 |
| VEGAS VALLEY BROADCASTING CO., BOULDER CITY, NEV. | Docket No. 15747<br>File No. BPCT-3454 |
| For Construction Permit for New Television Broadcast Station | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Charles Vanda, an applicant for a construction permit for a new television station in Henderson, Nevada, has petitioned the Review Board for the deletion of a financial qualifications issue.[1] Vanda's application was designated for comparative hearing with two other applications by Commission Order (FCC 64-1075) released November 20, 1964.[2] My this Order the Commission designated a financial qualifications issue against the petitioner because the extent of his liabilities was unclear and therefore the applicant's financial qualifications could not be determined from the information contained in the application.

2. Vanda makes his instant request on the basis of an alleged error in the designation of the financial issue against him. The petitioner contends that a November 9, 1964, amendment to his application, which was before the Commission at the time of designation, contained an unequivocal statement that he had no liabilities other than daily living expenses. Vanda contends that this statement was apparently overlooked and that the financial issue should not have been designated for hearing. Thus, Vanda contends, the issue should be deleted as no substantial question remains as to the applicant's ability to meet the standard test of financial qualification. The Broadcast Bureau opposes Vanda's request. The Bureau argues that Vanda's application includes "listed" stocks purchased on margin which are the subject of a $31,500 debit account, but the partial financial statement submitted to the Commission failed to indicate whether the assets upon which Vanda chose to rely had been adjusted to reflect this

[1] Pleadings before the Board are: Petition to Delete Issue, filed December 7, 1964, by Charles Vanda; Opposition, filed December 18, 1964, by the Broadcast Bureau; Reply, filed December 31, 1964, by Vanda.

[2] After filing of the instant petition the Commission redesignated this case for hearing and added a new applicant, Vegas Valley Broadcasting Co., to this comparative proceeding (Order, FCC 64-1163, released December 22, 1964). In the new Order the Commission retained the financial qualifications issue against Vanda.

liability. In reply, Vanda acknowledges the existence of such purchase and debit account but avers that the stocks relied upon in the November 9th partial statement of assets are different stocks and are owned free and clear.

3. Vanda's November 9, 1964, amendment does not eliminate the necessity for retention of the issue in this proceeding. While this amendment purports to establish assets of $247,000, it unequivocally states that the applicant has no liabilities with the exception of costs of maintaining "apartment, family, office and college fees for our youngsters." In its reply pleading, the applicant concedes however, the continued existence of a $31,500 debit account, but states that this debit account relates to stocks other than those relied upon in his November 9, 1964 amendment. Because of the direct conflict in the applicant's statement in the November 9, 1964 amendment concerning liabilities, and the concession in his reply pleading that he does have liabilities, the financial qualification issue must be retained. While such conflict may be susceptible to reasonable explanation, the conflict should be resolved in hearing rather than on the basis of allegations in interlocutory pleadings.

Accordingly, IT IS ORDERED, This 14th day of January, 1965, That the Petition to Delete Issue, filed December 7, 1964, by Charles Vanda, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–20

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| LORENZO W. MILAM AND JEREMY D. LANSMAN, A PARTNERSHIP, ST. LOUIS, MO. | Docket No. 15615<br>File No. BPH–4218 |
| CHRISTIAN FUNDAMENTAL CHURCH, ST. LOUIS, MO. | Docket No. 15617<br>File No. BPH–4402 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration the Broadcast Bureau's motion to include an antenna site availability issue with respect to the application of Lorenzo W. Milam & Jeremy D. Lansman (Milam & Lansman).[1]

2. The mutually-exclusive applications of Milam & Lansman and of Christian Fundamental Church for construction permits for a new FM broadcast station on Channel 273, St. Louis, Missouri, were designated for hearing by Commission Order (FCC 64–821), released September 8, 1964, and published in the Federal Register (29 F.R. 12853) on September 11, 1964. The designation Order specified an issue relative to the areas and populations to be served by the proposals and the standard comparative issue. The engineering portion of the Milam & Lansman application indicated that the proposed antenna would be mounted on the upper portion of a guyed tower of 116 feet to be installed at the present location of a 56-foot tower currently being used by Radio Station KADI–FM on the roof of the Continental Building in St. Louis, Missouri.[2] In a Memorandum Opinion and Order (FCC 64R–561), released December 16, 1964, the Review Board denied a motion to include a site availability issue against Milam & Lansman, which was requested by Christian Fundamental Church, on the grounds that the motion was procedurally and substantively deficient. Nevertheless, the Board noted that the Broadcast Bureau had directed an inquiry to the management of the Continental Building relative

[1] The pleadings before the Review Board include: (1) Motion to enlarge issues, filed December 7, 1964, by the Broadcast Bureau; (2) Opposition, filed December 15, 1964, by Lorenzo W. Milam & Jeremy D. Lansman, A Partnership; (3) Reply, filed December 21, 1964, by the Broadcast Bureau; and (4) Comments in support of Broadcast Bureau's petition to enlarge, filed December 22, 1964, by Christian Fundamental Church. In its Comments in support of Broadcast Bureau's petition to enlarge, Christian Fundamental Church incorporates, by reference, its petition for enlargement of issues, filed December 22, 1964, which requests the addition of antenna site availability and misrepresentation issues against Milam & Lansman. Said petition for enlargement of issues will be the subject of a separate Memorandum Opinion and Order when all related pleadings have been filed.

[2] In Federal Aviation Agency Form 117 (attached to the engineering portion of the partnership application), the consulting engineer for Milam & Lansman indicated that a permanent alteration was proposed to increase the height of an existing antenna structure by 60 feet and to install a side-mounted antenna atop the Continental Building.

to the proposed antenna site of Milam & Lansman, and the Board stated that its denial of the Christian Fundamental Church motion did not preclude future consideration of the question if newly-discovered facts so warranted.

3. On the basis of the reply received from the management of the Continental Building, the Bureau moves that a site availability issue be added against Milam & Lansman. In that reply, dated December 2, 1964, and attached to the Bureau's motion, Thelma M. Tucker, rental agent for the Continental Building, states that she had no correspondence or any other contact with Jeremy Lansman prior to September 25, 1964, and that she has found no evidence of a request by Milam & Lansman to use the roof of the Continental Building. The rental agent also points out that she has not given anyone the right to construct a tower or add to the existing tower on the building's roof; that she does not have the authority to grant such permission; and that proposed construction could not be authorized to anyone without appropriate sketches and engineering data. Miss Tucker claims that no one has submitted any such sketches or engineering data to her or to the owner of the building. In light of these remarks by the rental agent, the Bureau claims that the availability of the antenna site of the partnership for its proposed use is in doubt and that the requested issue should be added.

4. Milam & Lansman initially contend that the Bureau's motion is procedurally defective under Section 1.229 of the Commission's Rules in that the statement of the rental agent is not under oath. Milam & Lansman also oppose the Bureau's position on the merits in that the partnership satisfied itself through personal inquiries and correspondence that it could secure the site; an affidavit of Jeremy D. Lansman, dated December 15, 1964, is attached to the partnership's opposition in support of this contention. In the affidavit, Lansman avers that, prior to the filing of the Milam application, he made several inquiries concerning a suitable site and, as a result, received a letter from the Continental Building realtor, which letter was signed by a Mr. Brennan. Lansman states that he subsequently requested a sample lease from the realtor on several occasions and that, while no lease was ever received, Lansman was told that space was available for a tower for an FM station. When the question of site availability was first raised by Christian Fundamental Church, Lansman claims that he contacted the realty company again and was assured that space is available on the roof of the Continental Building for three more stations. In support of this statement, Lansman attaches a letter from Thelma Tucker, dated October 19, 1964, wherein she states that she has been unable to locate a file or any proposal for a lease regarding the partnership; however, she does confirm space availability to a Commission licensee whose equipment is compatible with existing equipment located on the existing tower of the building. Lansman, in his affidavit, also claims that he has consulted with a Mr. Cervanties of the Continental Building who has informed Lansman that the tower structure proposed by the partnership could be placed on the building. Since use of the Con-

tinental Building has not been ruled out by the building's rental agent and since the partnership has in fact been asked to submit plans and specifications for the rental agent's use in making a lease of the site, Milam & Lansman contend that they have adequately demonstrated reasonable assurance that they may secure the right to use the site.

5. The Bureau's request to include a site availability issue against Milam & Lansman is not supported by an *affidavit* of the rental agent for the Continental Building. See Section 1.229(c) of the Rules. The Board notes, however, that the reply received to the Bureau's certified, special delivery letter is supported in all particulars by the rental agent's affidavit of November 12, 1964, which was submitted with the petition for enlargement of issues, filed by Christian Fundamental Church on December 22, 1964. While it may be true that the rental agent has not ruled out the use of the Continental Building by the partnership, the Board cannot agree that Milam & Lansman have demonstrated thereby the availability of the proposed antenna site for the intended purpose. In the opposition, itself, it is shown that the partnership does not now have an agreement or commitment for the proposed site and that such commitment requires the submission and approval of engineering plans relative to the partnership's anticipated construction.[3] Since Milam & Lansman have not submitted such plans and since the right to use the proposed site depends upon the approval of such plans by the management of the Continental Building, the Board is unable to find even reasonable assurance of the availability of the antenna site proposed by the partnership.

6. The Board's opinion, in this regard, does not mean that a binding arrangement is needed to demonstrate site availability. See *Eastside Broadcasting Co.*, FCC 63R–528, 1 RR 2d 763 (1963). Commission requirements are satisfied when an applicant proposes a site with reasonable assurance in good faith that the site will be available for the intended purpose. *Beacon Broadcasting System, Inc.*, FCC 61–684, 21 RR 727 (1961). Because of the extensive alterations which Milam & Lansman propose to make on the roof, together with the fact that approval of the plans is a prerequisite to the use of the roof, and since it is not clear that the roof of the Continental Building is available to Milam & Lansman, Milam and Lansman have not demonstrated satisfactorily that there is reasonable assurance of the approval of said construction, and an issue will therefore be added to determine the availability of the specified site for the use proposed. See *Edina Corp.*, FCC 62R–82, 24 RR 455 (1962). The Board's disposition of the Bureau's motion does not, however, comprehend a determination of the suitability of the proposed antenna site and the Board notes the absence of any factual allegations concerning such a question.[4]

[3] The Milam & Lansman proposal apparently anticipates either an increase in the height of the existing tower on the roof of the Continental Building or the erection of a separate tower to support its antenna, also located on the building's roof. In either case, the rental agent for the building denies the existence of any such initial authorization to the partnership or to anyone else.

[4] Since the basis of the Bureau s motion involves newly-discovered facts, the Board finds good cause for the delay in the filing of its motion under Section 1.229(b) of the Rules.

Accordingly, IT IS ORDERED, This 18th day of January, 1965, That the motion to enlarge issues, filed December 7, 1964, by the Broadcast Bureau, IS GRANTED; and the issues in this proceeding ARE ENLARGED by the addition of the following:

To determine whether there is reasonable assurance that the antenna site proposed by Lorenzo W. Milam and Jeremy D. Lansman, A Partnership, is available for its proposed use.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

F.C.C. 65–52

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
LIABILITY OF UNITED BROADCASTING CO. OF NEW YORK, INC., LICENSEE OF STATION WBNX, NEW YORK, N.Y.
For Forfeiture

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability, dated July 3, 1962 (FCC 62–714) addressed to United Broadcasting Company of New York, Inc., licensee of Station WBNX, New York, New York, and (2) the response to the Notice of Apparent Liability by the licensee filed September 13, 1962.

2. Station WBNX is licensed for operation at New York City on the frequency of 1380 kc/s with operating power of 5 kw, (DA–1) and shares time with Station WAWZ, Zarapath, New Jersey. The licensee is a wholly owned subsidiary of United Broadcasting Company, Inc., one of several corporations engaged in broadcasting which are owned or controlled by Mr. Richard Eaton.

3. The Notice of Apparent Liability was issued in this case because it appeared that in the operation of WBNX the licensee willfully or repeatedly failed to observe the provisions of Section 317 of the Communications Act of 1934, as amended, and of former Sections 1.342(c), 3.111, 3.113, 3.114, 3.117 and 3.119 of the Commission's Rules.[1] The Notice indicated that for its apparent willful or repeated failure to observe the provisions of the Communications Act and the Commission's Rules the licensee was, pursuant to Section 503(b) of the Communications Act, subject to a forfeiture in the amount of $10,000. For the purposes of clarity, the circumstances surrounding the violations cited in the Notice of Apparent Liability and the licensee's responses to the Notice are treated by individual sections of the Act and the Rules as follows:

4. *Sections 73.111, 73.113 and 73.114 of the Rules.* An examination of the WBNX program logs for the period June 23 to July 18, 1961, inclusive, revealed that for all or portions of each broadcast day during this period the program logs consisted of skeleton printed logs without any further notation other than the printed

[1] Section 1.342(c) is now 1.613(c); Sections 3.111, 3.113 and 3.114 are now parts of Sections 73.111 and 73.112; Sections 3.117 and 3.119 are now Sections 73.117 and 73.119.

program title or sponsor's name and the scheduled time of broadcast. Those portions of the log which were partially maintained contained meaningless symbols such as check marks, and portions of broadcast time were logged separately on as many as three different copies of the logs. Even when all copies of the logs for each day are read together, for no single day between July 9 and 18, 1961, can the logs be said to have been maintained in an orderly manner, in suitable form, and in such detail as to comply with former Section 3.114 of the Rules, (now 73.111). On no single day was a suitable continuous record kept reflecting the station's daily operation.

5. Among other things, throughout all or a portion of the above-stated time no entries were made in the program logs showing station identification, briefly describing each program, showing the time of the beginning and ending of the complete program and showing that each sponsored program broadcast had been announced as sponsored, paid for or furnished by the sponsor. The failure properly to maintain program logs throughout all or a portion of each day between July 9 and July 18, inclusive, was in violation of former Sections 3.111 and 3.113 of the Rules (now 73.111 and 73.112). Moreover, during each or a part of each day specified the logs were not signed by the person competent to do so when starting and when going off duty in violation of former Section 3.113 (now 73.111) of the Rules.

6. The licensee's response to the Notice of Apparent Liability acknowledges that "during the period in question the logs which were maintained by the station failed from time to time to list information which was required to be on the logs." However, the licensee contends that "despite the fact that all of the information is sometimes not recorded on one log, a review of the various logs for the day establishes that, viewed as a composite, the logs comply substantially with the Commission's Rules." In addition, licensee appears to place some of the blame for the multiple violations upon the laxity of its WBNX announcers. Licensee seems to attach some significance to the fact that the Commission did not allege that such sparse information that the logs did contain was inaccurate. Lastly, licensee contends that during the period of violations it was taking affirmative steps to improve its log maintenance procedures and that a new log maintenance system was initiated about the time in question.

7. Licensee's arguments on this point are not persuasive. Even taking into account as many as three copies of the log submitted as *the* official log, there is not a single day without numerous violations. As late as July 18, 1961, the logs were maintained only sporadically, with repeated omissions of the essential factors required by the Rules. Under the circumstances it is difficult to comprehend exactly how the licensee complied substantially with our log keeping requirements, and the fact that the Notice of Apparent Liability did not allege that what little that was kept was inaccurate is immaterial. Moreover, licensee's attempts to place the blame for its ineffectual compliance on the individual announcers can not excuse the licensee from its responsibility for

being aware of and complying with the Commission's Rules. Lastly, corrective efforts subsequent to the date of the violations will be considered as one factor in mitigation when determining the ultimate amount of the forfeiture.

8. In addition to the foregoing, specific violations of former Section 3.113 (now 73.111) of the Rules were noted in that on July 18, 1961, the announcer on duty, one George Sheridan, logged two commercial announcements which were broadcast between 11:30 and 11:46 P.M. by the engineer on duty during the time when Sheridan was enroute from the studio to a remote broadcast from a New York cafe. Sheridan obtained the times of broadcast from the engineer and later made the log insertions as to time.

9. In its response the licensee admits that Sheridan logged the announcements but contends that during the short period of time when Sheridan was traveling from the studio to the remote location, responsibility for the maintenance of the logs was shared with Sheridan by the engineer on duty.[2]

10. However, Sheridan's signature is the only one which appears on the log in question. Thus, the engineer, the person who kept the log from 11:30 to 11:46 p.m. did not sign it, and Sheridan, who signed it, did not keep it for this period, in violation of the requirements of Section 73.111 (a) that "Each log shall be kept by the person or persons competent to do so, having actual knowledge of the facts required, who shall sign the appropriate log when starting duty and again when going off duty."[3]

11. *Section 3.117 (now 73.117) of the Rules.* Monitoring of Station WBNX from 10:30 p.m., July 18, to 2:45 a.m. on the morning of July 19, 1961, revealed that not one correct station identification was made with the station call letters and location in violation of former Section 3.117 of the Rules.[4] In most cases the frequency and call letters were given but in all cases the location was omitted. Licensee contends that the numerous incorrect violations were "isolated, unintentional and inadvertent"; that the fact that the station identifications "even if they were in improper form, were made, demonstrates that the employee was attempting to comply with Commission procedures and station policy, albeit that full compliance was not achieved." Licensee further contends that it did not wish to mislead the public as to the location of the station and the staff had been given specific instructions as to the proper form for station identification announcements.

12. In effect, the licensee is contending that half compliance is better than none and that some credit should be given for its attempts to comply "even if they were in improper form." We cannot accept such incomplete compliance. The requirements of the station identification Rule are specific and simple to follow. The repeated violations heard during the period monitored simply

[2] As indicated in paragraph four *supra*, multiple copies of the program log were maintained on a sporadic basis.

[3] For twelve and one-half hours of the broadcast day prior to Sheridan's show there are no signatures on the program log whatsoever, in further violation of the former Section 3.113 of the Rules.

[4] It should also be noted that, of the numerous incorrect station identifications heard scattered throughout the time monitored, only two were logged, in further violation of former Section 3.111 of the Rules.

indicate that the licensee failed to monitor its station or to supervise its employee.

13. *Section 317 of the Communications Act and Section 3.119 (now 73.119) of the Rules.* From July 10 to July 14, 1961, inclusive, during the hours from 12 midnight to 6:30 a.m., WBNX broadcast matter for which certain monies were either paid or promised to be paid by Pam Cal Inc., pursuant to a contract between WBNX and Pam Cal Inc., for the purchase of this period, without an appropriate announcement being made that the program was paid for or furnished by Pam Cal in violation of Section 317 of the Communications Act and former Section 3.119 of the Rules.

14. Licensee contends that it "is clear from the terms of the contract" between Pam Cal, Inc. and the licensee that Pam Cal purchased the time as a time broker for resale and not to promote the sale of any product or service owned by Pam Cal; that no announcement was required that Pam Cal had purchased the time for resale to others since Section 317 of the Communications Act does not require that a time broker be identified, and that if such announcement were required many other broadcast licensees would be in violation of the Act.

15. Examination of the contract in question fails to reveal the clarity of purpose ascribed to it by the licensee. The contract simply indicates that the broadcast time in question "shall be the exclusive property of PAM CAL" subject to certain restrictions which appear to give the licensee supervisory rights with respects to such matters as conformity to station policy and allows the licensee to approve talent and to broadcast, if it desires, at least four spots an hour. An attachment to the contract would seem to contemplate a time-broker arrangement. However, although Pam Cal may have intended eventually to resell the time to various sponsors, information available to the Commission indicates that this was never done, and during the period in question the time was, in fact, the exclusive property of Pam Cal. Pam Cal either paid or promised to pay the licensee a sum of money for six and one-half hours of programming and therefore an appropriate sponsorship announcement was required by the Communications Act and the Rules.

16. The licensee further contends that in any event the fact that an announcement was made at the conclusion of each broadcast that "this has been a Pam Cal production" constituted proper sponsorship identification. We cannot agree. Section 317(a)(1) of the Communications Act requires that "All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person . . ." The announcement used in this case indicated only that Pam Cal was the producer of the broadcast. It did not convey to the listener the fact that the program was paid for or furnished by Pam Cal.

17. In addition, on July 18, 1961, the WBNX program log

lists Prospect Appliance as the sponsor of a commercial announcement at 11:05 p.m. but the announcement broadcast (for a sewing machine) at this time made no mention of Prospect Appliance, nor was any other sponsor identified, in violation of Section 317 of the Communications Act and former Section 3.119 of the Rules (now 73.119). Licensee acknowledges the lack of sponsorship identification but blames the violation on the announcer who, it states, was supposed to add the identification to all advertising copy which did not contain proper sponsor identification. Licensee alleges that "contrary to the situation which exists when sponsorship identifications intentionally are not made over the air, in this case the advertiser was in fact very anxious for its identity to be known as soon as possible . . ."[5] Licensee alleges that since the announcement refers to a telephone number which must be called "the identity of the sponsor would be easily established to those who are interested in the advertisement."

18. The responsibility for compliance with the requirements of the Communications Act and the Rules rests upon the licensee and it cannot shift the ultimate responsibility to an employee. Licensee's response in this regard again indicates that the violations may have been due to inadequate supervision of its employees. In any event, the use of a sponsor's telephone number alone does not constitute the identification required by the Act and the Rules.

19. *Section 1.342(c) (now 1.613) of the Rules.* Throughout the broadcast week of July 10, 1961, and thereafter until September 29, 1961 (when the licensee forwarded copies of the contracts to the Commission), programs in the Hungarian, French and Greek languages were broadcast pursuant to oral or written contracts for the sale of broadcast time to time brokers for resale. Copies of the contract were not filed with the Commission within 30 days of execution thereof, in violation of former Section 1.342(c) of the Rules.

20. The licensee contends in its response that when it assumed control of WBNX in November, 1960, it continued the foreign language programs with the same arrangements as the former licensee; that "a serious question was presented to the licensee as to whether these agreements were employee arrangements for the conduct of the program or whether they were time brokerage arrangements"; that in June 1961 the licensee was advised by its counsel that it would be desirable "to review the arrangements between the parties and to formalize them"; that the licensee did enter into agreements with the three individuals involved and that they were filed with the Commission September 29, 1961; that the agreements are not time brokerage agreements; that even if they were, no forfeiture should be imposed because the "licensee was diligent in reducing to writing the prior arrangements" and be-

[5] The announcement was as follows: "Now when you see a lady walking down the street if she looks neat and nifty she's the kind that thrifty and chic and charm comes from knowing how to handle a sewing machine when she has to. Here is the buy of a lifetime. A famous brand new sewing machine, electric portable, guaranteed for only $16.50 with the luggage style carrying case. A free gift if you call now. A camera to take pictures of the family all year round. Or a pair of pinking shears if you are a dressmaker. Call for a free home demonstration. Call this station Plaza 7-3900, that's Plaza 7-3900 and see this machine in action. See it sew, mend and monogram and notice the AC-DC quiet running motor. The sewing's like no others . . . Call this station now for a free home demonstration. Plaza 7-3900, that's PL 7-3900."

cause "licensees frequently do not file their written agreements within the required 30-day period."

21. A time broker is simply one who buys time and then resells it to others. The time is the broker's to do with as he wishes and the risk is entirely the broker's since, if he cannot resell the time, he still is responsible for payment to the station of the agreed sum. Normally the broker has the entire responsibility for collection of money from the advertisers to whom he sells. In our opinion the contracts between the licensee and the individuals who broadcast the three foreign language shows in question reveal that these persons were time brokers. Each paid a certain sum weekly for the time involved, each used the time for presentation of programs prepared solely by him and each sought to make a profit by selling, receiving payment for and broadcasting commercial announcements for others. See *Metropolitan Broadcasting Corp.*, 8 FCC 557. The fact that the licensee appeared to retain (by contract) some vestiges of control over content of the programs is not controlling. *Metropolitan Broadcasting, supra.* It is of course, the licensee's obligation to retain control over program content at all times.

22. Nor are we impressed by the other portions of the contract which tend to give the appearance of an employer-employee relationship between station and the time broker. A broker does not become an employee by a mere recitation of words. We are convinced that few if any of the essential elements of an employer-employee arrangement existed between the station and the individuals broadcasting the three foreign language programs. The contract appears to be nothing more than an attempt, through manipulation of words, to avoid the requirements of former Section 1.342(c). The licensee should have been aware that it was not complying with Section 1.342(c) of the Rules soon after it acquired WBNX and should have taken steps to comply with the Rule at that time. We are not impressed by the licensee's attempts to justify its actions by claiming that other licensees may not be in compliance.

23. We conclude from the above that from the period July 9, 1961 to July 19, 1961, inclusive, the licensee willfully and repeatedly failed to observe the provisions of Section 317 of the Communications Act and former Sections 1.432(c), 3.111, 3.113, 3.114, 3.117 and 3.119 of the Commission's Rules. *Midwest Radio Television, Inc.* FCC 63–1024.

24. Lastly, the licensee asks that we reconsider the amount of forfeiture proposed in the Notice of Apparent Liability. It is pertinent to note that violations by other licensees which are also owned or controlled by Richard Eaton have been such as to require the imposition of severe sanctions, including a forfeiture for $4,000 and short term renewals of the licenses for five stations. Here again we find that the licensee has fallen far short of the high standard of conduct to which the Commission is entitled from its broadcast licensees. *Midwest Radio Television, Inc., supra.* In our opinion, most of the violations in this case could, and indeed should, have been easily avoided.

25. We have decided, taking into consideration the extent and seriousness of the violations as well as other factors raised by the licensee in its response, including the fact that the violations occurred shortly after the licensee acquired control of the station and the fact that some improvement has been shown by the licensee in the past years, to reduce the forfeiture from the sum originally proposed to five thousand dollars ($5,000.00).

26. Accordingly, in view of the foregoing, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended that United Broadcasting Company of New York, Inc., licensee of Radio Station WBNX, New York, New York, FORFEIT to the United States the sum of five thousand dollars ($5,000.00). Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to the provisions of Section 504(b) of the Communications Act and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days from the receipt of this Memorandum Opinion and Order.

27. 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 United Broadcasting Company of New York, Inc., licensee of Station WBNX, New York, New York.

Adopted January 19, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–22

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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| In Re Applications of | |
| DOVER BROADCASTING CO., INC., DOVER-NEW PHILADELPHIA, OHIO | Docket No. 15429<br>File No. BPH–3560 |
| THE TUSCARAWAS BROADCASTING CO., NEW PHILADELPHIA, OHIO | Docket No. 15430<br>File No. BPH–4196 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

1. The Review Board has before it an "appeal from the Examiner's order dismissing Dover's application and granting amendment of Tuscarawas' application."[1] On October 10, 1961, Dover Broadcasting Company, Inc. filed its application for a new FM station for Dover-New Philadelphia, Ohio. This application was delayed at least in part because of certain Commission rule making proceedings concerning the FM radio service. On October 30, 1963, Tuscarawas Broadcasting Company filed its application for a new FM broadcast station for New Philadelphia, Ohio, utilizing FM Channel 261. The Commission determined that these two applications were mutually exclusive and accordingly by its order FCC 64–358 on April 24, 1964, designated them for comparative hearing. By Report and Order, June 9, 1964, FCC 64–445, 2 RR 2d 1588, the Commission amended its duopoly rules, Section 73.240(a).[2] On July 29, Tuscarawas filed a petition requesting that the application of Dover Broadcasting Company, Inc. be dismissed as inconsistent with the Commission's revised duopoly rules. The Hearing Examiner on October 28, 1964, heard oral argument on this petition, together with a petition filed by Tuscarawas requesting permission to amend its application. By his Memorandum Opinion and Order, FCC 64–1096, released November 4, 1964, the Hearing Examiner dismissed the Dover application and granted Tuscarawas' request to amend its application. Dover has appealed from that order. For the purpose of our discussion here, we shall treat first the petition to dismiss, and second, Tuscarawas' petition to amend its application.

2. The order which amended the duopoly rules made it quite

[1] Other pertinent pleadings before the Board in this matter are the Broadcast Bureau's opposition to appeal from the Examiner's order dismissing Dover's application and granting amendment of Tuscarawas' application, filed December 10, 1964; Reply to "Appeal from Examiner's order dismissing Dover's application, etc., filed by Dover Broadcasting Company, Inc." filed December 10, 1964, by Tuscarawas Broadcasting Company; and Reply of Dover Broadcasting Company, Inc. to Broadcast Bureau's Opposition and to Tuscarawas Broadcasting Company's "Reply" to Dover's appeal from Examiner's order, filed December 22, 1964, by Dover Broadcasting Company, Inc.

[2] Petitions for reconsideration of these rules were denied by the Commission, October 5, 1964.

clear that those rules were to apply to all pending applications, including those applications already in hearing.[3] The amended rule in pertinent part reads as follows (Section 73.240(a)):

(a) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if:
(1) Such party directly or indirectly owns, operates, or controls one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1 Mv/m contours of the existing and proposed stations, computed in accordance with Section 73.313.

Dover operates an FM station in Canton, Ohio, only 20 miles from the site of the proposed new FM station. Thus the 1 mv/m signal of the existing station at Canton would overlap 76% of the area within the 1 mv/m contour of the station proposed for Dover-New Philadelphia, and 86.5% of the population which would receive a 1 mv/m signal from the proposed station now receives at least a 1 mv/m signal from Dover's existing station at Canton. The Examiner held this overlap to be clearly inconsistent with the amended rule and accordingly dismissed the Dover application.[4]

3. On October 27, 1964, Dover filed a petition for waiver or in the alternative for modification of issue. This petition requested the Commission to waive the provisions of Section 73.240(a) or in the alternative to modify the hearing issues to enable it to show on the hearing record why that section of the rules should be waived with respect to its application.[5] It now argues that since its petition to waive the rule or modify the hearing issue was pending as of the date the Examiner dismissed its application, such action on the part of the Examiner was improper. Dover argues that since it had petitioned the Commission to waive the rule, any action by the Hearing Examiner which relied upon the rule in question was invalid. We cannot accept this argument. The Examiner is responsible for the orderly and expeditious conduct of hearings assigned to him. There is no question that the application before him at the time he acted was pursuant to the policy pronounced by the Commission [6] subject to summary dismissal. While he could have deferred action on the petition to dismiss until after the Commission had disposed of the "petition for waiver", his failure to do so was not an abuse of his discretion. Moreover, the rights of the applicant were not adversely affected by the Examiner's action. Had the waiver or modification of hearing issues as requested by the applicant been granted, the application would have been re-instated and the proceeding would have continued as before the application was dismissed. The appeal from the Examiner's order dismissing Dover's application will therefore be denied.

4. With respect to Tuscarawas' petition to amend its application, the following facts are pertinent. On April 11, 1963, the Commission granted Tuscarawas' application for a new standard broadcast

[3] This phase of the order was subsequently modified to read: all applications in hearing in which the Initial Decision had not yet been issued; however, this change had no bearing on the case here under consideration.
[4] The Commission in its Report and Order, *Supra*, stated that applications which were inconsistent with the rule must be amended before its effective date or be summarily dismissed.
[5] The Commission by its Order, FCC 64-1112, December 2, 1964, referred that petition to the Review Board. The Board denied the petition December 21, 1964, by its Memorandum Opinion and Order, 64R-564, released December 23, 1964. The applicant has not applied for review of Review Board's action.
[6] Report and Order re Duopoly Rules, *Supra*.

station at Urichsville, Ohio. At that time, Tuscarawas was owned 25% by James Natoli, Jr., 25% by his mother, Mary C. Natoli, and 50% by Theodore and Margaret Austin, husband and wife. In December 1963, an application for transfer of control was filed whereby the 50% owned by the Austins would be acquired by James Natoli, Jr. This application was granted January 29, 1964, and the transfer consummated February 7, 1964. The application presently before the Board was filed October 30, 1963, and on April 22, 1964, it was designated for consolidated hearing with the application of Dover Broadcasting Company.[7] In July of 1964, Tuscarawas amended its corporate charter to increase the number of shares of stock authorized from 200 to 1,000, and additional shares of stock were issued to James Natoli in exchange for funds advanced by him for the construction of the AM station, thus redistributing the ownership of the corporation so that James Natoli owned 93.4% of the total shares and Mary C. Natoli, his mother, 6.6%. On August 5, 1964, Tuscarawas sought to amend its application to reflect this change in the corporate structure and to reflect the change in ownership which the Commission had approved January 29, 1964.

5. Dover has opposed Tuscarawas' petition to amend on the ground that the petition filed by Tuscarawas failed to describe the nature of the amendment which was offered; moreover, that it was not a pro forma amendment showing simply a change in the corporate structure of the applicant but rather that it would effect a basic change in the ownership of the corporation which would result in a comparative advantage to Tuscarawas; and that Tuscarawas had not made a showing which would justify this amendment after the matter had been designated for hearing. Dover relies upon Section 1.522 of the Commission's rules and *Sands Broadcasting Corporation*[8] and other cases which apply the good cause test to amendments to support its position.

6. The Bureau in its comments takes the position that the amendment should be granted. It notes that the change in ownership which deleted the Austins from the corporation and substituted complete ownership on the part of the Natolis was in fact approved by the Commission two months before the matter was designated for hearing, and that the amendment at this time merely corrects the record in this case so that it properly reflects these facts. The Bureau also observes that Dover had constructive notice of this change in ownership and that the amendment at this stage of the proceedings can have no adverse effect upon Dover's application. With respect to the changes in corporate structure, the Bureau notes that this merely shows a modification in the financing of the corporation, but that there are no new owners nor is there any change in the actual control of Tuscarawas Broadcasting Company.

7. The Examiner, after having heard argument of both parties, held that Dover's opposition to the amendment when read as a whole was "without merit" and that the amendment should be allowed. Dover has now appealed from the Examiner's ruling. It has reiterated all of the arguments which it made before the Ex-

[7] At the time the application was filed, the applicant corporation was owned by 50% by the Natolis, and 50% by the Austins.
[8] *Sands Broadcasting Corporation*, 22 RR 106 (1961).

aminer. It also urges that the Examiner in his ruling failed to consider its arguments, made no finding of good cause for the amendment and disregarded the deficiencies in Tuscarawas' petition which it had called to his attention. Thus Dover argues that the Examiner had committed fatal error and must be reversed. The Bureau and Tuscarawas take the position that the result reached by the Examiner is correct and that his ruling must be affirmed.

8. It is true that the Examiner could have given a more comprehensive explanation for his holding. Nevertheless we agree that in view of all the circumstances in this case the amendment should be allowed. The matter was not decided by the Examiner on the basis of written pleadings alone. It was only after extensive arguments by all parties of record that the Examiner reached his decision. Thus the Examiner was not misled by the obvious deficiencies in Tuscarawas' petition. Moreover, the record makes it quite clear that none of the parties were misled or otherwise deprived of any of their rights because of deficiencies in the petition. With respect to the substantive problem we note that it would have been better practice had Tuscarawas filed an amendment to its FM application reflecting the change in ownership at the time the change was approved by the Commission rather than waiting until after the matter was designated for hearing. However, we do not feel that the amendment now before us should be denied because of this oversight. The amendment before us can give no competitive advantage to Tuscarawas. The change in ownership which it reflects became an accomplished fact in February of 1964, when James Natoli, with the Commission's consent, acquired the stock which had originally been held by Mr. and Mrs. Austin. In these circumstances, the amendment of the FM application to show the deletion of the Austins and total ownership of the Natolis is no more than a ministerial act which Tuscarawas neglected to perform until its amendment was filed August 5, 1964. Moreover, Dover had constructive notice of the change in ownership and in view of the competitive situation which exists in this proceeding we must assume that it was in fact fully aware of this change even though Tuscarawas' application was not formally amended.

9. Tuscarawas proceeded with diligence to amend its application to reflect the modification of its corporate charter. Within one month of the date the charter was amended its petition to amend was filed with the Commission. Further, it is noted that the modifications set forth in the amendment, while affecting the percentage of ownership of stock as between James Natoli, Jr., and Mary C. Natoli, do not introduce any new parties into the proceeding nor do they require that any new issues be added or the existing issues be modified in any way.[9] Thus we cannot say that the proffered amendment would afford a competitive advantage to Tuscarawas Broadcasting Company nor would it be contra to any of the other principles or criteria set forth in Sands Broadcasting Corporation or other cases which consider the "good cause" requirement for

[9] The Review Board added an issue with respect to the financial qualifications of Tuscarawas by its Memorandum Opinion and Order FCC 64R-539, released November 27, 1964.

amendments after an application has been designated for hearing.

Accordingly, IT IS ORDERED, This 21st day of January, 1965, That the Appeal from the Examiner's order dismissing Dover's application and granting the amendment of Tuscarawas' application IS DENIED, and That the actions of the Hearing Examiner dismissing Dover's application and granting Tuscarawas' petition to amend its application ARE HEREBY AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65-46

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| KTIV TELEVISION CO. (KTIV), SIOUX CITY, IOWA<br>For Construction Permit To Make Changes in the Facilities of Television Broadcast Station KTIV | Docket No. 15374<br>File No. BPCT-3127 |
| PEOPLES BROADCASTING CORP. (KVTV), SIOUX CITY, IOWA<br>For Construction Permit To Make Changes in the Facilities of Television Broadcast Station KVTV | Docket No. 15375<br>File No. BPCT-3128 |
| PALMER BROADCASTING CO. (WHO-TV), DES MOINES, IOWA<br>For Construction Permit To Make Changes in the Facilities of Television Broadcast Station WHO-TV | Docket No. 15376<br>File No. BPCT-3138 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING; COMMISSIONER LOEVINGER DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it a request to grant without further hearing the applications of KTIV Television Company (KTIV) and Peoples Broadcasting Corporation (KVTV), and related pleadings.[1] Accompanying the petition is a contract between these two applicants and respondent, Northwest Television Company, licensee of UHF Station KQTV, Ft. Dodge, Iowa. The contract provides for withdrawal of KQTV's objections, reimbursement of a portion of KQTV's expenses, and ways to avoid the imposition of any adverse effects upon KQTV. Accompanying the petition is a listing of expenses incurred, with supporting affidavits; an affidavit of a National Broadcasting Company official to the effect that KQTV would not lose its NBC network affiliation or suffer a diminution of network programs as a result of grant of the proposals; and an affidavit of the president and sole stockholder of Northwest Television Company (KQTV) explaining why, in view

[1] The pleadings are: (a) joint petition to terminate proceedings as to Sioux City applicants and for grant of KTIV and KVTV applications, filed October 23, 1964, by KTIV Television Company (KTIV) and Peoples Broadcasting Corporation (KVTV); (b) Broadcast Bureau comments, filed November 25, 1964; (c) responsive statement, filed November 27, 1964, by Palmer Broadcasting Company (WHO-TV); (d) reply, filed December 8, 1964, by Northwest Television Company (KQTV); and (e) reply, filed December 8, 1964, by KTIV Television Company and Peoples Broadcasting Corporation (KVTV).

of the contractual provisions, grant of the Sioux City proposals would have no substantial impact upon KQTV.

2. The Broadcast Bureau supports the petition, but suggests that two provisions of the contract be disapproved.[2] Palmer Broadcasting Company (WHO–TV) opposes the petition, contending that grant of the proposals requires a public interest determination which can be better made in the first instance by the Hearing Examiner after completion of the hearing on the basis of the record evidence.

3. All three applications herein seek authority to change facilities by moving transmitter locations toward Ft. Dodge, Iowa, and by increasing antenna heights. The proposed service areas of those stations would overlap the service area of UHF Station KQTV. KQTV filed pre-hearing petitions to deny all three proposals. The hearing issues, in addition to coverage, relate to the impact upon KQTV of grant of any or all of the proposals, the service loss and availability of other services should the grant of any of the proposals jeopardize KQTV's continuance, and consistency of the grant of each of the proposals with certain Commission television allocation objectives.

4. Under the contract between KQTV and the Sioux City stations, KQTV is authorized to pick up and rebroadcast, without charge, network programs from Sioux City stations KTIV and KVTV, for which KQTV is ordered by NBC, ABC or CBS. The Sioux City stations are precluded from soliciting local advertising in the area where such proposals overlap KQTV's service area and from conducting promotions in such area designed to cause viewers to switch from KQTV to their stations.[2a] Each Sioux City station will attempt to sell KQTV, together with its own station, to regional advertisers in certain parts of its coverage area (excluding the overlap area), and KQTV may sell either Sioux City station, together with KQTV, to regional advertisers in specified parts of KQTV's coverage area. Rates specified are those of the particular station being sold. This arrangement does not restrict the freedom of any licensee to accept or reject any advertising contract, nor does it prevent him from changing or altering his rates or from soliciting business from national or regional advertisers doing business within or without the KQTV coverage area. It does not require any advertiser to purchase stations in combination. The contract provides reimbursement from each of the Sioux City stations of one-third of the expenses incurred by KQTV in this proceeding, provided, however, that the liability of each shall not exceed $7,000.

5. We are satisfied, on the basis of the contract and the existing evidence of record, that grant of the Sioux City proposals would have a minimal effect upon KQTV, Ft. Dodge, and would be in the public interest. The penetration of the Sioux City stations into KQTV's service area is insubstantial, overlapping only 16% of the total coverage of KQTV with Grade B signals. The KTIV and KVTV Grade B signals fall short of Ft. Dodge by 19 miles and

[2] The contractual provisions are expressly made severable; so that disapproval by the Commission of one or more does not render the others inoperative.

[2a] This provision of the contract has been disapproved by the Commission. Shee para. 10, *infra*.

KQTV will, for the most part, project the stronger signal in the overlap area. As indicated by KQTV, a serious question which prompted its initial opposition to the Sioux City proposals was possible loss of its NBC affiliation. The affidavit of the NBC official (par. 1, *supra*) constitutes an assurance that there will be no loss of KQTV's network affiliation. Moreover, arrangements for the rebroadcast of network programs by KQTV from both KTIV and KVTV will enable the UHF station to carry the programs of all three national networks broadcast by the Sioux City stations if the UHF station be ordered by the networks. KQTV is given some opportunity to enhance its regional advertising under the arrangement whereby the Sioux City stations will serve as sales representatives for KQTV in their areas on a non-exclusive basis, and correspondingly KQTV will be a non-exclusive sales representative for the Sioux City stations to regional advertisers in its area.

6. There are persuasive reasons for granting the Sioux City proposals. KTIV and KVTV will reach rural areas of low population density in Iowa, Nebraska and South Dakota, much of which has little or no television service. Some 220,470 persons in an area of 8,480 square miles would gain Grade A service. Of this number 73,270 would gain a first Grade A, and an additional 54,530 would acquire their first two Grade A services. Some 51,400 persons would obtain a second Grade A service and 16,930 who now receive one Grade A would acquire two additional Grade A services. About 426,210 persons in an area of 12,600 square miles would gain Grade B service. Of this number, 57,000 would receive television service for the first time (53,680 would gain two Grade B services and 3,320 one Grade B service). Further, some 45,210 persons now having one Grade B service would gain a second service, and 51,420 with one Grade B service would acquire two additional such services.

7. As pointed out by the Broadcast Bureau, the expansion of service will not impair UHF growth because the proposed services will reach cities of small size. Of the seven communities within the KTIV and KVTV gain area to which UHF channels have been allocated, only two exceed 10,000 population. One of these, Norfolk, Nebraska, receives two translator services, and grant of the proposals will provide it with a Grade B service. Fremont, Nebraska, now receives at least Grade B service from three Omaha VHF stations, and grant of the proposals will provide a fourth such service. Three communities under 10,000 receive two new Grade B signals. One of these has three existing Grade B services while the other two are without Grade B service, although one has three and the other four translator services. Of the remaining two, one has three Grade B services, one of which would be increased to a Grade A, and the other has one Grade B and will gain an additional Grade A. Since these communities constitute small markets which for the most part have existing television reception service, and have low population density in their surrounding areas, they represent little realistic potential for UHF in the near future.

8. The Bureau has suggested that the contractual provision for sales representation for regional advertising should be disapproved

as raising questions as to anti-competitive practices. This provision merely designates the Sioux City stations as non-exclusive sales agents for KQTV in their areas and correspondingly appoints KQTV as such agent for the Sioux City stations in its area. No combination rates are involved, no advertiser is compelled to take the stations in combination, rates charged are to be each station's specified rates, advertisers are free if they choose to deal directly with the stations involved, and any party is free to make rate changes. Under these conditions we do not find the provision contrary to the public interest.

9. The Bureau also opposes the partial reimbursement provision. KQTV has never shown a profit though operating since 1953. The situation in which it finds itself here is not of its own making, and its action opposing encroachment by VHF stations was deemed necessary to protect its vital interests. We therefore conclude that partial reimbursement of its hearing expenses is not contrary to the public interest in this situation.

10. No party has objected to the provision in the agreement prohibiting the Sioux City stations from soliciting local advertising and from conducting advertising promotions in the overlap area (Par. 4 of contract). We cannot condone such an anti-competitive division of markets or territories and hence disapprove this part of the contract.

11. We accordingly will grant the Sioux City proposals and terminate the proceeding as to such applicants. The disposition of the proposal of the remaining applicant herein, WHO–TV, Des Moines, Iowa, will be made hereafter on the basis of the hearing record, considering only the proposed impact on the UHF station from WHO–TV.

Accordingly, IT IS ORDERED, This 19th day of January, 1965 that the joint petition, filed October 23, 1964, by KTIV Television Company (KTIV) and Peoples Broadcasting Corporation (KVTV) IS GRANTED; that this proceeding IS TERMINATED insofar as it concerns the applications of KTIV Television Company (KTIV) and Peoples Broadcasting Corporation (KVTV); and that such applications ARE GRANTED.

IT IS FURTHER ORDERED, That the restriction imposed upon the solicitation of local advertising and promotions provided by Paragraph 4 of the contract, entered into on October 8, 1964, by the licensees of Stations KTIV and KVTV, Sioux City, Iowa, and KQTV, Fort Dodge, Iowa, IS DISAPPROVED, although the Commission does not object to the other provisions of the said contract.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

STATEMENT OF COMMISSIONER LOEVINGER DISSENTING IN PART

I would disapprove the provision for reimbursement on the grounds that this is subject to gross abuse in other cases.

F.C.C. 64R–565

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| UNITED ARTISTS BROADCASTING, INC., LORAIN, OHIO | Docket No. 15248<br>File No. BPCT–3168 |
| OHIO RADIO, INC., LORAIN, OHIO | Docket No. 15626 |
| For Construction Permit for New Television Broadcast Station | File No. BPCT–3348 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration a motion to enlarge issues, filed October 8, 1964, by United Artists Broadcasting, Inc. (United Artists).[1] Movant, requests two issues be added to this UHF proceeding as to Ohio Radio, Incorporated (Ohio) beyond those designated by Commission Order, FCC 64–860, released September 18, 1964, seeking to determine (a) the financial qualifications of Ohio and (b) the comparative coverage of the applicants.

2. United Artists requests, in addition to the designated standard financial qualification issue, the Board add an extended issue to determine Ohio's financial ability to execute its proposed program schedule. To illustrate Ohio's precarious financial condition, movant alleges that "substantial operating losses have been and are being incurred" by Ohio's three FM broadcast stations [2] and that the balance sheet submitted by the respondent to the Commission shows a $47,027 deficit for the first five months of operation. United Artists asserts that a Lorain UHF applicant must be prepared to do "business in a market which has three entrenched VHF stations which are network affiliates" and that, in view of the possible financial obstacles confronting a new UHF station, the Board should require Ohio to show that it has available to it funds sufficient to undertake the "regular and continued operation of the station". In opposition, Ohio contends that United Artists is requesting that the Board change established Commission policy, an action which the Board is not empowered to take; that the standard contained in United Artists' request is that of the "undefined and ambiguous period of 'regular and continued operation'" which contemplates no time limitation; and that United Artists' request is not supported by the requisite "allegations of fact" under oath, by someone with personal knowledge thereof as required by Section 1.229

[1] Pleadings before the Board include: (1) Motion to enlarge issues, filed October 8, 1964, by United Artists; (2) Opposition, filed October 21, 1964, by Ohio; (3) Comments, filed October 21, 1964, by Broadcast Bureau; and (4) Reply, filed November 2, 1964, by United Artists.

[2] WLKR(FM) Norwolk, Ohio, WKTN(FM) Kenton, Ohio and WRWR(FM) Port Clinton, Ohio were acquired by Ohio Radio, Incorporated, a newly formed corporation, on December 1, 1963.

of the Rules. The Broadcast Bureau, in opposing an additional financial issue, suggests that the Board hold the instant request in abeyance until the Commission acts upon three cases certified to it concerning financial qualifications of other UHF applicants.[3] While the Bureau makes this suggestion, it nevertheless recognizes that the competition confronting a Lorain UHF facility from Cleveland VHF facilities will not be of the same degree as that which faces the UHF applicants involved in the certified cases. In its reply, United Artists accedes to the Bureau's suggestion, but alleges that the factual differences which the Bureau cites show United Artists and Ohio to be in a more difficult economic position because Lorain "is not the principal city in the market".

3. The Board does not deem it necessary to add a further issue. The designated financial issue encompasses inquiry into both the availability and sufficiency of funds to effectuate an applicant's program proposal for the first three months of operation without revenues. See *Rhinelander Television Cable Corp.*, FCC 63R–249, 25 RR 476. It has not been the Commission's policy to require that a UHF applicant show sufficient capital to finance the "regular and continued operation" of its proposed station. On the contrary, a UHF applicant has been held to the same standard as applicants in all other broadcast services—*i.e.*, cost of construction plus three months' operating expenses without revenues. *Cleveland Broadcasting, Inc.*, FCC 63R–519, 1 RR 2d 676; *Liberty Television, Inc.*, FCC 59–181, 18 RR 206. In each of the certified proceedings (for UHF facilities in Buffalo, Cleveland, and Boston) the principal city specified by the UHF applicant is currently the principal city for at least three established VHF network affiliated stations; the proposed UHF facility in each instance would be in *direct* competition with established local VHF's for audiences and revenues. Lorain is not the principal city of a VHF facility; therefore, there will be no direct competition with any local VHF outlet. United Artists' general assertion that Ohio's proposal will compete in the same market with three existing VHF stations is not supported by any specific allegations of fact. Under these circumstances, it cannot be contended that the situation before us is basically the same as that involved in the three cases which the Board certified to the Commission. For this reason, United Artists' request will be denied. Our present disposition does not, of course, preclude a renewal of United Artists' request should the Commission, in the certified proceedings, adopt a policy which would require Ohio to show financial resources to operate its station for more than three months without revenue.

4. United Artists asserts that its Channel 31 proposal represents a superior utilization of the frequency and requests the Board add an issue to determine, on a comparative basis, the location of the predicted Grade A and B contours of the applicants in this proceeding. United Artists states that its proposal will provide a stronger signal than that of Ohio throughout Ohio's service area and that its Grade B contour will serve 1 million more people and

[3] *Ultravision Broadcasting, Inc.*, FCC 64R–192, 2 RR 2d 271 (1964); *Cleveland Telecasting Corp.*, FCC 64R–220 (1964); and *Integrated Communications System, Inc. of Massachusetts*, FCC 64R–248 (1964).

over 2,000 additional square miles of land area. The Broadcast Bureau supports United Artists' request only as to the addition of an issue to compare the Grade B contours of the applicants. The Bureau contends that its position is consistent with Review Board policy. Ohio does not dispute United Artists' allegations of fact, but relies instead upon the assertion that United Artists' intention to locate its antenna in Cleveland is in contravention of the Commission's Rules and for that reason a comparative coverage issue should not be added.

5. The Board will add a comparative coverage issue as to both the predicted Grade A and B contours. The undisputed allegations and supporting affidavits substantiate United Artists' contentions as to the predicted Grade B contours. Contrary to Ohio's contention, there is no present Commission rule requiring an applicant to locate its television antenna within the confines of the principal city. The requirement that an applicant must fulfill in this regard is that of covering its principal city with a city grade signal (80 dbu). (See Section 73.685(a) of the Commission's Rules.) Although United Artists has not presented sufficient factual data for a comparison of the Grade A contours, the Board will also add a comparative issue as to this contour on the basis of an examination of the engineering exhibits submitted by the applicants. These exhibits show that United Artists' proposed Grade A contour will not only encompass that of Ohio, but will serve an additional area which might be of decisional significance. Contrary to the Bureau's assertion, it is entirely consistent with previously stated Board policy to add comparative coverage issues as to both Grade A and Grade B contours.[4]

Accordingly, IT IS ORDERED, This 22nd day of December, 1964, That the motion to enlarge issues, filed October 8, 1964, by United Artists Broadcasting, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and the issues in this proceeding ARE ENLARGED by the addition of the following:

(a) To determine the location of the proposed Grade A and Grade B contours of the applicants in this proceeding.

(b) To determine, on a comparative basis, the areas and populations of the respective Grade A and Grade B contours which may reasonably be expected to receive actual service from the applicants' proposed operations.

(c) In the event the proof under Issues (a) and (b) above shall establish that either applicant will bring actual service to areas and populations not served by its competitor, to determine the number of services, if any, presently available to such areas and populations.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[4] See *Roswell Television*, FCC 64R-374, released July 13, 1964; *Ultravision Broadcasting Company*, FCC 64R-192, 2 RR 2d 271 (1964); and *Cleveland Broadcasting, Inc.*, FCC 64R-41, 1 RR 2d 949 (1964).

F.C.C. 64R–564

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| DOVER BROADCASTING CO., INC., DOVER-NEW PHILADELPHIA, OHIO | Docket No. 15429<br>File No. BPH–3560 |
| THE TUSCARAWAS BROADCASTING CO., NEW PHILADELPHIA, OHIO | Docket No. 15430<br>File No. BPH–4196 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER SLONE ABSTAINING: BOARD MEMBER NELSON DISSENTING AND ISSUING A STATEMENT.

1. The Review Board has before it a petition for waiver, or, in the alternative, for modification of issue, filed by Dover Broadcasting Company, Inc. (hereinafter referred to as Dover), Dover-New Philadelphia, Ohio, October 27, 1964, and related pleadings and documents.[1]

2. Dover filed its application for a new FM station to serve Dover-New Philadelphia, Ohio, on channel 239 (95.7 Mc) October 10. 1961.[2] A series of events, including a rule making proceeding, delayed Commission action on the application and on October 30, 1963, Tuscarawas Broadcasting Company (hereinafter referred to as Tuscarawas) filed its application for a new FM station to serve New Philadelphia, Ohio, on channel 269 (101.7 Mc). On April 22. 1964, the Commission designated the applications of Dover and Tuscarawas for a consolidated hearing on five designated issues. Issue No. 2 is concerned with common ownership of two FM stations by Dover which would serve a common area as follows:

> 2. To determine whether a grant of the application of the Dover Broadcasting Company, Inc., would be in contravention of the provisions of Section 73.240(a) of the Commission's Rules with respect to multiple ownership of FM broadcast stations.

At the time the hearing order was released, Section 73.240(a) of the Commission's rules read:

> No license for an FM broadcast station shall be granted to any party (including all parties under common control) if:
> (a) Such party directly or indirectly owns, operates, or controls another FM broadcast station which serves substantially the same service area.

[1] Broadcast Bureau's Opposition to Petition for Waiver, or, in the Alternative, for Modification of Issue, filed November 6, 1964; Memorandum Opinion and Order, FCC 64–1112, released December 3, 1964.

[2] Dover Broadcasting amended its application to specify channel 269 (101.7 Mc), November 21, 1962.

However, on June 9, 1964, the Commission released its Report and Order amending Section 73.240(a) to read as follows:[3]

(a) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if:

(1) Such party directly or indirectly owns, operates, or controls one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1 Mv/m contours of the existing and proposed stations, computed in accordance with Section 73.313.

3. By its petition, Dover has requested the Commission to waive Section 73.240(a) of its rules and to authorize the comparative consideration of Dover's proposal for a new FM station at Dover-New Philadelphia, Ohio, with the proposal of Tuscarawas for a new FM station at New Philadelphia, Ohio, even though the Dover proposal would result in an overlap of the predicted 1 mv/m contours of Dover's existing FM station in Canton, Ohio, and its proposed FM station for Dover-New Philadelphia which includes 83.6% of the population and 69.5% of the area within the predicted 1 mv/m contour of the proposed station. Or in the alternative Dover requests that issue 2 be modified to permit it to show at the hearing why the rule should be waived. Dover argues that a grant of its application would not infringe the policy objectives of Section 73.240(a) of the Commission's rules. It also argues that if the rule is not waived, the Commission cannot choose between its application and that of Tuscarawas, thus frustrating the Commission's declared objective to, whenever more than one applicant is available, choose the applicant best qualified to serve the public.

4. The petitioner concedes the validity of the rule, as amended, by the Report and Order released June 9, 1964, and the propriety of the underlying public interest considerations articulated by that report. Nevertheless it argues that the application of the rule in the instant case would be "inappropriate". In support of this position, Dover alleges that if it is permitted to do so, it will show on the hearing record that: Dover-New Philadelphia and Canton are separated by thirty miles, are in separate counties, and that one is the center of a substantial urbanized area, while the other is not listed by the Bureau of Census as urban; there are a substantial number of other AM, FM, and TV signals to serve the overlap area and at least three locally published daily newspapers and one weekly newspaper to serve the area; there will be competition for audience and advertisers by the two stations involved; the overlapping stations are "different in location, characteristics and interest at the regional level", and that therefore the Commission's policy objective concerning the impact in the political and editorial sense on public opinion at the regional level will not be jeopardized. Moreover, Dover will show that it has the support of local civic leaders and government officials to bring the first locally originated FM service to Dover-New Philadelphia and that the operation of the station will be based on the concept of local community service to meet existing critical broadcast needs.

[3] Report and Order, In the matter of, Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, FCC 64-445, June 9, 1964, 2 RR 2d, 1588.

5. The Broadcast Bureau has opposed waiver or the modification of issue, arguing that the best way to achieve the objectives of Section 73.240(a) is to adhere to the standard established thereby. The Bureau points out that the Commission is in fact interested in choosing the best of competing applicants but that where one of those applicants does not comply with the Commission's rules and regulations, its application must be dismissed and the application of the remaining applicant granted. The need for consideration of competing applications is not regarded by the Bureau as a valid ground for granting a waiver of the Commission's rules and regulations. Moreover, the Bureau takes the position that to justify a hearing on its request for waiver, the applicant must come forth with a public interest showing which, if true, would justify the waiver of the rule.[4] The Bureau contends that Dover has not made such a showing in this case.

6. Even if we accept as true all of the petitioner's allegations, it has not made a case to justify waiver of Section 73.240(a) of the rules. Prior to June 9, 1964, each case involving overlap of service areas by commonly owned stations was decided by the facts in that case. However, in paragraph 9 of its Report and Order of June 10, 1964, *Supra*, the Commission pointed out that:

> The duopoly rules embody considerations of fundamental policy. See paragraph 2–4, supra. Experience with twenty years of ad hoc method does not permit a fully effective translation of this policy into accomplished fact. Moreover, we believe that this result derives from the very nature of the ad hoc process rather than from defects in its application. The fact of undesirable overlap becomes, in case by case adjudication, but one of the large number of evidentiary submissions considered to be of decisional significance. Under these circumstances, any single fact undergoes a process of submergence and comes to be regarded as no more significant than any one of a large number of other facts. The end result is, often, that the importance of an extensive overlap situation is obscured in a welter of competing factors and the principle that adequate separation is to be maintained between commonly owned stations disappears in the process.

This emphatic statement of Commission policy leaves no doubt that the Commission has found that an ad hoc procedure, such as the petitioner would have us follow here, is unsatisfactory.

7. The showing which Dover is prepared to make to the effect that the proposed waiver would not adversely affect the policy objectives set forth in the Report and Order is not sufficient to warrant a return to the very kind of procedure which the Commission has found, after twenty years of experience, to be unsatisfactory. Moreover, petitioner's proposed showing of public need for the service it is prepared to offer cannot be decisive, where as here, another applicant which fully complies with the rule is prepared to offer a comparable service.[5] The fact that certain local groups may pre-

[4] In a recent Memorandum Opinion and Order the Review Board held this to be the proper test to justify an issue with respect to waiver of the rule. *American Colonial Broadcasting Corporation* (FCC 64R–494), October 22, 1964, —— RR ——.

[5] We have considered Dover's declaration that it does not propose to duplicate its AM programming, while Tuscarawas would duplicate the programming of its AM station. We note that a proposal to duplicate the programming of an existing AM station by a proposed FM station does not bar a grant of that application. *Report and Order, In the matter of Amendment of Part 73 of the Commission's Rules and Regulations regarding AM station assignment standards and relationship between the AM and FM broadcast services*, 29 F.R. 9492, 2 RR 2d 1658 (1964). The policy questions with respect to AM-FM program duplication are actively being considered by the Commission, and prior to the resolution of these problems a proposal to operate a new FM station without duplication of the existing AM station of the applicant will not be treated as grounds for a waiver of the duopoly rules. Section 73.240(a).

fer the petitioner over the competing applicant does not warrant the action here requested. The rule was adopted only after an extensive public rule making proceeding. The Commission took great care to spell out the underlying reasons for its adoption. Such a rule should not be waived without a compelling showing of public need. None of the foregoing allegations, even if true, constitute such a showing. The waiver therefore cannot be granted. Moreover, in view of this conclusion, no useful purpose would be served by a hearing on such an issue. The petition for waiver, or in the alternative for modification of issue filed by Dover will be denied.

8. We note further that the above-captioned petition is procedurally deficient in that none of the factual allegations are supported by affidavits of persons having knowledge of the facts.[6] This defect warrants dismissal of the petition.

Accordingly, IT IS ORDERED, This 21st day of December, 1964, That the Petition for Waiver, or, in the Alternative, For Modification of Issue, filed by Dover Broadcasting Company, Inc., October 27, 1964, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF BOARD MEMBER JOSEPH N. NELSON

The question before us is: Should an applicant in a pending *comparative* FM hearing presently containing an overlap issue, whose application is subject to dismissal under the amended multiple ownership rules, be permitted to *show* that the intent and purpose of said multiple ownership rules will be better served by a grant of his application?

In my judgment, the very unusual factual situation before the Board warrants the addition of a waiver issue. Both applications were filed before the Commission instituted the rule-making proceeding which led to the adoption of the existing overlap rule. As a result of the operation of the Commission's cut-off rules, no other applicant can file an application for the facility sought by the two applicants before us so long as this proceeding is pending. Accordingly, a denial of the request for a waiver issue will result in the grant of Tuscarawas' application (assuming it can meet its burden of proof under the issues specified as to it), inasmuch as a denial of Dover Broadcasting's waiver request must inevitably result in the dismissal of its application.

As noted by the majority, Dover Broadcasting would *not* duplicate the programming of either its existing AM station in Dover or of its FM station in Canton with which it has the overlap problem. Tuscarawas, on the other hand, proposes to duplicate the programming of its daytime only AM station which serves the same area. A denial of the request for a waiver issue would not, therefore, "promote maximum diversification of program and service viewpoints and . . . prevent undue concentration of economic power contrary to the public interest",[1] which are the stated objectives

[6] See Section 1.229(c) of the Commission's Rules and Regulations.

[1] None of the parties alleges that the facts before us present a concentration of power problem.

of the new overlap rule. See paragraph 2 of the Report and Order cited in the majority's opinion. Instead of promoting maximum diversification of programming, a denial of the waiver request will, under the circumstances here present, have precisely the contrary effect.[2] The fact that the program duplication problem presented by Tuscarawas' application involves duplication of programming of an AM station instead of another FM station does not preclude its consideration in the factual context before us. While the Commission has promulgated separate rules governing FM stations as opposed to AM stations, the cleavage between the two classes of stations is not so hard and fast as to preclude consideration of Tuscarawas' proposed program duplication. In other contexts, the difference in classes of stations has not required that their interrelationship be ignored. See *Easton Publishing Co.* v. *FCC*, 175 F. 2d 344, 4 RR 2147; *Charles County Broadcasting Co., Inc.*, FCC 63–821, 25 RR 903.

In *Storer Broadcasting Co.*, FCC 56–1133, 14 RR 742 (1956), the Commission denied a request for an issue to determine whether circumstances exist which would warrant a waiver of its rule limiting the number of VHF television stations that may be owned by one licensee. In denying the request, the Commission noted that the purpose of that rule is to assure diversification of ownership, and that the rule is based upon its view that there are enough different persons capable and desirous of serving the needs of the public so that the extremes of multiple ownership may be avoided without adversely affecting the public interest. As noted above, because of the "umbrella" protection accorded the applicants before us by the Commission's cut-off rules, no other applicant can apply for the facility sought by the two applicants in this proceeding. Unlike the situation envisioned by the Commission in *Storer*, where a denial of a waiver request could permit another applicant to seek the facility, the denial of Dover Broadcasting's waiver request precludes consideration of any applicant other than Tuscarawas. Moreover, the Commission also indicated in *Storer* that a waiver of the multiple ownership rule might be in order if it were shown that the facility would otherwise lie fallow; in other words, some relaxation of the rule would be preferable to no service. In my judgment, where, as in the case before us, the effect of a refusal to waive the overlap rule would not merely be that of letting the channel lie fallow, but would result in programming duplication, a denial of the request for a waiver issue is not in the public interest.

[2] According to an engineering exhibit attached to Dover's application form, a maximum of 38,571 persons are in the area which would be served by Dover's proposed station and which are now served by Dover's Canton FM station. Tuscarawas' station in Ulrichsville provides primary service to the entire 1 mv/m service area of Tuscarawas' proposed New Philadelphia station; a total of 66,593 persons reside in the area which would receive 1 mv/m service from the Tuscarawas' proposed FM station.

F.C.C. 64–1206

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
LIABILITY OF CHANNEL SEVEN, INC., LICENSEE OF STATION KLTV (TV), TYLER, TEX.
For Forfeiture

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration (1) a Notice of Apparent Liability dated October 14, 1964, addressed to Channel Seven, Inc., the licensee of Television Station KLTV, Tyler, Texas, and (2) the response to the Notice of Apparent Liability by the licensee filed November 11, 1964.

2. The material facts leading to the issuance of the Notice of Apparent Liability are as follows: in past years, Station KLTV has had an arrangement with Station KSLA–TV, Shreveport, Louisiana for rebroadcast by an off-the-air pickup of certain National Football League games broadcast by KSLA–TV. When KLTV requested rebroadcast permission from KSLA–TV to carry the NFL game of December 15, 1963, KSLA–TV at first refused and then granted permission, stating, however, in a letter to the licensee dated December 12, 1963, that ". . . it is our intention to deny further requests [for rebroadcast permission] in the future. . ."

3. During a telephone conversation on Wednesday, September 16, or Thursday, September 17, 1964 (the date is in dispute), Mr. Marshall H. Pengra, vice president and general manager of KLTV, was informed by Mr. Winston B. Linam, vice president and manager of KSLA–TV, that rebroadcast permission for the September 20, 1964, game would be denied. The denial was confirmed by a special delivery-certified mail letter from KSLA–TV dated September 18, 1964, the receipt of which letter was acknowledged by a KLTV employee on Saturday morning, September 19, 1964. On the following day, September 20, 1964, Station KLTV rebroadcast the NFL game without obtaining express authority to do so from KSLA–TV, the originating station.

4. Thereafter, pursuant to Section 503(b) of the Communications Act of 1934, as amended, the Commission issued a Notice of Apparent Liability to the licensee in the amount of two hundred and fifty dollars ($250) because of the licensee's apparent willful failure to observe the provisions of Section 325(a) of the Com-

munications Act and Section 73.655 of the Commission's Rules promulgated thereunder.[1]

5. In its response to the Notice of Apparent Liability the licensee offers numerous explanations for its actions as follows: (a) that the sudden death, on September 9, 1964, of Mr. Richman Lewin, president and general manager of KTRE "constituted an emergency that required immediate attention and forced the postponement of numerous business matters involving KLTV";[2] (b) that during the Pengra-Linam telephone conversation of September 16 or 17, 1964, Pengra, after being informed that permission for the rebroadcast was denied, specifically requested Linam "to send me a wire immediately refusing me permission for the rebroadcast with your name signed to the bottom" and that no such wire was ever received from Linam denying permission; (c) that since Linam had previously reversed himself on the December 15, 1963 game, Pengra "assumed that he would do so again" particularly since Linam did not send the wire as requested and because ever since the first refusal in December 1963, KSLA–TV had only stated it was its "intention to refuse" and there was no "definite and final refusal" in writing until the letter from KSLA–TV received at KLTV the morning of September 19, 1964; (d) that early on the morning of September 19 Pengra left Tyler to attend the annual board meeting of Forrest Capital Communications Corp. and had left word with the KLTV sales manager to contact him if any wire were received from Linam (and that if no wire were received to carry the rebroadcast) and (e) that although the letter from KSLA–TV denying rebroadcast permission was received by a KLTV employee (and placed on Pengra's secretary's desk) at approximately 8:30 a.m. on September 19, 1964, it was not read by Pengra until Monday, September 21, 1964.

6. We have carefully considered all of the licensee's statements in response, but we cannot agree that they relieve it of liability, in view of the fact that the licensee did not receive the required express authority of the station originating the broadcast of September 20, 1964. Authority for such a rebroadcast was orally refused by the licensee of KSLA–TV on September 16 or 17 and the refusal was confirmed in a letter received at KLTV more than 24 hours before the broadcast. Merely by requesting the licensee of KSLA–TV to send a telegram refusing permission, Mr. Pengra could not shift to that station the burden which the Act and the Rules impose upon KLTV to obtain the express authority of the originating station before rebroadcasting any of its programs.

7. We find that the licensee wilfully failed to observe the provisions of Section 325(a) of the Communications Act and Section

[1] Section 325(a) in pertinent part is as follows: "... nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." Section 73.655 of the Commission's Rules states in pertinent part as follows: "(b) The licensee of a television broadcast station may, without further authority of the Commission rebroadcast the program of a United States television broadcast station, provided the Commission is notified of the call letters of each station rebroadcast and the licensee certifies that express authority has been received from the licensee of the station originating the program."

[2] KTRE-TV is licensed to Forrest Capital Communications Corp. Lucille Buford owns the majority of stock of both Forrest Capital Communication Corp. and Channel Seven, Inc. Mr. Pengra is the second largest stockholder as well as the vice president of both corporations.

73.655 of the Rules thereunder. However, in view of all of the circumstances of the case, we believe that the amount of liability set forth in the Notice of Apparent Liability should be reduced to one hundred dollars ($100).

8. In consideration of the foregoing, IT IS ORDERED that Channel Seven, Inc., the licensee of Station KLTV(TV), Tyler, Texas, FORFEIT to the United States Government the sum of one hundred dollars ($100). Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended and Section 1.621 of the Commission's Rules, an applcation for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

9. 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 Channel Seven, Inc.

Adopted December 23, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–29
F.C.C. 64–1195

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Applications of

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| KFOX, INC. (KFOX), LONG BEACH, CAL.<br>Has: 1280 kc., 1 kw., Day, Class III, Long Beach, Calif.<br>Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class III | Docket No. 15751<br>File No. BP–16149 |
| CHARLES W. JOBBINS, COSTA MESA — NEWPORT BEACH, CALIF.<br>Requests: 1110 kc., 1 kw., Day, Class II | Docket No. 15752<br>File No. BP–16157 |
| RADIO SOUTHERN CALIFORNIA, INC., PASADENA, CALIF.<br>Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II | Docket No. 15753<br>File No. BP–16158 |
| GOODSON-TODMAN BROADCASTING, INC., PASADENA, CALIF.<br>Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II | Docket No. 15754<br>File No. BP–16159 |
| ORANGE RADIO, INC., FULLERTON, CALIF.<br>Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II | Docket No. 15755<br>File No. BP–16160 |
| PACIFIC FINE MUSIC, INC., WHITTIER, CALIF.<br>Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II | Docket No. 15756<br>File No. BP–16161 |
| THE BIBLE INSTITUTE OF LOS ANGELES, INC. PASADENA, CALIF.<br>Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II | Docket No. 15757<br>File No. BP–16162 |
| C. D. FUNK AND GEORGE A. BARON, A PARTNERSHIP D.B.A. TOPANGA MALIBU BROADCASTING CO., TOPANGA, CALIF.<br>Requests: 1110 kc., 500 w., DA–2, U, Class II | Docket No. 15758<br>File No. BP–16164 |
| CALIFORNIA REGIONAL BROADCASTING CORP., PASADENA, CALIF.<br>Requests: 1110 kc., 50 kw., DA–2, U, Class II | Docket No. 15759<br>File No. BP–16165 |
| STORER BROADCASTING CO. (KGBS), LOS ANGELES, CALIF.<br>Has: 1020 kc., 50 kw., DA–1, L–KDKA, Class II, Los Angeles, Calif.<br>Requests: 1110 kc., 50 kw., DA–2, U, Class II, Pasadena, Calif. | Docket No. 15760<br>File No. BP–16166 |

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| MITCHELL B. HOWE, PETER DAVIS, EDWIN M. DILLHOEFER, AND C. HUNTER SHELDEN D.B.A. PASADENA CIVIC BROADCASTING CO., PASADENA, CALIF. Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II | Docket No. 15761 File No. BP–16167 |
| ROBERT S. MORTON, ARTHUR HANISCH, MACDONALD CAREY, BEN F. SMITH, DONALD C. MCBAIN, ROBERT BRECKNER, LOUIS R. VINCENTI, ROBERT C. MARDIAN, JAMES B. BOYLE, ROBERT M. VAILLANCOURT, AND EDWIN EARL, D.B.A. CROWN CITY BROADCASTING CO., PASADENA, CALIF. Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II | Docket No. 15762 File No. BP-16168 |
| PASADENA COMMUNITY STATION, INC., PASADENA, CALIF. Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II | Docket No. 15763 File No. BP–16170 |
| VOICE OF PASADENA, INC., PASADENA, CALIF. Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II | Docket No. 15764 File No. BP–16172 |
| WESTERN BROADCASTING CORP., PASADENA, CALIF. Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II | Docket No. 15765 File No. BP–16173 |
| PASADENA BROADCASTING CO., PASADENA, CALIF. Requests: 1110 kc., 10 kw., 50 kw.–LS, DA–2, U, Class II For Construction Permits | Docket No. 15766 File No. BP–16174 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND FORD NOT PARTICIPATING.

1. The Commission has before it for consideration (a) the remaining above-captioned applications accepted for filing by and for the purposes listed in the Commission's action of July 29, 1964 (FCC 64–743); (b) the "Petition for Reconsideration and Revision of Hearing Procedure" filed on September 8, 1964, by Western Broadcasting Corporation; (c) statements and comments filed in support of the petition for reconsideration by Goodson-Todman Broadcasting, Inc., by Storer Broadcasting Company, licensee of Station KGBS, Los Angeles, California, and by California Regional Broadcasting Corporation; (d) a timely filed opposition by C. D. Funk and George A. Baron, d/b as Topanga Malibu Broadcasting Company; (e) a timely reply to the opposition filed by Western Broadcasting Corporation; (f) a late-filed opposition to the petition for reconsideration filed on October 20, 1964 by Charles W. Jobbins and a statement by Western Broadcasting Corporation concerning the opposition by Jobbins.

2. The Commission also has before it for consideration (a) the "Petition for Extension of Procedural Dates" filed on October 16, 1964, by Voice of Pasadena, Inc. and (b) the oppositions to the petition for extension of procedural dates filed by Topanga Malibu Broadcasting Company, Goodson-Todman Broadcasting, Inc., and by Storer Broadcasting Company, licensee of Station KGBS, Los Angeles, California.

3. The thrust of the pleadings set forth in paragraph 1 above deal primarily with paragraph 9 of the Commission's Opinion and Order of July 29, 1964, *Charles W. Jobbins* (FCC 64–743). Paragraph 9, in substance, stated that with respect to those applications tendered for filing on 1110kc in the Southern California area, the "AM freeze" would be waived to the extent necessary to permit consideration of the applications on the question of which of the tendered proposals would, in the light of Section 307(b) of the Act, best provide a fair, efficient and equitable distribution of radio service. The pleadings set forth in paragraph 2 above are directed to paragraph 8 of the *Jobbins* opinion *supra*. Paragraph 8 of the *Jobbins* opinion permitted those applicants that incorporated, by reference, the engineering data on file for the existing operation of Station KRLA, to file current engineering data to avoid specification of technical issues based on obsolete or incomplete data. The final date for the filing of this engineering data was October 5, 1964.

4. The petition for reconsideration filed by Western requests that the Commission revise its hearing procedure to the extent that, even though the Section 307(b) question must be decided prior to any comparative considerations, the initial hearing should not be limited to consideration of the Section 307(b) question (plus issues of absolute qualifications). It is contended by Western that this so-called limited hearing could prolong rather than shorten the hearing because the Hearing Examiner's action on the Section 307(b) question would have to proceed through the full hearing process including possible appeals, and should the 307(b) question not prove decisionally significant, a comparative hearing would then have to be initiated. Western, in short, requests the addition of a contingent comparative issue. Western cites the case of *Rockland Broadcasting Company*, 23 R.R. 789 (1962) in support of its contention that the comparative issue should be included in the order of designation for hearing.

5. In support of its request that a contingent comparative issue be included, Western sets forth two propositions: *viz.* (1) that 307(b) considerations would be clearly undeterminative insofar as the mutually exclusive applicants specifying a station location of Pasadena or a nearby community, and (2) that the applicants specifying locations somewhat removed from the Pasadena area are either not technically qualified or their proposals are so inefficient that there is no certainty that 307(b) considerations would be determinative. As a corollary proposition, Western suggests that the "white area" problems of the communities somewhat removed from the Pasadena area may possibly be more easily solved through the use of FM facilities or an improvement

in their existing AM facilities. In conclusion, Western alludes to the fact that an additional 307(b) consideration is presented as to the removal of a long established service from the Los Angeles area.

6. Goodson-Todman, Inc. filed a statement fully supporting the Western petition for reconsideration. Storer Broadcasting Company contends that the Commission's Order of July 29, 1964 (FCC 64–743) was for the purpose of giving all applications full comparative consideration, and, if such was not the import of the Order, the Western petition should be granted. California Regional Broadcasting Corporation filed a comment in support of the Western petition, but raises the claims that the "freeze" problem need not be considered since the new rules have now been adopted and that certain actions taken following the "limited purpose" hearing could result in a denial of due process to an applicant. California Regional also raises the question as to whether a further waiver of the Commission's Rules would be required if certain Pasadena area applicants are successful under the Section 307(b) determination, and what disposition will be made of the unsuccessful applications. For the foregoing reasons, California Regional supports Western's request that the acceptance be unqualified and not limited to only the 307(b) question.

7. The opposition of Topanga Malibu supports the Commission's action in limiting the hearing to a 307(b) determination at this time. It disputes Western's contention that inclusion of the contingent comparative issue would have the effect of shortening the hearing. Topanga Malibu claims that the shortest route to final determination is limitation of the hearing to the 307(b) issue plus issues of absolute qualification. Topanaga Malibu contends that the Western petition attempts to deprecate the merits of the non-Los Angeles area applicants and that this is improper at this juncture. Topanga Malibu also contends that Western is attempting to, through the Section 307(b) issue, get the Commission to weigh the removal of Service from Pasadena against the institution of service in those communities outside the Los Angeles area.

8. In reply, Western reiterates the contentions that the Commission should follow the *Rockland* case, *supra* and not limit the Hearing Examiner to taking evidence only on the Section 307(b) issue. Western denies that it is attempting to get the Commission to pre-judge the merits of any of the non Los Angeles area applicants and contends that all that is requested is that a hearing be held and that Section 307(b) considerations may not be dispositive and therefore the contingent comparative issue should be included in the original designating order. Western, in the reply, contests the claim that the Topanga Malibu area is without service and states that KDHI has an FM facility to serve its nighttime white area. Finally, Western reiterates its claim that all it seeks is a hearing with the inclusion of the contingent comparative issue and that the Hearing Examiner not be prohibited from taking evidence on the comparative issue if it is necessary to properly dispose of the proceeding.

9. Charles W. Jobbins filed an opposition to the Western peti-

tion approximately two weeks late. No questions, other than those raised by the aforementioned oppositions have been raised in the Jobbins opposition. Western filed a statement in response to the Jobbins opposition. Western took the position that the Jobbins opposition would be subject to a motion to strike for late filing, but does not request that it be stricken, but does state that Jobbins' apparent unfamiliarity with the Commission's Rules and policy should not be permitted to continue during the prosecution of his application. Since no additional material has been submitted in Jobbins pleading and in view of our action on Western's petition for reconsideration, the Jobbins pleading will also be dismissed as moot.

10. Originally 19 applications were filed pursuant to the Commission's Public Notice of February 20, 1964 (FCC 64–142). The 19 applications included proposals to change frequency by existing stations in Arroyo Grande, California and Twenty-Nine Palms, California. The communities of Arroyo Grande and Twenty-Nine Palms are located approximately 150 and 120 miles, respectively, from Pasadena, and in addition, those two proposals were the only ones that met the "freeze criteria" as promulgated in the NOTE to Section 1.571 of the Rules (as then in force). Because of this factual situation, the Commission, in its order accepting the applications (FCC 64–743), and on its own motion, waived, the provisions of the "freeze" to the extent necessary to permit consideration of the applications, that did not meet the "freeze criteria", on the question of which of the tendered proposals would, in the light of Section 307(b) of the Act, best provide a fair, efficient and equitable distribution of radio service. Since the acceptance of the 19 applications, 3 have either dismissed their proposals or have amended them to specify a different frequency resulting in their dropping-out of this proceeding. One of the dismissed proposals specified Pasadena, as its location. The two proposals specifying Arroyo Grande and Twenty-Nine Palms, (the proposals that met the "freeze criteria") have been amended to specify a different frequency. Since these two proposals have been deleted from the proceeding, the remaining applications are located within a radius of 40 miles from Pasadena, California. Based on these changed circumstances, two questions must be considered. The first one is whether a complete waiver of the "freeze"[1] criteria is warranted and the second question is whether (should the first question be decided in the affirmative), in the light of recent decisions, a contingent comparative issue should be specified in the proceeding.

11. With respect to the question as to whether circumstances are present that would permit complete acceptance of the applications, the Commission has considered the requests for waiver of the "freeze" and is of the opinion that the unusual circumstances present in this case require that the applications remaining in this proceeding be considered on the merits. With respect to the applicants for Pasadena, we think that the fact that a station has operated on this frequency in Pasadena over many years as the only

[1] Note to Section 1.571 of the Commission's Rules as in force prior to July 1, 1964.

full-time local English language station is ample justification for waiver of our Rules to permit consideration of the applications for Pasadena. The applications for communities other than Pasadena, represent applications for a first local AM station in each of such communities and in addition, must be considered under the doctrine of *Kessler* v. *F.C.C.* 1 R.R. 2d 2061 (1963) because they are mutually exclusive and timely filed with the Pasadena applicants. It is again emphasized that this waiver of the "freeze" to permit consideration of these applications on their merits, does not constitute a pre-judgment on their merits of any of the issues specified as to any of the applications. The merits of each proposal will be judged in the hearing which is being designated at this time. Accordingly, the above-captioned applications will be accepted for filing without qualification and to that extent, our acceptance of July 29, 1964 is modified.

12. The next question is whether a contingent comparative issue should be specified in this proceeding. Before the amendments to the Arroyo Grande and Twenty-Nine Palms proposals, it was very likely that a choice could be made solely on Section 307(b) determinations due to the substantial geographic distance between certain of the proposals. Now that the remaining applications all specify designations located within a 40 mile radius, based on Commission precedents [2], the proceeding would likely be decided on comparative, rather than Section 307(b) considerations. Based on the changed circumstances, and the precedents applicable to this proceeding, the Commission will on its own motion specify the contingent comparative issue in addition to the Section 307(b) issue. Our action in waiving the "freeze" and specifying a contingent comparative issue renders moot the requests contained in the petition for reconsideration filed by Western Broadcasting Corporation and, accordingly, it will be dismissed.

13. Voice of Pasadena filed a petition for extension of procedural dates requesting, in effect, that the Commission's Order of July 29, 1964 (FCC 64–743) be modified to permit engineering amendments to all the applications. Voice of Pasadena contends that our July 29, 1964 Order required applicants who incorporated, by reference, the KRLA engineering data on file, to amend their engineering proposals. A reading of paragraph 8 of the Order clearly indicates that the applicants who incorporated the KRLA data would be permitted, but not required, to amend the engineering sections of their applications within 60 days from the release date of the Order. The Commission's Public Notice (FCC 64–744) dated August 6, 1964 fully supports this interpretation. To grant Voice of Pasadena's request would amount to permitting applicants to submit, in effect, new applications through major amendments to their existing applications without being subject to the "major change" provisions of Section 1.571(j)(1) of the

[2] *Kent-Ravenna Broadcasting Company*, 22 R.R. 605 (1961); *Rockland Broadcasting Company*, 23 R.R. 789 (1962); see also *Huntington Broadcasting Company*, 6 R.R. 569 (1950), affirmed sub nom. *Huntington Broadcasting Company* v. *F.C.C.* 192 F 2d 33, 7 R.R. 2030 (1951); *Radio Crawfordsville, Inc.* 25 R.R. 533; *Speidel Broadcasting Corporation of Ohio* 25 R.R. 723, 1 R.R. 2d 726 (1963); affirmed sub nom. *Speidel Broadcasting Corporation of Ohio* v. *F.C.C.* F.2d ???, 1 R.R. 2d 2094 (1964).

Rules. The oppositions filed by Goodson-Todman, Topanga Malibu and Storer correctly point out that the so-called "grace period" of 60 days" to file engineering is not available to Voice of Pasadena. Accordingly the request for extension of time filed by Voice of Pasadena will be denied.

14. On November 6, 1964, Voice of Pasadena, Inc. filed an amendment to increase nighttime power accompanied by a "Petition for Waiver of Rule 1.571(j) (1) and Acceptance of Amendment" in which it requested a waiver of said rule and the acceptance of a "major change" amendment to the engineering portion of its application without assignment of a new file number. The amendment, which involves an increase of nighttime power from 10 kilowatts to 25 kilowatts, is specifically within the purview of Section 1.571(j) (1) of the Rules which requires that a new file number be assigned to an application when it is amended to increase power. Oppositions to this petition were filed by Topanga Malibu Broadcasting Company, Storer Broadcasting Company, California Regional Broadcasting Corporation, Goodson-Todman Broadcasting Inc. and Pasadena Broadcasting Company. Voice of Pasadena filed a reply to the oppositions reiterating its contentions contained in the petition for waiver. Voice of Pasadena contends that acceptance of its proposal would provide a more efficient use of the channel with increased power. Voice of Pasadena, Inc. was afforded ample time and had the same opportunity as the other applicants within which to prepare its application. The Commission's Public Notice (FCC 64–142), released February 20, 1964, stated that, in order to receive comparative consideration, the 1110kc applications must be substantially complete and tendered for filing by the close of business on March 31, 1964. The proposed "major change" amendment is not timely filed for consideration in this proceeding. If the amendment were to be accepted a new file number would have to be assigned to the application pursuant to Section 1.571(j) (1) of the Rules and under the rules applicable to this proceeding, the amended application would be dismissed. The Commission is of the opinion that the contentions of Voice of Pasadena set forth in support of its request for waiver are not sufficient to warrant a waiver of Section 1.571(j) (1) to permit acceptance of the amendment without the assignment of a new file number. Voice of Pasadena requests the Commission to return its amendment in the event that its request for waiver is not granted to permit acceptance of the amendment without the assignment of a new file number. The Commission's Rules prohibit the conditional tender of applications, amendments and pleadings. However, in view of our finding that Voice of Pasadena has not made the showing necessary to justify a waiver of Section 1.571(j) (1) of the Rules, the conditional request is moot. In view of the foregoing, the petition filed by Voice of Pasadena will be denied and the tendered amendment will not be accepted for filing. The Voice of Pasadena, Inc. application will be considered as previously accepted for filing.

15. In addition to the petition for reconsideration and the other pleadings and tendered amendments, the following additional mat-

ters are to be considered in connection with the issues specified below:

*I. Engineering Considerations:*

A. KFOX, Inc. (BP–16149), Radio Southern California, Inc. (BP–16158), Goodson-Todman Broadcasting, Inc. (BP–16159), The Bible Institute of Los Angeles, Incorporated (BP–16162), Pasadena Civic Broadcasting Co. (BP–16167), Crown City Broadcasting Co. (BP–16168), Pasadena Community Station, Inc. (BP–16170), and Pasadena Broadcasting Company (BP–16174) have each applied for essentially the same facilities as formerly authorized to Eleven-Ten Broadcasting Corporation, the former licensee of Station KRLA, Pasadena, California. The deficiencies and findings that are common to the herein listed eight (8) applications will be listed in the following paragraphs (1) through (5).

(1) The aforementioned 8 applicants have an RSS nighttime limitation of 7.0 mv/m from Class I–B Station KFAB, Omaha, Nebraska, and the normally protected nighttime contour of the proposed Class II stations is 2.5 mv/m. It appears that each of the 8 proposals would receive interference that would result in a loss in excess of 10% of the nighttime population in violation of Section 73.28(d) (3) of the Commission's Rules (10% rule).

(2) Concerning the KRLA difficulties experienced in adjusting and maintaining its present directional antenna system, the following is pertinent to the specification of certain issues. Prior to November 12, 1958, KRLA was licensed to operate on 1110kc (10kw, DA–2, U). On November 12, 1958, the Commission granted KRLA a construction permit authorizing a daytime power increase to 50 kilowatts with a change in its directional antenna system. One of the conditions of this grant was as follows:

"Before program tests are authorized, the permittee shall submit new common point impedance measurements and sufficient field intensity measurement data to clearly show that the new tower construction and adjustment of the daytime array has not adversely affected the operation of the nighttime directional array."

Subsequent to the construction of the new antenna system for the 50 kilowatt operation, a power company constructed tall metal towers for high tension electrical lines in the vicinity of the KRLA antenna system. Because of these transmission line installations and other technical problems, KRLA, while operating pursuant to program test authority with the new facilities, was unable to secure satisfactory measurement data so as to show compliance with the above condition due to re-radiation and other technical difficulties. Accordingly, the 50 kilowatt authorization was never licensed to operate with increased daytime power.

Study of all the site photographs and of the topographic maps indicate that man-made objects and terrain irregularities exist in the vicinity of the proposed sites which may

result in signal scatter and re-radiation which raises a substantial question as to whether the proposed antenna systems can be adjusted and maintained and, whether in fact, adequate nighttime protection will be afforded Station KFAB and other stations. Accordingly, an issue will be specified below with respect to the suitability of the proposed antenna sites and feasibility of adjusting and maintaining the proposed directional antenna system.

(3) A number of the above-mentioned eight applicants have not indicated any nighttime MEOV toward Station KBND, Bend, Oregon, resulting in a theoretical showing of no increase in interference to KBND, while others have indicated an MEOV toward Station KBND. In light of the fact that an issue is to be raised with respect to the feasibility of each of the antenna systems, it appears that a question of protection afforded to Station KBND should be raised with respect to each of the applications. Accordingly, Central Oregon Broadcasting Company, licensee of Station KBND, will be made a party respondent to the hearing proceedings. The aforementioned eight applicants would increase the RSS nighttime limitation of the proposed operation of Donnelly C. Reeves for a new standard broadcast station at Roseville, California (File No. BP–12555). Accordingly, Donnelly C. Reeves will also be made a party respondent to the hearing proceedings and an appropriate issue specified.

(4) KFAB Broadcasting Company, licensee of Station KFAB, Omaha, Nebraska, pursuant to Section 309(d) (1) of the Communications Act of 1934, as amended, filed on September 8, 1964 a "Petition to Designate for Hearing and To Make KFAB a Party Thereto." KFAB contends that several of the applicants, particularly those who have specified the site from which Eleven-Ten Broadcasting Corporation operated Station KRLA, will cause interference to KFAB's normally protected contour during nighttime hours and also to the daytime protected contour during critical hours. Goodson-Todman (BP–16159) filed a motion to strike the KFAB petition on September 17, 1964, and Storer Broadcasting Company (BP–16166) filed an opposition to the petition on September 21, 1964. Each of the applicants, except Goodson-Todman Broadcasting, Inc., has either shown or indicated that the proposed 0.025 mv/m-10% contour would not overlap the KFAB 0.5 mv/m-50% contour. The Goodson-Todman proposal indicates a slight overlap of those contours. In view of the Commission's analysis of the engineering data submitted by Goodson-Todman and in the light of the difficulties experienced by Station KRLA in adjusting and maintaining its antenna system the Commission finds that a substantial question exists as to whether adequate protection will be afforded to the nighttime operation of Station KFAB. The Commission finds that no question of daytime interference to KFAB is present even during critical hours. Accordingly, KFAB's petition will be granted, in part, and appropriate

issues will be specified covering this overlap of contours question. KFAB Broadcasting Company will be made a party to the hearing, to the extent indicated hereafter.

(5) Gordon Broadcasting of San Diego, Inc., the licensee of Station KSDO, San Diego, California, pursuant to Section 309(d)(1) of the Act filed a "Petition to Deny" on April 21, 1964. KSDO requests that the applications be denied or, in the alternative, that the applications be designated for hearing and that Gordon Broadcasting of San Diego, Inc. be named a party to said hearing claiming that its 2.0 mv/m contour overlaps the 25 mv/m contour of the above-noted eight proposals, in violation of Section 73.37 of the Commission's Rules. The Commission agrees with the contentions of KSDO and the petition will be granted, and an issue will be specified concerning the overlap of contours. KSDO will be made a party respondent to the proceeding.

B. The deficiencies and findings, in addition to those set out in Paragraph A, that apply to the individual applications are listed in the following paragraphs (1) through (8). These applications specify essentially the same facilities that were formerly authorized to Eleven-Ten Corporation in its operation of Station KRLA.

(1) *KFOX, Inc.* (BP–16149). There are no additional engineering deficiencies in the KFOX proposal. KFOX proposes to change station location from Long Beach to Pasadena, thereby reducing the number of AM services licensed to Long Beach. A 307(b) question as to the broadcast needs of the two cities will be specified.

(2) *Radio Southern California, Incorporated* (BP–16158). Applicant has requested waivers of Sections 73.37, 73.28(d) 73.24(e) and 73.188 of the Commission's Rules. In view of our findings in Paragraph 14(A)(1) and 14(A)(5), concerning compliance with Sections 73.28(d) (10% rule) and 73.37 (2 and 25 mv/m overlap), further findings are not necessary. As to these Sections and as to the coverage requirements as set forth in Sections 73.188 and 73.24(e) of the Rules, the Commission is of the opinion that in view of the fact that over 99% of the population and area receive adequate coverage and that 62% of the small area not receiving primary service consists of orchards and reservoirs, there is substantial compliance with Sections 73.188 and 73.24(e), and accordingly, the provisions of these Sections will be waived.

The applicant erred in his distance computation toward the proposed operation of Donnelly C. Reeves in Roseville, California (BP–12555) which resulted in a showing of no nighttime interference to BP–12555. The finding concerning the interference caused to the Roseville proposal as set forth in Paragraph 14(A)(3), is applicable to the Radio Southern California proposal because the proposed operation would further limit the nighttime operation of the Roseville proposal.

The applicant proposes the use of a General Radio Type

19–38 modulation monitor which has not been type accepted pursuant to the provisions of Section 73.50 of the Rules. Since it is not type-accepted, in the event of a grant, the construction permit will be appropriately conditioned requiring installation of approved type modulation monitor.

(3) *Goodson-Todman Broadcasting, Inc.* (BP–16159). Waivers of the following Rules are requested: Section 73.37 and 73.28(d) and a further general request for waiver of the restrictions of such other rules or requirements as might be presented in the proposal. All engineering considerations concerning the Goodson-Todman proposal are set forth in Paragraph 14(A).

(4) *The Bible Institute of Los Angeles, Incorporated* (BP–16162). The applicant requests a waiver of Section 73.37 and 73.28(d) of the Rules. As previously noted in the findings concerning Goodson-Todman, no additional engineering findings are required as to this proposal.

(5) *Pasadena Civic Broadcasting Company* (BP–16167). All necessary engineering findings in respect to this application are set forth in Paragraph 14(A).

(6) *Crown City Broadcasting Co.* (BP–16168). The applicant indicates that this application is for essentially the same facilities formerly authorized to KRLA. However, the applicant sets forth the following exceptions and variations from the former KRLA operation: (a) The daytime directional antenna parameters are altered slightly which would result in a general increase in theoretical radiation, but the MEOV will be less than that of the former KRLA operation; however, no MEOV are specified for this daytime pattern; (b) The nighttime MEOV are slightly less than those specified in the KRLA authorization; (c) No overlap of proposed 25 mv/m contour with the KSDO 2.0 mv/m contour is shown, but they are indicated to be tangent; and (d) It is indicated that less than 10% of the population would be lost due to nighttime interference received from other stations.

In light of our findings pertaining to the suitability of the proposed antenna site and the feasibility of adjusting and maintaining the proposed antenna systems of all the applications specifying the facilities formerly authorized to KRLA as set forth in Paragraph 14(A)(2), substantial questions exist with respect to the claims of Crown City as set forth in exceptions (a), (b) and (c) noted above and issues will be specified as to these deficiencies. With respect to Crown City's contentions that it does not violate the Section 73.28(d)(10% rule) of the Rules, the Commission is of the opinion that the finding concerning violation of the 10% rule as set forth in Paragraph 14(A)(1) is applicable to the Crown City proposal and 10% issue will be included.

(7) *Pasadena Community Station, Inc.* (BP–16170). The applicant, as Radio Southern California has done, also proposes the use of a General Radio Type 19–38 modulation monitor which has not been type accepted pursuant to the

provisions of Section 73.50 of the Commission's Rules. Waivers of the following Rules are requested: Sections 73.37, 73.28(d), 73.24(e), and 73.188 of the Commission's Rules. Waiver of these Sections were also requested by Radio Southern California and our discussion and findings as set forth in Paragraph 14(B)(2), are equally applicable to the Pasadena Community proposal.

(8) *Pasadena Broadcasting Company* (BP–16174). The applicant proposes a site approximately 2.3 miles north of the KRLA site with slight changes in the directional antenna system from that formerly authorized to KRLA. However, the general pattern shapes are essentially the same as that formerly authorized to KRLA and the general radiation characteristics would remain essentially the same as that of the former KRLA operation.

The applicant indicates that the proposal would not involve 2 and 25 mv/m overlap with Station KSDO and that adequate protection would be afforded the nighttime operation of KFAB. However, the Commission finds that, because of substantial questions concerning the suitability of the proposed site, and the feasibility of adjusting and maintaining the proposed antenna system, the findings set forth in paragraph 14(A)(2)(4) and (5) are also applicable to this proposal.

The applicant requests a waiver of Section 73.28(d)(3) of the Commission's Rules. Our findings set forth in Paragraph 14(A)(1) dispose of this requested waiver.

C. The engineering deficiencies and findings that apply to the nine (9) remaining applications which involve either a change in site or radiation characteristics, even though four of the applicants specify Pasadena, California as the station location, are listed below. Appropriate issues and conditions will be specified in the Order based on these findings.

(1) *Charles W. Jobbins* (BP–16157). It appears that an overlap of the 2 and 25 mv/m contours will exist between this proposal and Station KSDO, San Diego, California in contravention of Section 73.37 of the Commission's Rules.

The proposed RCA transmitter type is not identified by the applicant, and therefore, the Commission is unable to make a determination as to whether an approved transmitter has been specified.

The applicant's site photographs are not sufficiently clear and, accordingly, the Commission is unable to make a determination as to whether the site is reasonably free of structures which would result in electrical interaction. Therefore, a substantial question exists as to the suitability of the antenna site. Charles W. Jobbins has specified a dual-city station location designation, but has not supported the request with showing required by Section 73.30(b) that it would place an unreasonable burden on the station if it were licensed to serve only one city, town, political subdivision or community.

(2) *Orange Radio, Inc.* (BP–16160). The applicant indicates that the Orange 25 mv/m contour is approximately

tangent to the 2 mv/m contour of Station KSDO, San Diego, California in an area southwest of Fullerton. Some measurement data on KSDO is available in connection with KSDO's proof of performance. However, these measurements are not sufficient to definitely establish the extent of KSDO's 2 mv/m contour. Therefore, additional field intensity measurements made on KSDO and from the proposed site will be required to insure that no overlap of these contours will occur in contravention of Section 73.37 of the Commission's Rules.

The applicant proposes to operate with a power of 10 kilowatts during nighttime hours, utilizing a directional antenna to suppress the radiation to values of approximately 11 mv/m (MEOV) over an arc of approximately 70 degrees towards the 0.5 mv/m-50% secondary service area of Class I–B Station KFAB, Omaha, Nebraska. A study of the applicant's site photographs and topographic maps indicates that man-made objects and terrain irregularities may exist in the vicinity of the proposed site which may result in signal scatter and re-radiation. Accordingly, a substantial question exists as to whether the antenna system can be adjusted and maintained as proposed and whether, in fact, adequate nighttime protection will be afforded KFAB and other existing stations. There is also a question as to the suitability of the proposed antenna site.

(3) *Pacific Fine Music, Inc.* (BP–16161). The proposed 0.025 mv/m-10% skywave contour would involve interference within the 0.5 mv/m-50% skywave service area of KFAB, Omaha, Nebraska. The applicant proposes to operate with a power of 10 kilowatts during nighttime hours, utilizing a directional antenna to suppress the radiation to a value as low as 15.3 mv/m (MEOV) over an arc of approximately 100 degrees toward the 0.5 mv/m 50% secondary service area of KFAB. A study of the applicant's site photographs and topographic maps indicates that man-made objects and terrain irregularities exists in the vicinity of the proposed site which may result in signal scatter and re-radiation. Accordingly, a substantial question exists as to whether the antenna system can be adjusted and maintained as proposed and, whether in fact adequate nighttime protection will be afforded KFAB and other existing stations. There is also a question of the suitability of the proposed antenna site.

(4) *C. D. Funk and George A. Baron d/b as Topanga Malibu Broadcasting Company* (BP–16164). The proposed 0.025 mv/m—10% skywave contour would involve interference within the 0.5 mv/m—50% skywave contour of Station KFAB, Omaha, Nebraska during nighttime hours of operation.

The proposed operation of Topanga Malibu appears to involve overlap of the 2 and 25 mv/m contours with Station KSDO, San Diego, California.

The proposal would cause nighttime interference to the pending application of Donnelly C. Reeves for Roseville, California (BP–12555).

The site photographs are not sufficiently clear to adequately show that the proposed site is reasonably free of structures with which electrical interaction could occur, and therefore a question exists as to the suitability of the proposed site and the feasibility of maintaining and adjusting the proposed directional antenna system.

The RMS of the array may not be satisfactory and the antenna parameters do not accurately depict the applicant's proposed radiation pattern.

(5) *California Regional Broadcasting Corporation* (BP–16165). According to the applicants showing, the proposed 25 mv/m contour is separated from the 2 mv/m contour of KSDO by approximately 2 miles. It appears that some measurement data is available on KSDO in connection with KSDO's proof of performance. However, these measurements are not sufficient to definitely establish the extent of KSDO's 2 mv/m contour. Accordingly, additional field intensity measurements made on KSDO and from the proposed site is required to insure that no overlap of these contours would occur in contravention of Section 73.37 of the Rules.

The applicant proposes to operate with a power of 50 kilowatts nighttime hours, utilizing a directional antenna to suppress the radiation to very low values (less than 1 mv/m calculated along some azimuths) over an arc of approximately 150 degrees. No clear showing of proposed MEOVS are indicated within this arc. A study of the applicants' site photographs and topographic maps indicate that man-made objects and terrain irregularities may exist in the vicinity of the proposed site which may result in signal scatter and re-radiation. Accordingly, a substantial question exists as to whether or not the antenna system can be adjusted and maintained as proposed and whether, in fact, adequate nighttime protection will be afforded KFAB and other existing stations. There is also a question as to the suitability of the proposed antenna site. The proposal involves nighttime interference with the pending application of Donnelly C. Reeves for Roseville, California (BP–12555).

(6) *Storer Broadcasting Company* (BP–16166). According to the applicant's showing the proposed 25 mv/m contour is separated from the 2 mv/m contour of KSDO by approximately 1 mile. As previously noted, the measurements data available on KSDO is not sufficient to definitely establish the extent of KSDO's 2 mv/m contour. Accordingly additional field intensity measurements data on KSDO and the proposed site is required in order to insure that no overlap of these contours will occur in contravention of Section 73.37 of the Rules.

The applicant proposes to operate with a power of 50 kilowatts during nighttime hours, utilizing a directional antenna to suppress the radiation to values of 47 mv/m (MEOV) over an arc of approximately 100 degrees toward the secondary service area of Class I–B Station KFAB, Omaha, Nebraska. A study of the applicant's site photographs and topographic

maps indicates that man-made objects and terrain irregularities may exist in the vicinity of the proposed antenna site which may result in signal scatter and re-radiation. Accordingly, a substantial question exists as to whether, the antenna system can be adjusted and maintained as proposed and whether, in fact, adequate nighttime protection will be afforded KFAB and other existing stations. There is also a question as to the suitability of the proposed antenna site.

The proposal will result in nighttime interference with the pending application of Donnelly C. Reeves for Roseville, California. (BP–12555).

(7) *Voice of Pasadena, Inc.* (BP–16172). The applicant has indicated that the proposal will involve an overlap of the proposed 25 mv/m contour with the 2 mv/m contour of KSDO's in contravention of Section 73.37 of the Rules.

The proposal will cause interference to the nighttime operation of Station KBND, Bend, Oregon.

The proposal will cause interference to the pending application of Donnelly C. Reeves for Roseville, California (BP–12555).

The applicant proposes to operate with a power of 10kw during nighttime hours utilizing a directional antenna to suppress the radiation to as low as 15 mv/m (MEOV) over an arc of approximately 80 degrees toward the secondary service area of KFAB. A study of the applicant's site photographs and topographic maps indicates that man-made objects and terrain irregularities may exist in the vicinity of the proposed site which may result in signal scatter and re-radiation. Accordingly, a substantial question exists as to whether the antenna system can be adjusted and maintained as proposed and whether, in fact, adequate nighttime protection will be afforded KFAB and other existing stations. There is also a question as to the suitability of the proposed antenna site.

The directional antenna parameters for the proposed daytime operation indicates that the antenna parameters do not depict the proposed daytime radiation pattern.

The RSS Limitation of 7.18 mv/m to this proposal is a result of the single limit from Class I–B Station KFAB, Omaha, Nebraska. This application is for operation as a Class II–B station, the normally protected nighttime contour of which is 2.5 mv/m. According to the applicant's study, based on a nighttime limitation of 8.0 mv/m, the proposed nighttime operation will suffer a 25% population loss with a corresponding area loss of 47.4% in contravention of Section 73.28(d) (3) of the Rules.

(8) *Western Broadcasting Corporation* (BP–16173). The proposal will cause nighttime interference to the pending application of Donnelly C. Reeves for Roseville, California (BP–12555).

The RSS Limitation of 7.08 mv/m to this application is a result of the single limitation from Class I–B Station KFAB, Omaha, Nebraska. This application is for operation as a Class II–B station, the normally protected contour of which is 2.5

mv/m. According to the applicant's study, based on a nighttime limitation of 7.41 mv/m, the proposed nighttime operation will suffer a 12.44% population loss with a corresponding area loss of 38.4% in contravention of Section 73.28(d) (3) of the Commission's Rules.

The applicant proposes to operate with a power of 10kw during nighttime hours, utilizing a directional antenna to suppress the radiation to a value as low as 14 mv/m (MEOV) over an arc of approximately 90 degrees toward the 0.5 mv/m—50% secondary service area of Class I–B station KFAB, Omaha, Nebraska. A study of the applicant's site photographs and topographic maps indicates that man-made objects and terrain irregularities may exist in the vicinity of the proposed antenna site which may result in signal scatter and re-radiation. Accordingly, a substantial question exists as to whether the antenna system can be adjusted and maintained as proposed and whether, in fact, adequate nighttime protection will be afforded KFAB and other existing stations. There is also a question as to the suitability of the proposed antenna site.

The directional antenna parameters for the proposed daytime operation indicate that the antenna parameters do not accurately depict the proposed daytime radiation pattern.

The applicant failed to submit a study with respect to compliance with Section 73.187 of the Rules during the critical hours of operation. Therefore it has not been determined whether or not the proposed operation would comply with Section 73.187 of the Commission's Rules regarding the maximum permissible radiation toward the 0.1 mv/m contour of Class I–B Station KFAB during critical hours of operations.

*II. Financial considerations:*

Each of the applicants, with the exception of those listed below, are financially qualified to construct and operate as proposed. The Commission is unable to make a finding that the applicants listed below are financially qualified and therefore, appropriate issues will be specified. The deficiencies and findings that apply to the following applications are listed below.

(1) *KFOX, Inc.* (BP–16149). Based on the information contained in the application, KFOX has not shown that it has sufficient cash and current assets to meet the costs of construction and initial operation of the proposed station. However the applicant states that affiliated persons and companies will provide whatever cash is necessary. In view thereof, the applicant has not furnished sufficient and definite information to support the financial plan to construct and operate as proposed.

(2) *Charles W. Jobbins* (BP–16157). Based on the information contained in the application, it appears that cash in the amount of approximately $57,067 will be required to meet initial expenditures. An analysis of the balance sheet submitted does not show cash or other current assets in an amount sufficient to construct and operate as proposed.

(3) *Crown City Broadcasting Co.* (BP–16168). Based on

the information contained in the application, it appears that funds of approximately $1,426,784 will be required for the construction and initial operation of the proposed station. The applicant's plan for financing is based upon capital of $50,000 furnished by the eleven partners, and a proposed loan of $1,000,000 from the Bank of America, Pasadena, California. (loan for a 3 year period which is to personally guaranteed by the partners and/or stockholders). However, no agreements from the endorsers have been furnished in support of the statement. The applicant plans to assign the construction permit to Crown City Broadcasting Co., a corporation, and the applicant states that this corporation will have additional capital in the sum of $450,000 plus further capital in the sum of $500,000. However, no information has been furnished showing agreements as to the availability and source of the additional funds. It also appears that the applicant has entered into negotiations concerning the purchase of the present KRLA equipment and other assets but no definite arrangements have been made to date. On the basis of the incomplete information submitted, the Commission cannot determine that the applicant has sufficient cash and current assets to meet the cost of construction and operation as proposed.

(4) *Pasadena Community Station, Inc.* (BP–16170). As of May 15, 1964, the applicants balance sheet shows that 74½ shares of capital stock have been issued and 12 shares committed for the sum of $54,000. Stockholders James M. Wood and Seymour M. Lazar have agreed to lend $300,000 and $100,000 respectively to the applicant. These two individuals have furnished balance sheets showing total assets in an amount sufficient to cover the loan commitments, but they have not shown cash and/or current assets definitely available and specifically obligated to cover the loan commitment. It also appears that the applicant is negotiating with Broadcast Equipment Corporation for acquisition or use of the realty and tangible assets which Eleven Ten Broadcasting Corporation had been using in the operation of Station KRLA. However, no definite arrangements have been made concerning this purchase or lease. On the basis of the information contained in the application, it cannot be determined that the applicant has sufficient cash and current assets to construct and operate as proposed.

(5) *Pasadena Broadcasting Company* (BP–16174). Based on the information contained in the application, it appears that funds in the amount of approximately $559,000 will be required to cover the down payment on the equipment, land, building, miscellaneous expense and working capital for a reasonable time. The applicant's plan for financing is to secure funds through the sale of capital stock, a bank loan and the purchase of equipment on deferred credit. 300 shares ($300,000) of capital stock has been subscribed for by fifteen subscribers. The subscribers have furnished undated balance sheets showing total assets in considerable amounts, but have not shown

cash or other assets specifically obligated to the subscription commitments. However, only four of them (Frank J. Burke, Charles E. McClung, Paul Titus and the Tribune Publishing Company) appear to show cash and/or liquid assets available in the amount required to cover their subscription commitments. Manufacturer's credit of $240,000 is available with a twenty-five percent downpayment and the balance payable over a 48 month period. The commitment from the Bank of California for $200,000 fails to show the terms of repayment and security for the loan. On the basis of the information submitted, the Commission cannot make a determination that the applicant has sufficient cash and current assets to construct and operate as proposed.

Except as indicated by the issues specified below, the applicants are legally, technically, financially and otherwise qualified to construct and operate as proposed. However, in view of the foregoing, the Commission is unable to make the statutory finding that a grant of the subject applications would serve the public interest, convenience, and necessity and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below:

IT IS ORDERED, That the requests for waiver of the NOTE to Section 1.571 of the Commission's Rules by the above-captioned applicants ARE GRANTED, and their applications ARE ACCEPTED for filing.

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

1. To determine the areas and populations which would receive primary service from the proposals, with the exception of the proposals of Station KGBS, Los Angeles, California, (BP–16166) and Station KFOX, Long Beach, California (BP–16149), and the availability of other primary service to such areas and populations.

2. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operations of Station KGBS, Los Angeles, California (BP–16166) and Station KFOX, Long Beach, California (BP–16149) and the availability of other primary service to such areas and populations.

3. To determine whether the proposals (with the exception of the proposal of Charles W. Jobbins (BP–16157) would cause objectionable nighttime interference to Station KFAB, Omaha, Nebraska or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

4. To determine whether the proposals listed below would cause objectionable nighttime interference to Station KBND, Bend, Oregon, or any other existing standard broadcast sta-

tions, and if so, the nature and extent thereof, the areas and populations affected thereby and the availability of other primary service to such areas and populations:

| *File Number* | *Applicant* |
|---|---|
| BP–16149 | KFOX, Inc. |
| BP–16158 | Radio Southern California, Incorporated |
| BP–16159 | Goodson-Todman Broadcasting, Inc. |
| BP–16162 | The Bible Institute of Los Angeles, Incorporated |
| BP–16167 | Pasadena Civic Broadcasting Company |
| BP–16168 | Crown City Broadcasting Co. |
| BP–16170 | Pasadena Community Station, Inc. |
| BP–16172 | Voice of Pasadena, Inc. |
| BP–16174 | Pasadena Broadcasting Company |

5. To determine whether the proposals listed below would cause objectionable nighttime interference to the pending application of Donnelly C. Reeves for a new standard broadcast station at Roseville, California (BP–12555) or any other existing standard broadcast stations, and if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations:

| *File Number* | *Applicant* |
|---|---|
| BP–16149 | KFOX, Inc. |
| BP–16158 | Radio Southern California, Incorporated |
| BP–16159 | Goodson-Todman Broadcasting, Inc. |
| BP–16162 | The Bible Institute of Los Angeles, Incorporated |
| BP–16164 | Topanga Malibu Broadcasting Company |
| BP–16165 | California Regional Broadcasting Corporation |
| BP–16166 | Storer Broadcasting Company |
| BP–16167 | Pasadena Civic Broadcasting Co. |
| BP–16168 | Crown City Broadcasting Co. |
| BP–16170 | Pasadena Community Station, Inc. |
| BP–16172 | Voice of Pasadena, Inc. |
| BP–16173 | Western Broadcasting Corporation |
| BP–16174 | Pasadena Broadcasting Company |

6. To determine whether interference received from Station KFAB, Omaha, Nebraska, would affect more than ten percent of the population within the normally protected primary service area of the proposed operation of the applicants listed below in contravention of Section 73.28(d)(3) of the Commission's Rules, and, if so, whether circumstances exist which would warrant a waiver of said Section.

| *File Number* | *Applicant* |
|---|---|
| BP–16149 | KFOX, Inc. |
| BP–16158 | Radio Southern California, Incorporated |
| BP–16159 | Goodson-Todman Broadcasting, Inc. |
| BP–16162 | The Bible Institute of Los Angeles, Incorporated |

| | |
|---|---|
| BP–16167 | Pasadena Civic Broadcasting Company |
| BP–16168 | Crown City Broadcasting Co. |
| BP–16170 | Pasadena Community Station, Inc. |
| BP–16172 | Voice of Pasadena, Inc. |
| BP–16173 | Western Broadcasting Corporation |
| BP–16174 | Pasadena Broadcasting Company |

7. To determine whether the proposal of Charles W. Jobbins (BP–16157) is consistent with the requirements of Section 73.30(b) of the Commission's Rules, to warrant an authorization for dual-city operation.

8. To determine whether each of the applicants, with the exception of the proposal of Charles W. Jobbins, (BP–16157) will be able to adjust and maintain the directional antenna systems as proposed in their applications.

9. To determine whether the transmitter site proposed by each of the applicants is satisfactory with particular regard to any conditions that may exist in the vicinity of the antenna system which would distort the proposed antenna radiation pattern.

10. To determine whether the proposed directional antenna parameters accurately depict the proposed radiation pattern of Topanga Malibu Broadcasting Company (BP–16164). Voice of Pasadena, Inc. (BP–16172); and Western Broadcasting Corporation (BP–16173).

11. To determine whether the radiation proposed by Western Broadcasting Corporation (BP–16173) toward Station KFAB, Omaha, Nebraska, is excessive pursuant to the provisions of Section 73.187 of the Commission's Rules.

12. To determine the comparative needs of the areas now served by Station KFOX including the city of Long Beach, California and the areas to be served by Station KFOX operating as proposed including Pasadena, California, for broadcast service and, in view thereof, whether a grant of the KFOX application would be in accordance with Section 307(b) of the Communications Act of 1934, as amended.

13. To determine whether overlap of the 2 and 25 mv/m contours would occur between any of the proposals listed below and existing Station KSDO, San Diego, California, in contravention of Section 73.37 of the Commission's Rules, and, if so, whether circumstances exist which would warrant a waiver of said Section:

| *File Number* | *Applicant* |
|---|---|
| BP–16149 | KFOX, Inc. |
| BP–16157 | Charles W. Jobbins |
| BP–16158 | Radio Southern California, Incorporated |
| BP–16159 | Goodson-Todman Broadcasting, Inc. |
| BP–16160 | Orange Radio, Inc. |
| BP–16162 | The Bible Institute of Los Angeles, Incorporated |
| BP–16164 | Topanga Malibu Broadcasting Company |
| BP–16165 | California Regional Broadcasting Corporation |

| | |
|---|---|
| BP–16166 | Storer Broadcasting Company |
| BP–16167 | Pasadena Civic Broadcasting Company |
| BP–16168 | Crown City Broadcasting Co. |
| BP–16170 | Pasadena Community Station, Inc. |
| BP–16172 | Voice of Pasadena, Inc. |
| BP–16174 | Pasadena Broadcasting Company |

14. To determine whether there is a reasonable possibility that the tower height and location proposed by the applicants listed below would cause a menace to air navigation.

| *File Number* | *Applicant* |
|---|---|
| BP–16157 | Charles W. Jobbins |
| BP–16164 | Topanga Malibu Broadcasting Company |

15. To determine whether the applicants listed below are financially qualified to construct and operate their proposed station.

| *File Number* | *Applicant* |
|---|---|
| BP–16149 | KFOX, Inc. |
| BP–16157 | Charles W. Jobbins |
| BP–16168 | Crown City Broadcasting Co. |
| BP–16170 | Pasadena Community Station, Inc. |
| BP–16174 | Pasadena Broadcasting Company |

16. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

17. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the operations proposed in the above-captioned applications would better serve the public interest, in light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:

(a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed standard broadcast station.

(b) The proposals of each of the applicants with respect to the management and operation of the proposed stations.

(c) The programming services proposed in each of the applications.

18. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.

IT IS FURTHER ORDERED, That, KFAB Broadcasting Company, Central Oregon Broadcasting Company and Gordon Broadcasting of San Diego, Inc., licensee of Stations KFAB, Omaha, Nebraska, KBND, Bend, Oregon and KSDO, San Diego, California, respectively, ARE MADE PARTIES to the proceeding.

IT IS FURTHER ORDERED, That, Donnelly C. Reeves applicant for a standard broadcasting station in Roseville, California (BP–12555) IS MADE A PARTY to the proceeding.

IT IS FURTHER ORDERED, That, in the event of a grant of

any of the applications, the construction permit shall contain the following condition:

> Pending a final decision Docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission Rules are not extended to this authorization, and such operation is precluded.

IT IS FURTHER ORDERED, That, in the event of a grant of the application of Radio Southern California, Inc. (BP–16158), or Pasadena Community Station, Inc. (BP–16170), the construction permit shall contain the following condition:

> Permittee shall install an approved type of frequency monitor.

IT IS FURTHER ORDERED, That, in the event of a grant of the application of Charles W. Jobbins (BP–16157), the construction permit shall contain the following condition:

> Permittee shall install an approved type transmitter.

IT IS FURTHER ORDERED, That, in the event of a grant of the application of Orange Radio, Inc., (BP–16160), California Regional Broadcasting Corporation (BP–16165), or Standard Broadcasting Company (BP–16166), the construction permit shall contain the following condition:

> In the event of interference to the Commission's monitoring operations at the Santa Ana monitoring station from harmonic or other spurious emissions the licensee will take prompt corrective action necessary to eliminate the interference.

IT IS FURTHER ORDERED, That, in the event of a grant of the application of Pasadena Broadcasting Company (BP–16174), the construction permit shall contain the following condition:

> Before program tests are authorized permittee shall submit antenna current distribution measurements to establish that the antenna towers exhibit the electrical characteristics of essentially 89.3 degree towers.

IT IS FURTHER ORDERED, That the provisions of Section 73.188 and 73.24(e) of the Commission's Rules concerning required coverage of the City of Pasadena ARE WAIVED, as to the applications specifying the facilities formerly authorized to Eleven Ten Broadcasting Corporation, licensee of Station KRLA.

IT IS FURTHER ORDERED, That the participation of the KFAB Broadcasting Company, Central Oregon Broadcasting Company, and Gordon Broadcasting of San Diego, Inc., licensees of Stations KFAB, Omaha, Nebraska, KBND, Bend, Oregon and KSDO, San Diego, California, respectively, and Donnelly C. Reeves, applicant for a new station at Roseville, California (BP-12555) in the proceeding ordered herein shall be limited to the issues affecting its proposal.

IT IS FURTHER ORDERED, That, in the event of a grant of the application of Goodson-Todman Broadcasting, Inc. (BP–16159), the construction permit shall contain a condition that program tests will not be authorized until the permittee has shown that Robert H. Foward has divested all interest in, and severed all connection with Metromedia, Inc., licensee of Station KLAC, Los Angeles, California.

IT IS FURTHER ORDERED, That, in the event of a grant to either KFOX, Inc., licensee of Station KFOX, Long Beach, California (BP–16149) and Storer Broadcasting Company, licensee of Station KGBS, Los Angeles, California (BP–16166), the construction permit shall contain the following condition:

> Program tests will not be authorized until the permittee relinquishes its present license to the Commission for cancellation.

IT IS FURTHER ORDERED, That the information filed by Goodson-Todman Broadcasting, Inc., California Regional Broadcasting Corporation and Crown City Broadcasting Co. that is contained in Dockets No. 15445, 15446, and 15447 respectively, which is applicable to and necessary for consideration for their respective applications for construction permits (BP–16159), (BP–16165), and (BP–16168) in this proceeding IS CONSOLIDATED into the Docket Numbers assigned to the respective applications by this Order.

IT IS FURTHER ORDERED, That the petition for reconsideration filed by Western Broadcasting IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the late-filed opposition to the petition for reconsideration filed by Charles W. Jobbins is DISMISSED as moot.

IT IS FURTHER ORDERED, That the petitions of KFAB Broadcasting Company and Gordon Broadcasting of San Diego, Inc. ARE GRANTED to the extent indicated herein.

IT IS FURTHER ORDERED, That the petition of Voice of Pasadena, Inc. filed on October 16, 1964 requesting an extension of procedural dates, IS DENIED.

IT IS FURTHER ORDERED, That the petition of Voice of Pasadena, Inc. requesting a waiver of the Commission's Rules and acceptance of a tendered amendment, filed on November 6, 1964 IS DENIED; and that the amendment tendered for filing by Voice of Pasadena, Inc. on November 6, 1964 IS HEREBY RETURNED.

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

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

IT IS FURTHER ORDERED, That, except as to the applicants against whom a financial issue has been specified (Issue 15.), the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or on petition properly filed by a

party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

Adopted December 23, 1964.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE. *Secretary.*

F.C.C. 65R–29

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of<br>DIRIGO BROADCASTING, INC., BANGOR, MAINE | Docket No. 15485<br>File No. BPCT–2911 |
| DOWNEAST TELEVISION, INC., BANGOR, MAINE | Docket No. 15486<br>File No. BPCT–2952 |
| For Construction Permit for New Television Broadcast Station | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Dirigo Broadcasting, Inc. (Dirigo) and Downeast Television, Inc. (Downeast), jointly petition for approval of agreement, dismissal of Dirigo's application, and grant of Downeast's application.[1]

2. On March 16, 1959, Leon P. Gorman, who is now president and majority shareholder of Dirigo, filed a petition for rule-making requesting that Channel 7, which had been assigned to Calais, Maine, be reassigned to Bangor, Maine. By Report and Order (FCC 61–522, 21 RR 1589), released April 24, 1961, the Commission, along with other actions, assigned Channel 7 to Bangor. On May 23, 1961, the University of Maine, Orono, Maine, requested the Commission to stay, in part, the effectiveness of aforesaid Report and Order, and on May 24, 1961, the University of Maine filed requests for reconsideration of the Bangor allocation and for oral argument. On May 24, 1961, Community Telecasting Service, licensee of Station WABI–TV, Bangor, Maine, filed, with relation to aforesaid reassignment, a petition to stay and a petition for reconsideration and oral argument. On June 8, 1961, Gorman filed an opposition to the aforesaid petitions to stay, and on June 9, 1961, he filed an opposition to the aforesaid requests for reconsideration. Many related pleadings were thereafter filed. On August 17, and October 19, 1961, Dirigo and Downeast, respectively, filed applications for a construction permit for a new television broadcast station to operate on Channel 7 at Bangor. On October 20, 1961, Dirigo filed a "statement in opposition to . . . further suspension of effectiveness of the Commission's Report and Order allocating Channel 7 to Bangor . . . and . . . request[ed] early action . . . ." From the time of the

[1] Before the Review Board for consideration are: (1) Joint petition for approval of agreement, dismissal of Dirigo application, and grant of Downeast application, filed October 20, 1964, by Dirigo and Downeast; (2) Supplement to (1), filed November 3, 1964, by Dirigo and Downeast; (3) Broadcast Bureau's opposition to (1), filed November 12, 1964; (4) Reply to Broadcast Bureau's opposition, filed December 1, 1964, by Dirigo Broadcasting, Inc. Rule 1.525(a) requires that such a joint petition be filed "within 5 days after entering". Thus, the subject petition was filed one day late. No good cause has been asserted for such untimeliness.

release of the April 24, 1961 Report and Order, to the end of 1961, numerous communications, including some from the Governor of Maine, were sent to the Commission with regard to said Report and Order. By Memorandum Opinion and Order (FCC 62–666, 21 RR 1596(a)), released January 12, 1962, the Commission, along with taking other actions, dismissed as moot the aforesaid petitions for stay; granted, in part, Community Telecasting Service's petition for reconsideration; and reassigned Channel 7 to Calais. A request for stay of this Opinion and Order was filed by Dirigo and was granted by the Commission on February 26, 1962 (FCC 62–227, 21 RR 1596(g)); and by a Second Memorandum Opinion and Order (FCC 63–256, 25 RR 1511), released March 15, 1963, the Commission removed the stay and assigned Channel 7 to Bangor. By its Third Memorandum Opinion and Order (FCC 63–1164, 1 RR 2d 1589), released December 23, 1963, the Commission denied petitions for reconsideration.

3. As stated above, on August 17, 1961, Dirigo filed its application for a construction permit for a new television broadcast station to operate on Channel 7 at Bangor, Maine. On September 22, 1961, Dirigo filed an amendment concerning another broadcast interest of Gorman which had been held since June 17, 1961. On July 5, 1962, the Commission received a letter from the law firm of Spear, Hill, and Greeley stating that it had withdrawn as Dirigo's counsel. A letter was sent by the Commission to Dirigo on January 3, 1964, stating that its application contained no information more current than October, 1961, and requesting that it furnish, within thirty days and in amendment form, additional, current data necessary to bring its application up to date. The Commission received letters on January 29, 1964, from Gorman, and on February 13, 1964, from Haley, Bader and Potts, counsel for Dirigo, requesting an extension of thirty days time within which to respond to the letter of January 3, 1964. The Commission granted such an extension on February 14, 1964. A six day extension was sought in a letter filed by Dirigo on March 12, 1964. On March 20, 1964, Dirigo filed an amendment which entails changes in the programming, financial, and engineering portions of the application and which shows additional business and other broadcast interests held by two of Dirigo's principals. Attached to the amendment are copies of two letters, each from a bank offering a loan to Dirigo of up to $300,000. Said letters are dated March 4, 1964, and March 19, 1964. On April 10, 1964, Dirigo filed a petition for conditional grant. By Order (FCC 64–470), released May 25, 1964, said petition was denied, and the above-captioned mutually-exclusive applications were designated for hearing on an issue concerning Dirigo's financial qualifications and on the standard comparative issue. A pre-hearing conference was held on June 17, 1964. By Order (FCC 64M–1222), released December 4, 1964, the Hearing Examiner, recognizing the fact that the instant request is before the Review Board, rescheduled the date of exchange of exhibits from November 23, 1964, to January 22, 1965, and the date of the hearing from December 7, 1964, to February 5, 1965.

4. The instant joint request seeks approval of an agreement

which provides for dismissal of Dirigo's application and, upon grant of the Downeast application, reimbursement to Dirigo by Downeast of $32,500 for the expenses incurred by Dirigo in preparing and prosecuting its application. In an attached affidavit Gorman shows itemized expenses which total $34,681.48—although he states that said expenses total $34,710.22—and asserts that the $32,500 proposed reimbursement "is truly a 'part' of the expenses —and a mighty small one at that." Dirigo, through an affidavit of Gorman, lists the following categories of expenses allegedly incurred, between January, 1959, and August, 1964, in the preparation and prosecution of its application: travel; hotels (including subsistence, entertainment, promotion); attorneys; engineering; advertising and public relations; stationery and supplies; and miscellaneous, telephone and telegraph.

5. Certain expenditures have been listed by Dirigo in exhaustive detail (*e.g.*, under the stationery and supplies expenses: February 28, 1964, refill for pen—$.78; March 4, 1963, 10 large envelopes—$.93). On the other hand, little factual information has been supplied in support of far more substantial expenses. Concerning the travel and hotel expenses, there is no clear explanation as to the connection between each of Gorman's alleged trips and the prosecution of the application. It cannot be determined from the travel outlays whether fares are one-way or round-trip. Additional information on this point might clear the doubt arising from the great diversity of fares between the same cities (*e.g.*, between New York and Tampa—$99.20, $142.64, $174.20, and $261.30). Also missing is information pertaining to the duration of time spent at various hotels and the rates per day which were paid at them. Such facts might show why, in some instances, there is a great diversity in expenditures at the same hotel (*e.g.*, $4.07, $7.51, $36.25, $41.71, $66.58 at the Lafayette, Portland, Maine), and why some of the hotel expenses are so high (*e.g.*, $246.26 at the Dupont Plaza, Washington, D.C., $756.00 at the Sheraton East, New York, N.Y.). Since Gorman claims that he has receipts for all of the hotel bills listed, such information could easily have been supplied. The "subsistence, entertainment, promotion" expenses should have been substantiated in far greater detail than a mere statement that they are based on "experience", and an occasional passing reference to a particular person entertained. See *WIDU Broadcasting, Inc.*, FCC 63R–367, 1 RR 2d 170 (1963).

6. Detailed affidavits, describing the nature of the legal work performed, should have been submitted by attorneys Jacob Agger and James E. Greeley. Since Attorney Saul Sherriff is dead, Dirigo should have stated the nature of work done by Sherriff. An employee of RCA, which allegedly paid Sherriff's fee out of money deposited with it by Dirigo, should have verified said allegation. There is no indication in the affidavit of Dirigo's engineer as to what part of the engineering work was related solely to the prosecution of the Dirigo application. Moreover, there is a discrepancy of $32.59 between the engineering expenses listed by Gorman and those stated in the affidavit submitted by Dirigo's engineer. The affidavit of Judy B. Cross Gorman, whose alleged unpaid salary (for work as Gorman's part-time secretary since 1959) constitutes the

bulk of the listed advertising and public relations expenses, is lacking in sufficient detail. Moreover, there is a discrepancy of $300 between the $4,800 which Mrs. Gorman claims is owed her (based on $25 per week) and the $5,100 which Gorman asserts he owes her (based upon a more "conservative" $75 per month). Dirigo should also have submitted a copy of the option agreement to which it refers in its list of miscellaneous expenses (*WIDU Broadcasting, Inc., supra*). It has inadequately explained the expense labelled "Speech made to the Maine State Legislature" and has not sufficiently related its telephone and telegraph expenses to specific activities in the prosecution of its application.

7. Because of the numerous deficiencies in Dirigo's showing, the joint petition must be denied. It is also noted that the expenses incurred in prosecuting Dirigo's application were not clearly segregated from those incurred by it in its successful effort to have the channel allocated to Bangor, Maine. This failure to segregate expenses was one of the reasons the Bureau objected to approval of the agreement. In view of our denial of the joint petition for the reasons herein stated, we need not reach this question raised by the Bureau.

Accordingly, IT IS ORDERED, This 26th day of January, 1965, That the joint petition for approval of agreement, dismissal of Dirigo application, and grant of Downeast application, filed October 20, 1964, by Dirigo Broadcasting, Inc. and Downeast Television, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 29–65

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
|---|---|
| KFOX, INC. (KFOX), PASADENA, CALIF. | Docket No. 15751<br>File No. BP–16149 |
| CHARLES W. JOBBINS, COSTA MESA — NEWPORT BEACH, CALIF. | Docket No. 15752<br>File No. BP–16157 |
| RADIO SOUTHERN CALIFORNIA, INC., PASADENA, CALIF. | Docket No. 15753<br>File No. BP–16158 |
| GOODSON-TODMAN BROADCASTING, INC., PASADENA, CALIF. | Docket No. 15754<br>File No. BP–16159 |
| ORANGE RADIO, INC., FULLERTON, CALIF. | Docket No. 15755<br>File No. BP–16160 |
| PACIFIC FINE MUSIC, INC., WHITTIER, CALIF. | Docket No. 15756<br>File No. BP–16161 |
| THE BIBLE INSTITUTE OF LOS ANGELES, INC. PASADENA, CALIF. | Docket No. 15757<br>File No. BP–16162 |
| C. D. FUNK AND GEORGE A. BARON, A PARTNERSHIP D.B.A. TOPANGA MALIBU BROADCASTING CO., TOPANGA, CALIF. | Docket No. 15758<br>File No. BP–16164 |
| CALIFORNIA REGIONAL BROADCASTING CORP., PASADENA, CALIF. | Docket No. 15759<br>File No. BP–16165 |
| STORER BROADCASTING CO. (KGBS), PASADENA, CALIF. | Docket No. 15760<br>File No. BP–16166 |
| MITCHELL B. HOWE, PETER DAVIS, EDWIN M. DILLHOEFER AND C. HUNTER SHELDON D.B.A. PASADENA CIVIC BROADCASTING CO., PASADENA, CALIF. | Docket No. 15761<br>File No. BP–16167 |
| ROBERT S. MORTON, ARTHUR HANISCH, MACDONALD CAREY, BEN F. SMITH, DONALD C. MCBAIN, ROBERT BRECKNER, LOUIS R. VINCENTI, ROBERT C. MARDIAN, JAMES B. BOYLE, ROBERT M. VAILLANCOURT, AND EDWIN EARL, D.B.A. CROWN CITY BROADCASTING CO., PASADENA, CALIF. | Docket No. 15762<br>File No. BP–16168 |
| PASADENA COMMUNITY STATION, INC., PASADENA, CALIF. | Docket No. 15763<br>File No. BP–16170 |
| VOICE OF PASADENA, INC., PASADENA, CALIF. | Docket No. 15764<br>File No. BP–16172 |
| WESTERN BROADCASTING CORP., PASADENA, CALIF. | Docket No. 15765<br>File No. BP–16173 |
| PASADENA BROADCASTING CO., PASADENA, CALIF. | Docket No. 15766<br>File No. BP–16174 |

For Construction Permits

## ERRATA

*Corrections in Memorandum Opinion and Order (FCC 64–1195) Designating the Above-Captioned Applications for Hearing*

The following changes are hereby noted in the Memorandum Opinion and Order (FCC 64–1195) designating the above-captioned applications for hearing:

*1.* On P. 25 of the Designation Order, the following Ordering Clause appears:

IT IS FURTHER ORDERED, That the Participation of the KFAB Broadcasting Company, Central Oregon Broadcasting Company, and Gordon Broadcasting Company of San Diego, Inc., licensees of Station KFAB, Omaha, Nebraska, KBND, Bend, Oregon, and KSDO, San Diego, California, respectively, and Donnelly C. Reeves, applicant for a new station at Roseville, California (BP–12555) in the proceeding ordered herein shall be limited to the issues *affecting its proposal.*

Strike the italicized words "affecting its proposal" and substitute the following:

affecting their respective existing operations and in the case of Reeves its proposal as presently set out in BP–12555.

*2.* Cover Page: KFOX Caption, the Requests line: "Requests 1110 Kc, 10 Kw, 50 Kw–LS, DA–2, U, Class III" should read: "Requests 1110 Kc, 10 Kw, 50 Kw–LS, DA–2, U, Class II, Pasadena, California".

*3.* Page 11, B., (2), line 3: reference is made to 14(A)(1) and 14(A)(5). This should read 15(A)(1) and 15(A)(5). Page 11, B, (2), line 18: 14(A)(3) should read 15(A)(3). Page 12, B, (3), line 4: 14(A) should read 15(A). Page 12, B, (5), line 3: 14(A) should read 15(A). Page 12, B, (6), line 18: 14(A)(2) should read 15(A)(2). Page 12, B, (6), line 24: 14(A)(1) should read 15(A)(1). Page 13, B, (7), line 5: 14(B)(2) should read 15(B)(2). Page 13, B, (8), line 15: 14(A)(2)(4) and (5) should read 15(A)(2)(4) and (5). Page 13, B, (8), line 17: 14(A)(1) should read 15(A)(1).

*4.* At page 13, C, line 1—change "nine (9)" to eight (8)".

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–54

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of<br>NEBRASKA RURAL RADIO ASSOCIATION (KRVN), LEXINGTON, NEBR.<br>Has: 1010 kc., 25 kw., Day, DA, Class II<br>Requests: 880 kc., 50 kw., U, DA–2, Class II–A | Docket No. 15812<br>File No. BP–15348 |
| TOWN & FARM CO., INC. (KMMJ), GRAND ISLAND, NEBR.<br>Has: 750 kc., 10 kw., L–WSB, DA–1, Class II<br>Requests: 880 kc., 50 kw., U, DA–2, Class II–A<br>For Construction Permits | Docket No. 15813<br>File No. BP–15354 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HENRY, CHAIRMAN; AND LEE ABSENT.

1. The Commission has before it for consideration (1) the above-captioned application; (2) petitions[1] filed by Columbia Broadcasting System, Inc. (hereinafter, CBS), licensee of Station WCBS, New York, New York, in opposition to each of the applications; (3) a "Petition to Deny" the Town & Farm Co., Inc., application, filed by KJSK, Inc., licensee of Station KJSK, Columbus, Nebraska; and (4) pleadings subsequent and responsive thereto. The Commission also has before it (5) a letter from W.W. Broadcasting Co., Inc., licensee of Station KUVR, Holdrege, Nebraska, objecting to a grant of the Nebraska Rural Radio Association application.

2. The Commission finds that the above-captioned applications are mutually exclusive and hence must be designated for hearing in a consolidated proceeding; and that, except as indicated by the issues specified below, each of the applicants is legally, technically, financially, and otherwise qualified to construct and operate as proposed.

3. In each of its petitions, CBS contends inter alia (1) that the Commission's Rules in effect when the WCBS license was issued specifically prohibited the assignment of a second unlimited-time station to 880kc, WCBS's frequency; (2) that the prohibition was

[1] Each such pleading captioned "Petition for a Public Hearing Pursuant to the Provisions of Section 316 and in the Interim for Suspension of Further Processing or, in the Alternative, Dismissal of Application; and Petition to Deny."

incorporated into the terms of the WCBS license; (3) that any change in that provision of the Rules would constitute a modification of the WCBS license; (4) that Section 316 of the Communications Act of 1934, as amended, provides that no broadcast license may be modified unless the licensee is given at least 30 days notice of a hearing regarding the proposed modification, at which hearing the burden of coming forward and burden of proof would be on the Commission; (5) that since CBS never received such notification, the Rules change permitting the assignment of a Class II–A, unlimited time, 880kc broadcast station in Nebraska never became final and is without force and effect.

4. For the following reasons, substantially identical to those set forth by the U.S. Court of Appeals for the District of Columbia in its decision in *Goodwill Stations, Inc.* v. *Federal Communications Commission*,[2] the foregoing CBS argument must be rejected: On May 19, 1957, the Commission granted a renewal of the WCBS broadcast license for a period ending June 1960. The WCBS license was not again renewed until February 1963.[3] The amendments to the Rules became effective October 30, 1961. The Commission's Order for the amendments provided that action on applications for the new stations (including a Class II–A, unlimited time, 880kc station in Nebraska) would not be taken until many months thereafter. The operation of WCBS was not subject to any interference or other difference during the life of that station's license prior to its renewal. The practical effect, and legal result, is that there was no modification prior to the expiration of the WCBS license. That license remained with its full integrity for the full term of its existence. Nor was there any modification of the WCBS license after its renewal since the renewed license incorporated the terms of the new amendments.

5. In its two petitions, CBS contends that neither applicant would be able to adjust and maintain its proposed antenna system within the MEOV's of radiation proposed and that, as a result, a grant of either application would cause nighttime interference within Class I–A Station WCBS's 0.5 mv/m, 50 percent skywave contour. Commission study reveals that both applicants herein propose to operate with 50kw of power and suppress radiation toward the nighttime secondary service area of WCBS to critically low values; that relatively minor changes in the operating parameters of either array would result in the proposed MEOV's of radiation being exceeded; that neither applicant has submitted any information in the form of a field intensity site survey to support its contention that the proposed directional antenna system could be adjusted within the critically low values of fields proposed; and that the high degree of suppression proposed by each applicant and the critical protection requirements which must be met raise a substantial question as to whether the proposed directional antenna systems can be adjusted and maintained as proposed and whether adequate nighttime protection would be afforded WCBS in the event of a grant of either application.

[2] 325 F.2d 637, at 641 (1963).

[3] For a period ending June 1, 1963, following which it was again renewed on December 20, 1963, for a period ending June 1, 1966.

6. CBS contends that the Town & Farm proposal for KMMJ does not conform to the requirements of Section 73.22(b) of the Commission's Rules, since it would not provide the first interference-free nighttime primary service to at least (1) 25 percent of the proposal's interference-free nighttime primary service area, or (2) 25 percent of its population. Having considered the pertinent data submitted by both petitioner and applicant, the Commission finds this CBS contention to be lacking in sufficient substance to warrant the inclusion of an issue concerning it: The CBS showing is based upon the mere assumption that "white area" would be eliminated by a signal strength of less than 0.5 mv/m from Class I–B Station KFAB; the applicant's contention regarding Section 73.22(b), on the other hand, is supported by measurements it has submitted to establish the extent of the KFAB 0.5 mv/m service contour in pertinent directions.

7. The proposed KMMJ operation would not provide a signal of 25 mv/m, day or night, over the business area of the city sought to be served and requests a waiver of Section 73.188(b) (1) of the Commission's Rules. An issue regarding that will be included.

8. KJSK, Inc., licensee of Station KJSK, Columbus, Nebraska, has filed an objection to the Town & Farm (KMMJ) proposal on the ground that a grant of the Town & Farm application would result in interference to KJSK within that station's normally protected service area. According to the data submitted by Town & Farm, prior to an amendment filed December 15, 1964 to change transmitter site, the proposed operation of KMMJ would involve interference with KJSK involving 3,174 persons (0.33 percent of the residents) within the proposed KMMJ 0.5 mv/m service area, and 30,658 persons (7.9 percent of the residents) within the KJSK 0.5 mv/m service area. A revised interference study regarding KJSK was not submitted but it appears that the KMMJ change in site did not eliminate the interference involved. Therefore, an issue will be included regarding interference to the existing operation of KJSK, and KJSK, Inc., will be made a party to the proceeding.

9. W.W. Broadcasting Co., Inc., licensee of KUVR, Holdrege, Nebraska, on December 17, 1963, filed an informal objection of the Nebraska Rural Radio Association (KRVN) application on the grounds that the proposed operation of KRVN would cause cross modulation with KUVR resulting in interference to the present KUVR service area population and that competition from KRVN would reduce KUVR's ability to provide the public services now provided by it. KUVR operates, daytime only, on 1380kc with 500 watts non-directional; its transmitter is 5½ miles from the proposed KRVN transmitter site. With respect to W.W. Broadcasting's first ground of objection, the Commission finds that KUVR will be afforded adequate protection, in the event of a grant of the Nebraska Rural application, by the inclusion in the construction permit of an appropriate condition, as set forth below. The second ground of objection must be rejected because of W.W. Broadcasting's failure to support it with specific allegations of fact.

10. The antenna tower construction proposed by Town & Farm Co., Inc., has not yet been approved by the Federal Aviation Agency. Accordingly, an issue will be included herein to determine whether the proposed antenna towers would constitute a menace to air navigation.

11. In view of the foregoing, the Commission is unable to make the statutory finding that a grant of the subject applications would serve the public interest, convenience, and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below:

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

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operations of Stations KRVN and KMMJ and availability of other primary service to such areas and populations.

2. To determine whether the Nebraska Rural Radio Association would, in the event of a grant of its application, be able to adjust and maintain the nighttime directional antenna system of KRVN within the maximum expected operating values of radiation, as proposed.

3. To determine whether Town & Farm Co., Inc., would, in the event of a grant of its application, be able to adjust and maintain the nighttime directional antenna system of KMMJ within the maximum expected operating values of radiation, as proposed.

4. To determine whether the proposal of Town & Farm Co., Inc. (KMMJ), would cause objectionable interference to Station KJSK, Columbus, Nebraska, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

5. To determine whether there is a reasonable possibility that the tower height and location proposed for KMMJ by Town & Farm Co., Inc., would constitute a menace to air navigation.

6. To determine, in the light of the evidence adduced pursuant to Issues 2 and 3, whether the proposed operations of KRVN and KMMJ, respectively, would adequately protect the 0.5 mv/m—50% secondary service area of Station WCBS, New York, New York.

7. To determine whether the proposal of Town & Farm Co., Inc. (KMMJ), would comply with Section 73.188(b)(1) of the Commission's Rules and, if not, whether a waiver is warranted.

8. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the pro-

posals would better provide a fair, efficient, and equitable distribution of radio service.

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

IT IS FURTHER ORDERED, That, in the event of a grant of either of the applications herein, the construction permit shall contain the following conditions:

"If harmonic or other spurious emissions cause interference to the operations of the Commission's monitoring station in the vicinity of Grand Island, Nebraska, the licensee shall promptly take the corrective action required to eliminate such interference.

"Field observations shall be made to determine whether the operation results in cross modulation and the emission of spurious signals and take prompt corrective action to eliminate any adverse problems which may result."

Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission's Rules are not extended to this authorization, and such operation is prohibited.

IT IS FURTHER ORDERED, That Columbia Broadcasting System, Inc., licensee of Station WCBS, New York; KJSK, Inc., licensee of Station KJSK, Columbus, Nebraska; and The Federal Aviation Agency, ARE MADE PARTIES to the proceeding.

IT IS FURTHER ORDERED, That the petition filed by Columbia Broadcasting System, Inc., IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

IT IS FURTHER ORDERED, That the petition filed by KJSK, Inc., IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

IT IS FURTHER ORDERED, That the informal Objection filed by W.W. Broadcasting Co., IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

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

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

IT IS FURTHER ORDERED, That the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceed-

ing, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

Adopted January 27, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–42

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| FARRAGUT TELEVISION CORP., COLUMBUS, OHIO | Docket No. 15619<br>File No. BPCT–3319 |
| PEOPLES BROADCASTING CORP., COLUMBUS, OHIO | Docket No. 15620<br>File No. BPCT–3333 |
| For Construction Permit for New Television Broadcast Station | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it an appeal from an Examiner's ruling, filed October 20, 1964, by Farragut Television Corporation (Farragut).[1]

2. On April 8, 1964, and May 12, 1964, Farragut and Peoples Broadcasting Corporation (Peoples), respectively, filed applications for construction permits for a new UHF television station to be operated on Channel 40, Columbus, Ohio. According to Farragut's application, Farragut's president, Vincent B. Welch; its vice-president, Edward P. Morgan; its secretary-treasurer, Lawrence J. Henderson, Jr.; and its assistant secretary-treasurer, Esterly C. Page (all of whom are directors and are residents of the Washington, D.C. area) owned, respectively, 27.5, 27.5, 25, and 20% of its stock. According to this application, the aforesaid men held, respectively, the aforesaid percentages of stock and the aforesaid positions in Associated Television Corporation, applicant for Channel 23 in Minneapolis, Minnesota. In addition, the application shows that Morgan had been director and is 10% stockholder of Grants Broadcasting Company, licensee of Station KMIN in Grants, New Mexico. On May 20, 1964, Farragut filed an amendment to its application which shows that James L. McIlvaine, a resident of the Washington, D.C. area, was added as a director and 17.5% shareholder of Farragut; that, accordingly, the ownership in Farragut of Henderson and Page was reduced to 17.5 and 10%, respectively; and that Welch, Morgan, Henderson, Page, and McIlvaine each (except for Page in the case of the Miami application) are shareholders, directors, and (except for McIlvaine in all the applications with the exception of that in Miami) officers of Associated Television Corporation, applicant for Channel 23, Min-

[1] Also before the Review Board are oppositions to the appeal, filed October 27, and October 30, 1964, by Peoples Broadcasting Corporation and the Broadcast Bureau, respectively; and reply to aforesaid oppositions, filed November 6, 1964, by Farragut.

neapolis, Minnesota; Sovereign Television Corporation, applicant for Channel 4, Henderson, Nevada; Urban Television Corporation, applicant for Channel 48, San Jose, California (this application was granted on September 30, 1964); and Gateway Television Corporation, applicant for Channel 33, Miami, Florida (this application was granted on September 17, 1964). An amendment to the Farragut application filed on June 23, 1964, shows that each of aforesaid men except Page is an officer, director, and shareholder in Globe Television Corporation, applicant for Channel 30, St. Louis, Missouri (this application was granted on September 30, 1964). In an amendment filed on August 6, 1964, Farragut showed that Welch and Morgan are shareholders in Seaport Broadcasting Corporation, Lancaster, New York, permittee of Station WMMJ.

3. By Order (FCC Mimeo No. 56629), released September 10, 1964, and published in the Federal Register (29 F.R. 12986) on September 16, 1964, the Chief of the Broadcast Bureau, acting under delegated authority, designated the above-captioned mutually-exclusive applications for consolidated hearing on the standard comparative issue. On September 15, 1964, Farragut filed a petition for leave to amend its application in order to add five shareholders who have no broadcast interests, but who are residents of Columbus, Ohio or its environs,[2] and who, cumulatively, would hold 47.5 per cent of the stock and constitute one-half of the board of directors. Each of the proposed shareholders would hold 9.5% of the Farragut stock, and the holdings of Welch, Morgan, Henderson, Page, and McIlvaine would accordingly be reduced to 14.4, 14.4, 9.2, 5.3 and 9.2%, respectively.

4. By Memorandum Opinion and Order (FCC 64M–1006), released October 13, 1964, the Hearing Examiner denied the aforesaid petition for leave to amend on the grounds that the proposed amendment would give Farragut a potential advantage in the proceeding and that Farragut had not shown good cause to justify acceptance of said amendment after designation, notwithstanding Broadcast Bureau's suddenness of action, the reasonableness of Farragut's assumption that it could file its amendment as a matter of right prior to designation, and the commencement well before the date of the designation Order of the process of securing local shareholders. Farragut now appeals this ruling; Peoples and the Broadcast Bureau support the Examiner's position.

5. Farragut contends that (a) it was taken by surprise by the "sudden designation" which was novel, unexpected, and unprecedented because the Broadcast Bureau has never exercised its discretion to designate for hearing an application for a television broadcast station construction permit, nor has it acted, without referral to the Commission, upon a single application where the

[2] According to the proposed amendment, the proposed shareholders have substantial business connections in Columbus. Charles J. McGreevy is officer, director, and/or shareholder of a local motel and of the following types of companies in and around Columbus: holding, banking, savings and loan, real estate, warehouse, jewelry manufacturing, and title insurance and mortgage. Joseph S. Summer is president and stockholder of a real estate company and of a personal holding company, and president of a real estate company. Richard F. Sater, a law partner of Gorrell and Vorys, *infra*, is a director of structural steel, trucking, and slipper manufacturing companies. James A. Gorrell is a law partner in the aforesaid local law firm. Arther I. Vorys, also a partner in said law firm, is director of seven insurance companies, and of hydraulic pump manufacturing and medical research companies, and secretary of a plastic manufacturing company.

principals held interests in other multiple applications pending before the Commission; (b) the decision to add local stockholders was made in March, 1964, in order to provide better insight into local needs, close supervision, and a sound basis for local commercial support, but due to prior pressing commitments, the absences of principals, the inability to arrange for an earlier mutually-convenient time for Farragut's president to meet with prospective shareholders, and the fact that UHF applications filed earlier than the present one awaited Commission action, the process of securing local shareholders, executing their stock subscription agreements, and preparing an amendment was almost—but not completely—finished when the designation Order was released; (c) any change in the comparative position of the applicants thus would be "at most an incident and not the purpose of the amendment;" (d) in effect the Examiner's ruling "constitutes a surrender of any exercise of discretion and applies a mechanical test that an amendment which results even in only 'a potential advantage' must be denied, however powerful the countervailing considerations;" (e) acceptance of the proffered amendment would not procedurally prejudice Peoples' preparation for hearing nor surprise Peoples, nor delay and disrupt the dispatch of the Commission's business (because the amendment was submitted less than a week after the Broadcast Bureau's action), nor require the addition of new issues; (f) it is impossible to state at this time whether the addition of the Columbus shareholders will prove to be a comparative advantage or disadvantage, for the amendment would also result in a reduction in the total broadcast experience of the Farragut shareholders; and (g) "the hearing should proceed not on the discarded basis of the original identity of the applicant, but on the more accurate and realistic foundation of the composition of the applicant in the actual posture in which it would operate the proposed station upon grant."

6. In its opposition Peoples argues that the Commission has long disallowed amendments after designation which would improve an applicant's posture in the comparative evaluation; that it is well settled that in such evaluation the Commission stresses an applicant's identification with the community to be served; that since the proposed changes which Farragut seeks are wholly voluntary on its part, and since said changes could have been made as long as four months prior to the designation Order, Farragut has failed to exercise due diligence; that whether the designation Order was adopted by the Chief of the Broadcast Bureau or by the Commission itself is unimportant; and that it is difficult to believe that the present amendment is not for the purpose of securing a comparative advantage, for in all of the Farragut principals' applications save Miami, none of the applicants have included stockholders with local residence. Broadcast Bureau's opposition is based upon its contentions that Farragut failed to exercise due diligence and that the amendment would improve significantly Farragut's comparative position.

7. The chief impediment to the allowance of the amendment is the change which it would create in Farragut's comparative posi-

tion. In support of its contention that the introduction of local residents as stockholders does not stand in the way of allowance of the amendment, Farragut, in its appeal, states:

> . . . although the Columbus stockholders reflect an increase in the degree of local ownership as a comparative factor, it is to be noted that as a composite group they constitute a minority interest, while at the same time they considerably diminish the extent of the interests of the original stockholders, two of whom have extensive experience in communications law and one in communications engineering, and all five of whom may be expected to have broad and intensive experience in UHF broadcasting before the hearing is completed through grants of construction permits for UHF television broadcast stations in Miami, San Jose, and St. Louis. It is impossible to state at this time, therefore, whether in the final analysis the addition of the Columbus stockholders will prove to be a comparative advantage or disadvantage.

8. It appears to be Farragut's position that unless it is established that it would gain a comparative advantage by the addition of local residents as stockholders, the addition of such residents does not stand in the way of allowance of the amendment. This argument overlooks the fact that it is for the applicant to show good cause for an amendment to its application after the application has been designated for hearing. One of the criteria for allowance of an amendment after designation is that the amendment will not strengthen the comparative position of the applicant seeking to amend. The burden of showing that it will not strengthen its comparative position is upon that applicant. It is not enough to say, as does Farragut, that it is "impossible to state at this time" whether a comparative advantage will result. This statement, in itself, is a concession that Farragut has not met its burden of showing that allowance of the amendment would not result in a comparative advantage. Implicit in the above-quoted statement from Farragut's appeal is that a determination as to whether the addition of the local residents will work to its advantage or disadvantage can finally be made only after all of the evidence is in. With this we agree. However, this fact merely serves to underscore the soundness of the requirement that the amending applicant shall show that it will not gain a comparative advantage. If there is a substantial possibility that, after all of the evidence is in, the amendment will serve to strengthen the amending applicant's comparative position, allowance of the amendment will have worked to the comparative disadvantage of the competing applicant. One of the major objectives of the rule governing amendments would thus be frustrated.

9. On the basis of the factual allegations made in the pleadings before us, it cannot be said that the addition of local residents among its stockholders will not improve Farragut's comparative position. Farragut's argument that the gain in local residents will be offset by a reduction in the percentage of stock held by stockholders with broadcast experience depends, as it concedes, upon what the record shows after all of the evidence is in, but, in addition, rests upon speculative factual premises. Thus, it relies upon an assumption that five of its stockholders "may be expected to have broad and intensive experience in UHF broadcasting before the hearing is completed through grants of construction permits for UHF stations in Miami, San Jose, and St. Louis." If this as-

sumption proves to be erroneous, allowance of the amendment will clearly serve to strengthen Farragut's comparative position. Broadcast experience not yet acquired is not a factor which may be taken into account in determining whether the proposed amendment will result in a comparative advantage. Farragut further alleges that one of its stockholders has experience as a communications attorney and another as a consulting engineer in the communications field; such experience is not, however, entitled to the same degree of weight as experience in actual broadcasting. *Cf. Grand Broadcasting Co.*, 36 FCC 925, 2 RR 2d 327, released April 24, 1964.

10. The denial of amendments which would improve the amending applicant's comparative position rests upon the practical consideration that the allowance of such amendments would stimulate similar amendments by the competing applicants. The net result of such competing amendments would be that of delaying indefinitely the date of final crystallization of the applications, resulting in delays of the hearing. Administrative realities require that at some point final crystallization of the applicants' proposals be required. The cut-off date for competing amendments is, under the Commission's rules, the date of designation of the applications for hearing. After designation, good cause for amendments must be shown. When, as here, an amendment might improve an applicant's comparative position, a heavy burden rests upon the amending applicant to show the presence of countervailing considerations which would warrant allowance of the amendment notwithstanding the possible improvement in its comparative position.

11. Such a showing has not been made by Farragut. To a considerable degree, Farragut, in seeking to make this showing, relies upon the argument that the addition of local residents will serve to strengthen the earning prospects of its proposed operation. In this connection, it submits that this is of prime significance inasmuch as its proposed UHF operation would be competing with three established VHF stations in Columbus. This does not, in the Board's view, constitute an appropriate basis for the allowance of an amendment which might, at the same time, also improve Farragut's comparative position. The earnings problem of a UHF station in a VHF market is not a new one. The alleged necessity of the amendment is not, therefore, of such recent origin as to justify the post-designation amendment. Moreover, allowance of post-designation amendments for this reason, notwithstanding the possible improvement in the amending applicant's comparative position, would to a substantial extent eliminate in UHF proceedings one of the required conditions for the allowance of post-designation amendments, viz., that the amending applicant's comparative position not be improved by the amendment.

12. The instant situation must be distinguished from that in *Integrated Communication Systems, Inc. of Massachusetts* (FCC 64R–364), released July 9, 1964. In the latter case the changes in the application were crystallized prior to designation, but the amendment did not reach the Commission until after designation. Farragut's argument that it was caught by "surprise" as a result of the Bureau's alleged "sudden designation" of its application for hearing is without substance. No showing was made, nor does it

appear that the Bureau acted unlawfully or contrary to the rules. Its reliance on *Perkins Brothers Co.*, 9 RR 1112 (1953) is misplaced; for in the *Perkins* proceeding the designation of the application for hearing was not in accordance with the rule and priorities but under an exception to it, whereas in the instant proceeding the application was designated in complete compliance with the rules.

13. For the foregoing reasons, Farragut's appeal from the Examiner's Order denying its petition for leave to amend will be denied.

Accordingly, IT IS ORDERED, This 1st day of February, 1965, That the appeal from ruling of the Hearing Examiner, filed October 20, 1964, by Farragut Television Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65M–132

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>PAUL D. NICHOLS, WILLIAM C. REID, AND HOUSTON L. PEARCE D.B.A. BIGBEE BROADCASTING CO., DEMOPOLIS, ALA.<br>For Construction Permit | Docket No. 14832<br>File No. BP–13976 |

### MEMORANDUM OPINION AND ORDER

BY MILLARD F. FRENCH, HEARING EXAMINER.

1. On October 21, 1964, the above-styled applicant, hereinafter referred to as Bigbee, filed a "Petition for Leave to Dismiss" its application. The Broadcast Bureau filed an opposition to such petition on October 30, 1964. On January 4, 1965 Bigbee filed its "Reply to Opposition of the Broadcast Bureau", and on January 19, 1965 oral argument with respect to said pleadings was held before the Examiner.

2. In its petition to dismiss its application pursuant to Sections 1.525(c)(l)(iii) and 1.568(c) of the Commission's rules, the applicant stated that on March 9, 1960 it filed an application for a construction permit for a new standard broadcast station at Demopolis, Alabama, which was granted by the Commission on June 27, 1962. On July 27, 1962 Demopolis Broadcasting Company, licensee of the only existing broadcast station in Demopolis, submitted a petition for reconsideration of said grant, which alleged, mainly, that there was inadequate economic support for two broadcast stations in Demopolis. On October 24, 1962 the Commission set aside the grant to Bigbee, designated the application for hearing, and made Demopolis a party to the proceeding. The testimony to be presented at the hearing, as well as rebuttal testimony, have been reduced to writing. The hearing was originally scheduled for September 1, 1964, but the Examiner granted a continuance thereof in view of the fact that the parties contemplated an agreement looking toward the dismissal of the Bigbee application. After an inconclusive meeting between the parties in July 1964 concerning the dismissal of the application, the complete and revised testimony of Horace W. Gross, an economist, was filed by Demopolis on August 11, 1964. After reviewing the full testimony of Mr. Gross, the principals of Bigbee became aware that considerable doubt existed as to the successful operation of a second broadcast station in Demopolis in view of the detailed economic analysis of the financial outlook that was contained in such proposed written testimony. On August 19, 1964 another meeting was held between the parties

and the agreement in question was made. This agreement was executed by the parties on October 7, 1964 and provided that, in consideration of Bigbee dismissing its application, Demopolis was to pay Bigbee the out-of-pocket expenses that it had incurred, not in excess of $6,500, after approval of the agreement by the Commission. In addition, the Bigbee principals agreed not to compete, either directly or indirectly, with Demopolis Broadcasting Company in Marengo County for a period of 10 years.

3. The opposition of the Broadcast Bureau to the petition to dismiss is based primarily on its contention that the request to dismiss had been misdirected since the Hearing Examiner is without authority to rule on such request, and it also questioned the scope of the covenant not to compete.

4. On January 4, in its reply to the Broadcast Bureau's opposition, Bigbee filed a supplemental agreement dated December 28, 1964 between the parties agreeing to delete from the October 7, 1964 agreement the provision with respect to the non-competition covenant and, in addition, the supplemental agreement reduced the amount for reimbursement of Bigbee's out-of-pocket expenses to $5,000. This supplemental agreement between the parties rendered moot one of the grounds for the Broadcast Bureau's opposition to the petition to dismiss.

5. With respect to the Bureau's contention that the petition to dismiss has been misdirected to the Hearing Examiner, it is noted that prior to the Commission's recent revision of May 13, 1964 in the matter of the delegation of authority in hearing proceedings, the contention of the Bureau would be correct, because under Section 0.351(g) of the Commission's rules and regulations the Chief Hearing Examiner was delegated the authority to act on petitions of applicants requesting that their application or the proceedings thereon be dismissed, except as such petitions were acted on by the Review Board under 0.365(b). Under the latter Section of the rules, the Review Board had authority to act upon "joint requests" for approval of agreements filed pursuant to Section 1.525. However, the Commission in its revision of authority in hearing proceedings released May 13, 1964 deleted the authority of the Chief Hearing Examiner as contained in Section 0.351(g), and stated that this matter "will hereafter be acted on by the Presiding Examiner". The Commission further stated that "Section 1.568(c) has been amended to specify a more precise standard for the guidance of Examiners in matters involving dismissal without prejudice in broadcast hearing proceedings". In its revision of the delegation of authority the Commission stated: "Our review of the hearing delegations also indicates that most of the interlocutory matters now acted upon by the Review Board, and some of those now acted upon by the Chief Hearing Examiner, could more effectively be acted upon by Presiding Examiners. Action by the Board and the Chief Examiner on these matters in the past has provided a uniform body of precedent upon which Examiners may base their rulings; and continued review of Examiners' rulings by the Board affords a satisfactory degree of assurance as to the consistency

of future rulings." It is concluded that under the aforesaid delegation of authority the Hearing Examiner has the authority to act on the petition of this applicant requesting that its application be dismissed.

6. As a part of its petition for leave to dismiss, Bigbee filed an itemized accounting of the expenses it had incurred in the preparation, filing and prosecution of its application. These expenses totalled $7,787.36, and affidavits and statements filed as a part thereof showed in detail that the reported expenses represented legitimate and prudent costs. The supplemental agreement filed on January 4 by Bigbee shows that $5,000 was to be paid it as part reimbursement of the aforesaid out-of-pocket expenses. The Broadcast Bureau did not question or contest the amount of the payment, and it is concluded that the revised agreement of reimbursement in an amount not in excess of $5,000 to Bigbee for its legitimate and prudent out-of-pocket expenses should be approved.

7. As stated hereinbefore, the supplemental agreement deleted the provision with respect to the non-competition covenant and thus rendered moot the objection of the Broadcast Bureau to its inclusion in the agreement to dismiss.

8. The Broadcast Bureau also opposed the granting of the petition under the reasoning set out in the Mt. Airy, North Carolina Memorandum Opinion and Order released June 18, 1963, and subsequently affirmed by the Commission on October 11, 1963, in *Woma Typa Broadcasting Company*, 25 RR 900 and 1 RR 2d Page 323. In said case, an applicant for a broadcast station at Mt. Airy initiated and entered into an agreement with the two existing stations in the community whereby they would reimburse the applicant for certain of its out-of-pocket expenses in return for dismissal of its application. The two broadcast stations did not see fit to become parties to the proceeding or to resist the granting thereof by an appropriate evidentiary presentation which might show that it would be impossible economically for three standard broadcast stations to survive in a community the size of Mt. Airy, and render satisfactory service therein. The reason given by the applicant for initiating and entering into the dismissal agreement was that since the filing of the application it "has had an opportunity to observe the financial operations of various stations in the area and now believes that a third station in Mt. Airy would be none too profitable". In affirming the Chief Hearing Examiner's decision denying Commission approval of the payment of out-of-pocket expenses of the applicant, the Commission stated that "the general statements in the affidavits submitted in support of this agreement fall far short of the type of showing required".

9. However, the facts presented here differ materially from the Mt. Airy case. The agreement is between an applicant and a licensee who was made a party to the proceeding by the Commission after said licensee filed a petition for reconsideration of the Commission's action in granting the Bigbee application without a hearing. Further, the dismissal agreement was entered into after the proposed testimony-in-chief and rebuttal statements had been exchanged between the parties. After studying the complete and revised pur-

ported testimony of Mr. Horace W. Gross that had been exchanged by Demopolis, the applicant concluded that serious doubt existed as to the successful operation of a second broadcast station in Demopolis. Mr. Gross's study showed that Demopolis was far inferior economically to other markets in the south in that it ranked lowest in retail trade, lowest in median family income, and highest in percentage of family income under $3,000 a year. The study also pointed up the fact that in all probability the revenue in the future in Demopolis would be declining inasmuch as station WXAL had lower revenues in 1963 than in 1962 and that the total population of the county in which Demopolis is located, as well as the four neighboring counties, suffered a decline in population which ranged from 6.2% to 17.5%. The study further characterized the Bigbee estimated operating expenses for the first year of operation as unrealistically low since it proposed to operate a 5 kw directional day-time station for 40.3% less than the actual experience of non-directional radio stations in comparable markets, nearly all of which operated with lower power. Further, the principals of Bigbee considered the nearly 5 years that had elapsed since the filing of its application in 1960. In contrast to the written study of Mr. Gross which lead to the dismissal agreement in this case, the Mt. Airy case was based merely on the personal observations of the applicant that a third station in that city would be "none too profitable". For the above reasons, it is concluded that the reasoning set out in the Mt. Airy case does not apply to the present proceeding.

10. With respect to the applicant's request for dismissal of its application without prejudice, it is noted that paragraph 1.568(c) provides that "Requests to dismiss an application without prejudice after it has been designated for hearing * * * * shall be granted only upon a showing that the request is based on circumstances wholly beyond the applicant's control which preclude further prosecution of his application". While the applicant had no control over the declining population in Marengo and the adjoining counties, it could have been more realistic in estimating its first year operating expenses at the time it filed its application. Also, it should have made a more thorough and continuing analysis of the economical situation with respect to a second station in the area rather than wait for Demopolis to make such a study and bring such facts to its attention. For these reasons it is concluded that Bigbee has not made a sufficient showing of good cause within the meaning of Section 1.568(c) of the rules and its application must be dismissed with prejudice.

11. Upon consideration of all the foregoing facts, it is found and concluded that the public interest will be served by approval of the agreement to reimburse, and by dismissal of the Bigbee application with prejudice.

Accordingly, IT IS ORDERED, this 2nd day of February, 1965, that the "Petition for Leave to Dismiss" filed by Bigbee Broadcasting Company on October 21, 1964, BE, AND THE SAME IS, HEREBY GRANTED, but that its application IS HEREBY DISMISSED WITH PREJUDICE; that the agreement for reimbursement, as modified by the supplemental agreement filed January 4,

1965, in an amount not in excess of $5,000 for its out-of-pocket expenses, BE, AND THE SAME IS, HEREBY APPROVED: and that the proceeding, BE, AND THE SAME IS, HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,

MILLARD F. FRENCH, *Hearing Examiner.*

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–48

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| DAVID F. STEVENS, JR., TRADING AS TRI-CITIES BROADCASTING CO., COZAD, NEBR. | Docket No. 15679<br>File No. BP–15052 |
| DAWSON COUNTY BROADCASTING CORP., COZAD, NEBR. | Docket No. 15680<br>File No. BP–15679 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Dawson County Broadcasting Corporation (Dawson) petitions the Review Board in this comparative proceeding to add the following issues against David F. Stevens, Jr., tr/as Tri-Cities Broadcasting Co. (Stevens) to those designated by the Commission (FCC 64–990, released November 2, 1964) :[1]

(a) To determine whether David F. Stevens, Jr. has deliberately misrepresented facts to and deliberately concealed facts from the Commission in connection with the prosecution of his application.

(b) In view of the evidence adduced pursuant to the foregoing issue, to determine whether Mr. Stevens has the necessary character qualifications to be a Federal Communications Commission licensee.

(c) To determine whether Mr. Stevens is financially qualified to construct and operate his proposed station.[2]

2. Because Stevens' original application, filed August 15, 1961, included insufficient information as to assets, the Commission, in a predesignation letter of June 23, 1964, requested additional data as to the adequacy of his cash and other liquid assets and the facts surrounding any loans he intended to secure. On the basis of an August 1964 amendment filed in response to the Commission's letter, an initial determination of financial qualification was made by the Commission in the designation Order. Stevens' cash requirement (adjusted to reflect relevant information included in his amendment) for construction and three months' operation totals

[1] Before the Review Board are: motion to enlarge issues, filed November 23, 1964, by Dawson; comments on petition to enlarge issues, filed December 7, 1964, by the Broadcast Bureau; opposition, filed December 22, 1964, by Stevens; reply, filed January 5, 1965, by Dawson; motion to strike certain portions of opposition, filed January 5, 1965, by Dawson; comments on motion to strike, filed January 11, 1965, by the Broadcast Bureau; opposition to motion to strike, filed January 21, 1965, by Stevens; and supplement to opposition to motion to enlarge, filed January 28, 1965, by Stevens.

[2] Dawson also requested addition of a sufficiency of funds (Evansville) issue. This request is not properly addressed to the Review Board, the Examiner having been authorized in the designation Order (FCC 64-990), released November 2, 1964, to add such an issue at his discretion. See *Triangle Publications, Inc.* (*WNHC*), FCC 61–99, 21 RR 187 (1961).

$32,550.43. This figure includes: rental of land (prorated for the initial three month period), and rental and remodeling of building totaling $2,100;[3] purchase of transmitter and equipment totaling $16,900.43; other items totaling $1,850.00; and three months' operation costing $11,700.[4] To meet the costs of $32,550.43 Stevens has two loan commitments for which he could be credited with a total of $33,000.00 and a deferred equipment credit netting $11,250.00,[5] giving a total of $44,250.00,[6] if the bank commitments and the deferred credit are allowable.

3. Dawson and the Bureau argue that they are not. The loan commitments offered as part of Stevens' August 1964 amendment are represented by letters of August 18 and 19, 1964, from the Cozad State Bank ($15,000.00) and the Gothenburg State Bank ($18,000.00), respectively. Dawson and the Bureau contend that the letters do not evidence a firm commitment to lend money to Stevens. However, their challenges are largely disposed of by additional letters from both banks, included with Stevens' opposition, which affirm that the previous letters did constitute firm commitments subject only to the standard condition of renegotiation at the time of advancement of funds in the event of alteration in Stevens' financial posture.[7] Finally, in view of the fact that security for the loans must be presumed to have been reviewed and found satisfactory by the banks themselves, it is not necessary that it be listed. See *Springfield Television Broadcasting Corporation*, FCC 64R–243, 2 RR 2d 843; *Massillon Broadcasting Co., Inc.*, FCC 61–1164, 22 RR 218. Even if serious doubts were found to exist with respect to specific claimed assets, the value of Stevens' assets exceeds his liabilities, and the bank loan commitments are sufficient to meet the proposed construction and initial operating costs. See *Massillon Broadcasting Co., Inc., supra; Martin Karig*, 30 FCC 557, 21 RR 439 (1961).

4. In its request for misrepresentation and character qualification issues, Dawson submits an affidavit of its attorney, William P. Trusdale, based on "studies of public records, review of a credit evaluation report [8] and other reliable sources," arguing that the

[3] The rental and remodeling figure includes a full year's rent; since the remodeling cost was not segregated from the rental figure, the rent cannot be prorated.

[4] Absent explanation by Stevens it must be assumed that initial payments on the two bank commitments reported in his 1964 amendment are not reflected in the $36,000.00 first year operating cost reported in the 1961 application. Since no date for commencement of repayment is given, it will be assumed to be concurrent with commencement of station operation. According to the terms of bank letters submitted with Stevens' opposition, three months' payments on the two loans, which total $33,000.00, will be approximately $2,700.00

[5] Although Stevens' August 1961 application specifies $16,900.43 worth of equipment, the attached letter from Collins Radio Co., written six months earlier, speaks only of a credit "in the approximate amount of $15,000.00"; it must therefore be inferred that expenditures over $15,000.00 will be met in some other manner. Under the terms of the agreement, Stevens will make a down payment of 25%, or $3,750.00, which reduces the $15,000.00 total to $11,250.00.

[6] Stevens' opposition attempts to show a third loan in the amount of $60,000.00 which was to have been completed in December, 1964. Such a loan should properly have been the subject of an amendment and therefore will not be considered in connection with Stevens' financial qualifications. See *Triad Stations, Inc.*, FCC 64R–540, released November 27, 1964.

[7] Dawson's reply attacked the supplemental bank letters on the grounds that they constitute new matter at variance with the application and cannot therefore be considered by the Review Board. A motion to strike these and other portions of Stevens' opposition was filed concurrently with the reply. Except insofar as it challenges Stevens' attempt to rely upon his post-amendment loan (see fn. 6, *supra*), Dawson's motion will be denied; as noted by the Bureau, material filed with the opposition is explanatory in nature and strictly responsive to Dawson's motion. See *Smackover Radio, Inc.*, FCC 62–81, 22 RR 865.

[8] Assertions allegedly based on this report are properly challenged by the Bureau, as in violation of Section 1.229(c) of the Commission's Rules. See *Smackover Radio, Inc., supra.*

financial information filed by Stevens is misleading in that he has claimed assets he does not in fact hold and has understated many of his liabilities. It is alleged, *inter alia*, that: the Dawson County Registry of Deeds shows Stevens' parents to be owners of record of a parcel of real estate at 921 Avenue "C", Cozad, included in Stevens' financial statement; Stevens is not owner of record of a parcel at 1436 Avenue "O", Cozad, mentioned in his financial statement, nor are his parents; records of the Cozad County Clerk's office list 11 unpaid chattel mortgages against Stevens totaling in excess of $75,000 in original amounts; and the Registry of Deeds records a real estate loan in the original amount of $19,607.00. This information, says Dawson, conflicts with Stevens' August 1964 enumeration of liabilities in the amount of open accounts payable of $1,750; chattel mortgages of $2,150; and three real estate mortgages totaling $24,050. Dawson notes that in December 1962 Stevens reported current liabilities of $30,000 and long term liabilities of $40,000. The affidavit challenges Stevens' ownership of two of the three parcels claimed by him and indicates that his August statement that $18,000 was owed on the third was inaccurate in view of the fact that $19,987 was owed on November 1, 1964. These discrepancies are not consistent with candor, concludes Dawson.

5. The Bureau would add the requested misrepresentation and character issues if Stevens is unable to give satisfactory explanation of the apparent discrepancies between Stevens' report of existing liabilities and real estate ownership and the records of the Registry of Deeds and Office of County Clerk of Dawson County. In its comments the Bureau takes the position that the Registry would show Stevens' reported ownership of the 921 Avenue "C" and the 1436 Avenue "O" property and that the county clerk's office would show the extent to which the chattel mortgages have been paid off or reduced to the sums alleged in the August 18, 1964 financial statement.

6. The challenges to Stevens' record of his liabilities appear to be satisfactorily answered in his opposition, which lists in detail the nature and amount of outstanding liabilities. In addition, Stevens attaches an affidavit of the County Clerk stating that payments or discharges of mortgages are not matters of record unless filed and that many of Stevens' liens are in favor of non-residents and no local agency could report outstanding balances. Also attached is an affidavit of Stevens' accountants detailing amounts paid on all chattel mortgages and listing those retired. The existing balance due is reflected as $28,120.29 rather than the $75,000 alleged by Dawson. The mortgages were included in the August financial statement; while not listed separately, they were all considered in calculating the $100,893.05 net worth figure set forth therein.

7. However, problems raised with respect to the two parcels of real estate are not satisfactorily resolved. The opposition does state that due to a typographical error in his financial statement Stevens improperly claimed as an asset property at 915 Avenue "C", Cozad; the property is in fact at 921 Avenue "C". However,

Stevens admits that neither this property nor the property at 1436 Avenue "O" is owned of record by him. An affidavit of Stevens' mother is attached, affirming that Stevens has for some time managed the property and it is understood and agreed that he has full use of the property, including right of sale and appropriation of the proceeds, for the purpose of acquiring funds to construct and operate a radio station.[9] Stevens' own affidavit states that an unfiled deed gave his mother title to the Avenue "O" property in 1952 and that a similar deed was drawn up December 16, 1964 and is being filed. As noted in Dawson's reply, Stevens' explanation of title to the two parcels of real estate is less than complete. While the actual state of title is not important in connection with Stevens' financial qualification in view of our disposition of that portion of the Motion to Enlarge, the possibility that Stevens has been less than candid in his explanation of ownership cannot be considered immaterial. *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). Dawson's reply pleading suggests a direct conflict with Stevens' opposition, which makes no allegation with respect to the ownership of the Avenue "C" property but does allege that the Avenue "O" property is "also owned" by his mother. Dawson replies, however, that according to the Registry of Deeds title to the Avenue "C" property is in both parents, rendering the affidavit of Mrs. Stevens meaningless. Stevens not only fails to explain why his father did not join in this instrument but also does not suggest that he will join in the affidavit to be filed in connection with Avenue "O". The actual state of title cannot be determined from these conflicting pleadings. While it is true that neither party has offered the best evidence of the true state of title, the fact remains that there is a direct conflict, unexplained by Stevens, which can only be resolved at this stage of the proceeding by addition of the requested issue. See *Beamon Advertising, Inc.*, FCC 63R–467, 1 RR 2d 285.

Accordingly, IT IS ORDERED, This 3rd day of February, 1965, That the Motion to Enlarge Issues, filed November 23, 1964, by Dawson County Broadcasting Corporation, IS GRANTED to the extent indicated below and IS DENIED in all other respects; and

IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by addition of the following:

> To determine whether David F. Stevens, Jr., tr/as Tri-Cities Broadcasting Co., has misrepresented or concealed facts in connection with the prosecution of his application, and whether in light of the evidence adduced relative thereto Mr. Stevens has the requisite qualifications to be a licensee of the Federal Communications Commission.

IT IS FURTHER ORDERED, That the Motion to Strike, filed January 5, 1965, by Dawson County Broadcasting Corporation, IS GRANTED, to the extent reflected herein and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[9] The only affidavit filed with the opposition relates to the Avenue "O" property. On January 28, 1965, a similar affidavit, inadvertently omitted, was filed relating to the Avenue "C" property.

F.C.C. 65–102

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| RADIO AMERICANA, INC., BALTIMORE, MD. For Construction Permit | Docket No. 13245 File No. BP–12962 |
| and | |
| JOE ZIMMERMANN, ARTHUR K. GREINER, GLENN W. WINTER, WILLIAM W. RAKOW, ROBERT M. LESHER D.B.A. LEBANON VALLEY RADIO, LEBANON, PA. Requests: 940 kc., 1 kw., Day, Class II | Docket No. 15835 File No. BP–16098 |
| JOHN E. HEWITT, THOMAS A. EHRGOOD, CLIFFORD A. MINNICH AND FITZGERALD C. SMITH D.B.A. CEDAR BROADCASTERS, LEBANON, PA. Requests: 940 kc., 1 kw., Day, Class II | Docket No. 15836 File No. BP–16103 |
| D. ROBERT BUCH, WALTER L. HARTZ AND ALLEN H. KRAUSE D.B.A. LEBANON VALLEY BROADCASTING CO., LEBANON, PA. Requests: 940 kc., 1 kw., Day, Class II | Docket No. 15837 File No. BP–16104 |
| CATONSVILLE BROADCASTING CO., CATONSVILLE, MD. Requests: 940 kc., 1 kw., Day, Class II | Docket No. 15838 File No. BP–16105 |
| RADIO CATONSVILLE, INC., CATONSVILLE, MD. Requests: 940 kc., 1 kw., DA, Day | Docket No. 15839 File No. BP–16106 |
| COMMERCIAL RADIO INSTITUTE, INC., CATONSVILLE, MD. Requests: 940 kc., 1 kw., DA, Day For Construction Permits | Docket No. 15840 File No. BP–16107 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX NOT PARTICIPATING.

1. The Commission has before it for consideration (a) the above applications; (b) a petition for relief by Radio Americana, Inc.; (c) a petition to deny the applications for Lebanon by the licensee of Station WHYL, Carlisle, Pennsylvania; (d) a motion to strike the latter petition by Cedar Broadcasters; and (e) pleadings in response to the above petitions.[1]

[1] Submitted in this proceeding are (a) petition for relief and petition for alternative relief filed May 18, 1964 and February 2, 1965, respectively, by Radio Americana; (b) opposition to petition for relief and petition to dismiss or for alternative relief filed June 1, 1964 and January 25, 1965, respectively, by Cedar Broadcasters; (c) opposition to petition for relief also filed June 1, 1964 by Commercial Radio Institute, Inc.; (d) reply to oppositions to petition for relief filed June 11, 1964, by Radio Americana; (e) petition to deny the Lebanon applications filed April 6, 1964 by Richard F. Lewis, Jr. Inc., of Carlisle, licensee of WHYL; (f) motion to strike the latter petition filed April 17, 1964 by Cedar Broadcasters; and (g) opposition to motion to strike filed April 21, 1964 by WHYL.

2. Among other applications in a proceeding involving more than thirty proposals scattered over eleven states were three mutually exclusive applications for operation on 940 kilocycles. Rossmoyne Corporation sought to locate its station in Lebanon, Pennsylvania, Caba Broadcasting Corporation proposed Baltimore, Maryland, and Catonsville Broadcasting Company designated Catonsville, Maryland, an unincorporated suburb within the urbanized Baltimore area. On August 4, 1960 (FCC 60M–1345), the Chief Hearing Examiner dismissed Catonsville pursuant to an agreement dated July 21, 1960 between it and Caba whereby the latter reimbursed Catonsville for expenses incurred in connection with its application. On July 22, 1960, Rossmoyne and Caba signed a merger agreement whereby a new corporation, Radio Americana, would be substituted for Caba and the Rossmoyne application dismissed. The principals of Rossmoyne were to receive a two-thirds interest in the new applicant with the Caba principals acquiring the remainder. On August 24, 1960 (FCC 60M–1440), the Hearing Examiner approved the agreement and stated that the Rossmoyne dismissal would be considered in the initial decision in accordance with Section 1.605(b) (then 1.363(b)) of the Commission's Rules. By Memorandum Opinion and Order released January 9, 1961 (21 RR 67, FCC–61–12) the application granted. The Commission reconsidered and set aside Rossmoyne application was dismissed and the Radio Americana cana "to submit within 20 days of the release date of this order the grant on September 13, 1961 (21 RR 70a, FCC–61–1100), retained Radio Americana in hearing status and remanded the proceeding to the Hearing Examiner to determine, the facts surrounding the merger, whether the Commission's procedures had been abused and whether the grant was consistent with Section 307(b) of the Act. After the hearing on these issues, the Initial Decision of Hearing Examiner Elizabeth C. Smith (24 RR 169) proposed denial of the application. Oral Argument was subsequently held before the Commission *en banc* on the exceptions. By Memorandum Opinion and Order released December 16, 1963 (1 RR 2d 722, FCC 63–1133), the Commission held in abeyance any decision in the proceeding to enable interested parties to file applications for Lebanon or Catonsville on 940 kilocycles with substantially the same service areas as the Rossmoyne and Catonsville applications. In so ruling the Commission found that ". . . our statutory responsibility under Section 307(b) requires that we protect the broadcasting needs of particular communities for which broadcast facilities have been proposed, and then withdrawn, for otherwise grant of the remaining application may totally preclude the establishment of facilities in the community which the withdrawing applicant sought to serve." Radio Americana sought reconsideration of this ruling and their petition was denied in the Memorandum Opinion and Order, released April 27, 1964 (2 RR 2d 656, FCC 64–350), wherein the Commission noted that a total of eight new applications had been filed for Lebanon and Catonsville. The Commission, in the last paragraph specifically directed Catonsville, Rossmoyne and Caba, or Radio Ameri-

statements of their intentions either to continue the prosecution of their applications or to remove themselves from further participation in this proceeding."

3. Faced with this specific order, Radio Americana, rather than comply, chose instead to file what might be described as a second petition for reconsideration. In the petition for relief, Rossmoyne was eliminated as an applicant but as between Radio Americana and Caba "it is submitted that it is unreasonable and inequitable to require that such an election be made at the present time." One might then ask "If not now, when?" Petitioner answers in the alternative and in such a fashion as to place on the Commission the burden of making the election.

4. Petitioner first sets forth certain conditions which if granted would result in the prosecution of the Radio Americana application; (a) instead of the applications being designated for hearing in the usual manner, petitioner insists that the Section 307(b) questions be decided first since these factors are "the only proper area of comparative consideration between Radio Americana and the seven new applicants"; (b) the hearing order should recite that the record in Docket No. 13245 is incorporated into the new proceeding with the rights of new applicants limited to rebuttal; and (c) that since the Radio Americana transmitter site is no longer available and the cost of placing another site under option would be prohibitively expensive, the Commission should waive the requirements of Section 73.33(a)[2] of the Rules and allow petitioner "to proceed upon the basis of its presently specified site" even though, by its own admission, it has none. While this method may result in two separate hearings, Radio Americana submits that it would be more equitable and less expensive. If the Commission follows this procedure in framing the issues then Radio Americana will prosecute its application. However, if the applications are designated for hearing in such a way as to "make possible a comparison, other than a Section 307(b) comparison, between the Baltimore applicant and any other applicant, then at such time as either the Commission or the Examiner rules that such a comparison is necessary Radio Americana should be given the opportunity to withdraw in favor of Caba Broadcasting Corporation." In this way "the Baltimore applicant" would not have to carry the comparative burden of the original Rossmoyne principals who are "non-local multiple owners."

5. The alternate proposals set forth above by petitioner would doubtlessly enhance the possibility of "the Baltimore applicant's" overcoming the severe 307(b) handicaps that any big city applicant must contend with when opposed in a comparative proceeding by applications designating smaller communities. It is likewise true that being spared the cost of optioning land for a transmitter site in Baltimore would place less of a financial burden on "the Baltimore applicant" thus making it easier to show financial qualification. But petitioner seems to overlook one very important fact

[2] On October 28, 1953 (Docket No. 10572) the Commission abandoned the site-to-be-determined basis and adopted the rule that is now Section 73.33. Subsection (a) provides in pertinent part: "(a) An application for authority to install a broadcast antenna shall specify a definite site and include full details of the antenna design and expected performance."

and that is that it chose Baltimore—not the other applicants. And in so doing Radio Americana cannot now be heard to complain when, as petitioner indicates, it finds itself faced with a Section 307(b) disadvantage. Furthermore, petitioner overlooks the fact that under 307(b) it is the Commission's duty to insure in so far as possible the "fair, efficient, and equitable distribution of radio service" among the several states and communities. In carrying out this mandate it is not our function to frame issues in such a way as to lighten the burden of any applicant in a comparative proceeding. For in so doing the Commission would be likewise increasing the burden of the competing applicants. For these reasons the Commission will not grant the relief requested and the petition will be denied.

6. In the Memorandum Opinion and Order released December 16, 1963, *supra*, the Commission stated that if new applications for Lebanon and Catonsville were filed provision would be made for a brief additional period within which the three original applicants, or Radio Americana, could decide whether or not to prosecute their applications. Upon reconsideration of the aforementioned opinion, the Commission subsequently directed [3] them to file within twenty days statements of their intent to prosecute the applications or to remove themselves from further participation. As of this date the only definite statement received is the one in the petition for relief eliminating Rossmoyne. Nothing has been filed by the original Catonsville Broadcasting Company.[4] This leaves only Caba and Radio Americana, neither of which have filed an uniquivocal statement within the time specified. Furthermore, since a transmitter site has not been specified for "the Baltimore applicant's" directional operation, it has not been established that the city would be provided coverage in accordance with Section 73.188 of the Rules. It is also apparent that in the absence of a definite site it is not possible to demonstrate that the directional antenna system could be properly adjusted and maintained in a manner calculated to produce the radiation pattern desired. For these very reasons the Commission, since the elimination of the site-to-be-determined basis and the adoption of Section 73.33, has never waived the rule in the eleven years it has been in force, nor can we find any persuasive reason for doing so in this case. This denial of the waiver request means that "the Baltimore application" is incomplete and fatally defective.[5]

7. Thus, assuming *arguendo* that a firm and unconditional election had been made, the Commission would still be faced with a defective application. Accordingly, the Caba application as well as Rossmoyne and Catonsville Broadcasting Company will remain in a dismissed status; Radio Americana's application will be dismissed as defective pursuant to Section 1.566 of the Rules as well

[3] Paragraph 2, *supra*.

[4] The Catonsville Broadcasting Company, listed in the caption, File No. BP-16106, is an entirely different applicant than the original.

[5] Nor is this defect cured by the request in Radio Americana's petition for alternative relief that it be given a period of at least 60 days—after designation for hearing—in which to decide whether to proceed with its application and obtain a transmitter site. This request will likewise be denied.

for its failure to prosecute under Section 1.568(b); and the proceeding in Docket No. 13245 will be terminated.

8. Turning to the petition to deny the Lebanon applications, it is alleged by the licensee of Station WHYL, Carlisle, Pennsylvania (960kc, 5kw, DA–D, Day), based on the measurement data filed by Radio Americana at an earlier stage of this proceeding, that the 25 mv/m contour of the Lebanon proposals would overlap the existing 2 mv/m contour of WHYL in contravention of Section 73.37 of the Rules and that, accordingly, WHYL would receive objectionable interference. WHYL requests that the Lebanon applications be dismissed, denied, or in the alternative, designated for hearing on appropriate issues.

9. In a motion to strike the WHYL petition, Cedar Broadcasters contends that WHYL's engineering affidavit was not filed in accordance with Section 309(d)(1) of the Act and Section 1.580(i) of the Rules. These sections require that allegations of fact, except those of which the Commission may take official notice, must be supported by an affidavit from a person with personal knowledge thereof. Cedar Broadcasters claims that the WHYL engineering affidavit is defective since the WHYL engineer merely relied on the Radio Americana engineer's measurements and did not himself take actual measurements.

10. While it is true that the WHYL engineer relied on another engineer's data, it has become customary over the years for both private engineers and members of the Commission's staff to do so in order to predict more accurately the probable location of contours. In this particular case no one has attacked the qualifications of either engineer or the accuracy of the data. The Commission has studied the data originally filed by Radio Americana as well as recent measurements by Lebanon Valley Radio showing no prohibited overlap [6] and, in keeping with past practice [7], we will, on our own motion, include appropriate issues, since it cannot be denied that at least a substantial and material question exists concerning the overlap. Thus, it will not be necessary to make a specific finding with respect to the sufficiency of WHYL's affidavit. Accordingly, both the petition to deny and the motion to strike will be dismissed as moot.

11. In addition to the interference caused to WHYL there are certain other interference problems that are presented. Examination of the Lebanon proposals reveals that they would cause objectionable interference to the existing operations of Stations WPEN and WCNR, Philadelphia and Bloomsburg, Pennsylvania, respectively. According to the applicants' data, the interference would result in population losses to WPEN of from 51,290 to 75,507 persons and losses to WCNR of from 2,144 to 7,805 persons, depending on which one of the Lebanon proposals, if any, is granted. The licensees of these stations will be made parties to this proceeding and an issue included to determine the nature and extent of the interference. Originally the applications of Edwin

[6] These measurements were taken in the summertime, whereas the Radio Americana measurements, showing that overlap would occur, were made in the winter.

[7] In re Mid-Utah Broadcasting Company (KEYY), adopted April 27, 1964 (FCC 64-357).

R. Fisher, File No. BP–13114, for a new station in Newport News, Virginia and The Tidewater Broadcasting Co., Inc., File No. BP–12815, for a new station at Smithfield, Virginia were included in the hearing with the Baltimore, Catonsville and Lebanon applications because of mutual interference. However, it was subsequently determined that the interference would not be so extensive as to preclude grants and the Virginia proposals were severed. The applications however, are now awaiting final Commission action and thus, a grant of any of the applications herein will be conditioned to accept interference from the Virginia applications.

12. Examination of the Commercial Radio Institute and the Radio Catonsville proposals disclose a number of technical dificiencies. Regarding the former, the ground radials for the directional antenna system would be severely restricted in length in certain directions and a photograph tending to establish the suitability of the antenna site for directional operation has not been submitted. Radio Catonsville has filed a site photograph but it is not sufficiently detailed to permit the identification of all structures in the area which might tend to distort the proposed radiation pattern. In addition, the 1 v/m contour is not marked on the photograph and there are no figures given for the populations within the 1 v/m and 25 mv/m contours. Accordingly, issues with respect to these deficiencies will be included.

13. With respect to the financial portion of the Cedar Broadcasters application, it is noted that funds of approximately $28,576 are required to cover the downpayment on equipment, building, miscellaneous expense and to operate the station for a reasonable period of time without working capital. The applicant has submitted a bank letter indicating that a loan of $30,000 would be made available in the event of a grant. However, the letter fails to show the terms of repayment and the security for the loan as required by Section III, Paragraph 4(h) of the application form. Thus, based on the information at hand, the Commission cannot now conclude that adequate funds are available to construct and operate the proposed operation and a financial issue with respect thereto will be included.

14. The application of Radio Catonsville, Inc. shows that funds of approximately $21,214 are needed to cover the downpayment on the equipment, miscellaneous expense and to operate the station for a reasonable period of time without working capital. The land and building are to be leased. The plan for financing is to secure funds through the sale of capital stock. Thus far 12 shares ($1200) have been issued and 288 ($28,000) shares have been subscribed for. Financial information relating to the subscription agreements of Messrs. J. L. Putbrese, E. L. and L. P. Morsberger fails to show that they or their lenders have cash and/or liquid assets available in the amount required to cover their commitments, and no financial information has been submitted by Messrs. T. N. Evans, Sr. and Jr. Thus, based on the information at hand, the Commission cannot now conclude that adequate funds are available to construct and operate the proposed station and a financial issue with respect thereto will be included.

15. Catonsville is listed in the 1960 Census as an unincorporated urbanized place with a population of 37,372. It is immediately adjacent to the southwest corner of Baltimore and is part of the Baltimore urbanized area. Accordingly, issues will be included to determine whether Catonsville is a separate community from Baltimore for the purposes of Section 307(b) of the Act and, if so, whether in view of the nature of the Catonsville proposals, they should be treated as applications for Catonsville or as applications for Baltimore.

16. Except as indicated by the issues specified below and the financial deficiencies previously discussed, all the above-captioned applicants, with the exception of Radio Americana, Inc., are legally, technically, financially, and otherwise qualified to construct and operate as proposed. However, since all these applications involve mutually destructive interference, they must be designated for hearing in a consolidated proceeding on the issues set forth below:

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

1. To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary service to such areas and populations.

2. To determine whether overlap of the 2 and 25 mv/m contours would occur between any of the proposals for Lebanon, Pennsylvania and the existing operation of Station WHYL, Carlisle, Pennsylvania in contravention of Section 73.37 of the Commission's Rules, and, if so, whether circumstances exist which would warrant a waiver of said Section.

3. To determine whether any of the proposals for Lebanon, Pennsylvania would cause objectionable interferences to Stations WPEN, WCNR and WHYL, Philadelphia, Bloomsburg, and Carlisle, Pennsylvania, respectively, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

4. To determine whether Commercial Radio Institute, Inc. will be able to adjust and maintain the directional antenna system as proposed in the instant application.

5. To determine whether the transmitter sites proposed by Commercial Radio Institute, Inc. and Radio Catonsville, Inc. are satisfactory with particular regard to any conditions that may exist in the vicinity of the antenna system which would distort the proposed antenna radiation pattern.

6. To determine whether the proposal of Radio Catonsville, Inc. is in compliance with Section 73.24(g) of the Commission's Rules concerning population within the 1000 mv/m con-

tour, and, if not, whether circumstances exist which would warrant a waiver of said Section.

7. To determine whether Cedar Broadcasters and Radio Catonsville, Inc. are financially qualified to construct and operate their respective proposals.

8. To determine whether Catonsville, Maryland is a separate community from Baltimore, Maryland for the purpose of Section 307(b) of the Communications Act of 1934, as amended.

9. To determine, if it is concluded pursuant to the foregoing issue that Catonsville, Maryland is a separate community, whether, in light of the nature of the Catonsville proposals, they should be treated as applications for Catonsville or as applications for Baltimore.

10. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

11. To determine, in the event it is concluded pursuant to the foregoing issue that one of the proposals for Lebanon, Pennsylvania should be favored, which of those proposals would best serve the public interest, convenience and necessity in light of the evidence adduced under the issues herein and the record made with respect to the significant differences between the said applicants as to:

(a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed standard broadcast station.

(b) The proposals of each of the applicants with respect to the management and operation of the proposed station.

(c) The programming services proposed in each of the applications.

12. To determine, in the event it is concluded pursuant to Issue 10, above, that one of the proposals specifying Catonsville, Maryland should be favored, which of those proposals would best serve the public interest, convenience and necessity in light of the evidence adduced under the issues herein and the record made with respect to the significant differences between the said applicants as to:

(a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed standard broadcast station.

(b) The proposals of each of the applicants with respect to the management and operation of the proposed station.

(c) The programming services proposed in each of the applications.

13. To determine, in the light of the evidence adduced pursuant to the foregoing issues which of the applications should be granted.

IT IS FURTHER ORDERED, That the "Petition for Relief" and the "Petition of Radio Americana for Alternative Relief" filed by Radio Americana, Inc. ARE DENIED; that the "Petition

to Deny" filed by Richard F. Lewis, Jr. Inc. of Carlisle IS DISMISSED; and that the "Motion to Strike" by John C. Hewitt, Thomas A. Ehrgood, Clifford A. Minnick and Fitzgerald C. Smith d/b as Cedar Broadcasters IS DISMISSED.

IT IS FURTHER ORDERED, That the proceeding in Docket No. 13245 IS TERMINATED and the application therein of Radio Americana, Inc., is hereby DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED, That Wm. Penn Broadcasting Co., Columbia-Montour Broadcasting Corporation and Richard F. Lewis, Jr., Inc. of Carlisle, the licensees of Stations WPEN, WCNR and WHYL, respectively, ARE MADE PARTIES to the proceeding.

IT IS FURTHER ORDERED, That, in the event of a grant of any of the applications herein, the construction permit shall contain the following conditions:

Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

Permittee shall accept any interference resulting from a grant of either of the applications of Edwin R. Fischer, File No. BP–13114 or The Tidewater Broadcasting Co., Inc., File No. BP–12814.

IT IS FURTHER ORDERED, That, in the event of a grant of the application of Commercial Radio Institute, Inc., the construction permit shall contain the following condition:

Program tests will not be authorized until the permittee has submitted satisfactory evidence showing that Robert S. Maslin, Jr. (a six percent stockholder of the applicant who also controls and is president of the licensee of Station WFBR, Baltimore, Maryland) has sold his stock in the applicant back to the applicant-corporation in accordance with his present agreement to do so.

IT IS FURTHER ORDERED, That in the event of a grant of any of the applications for Catonsville, Maryland, the construction permit shall contain the following conditions:

The installation of a properly designed phase monitor in the transmitter room as a means of continuously and correctly indicating the amplitude and phase of currents in the several elements of the directional antenna system.

Field measuring equipment being available at all times and, after commencement of operation, the field intensity at each of the monitoring points being measured at least once every seven days and an appropriate record kept of all measurements so made.

A complete nondirectional proof of performance, in addition to the required proof on the directional antenna system, being submitted before program tests are authorized.

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and parties respondent herein, pursuant to Section 1.221(c) of the Commission's Rules,

in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

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

IT IS FURTHER ORDERED, That, except with respect to the applications of Radio Catonsville, Inc. and Cedar Broadcasters, the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

> To determine whether the funds available to the applicants will give reasonable assurance that the proposals set forth in the application will be effectuated.

Adopted February 10, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–103

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| TLB, INC. (WTCN–TV), MINNEAPOLIS, MINN. | Docket No. 15841<br>File No. BPCT–2850 |
| MIDWEST RADIO-TELEVISION, INC. (WCCO–TV), MINNEAPOLIS, MINN. | Docket No. 15842<br>File No. BPCT–3292 |
| UNITED TELEVISION, INC. (KMSP-TV), MINNEAPOLIS, MINN. | Docket No. 15843<br>File No. BPCT–3293 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the above-captioned applications, each requesting a construction permit to make certain changes in the authorized facilities of the respective television broadcast stations, and pleadings filed in connection therewith.[1] TLB, Inc., is the licensee of Television Broadcast Station WTCN–TV, Channel 11, Minneapolis, Minnesota; Midwest Radio-Television, Inc. (WCCO–TV), is the licensee of Television Broadcast Station WCCO–TV, Channel 4, Minneapolis, Minnesota; and United Television, Inc. (KMSP–TV), is the licensee of Television Broadcast Station KMSP–TV, Channel 9, Minneapolis, Minnesota. As is more fully set forth in succeeding paragraphs hereof, the factor common to all of these applications which warrants consideration in a consolidated proceeding is the request of each of the applicants to relocate its transmitter site and to increase antenna height above average terrain. The Federal Aviation Agency has determined, with respect to each of these proposals, that the tower location and height proposed would constitute a menace to air navigation.

2. TLB, Inc., is authorized to operate Station WTCN–TV with effective radiated visual power of 316 kw and antenna height above average terrain of 470 feet, located atop the Foshay Tower in downtown Minneapolis, Minnesota. The applicant proposes to move its

[1] The Commission also has before it for consideration: (a) Petition to Deny filed March 6, 1964, by Post Broadcasting Corporation, licensee of Television Broadcast Station WEAU-TV, Channel 13, Eau Claire, Wisconsin, against the Midwest and United applications; (b) informal objections filed March 2, 1964, by The Association of Maximum Service Telecasters, Inc. (MST), pursuant to Section 1.587 of the Commission's Rules, against the United application only; (c) informal objections filed March 19, 1964, by the State of Minnesota Department of Aeronautics against the Midwest and United applications; (d) Opposition filed April 13, 1964, by United to (a) and (b) above; (e) Opposition filed April 13, 1964, by Midwest to (a) above; and (f) Reply filed April 20, 1964, by MST to (d) above. Each of the parties requested and was granted an extension of time within which to file a responsive pleading. Post Broadcasting Corporation did not file replies to the oppositions of Midwest and United.

transmitter to a point approximately 5 miles northeast of Minneapolis, near Shoreview, Minnesota, a move of approximately 12 miles generally northeasterly from the present site. It is proposed to increase antenna height above average terrain from the present authorized 470 feet to 1,702 feet. No change in power is proposed.

3. Midwest (WCCO–TV) is authorized to operate with effective radiated visual power of 100 kw and antenna height above average terrain of 540 feet, located atop the Foshay Tower. The applicant proposes to move its transmitter to a site approximately 9 miles northeast of downtown Minneapolis (8 miles north of St. Paul), .4 miles east of Victoria Street and Gramsie Roads, Shoreview, Minnesota. It is proposed to increase antenna height above average terrain to 1,603 feet. No change in power is proposed.

4. United (KMSP–TV) is authorized to operate with effective radiated visual power of 316 kw and antenna height above average terrain of 450 feet, located atop the Foshay Tower. The applicant proposes to relocate its transmitter to the same site as that proposed by WCCO–TV and it will share the same tower with WCCO–TV. Antenna height above average terrain will be increased to 1,693 feet, but no change in power is proposed. The three applicants propose to locate their transmitters in essentially the same area which they characterize as an "antenna farm" area. On April 19, 1963, the Federal Aviation Agency issued a determination of menace to air navigation with respect to each of the proposals (FAA OE Docket 61–CE–70) and on June 24, 1963, denied reconsideration of its determinations. Considerations of aeronautical safety constitute the basis also for the objections filed by the State of Minnesota Department of Aeronautics and, in part, the Petition to Deny filed by Post Broadcasting Corporation.

5. Post Broadcasting Corporation (WEAU–TV) alleges standing in this proceeding, with respect to the WCCO–TV and KMSP–TV applications, on the basis of the alleged adverse economic effects which the expansion of the coverage areas of these two stations might have on Station WEAU–TV. It is alleged that the proposed Grade A contours of the two applicants would intrude into the present Grade A coverage area of Station WEAU–TV by approximately 6 miles and that the proposed Grade B contours would intrude into Station WEAU–TV's Grade A coverage area almost to the City of Eau Claire, Wisconsin, itself. About 15 miles now separates the Grade A contours of the two applicants and the Grade A contour of Station WEAU–TV.

6. Petitioner originally alleged that it would, as a result of a grant of these applications, suffer economic injury and would be compelled to curtail certain of its local live programming. The petitioner requested that the applications be designated for hearing, *inter alia*, on a *Carroll* issue.[2] These assertions, however, were bare conclusions, unsupported by specific and material facts sufficient to enable the Commission to determine whether an economic issue would be warranted. The petition does not, therefore, comport with the requirements of Section 309(d)(1) of the Communications Act

[2] *Carroll Broadcasting Company* v. *Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 F. 2d 440, 17 RR 2066.

of 1934, as amended, which requires the specific allegation of facts sufficient to show that a grant of the applications would be *prima facie* inconsistent with the public interest. Accordingly, by letter dated August 20, 1964, the Commission afforded the petitioner an opportunity to amend its petition to furnish the type of information which the Commission has indicated that it considers necessary in order to enable it to determine whether specific and material questions of fact have been raised sufficient to warrant an evidentiary hearing.[3] By letter dated September 9, 1964, petitioner responded to the Commission's letter and advised that it chose not to pursue its request for an economic issue and therefore withdrew its request for the issue. The petition will, therefore, be denied. Nevertheless, we think that it is obvious that, for the purposes of standing in this proceeding, there may be some economic impact on petitioner's station in the event of a grant of these applications. We find, therefore, that the petitioner has standing as a "party in interest" within the intent and meaning of Section 309(d)(1) of the Communications Act of 1934, as amended. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470.

7. MST does not allege standing in this proceeding as a "party in interest" within the meaning of Section 309(d)(1) of the Communications Act, but claims only the status of an informal objector pursuant to the provisions of Section 1.587 of the Commission's Rules. The State of Minnesota, by its Department of Aeronautics, does not allege standing as a "party in interest" within the meaning of Section 309(d)(1) of the Communications Act, but merely objects to a grant of any or all of the applications on the grounds that the tower locations and heights proposed would constitute a menace to air safety. The State of Minnesota asks to be permitted to appear and present evidence in the event that these applications are designated for hearing on the air safety question. We will, accordingly, consider the objections of the State of Minnesota as objections filed pursuant to Section 1.587 of the Commission's Rules and we will afford it an opportunity to be heard.

8. The only questions to be resolved with respect to the WTCN–TV and WCCO–TV applications are those concerned with whether the tower heights and locations proposed might constitute a menace to air safety. The KMSP–TV application, however, presents an additional problem which has been raised by MST with respect to whether a waiver of the Commission's minimum mileage separation rules would be warranted. The Commission, on November 12, 1964, granted the application (BMPCT–5955) of Midcontinent Broadcasting Company, permittee of Television Broadcast Station WAOW–TV (formerly WCWT), Channel 9, Wausau, Wisconsin (FCC 64–1080, released November 13, 1964) for a construction permit to relocate the site of its proposed transmitter to a point on Rib Mountain, 175.8 miles from the present site of Station

[3] *Missouri-Illinois Broadcasting Co.*, FCC 63–650, 1 RR 2d 1; remanded *sub nom KGMO Radio-Telcvision, Inc.* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 336 F. 2d 920, 2 RR 2d 2057. See also *KXO-TV, Inc.*, FCC 63–759, 1 RR 2d 125; affirmed *sub nom Valley Telecasting Co., Inc.* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 336 F. 2d 914, 2 RR 2d 2064.

KMSP–TV. The present authorized sites of the two stations represent a separation shortage of 13.2 miles, but on the basis of Station WAOW–TV's undertaking to provide "equivalent protection" to Station KMSP–TV, the Commission waived Section 73.610 of the Rules, which requires a minimum mileage separation of 190 miles between co-channel VHF stations in Zone II in which both stations are located. Operating as proposed, however, the distance between the authorized site of Station WAOW–TV and the proposed site of Station KMSP–TV would be 168.6 miles, resulting in an additional shortage of 8.2 miles, or a total shortage of 21.4 miles. The applicant has, accordingly, requested a waiver of Section 73.610 of the Commission's Rules. The objector, MST, has filed its objections opposing the proposed co-channel short separation. In addition to the shortage to the Wausau co-channel station, however, the proposed site of Station KMSP–TV would also be short 3 miles to the co-channel reference point in Bemidji, Minnesota (the present site of Station KMSP–TV is one mile short of the Bemidji reference point). The applicant has not requested a waiver of the Rules with respect to this shortage. No allegations have been made that operation by Station KMSP–TV from the site proposed would preclude operation of a station in Bemidji at standard spacing and, in fact, MST concedes that there is an area from which a station could operate at Bemidji on Channel 9 and still meet all spacing requirements. Nevertheless, we think that evidence must be adduced and considered with respect to the proposd short-spaced operation to the Bemidji, Minnesota, reference point as well as to Station WAOW–TV, and the issue which will be specified is intended to include such evidence. We are required to determine, therefore, whether there are public interest considerations which would result from a grant of the KMSP–TV application sufficient to override the disadvantages inherent in short-spaced operation, warranting a waiver of the mileage separation requirements of the Commission's Rules.

9. As we have stated, the grant of the WAOW–TV application for Wausau, Wisconsin, was conditioned upon that station's agreement to provide "equivalent protection" to Station KMSP–TV in accordance with the standards set forth in Docket No. 13340. We stated that the grant was made without prejudice to such action as the Commission may consider appropriate with respect to the KMSP–TV application. KMSP–TV proposes no "equivalent protection" with respect to Station WAOW–TV and it is likely, therefore, that there would be an additional area of co-channel interference caused to Station WAOW–TV as the result of the proposed operation. We are unable to determine, on the basis of the information presently available, whether the public interest requires that KMSP–TV provide "equivalent protection" to Station WAOW–TV. The applicant will, therefore, be afforded an opportunity to be heard with respect to whether a waiver of the separation requirements can be justified and, if so, whether the applicant should be required to so modify its proposal as to provide "equivalent protection" to Station WAOW–TV in accordance with the standards set forth in Docket No. 13340. An appropriate issue will, accordingly, be specified.

10. MST has raised two other questions with regard to the KMSP–TV application which we believe require discussion. MST states that, in the event of a grant of the KMSP–TV application, 754,645 persons in a 154 square-mile area of Minneapolis and St. Paul would receive a lower field strength signal than that which they are now receiving. Although a minimum field strength signal of 77 dbu will still be delivered over all of Minneapolis and St. Paul, as required by Section 73.685(a) of the Commission's Rules, we are, nevertheless, required to consider whether the losses represented by this diminution of signal strength may be offset by concomitant factors.[4] The applicant alleges that there will be significant gains, including television service to areas and populations which do not now receive the signals of any television station. We have said, however, that evidence will be received with respect to whether the applicant should be required to provide "equivalent protection." If it should be determined that "equivalent protection" must be provided, it is possible that these computed gains may be substantially diminished or completely eliminated. Under these circumstances and in view of the fact that the applicant will, in any event, be required to go to hearing, we think that an issue should be specified to enable gains and losses to be weighed and evaluated.

11. Finally, MST states that there is an area of between 675 and 950 square miles within which Station KMSP–TV could locate its transmitter and still meet all spacing requirements of the Commission's Rules and that this area includes a triangular area of approximately 62 square miles (7 miles by 18 miles by 18 miles on its sides) within which all three applicants could locate their transmitters and meet all spacing requirements.[5] MST says that Station KMSP–TV has not shown that it could not locate its tower in this area. We do not think, however, that the applicant is required to make a showing that it is unable to procure a site in some area other than that which it has chosen. Moreover, the objector has furnished no facts to indicate that a site within the suggested alternative area is, in fact, available. For example, we have no facts to indicate whether a site in the suggested alternative area would be accessible, would meet air safety requirements, or that terrain, zoning, geological or other factors would permit a tower to be located in the area. Of paramount concern, however, is the fact that MST would have us require the applicant to defend its choice of a site against a hypothetical alternative for which it has not applied. If we were to adopt such a policy, applicants could be required to defend not only their choices of site, but also their choices of tower height, power, and perhaps even frequency. This course of action would inevitably serve to introduce chaos into the Commission's processes and would impose almost impossible burdens on applicants as well as upon the Commission. We must, therefore, reject consideration of hypothetical alternatives for which the applicant has not applied. *WKYR, Inc.*, FCC 63–893, 1 RR 2d 314. This

[4] *Hall et al.* v. *Federal Communications Commission*, 99 U.S. App. D.C. 86, 237 F. 2d 567, 14 RR 2009; *Television Corporation of Michigan, Inc.* v. *Federal Communications Commission*, 111 U.S. App. D.C. 101, 294 F. 2d 730, 21 RR 2107.

[5] This area would now be substantially redeced as a result of the grant, in November, 1964, of the Midcontinent application (BMPCT–5955) for Station WAOW-TV.

problem was also considered and disposed of in like manner in our decision in *Television Broadcasters, Inc.*, FCC 65–15, 4 RR 2d 119.

12. In view of the foregoing, the Commission finds that, except as indicated by the issues specified below, each of the applicants is legally, technically and financially qualified to construct and operate as proposed, and that, except as otherwise indicated herein, no substantial and material questions of fact have been raised by the pleadings. The Commission, however, is unable to make the statutory finding that a grant of any or all of the applications would serve the public interest, convenience and necessity, and is of the opinion that the applications must be designated for hearing on the issues set forth below. In view of the fact that these three cases involve substantially the same issues and that we believe that consolidation would best conduce to the proper dispatch of the Commission's business and to the ends of justice, we will, upon our own motion, pursuant to the provisions of Section 1.227(a) of the Commission's Rules, order these applications into hearing in a consolidated proceeding. In order to aid the Commission in making its determination with respect to the air safety issues, we will, upon our own motion, make the Federal Aviation Agency and the Department of Aeronautics of the State of Minnesota, parties respondent. No useful purpose, however, would be served by making Post Broadcasting Corporation a party to this proceeding.

Accordingly, IT IS ORDERED, That the Petition to Deny filed herein by Post Broadcasting Corporation, with respect to the application of United Television, Inc., IS DENIED; and that the Objections filed herein by The Association of Maximum Service Telecasters, Inc., ARE GRANTED.

IT IS FURTHER ORDERED, That The Association of Maximum Service Telecasters, Inc., and upon the Commission's own motion, the Federal Aviation Agency and The Department of Aeronautics of the State of Minnesota, ARE MADE PARTIES RESPONDENT in this proceeding.

IT IS FURTHER ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications of TLB, Inc., Midwest Radio-Television, Inc., and United Television, Inc., ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, upon the Commission's own motion, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by TLB, Inc., would constitute a menace to air navigation.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Midwest Radio-Television, Inc., would constitute a menace to air navigation.

3. To determine whether there is a reasonable possibility that the tower height and location proposed by United Television, Inc., would constitute a menace to air navigation.

4. To determine whether circumstances exist which would warrant a waiver of Section 73.610(a) of the Commission's Rules in connection with the application of United Television, Inc., and, if so, whether United Television, Inc., should be

required to afford "equivalent protection" to Television Broadcast Station WAOW–TV, Channel 9, Wausau, Wisconsin, on the basis of the standards set forth in Docket No. 13340.

5. To determine the areas and populations which may be expected to gain or lose television signals or signal strength by the operation of Station KMSP–TV, either as proposed or as modified to provide "equivalent protection", and the availability of other television signals to such areas and populations.

6. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the above-captioned applications of TLB, Inc., Midwest Radio-Television, Inc., and United Television, Inc., or any of them, would serve the public interest, convenience and necessity.

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

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

Adopted February 10, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–60

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| WIDE WATER BROADCASTING CO., INC., EAST SYRACUSE, N. Y. | Docket No. 14669<br>File No. BP–14212 |
| RADIO VOICE OF CENTRAL NEW YORK, INC., SYRACUSE, N. Y. | Docket No. 14671<br>File No. BP–15147 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER KESSLER CONCURRING IN RESULT ONLY; BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has under consideration a verified motion, filed July 31, 1964, by the Broadcast Bureau, to reopen the record and add issues in this proceeding concerning the qualifications of Radio Voice of Central New York, Inc. (Radio Voice) to be a licensee of the Commission.[1]

2. The applications of Wide Water Broadcasting Co., Inc. (Wide Water) for a construction permit for a new standard broadcast station at East Syracuse, New York (1540kc, 1kw, Day, Class II), and of Radio Voice for a construction permit for a new standard broadcast station at Syracuse, New York (1540kc, 50kw, DA, Day, Class II), were designated for hearing by Commission Order (FCC 62–655), released June 25, 1962.[2] The designation Order specified issues which include, among others, the following: (1) a determination of the areas and populations to be served by the proposals and the availability of other primary service to such areas and populations; (2) a determination of whether the Radio Voice proposal would cause objectionable interference to the proposed operation of Station WPME, Punxsutawney, Pennsylvania, or any other existing standard broadcast station, and, if so, the nature and extent thereof; (3) a determination of whether the proposed operations of Radio Voice and Wide Water should contravene the 10% Rule (now Section 73.28(d)(3) of the Commission's Rules); (4) a Section 307(b) issue; and (5) a contingent standard comparative issue. In an Initial Decision (FCC 63D–39), released April 3, 1963, and in a Supplemental Initial Decision (FCC 63D–143), released December 18, 1963, Hearing Examiner Thomas H. Donahue proposed a grant of the Radio Voice applica-

[1] The pleadings before the Review Board include: (1) Verified motion to reopen record and add issues, filed July 31, 1964, by the Broadcast Bureau; (2) Response, filed October 26, 1964, by Radio Voice of Central New York, Inc.; and (3) Reply, filed December 15, 1964, by the Broadcast Bureau.

[2] The application of another applicant, Fred S. Grunwald, tr/as Onondaga Broadcasters, was subsequently dismissed by an Order (FCC 62M–1167) of the Chief Hearing Examiner, released August 30, 1962.

tion and a denial of the Wide Water application. Exceptions to the Initial Decision were subsequently filed by Wide Water, Radio Voice and the Broadcast Bureau, but action on such exceptions has been withheld pending disposition of the subject motion.

*Bureau's Motion*

3. In its verified motion, the Bureau states that newly-discovered evidence links a number of the principals in Radio Voice with the financial aspects of John J. Farina's application (Mount Holly-Burlington Broadcasting Company, Inc., Docket No. 13933) for a new standard broadcast station at Mount Holly, New Jersey. This evidence, the Bureau contends, indicates that said principals misrepresented or failed to disclose other business and broadcast interests in applications filed with the Commission.[3] The essential allegations of the Bureau's motion, based upon the Bureau's inquiry into the financial representations made by Farina in proceedings held on his application, are that substantial sums used by Farina in the prosecution of his application and the eventual operation of the Mount Holly facility (now Station WJJZ) were provided by Dr. Daniel J. Fernicola, Dr. John T. McSweeney and Mr. James F. McDonald (all principals of Radio Voice); that the financial contributions of these individuals to Farina were so large as to indicate an interest in the Farina application; that in connection with the filing of the Radio Voice application, these individuals failed to disclose broadcast or business affiliations; and that these same individuals had knowledge of or participated in concealment of facts which, if known to the Commission, would have required a different result with regard to Farina's Mount Holly application; and that the financial representations made by these individuals in the Radio Voice application were untrue or misleading and that, as a result, Radio Voice may not be financially qualified to construct and operate its proposed facility.

4. Radio Voice is a corporation of nine stock subscribers including Herbert P. Michels (Farina's brother-in-law), Daniel J. Fernicola, John T. McSweeney, James F. McDonald (Fernicola's brother-in-law), Matthew Marano, Charles A. Fernicola (Fernicola's father), Joseph Izzo, Joseph Santangelo and John J. Regan. Michels originally filed the application as an individual but a subsequent amendment, filed January 30, 1962, reflected a change to the Radio Voice corporation controlled by Michels. Each principal in the Radio Voice application, except for Michels, indicates that he had no other broadcast interests prior to the date of the amended application. Each principal also certifies that he had

[3] The Bureau simultaneously filed a similar verified motion with the Commission to reopen the record and add issues in the *Connecticut Coast Broadcasting Company* (Bridgeport, Connecticut) proceeding (Docket No. 14830) concerning the qualifications of that applicant, of which a Dr. Daniel J. Fernicola is a principal (Co-partner), to be a Commission licensee. A Review Board Decision (36 FCC 1038, 2 RR 2d 399), released April 16, 1964, had granted the application of Connecticut Coast Broadcasting Company and had denied the application of Garo W. Ray (Docket No. 14829, File No. BP-15462) for a new standard broadcast station at Seymour, Connecticut. The Commission subsequently denied Ray's application for review of the Board's Decision and also severed Ray's application from the consolidated proceeding with the Connecticut Coast application. By Order (FCC 64-807), released September 4, 1964, the Commission referred the Bureau's verified motion and related pleadings in the *Connecticut Coast* proceeding to the Review Board for its original action in view of the present motion before the Board concerning the application of Radio Voice, of which Dr. Daniel J. Fernicola is also a principal. The Commission also authorized the Board to order consolidation of the common matters of these proceedings.

available liquid assets, over and above all liabilities, of at least $25,000 to meet financial commitments to the corporation.

5. In order to illustrate the alleged relationship between Farina and principals of Radio Voice, the Bureau briefly sketches the history of Farina's Mount Holly application. The Bureau contends that Farina originally filed his Mount Holly application on February 26, 1960, and, in that application, represented that he had in excess of $54,000 on deposit in the Fidelity Union Trust Company of Newark, New Jersey. According to the Bureau, Farina subsequently testified during the Mount Holly proceeding that, in fact, he had $53,000 in cash in a receptacle at his home and that, when questions were raised concerning his financial qualifications, he withdrew the cash from the receptacle and deposited it with the Hanover Bank branch at Rockefeller Center in New York City for the purchase of U. S. Government bonds. Farina's application was granted by Commission Decision (34 FCC 1135, 25 RR 633), released June 14, 1963,[4] and the mutually-exclusive application of Halpern and Seltzer was denied. The Commission subsequently approved an assignment of the construction permit from Farina to the Mount Holly-Burlington Broadcasting Company, of which Farina owns all but single qualifying shares of stock. As a result of the Commission grant of program test authority, Station WJJZ has been operating since December 13, 1963.

6. Halpern and Seltzer, in the meantime, appealed the Commission's Decision to the U.S. Court of Appeals for the District of Columbia Circuit, and, on March 19, 1964, that Court remanded the Mount Holly case to the Commission for further proceedings although it retained jurisdiction of the case.[5] As the Bureau points out, the Court directed inquiry into corroboration of the alleged financial arrangements for the custody of Farina's funds when his application was executed, as well as Farina's financial arrangements for future operations and the detail of Farina's alleged organizational expenses. Pursuant to the Court's directives, the Commission remanded the Mount Holly proceeding to the Hearing Examiner[6] for further hearings on specified issues and, as a result, the Broadcast Bureau instituted an inquiry into Farina's financial claims. On July 10, 1964, Farina advised the Commission that he was withdrawing from the further prosecution of the case and that he would not participate in further hearings. On the same day, Farina's creditor bank appointed a receiver of the assets of Mount Holly-Burlington; the continued operation of Station WJJZ has been under the receiver's direction. In light of Farina's failure to appear at the further hearing ses-

[4] Farina's petition for partial reconsideration of this Decision was denied by Commission Memorandum Opinion and Order (35 FCC 456, 1 RR 2d 297), of September 25, 1963. A petition filed by the other applicant in the proceeding, William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company, which sought a reopening of the record and a rehearing, was also denied by Commission Memorandum Opinion and Order (35 FCC 758, 1 RR 2d 728) of December 11, 1963.

[5] *Halpern and Seltzer v. FCC.* —— U.S. App. D.C. ——, 331 F. 2d 774, 2 RR 2d 2005; *motion for recall denied* July 8, 1964; *cert. denied* October 12, 1964 *sub nom. Mount Holly-Burlington Broadcasting Company, Inc. v. Halpern and Seltzer*, 379 U.S. 827 (Case No. 190).

[6] See Commission Order (FCC 64-373), released May 1, 1964.

sion of July 13, 1964, the Examiner held Mount Holly-Burlington in default, and, in an Initial Report and Recommendation (FCC 64M–676), released July 17, 1964, Hearing Examiner Jay A. Kyle recommended cancellation of previous authorizations issued to Farina and his corporation and denial of the corporation's license application. The Commission, in a Report and Recommendation (FCC 64–1133), released December 10, 1964, urged the Court of Appeals to remand the case to the Commission for the issuance of a Supplemental Decision which would dismiss the Farina application and would grant the Halpern and Seltzer application.

7. As a result of the reopening of the Mount Holly proceeding, the Bureau inquired into the financial representations of Farina. Records of the Fidelity Union Bank were inspected, pursuant to subpoena, by Bureau counsel, and these records indicated that Farina had opened a checking account of $25,000 on May 3, 1960, more than three months after he filed his Mount Holly application. The $25,000, which was deposited for the purpose of meeting Commission requirements in connection with his Mount Holly application, was in the form of three official bank checks given to Farina by Dr. Daniel J. Fernicola and endorsed by both Farina and Fernicola.[7] Two of these checks, in the amounts of $14,000 and $1,000, were drawn by the Yorke Savings and Loan Association of Newark, New Jersey, and were made out to the order of Fernicola. The third check of $10,000 was drawn by the National State Bank of Newark to the order of James F. and Ann R. McDonald (Fernicola's brother-in-law and sister).

8. Bureau counsel interviewed Fernicola on June 30 and July 1, 1964, in regard to Farina's financial transactions. According to the Bureau's allegations, Fernicola stated that he had given $25,000 to Farina in early 1960 and that it had been necessary to sell securities, to borrow on life insurance and to borrow from his brother-in-law (McDonald) in order to raise the money. Fernicola also stated that he was responsible for the $10,000 loan made to McDonald and his wife and that he, Fernicola, was repaying the principal and interest thereon. Fernicola claimed that the $25,000 was intended to finance a secret patentable control system which had been installed in some factories; however he did not know what the process was, where it was installed or by whom it was developed. He also informed Bureau counsel that he had not received any accounting from Farina regarding disposition of the money advanced, had not been repaid any money by Farina, and had no evidence (receipt or document) of the $25,000 payment to Farina. Fernicola also stated that he had given an additional $6,000 to Farina on April 8, 1964, in consideration of Farina's consultant services in regard to Fernicola's Connecticut Coast application.[8]

9. In response to the Bureau's demand for Farina's records at prehearing conferences, Farina's counsel provided some checks (attached to the Bureau's motion as exhibits) which purported to represent payments in connection with the Mount Holly applica-

[7] Photostatic copies of these checks are attached to the Bureau's verified motion.
[8] A copy of Fernicola's personal check in this amount, made out to Farina, is attached as an exhibit to the Bureau's motion.

tion. Among those checks were a number which were drawn on Farina's account with the Fidelity Union Bank [9] and which represents substantial payments on behalf of the Mount Holly application. The Bureau's inquiry also indicated that Fernicola's $6,000 check was deposited by Farina in a special checking account and that withdrawals in the amount of $4,860 were made from this account in favor of Mount Holly-Burlington Broadcasting Company.

10. Investigation by the Bureau of the records of the Rockefeller Center branch of the Hanover Bank showed that Farina opened a checking account there on July 19, 1961, with an initial deposit of $6,000. The initial deposit consisted of three checks, each in the amount of $2,000, two of which were drawn by principals of Radio Voice, James F. McDonald (Fernicola's brother-in-law) and Dr. John T. McSweeney, and the third was an official check of the Fidelity Union Trust Company. According to the Bureau, bank records indicated that the account was opened to be used in connection with Farina's acquisition of a television station in Burlington, New Jersey. Farina's own records showed that the Hanover Bank account was used to pay expenses of his Mount Holly application. When the Bureau interviewed McSweeney concerning his $2,000 payment to Farina, he claimed that Farina was being paid for consultant services in connection with the Radio Voice application; however, Farina had made no accounting of the disposition of the $2,000 to McSweeney. Subsequent to the interview, McSweeney directed a letter to the Commission wherein he noted a discussion with Fernicola concerning their radio business ventures and indicated that the contribution of $2,000 to Farina was actually for the purpose of applying for a new radio station in Rochester, New York. In an interview with Bureau counsel, McDonald claimed that his $2,000 payment was for services rendered by Farina in connection with an enterprise known as Radio Rochester, Inc. McDonald stated that no application was ever filed by Radio Rochester although such a corporation had apparently been organized in 1961. No disclosure was made by McSweeney or McDonald in the Radio Voice application of any interest in Radio Rochester, Inc.

11. On the basis of the foregoing information developed in connection with the remanded Mount Holly proceeding, the Bureau now requests a full inquiry into the character and financial qualifications of Radio Voice and its principals. The Bureau points out that Farina relied entirely on funds furnished by Fernicola and other Radio Voice principals in the prosecution of his Mount Holly application. If these funds did represent an investment in a secret patentable control system, as claimed by Fernicola, the Bureau maintains that such an investment was not disclosed in either the Radio Voice or Connecticut Coast applications. If funds were given to Farina in connection with a radio venture in Rochester, as claimed by McSweeney and McDonald, then the Bureau asserts

[9] According to Bureau counsel, as far as could be determined, the only deposit made to this account by Farina was the $25,000 received from Fernicola. Bank records indicate that this entire amount was eventually drawn out.

that such facts should have been revealed in the Radio Voice application. It is the Bureau's contention that serious questions are raised concerning the extent of the interest and involvement of Fernicola, McSweeney, McDonald and others in Farina's application; the possible misrepresentation or concealment of such facts in applications filed with the Commission; and the possible dilution of Radio Voice's financial position. The Bureau questions the validity of the financial representations made by Fernicola and McDonald in the Radio Voice application in view of their substantial participation in payments made to Farina, including a $10,000 bank loan made to McDonald and his wife and assumed by Fernicola. The Bureau attaches a copy of the bank ledger card for this loan to its motion; the card indicates that the loan has not been fully repaid. On the basis of all of the above, the Bureau moves to remand the Radio Voice application for further hearing upon issues to determine whether Radio Voice and its principals possess the requisite character and financial qualifications to be Commission licensees in light of all facts regarding financial transactions between Radio Voice principals and John J. Farina.

*Radio Voice's Response*

12. Radio Voice admits, in its response to the Bureau's motion, that the facts set forth by the Bureau "do suggest . . . that Fernicola, McDonald, and McSweeney (perhaps even others) were involved in a tangled skein of complex financial maneuvering on the part of Farina in connection with his Mount Holly application and station. However, Radio Voice points out that the relevant questions to be answered are whether the funds furnished to Farina were intended to be used or were used with the knowledge and consent of Fernicola, McDonald and McSweeney and, if so intended, whether said principals received or were to receive an interest in Farina's Mount Holly station. According to Radio Voice, affidavits of its principals (attached to its response) establish: (1) that Farina received $2,000 checks from McDonald, McSweeney, Drs. Marano and Santangelo, Mr. Charles Fernicola (Fernicola's father), Mr. John J. Regan and Mr. Joseph Izzo (all Radio Voice principals) as advance payments to cover preliminary expenses in connection with an application for a Rochester station;[10] (2) that $25,000 was initially given to Farina by Fernicola in connection with a proposed application for a Hammonton, New Jersey, station but was later committed for the purpose of investment in a patentable control process; and (3) that Fernicola's $6,000 payment to Farina in April 1964 was for consultant services rendered by Farina in connection with Fernicola's Connecticut Coast application.

13. Radio Voice further contends that its attached affidavits indicate that Fernicola, McSweeney and McDonald do not now have, and did not have, any interest in Farina's Mount Holly ap-

[10] Radio Voice notes that only eight persons, including Fernicola, were associated with Farina in the Rochester venture and that Fernicola was not required to advance funds for that venture. Fernicola, in his affidavit, indicates that he was to receive an interest in Rochester on a services rendered basis.

plication and station. Radio Voice also denies the Bureau's claims of misrepresentation or concealment of facts by its principals in the Radio Voice application on the grounds that no Radio Voice principal possessed an interest in Farina's application and that Section II of the broadcast application does not require disclosure of planned and speculative ventures, such as the proposed Rochester station or the patentable control system. In regard to the Bureau's claims concerning its financial qualifications, Radio Voice notes that such qualifications were passed on by the Commission when the Radio Voice application was designated for hearing and that the Bureau's motion contains no facts to justify reopening the matter now. Since the affidavits attached to its response provide a complete explanation of the questions raised by the Bureau, Radio Voice suggests denial of the Bureau's motion.

14. In support of its response, Radio Voice attaches an affidavit of Dr. Matthew Marano, which statement forms the basis of other affidavits furnished by Radio Voice principals. Marano indicates that he first met Farina in Fernicola's office in March, 1960, along with Dr. Joseph Santangelo, Dr. Michael Ritota, Dr. John Ritota and Charles Fernicola. Marano states that the purpose of the meeting was to consider a radio station venture in Hammonton, New Jersey, which had been suggested to Fernicola by Farina. According to Marano, Farina indicated that he would not be a party to the Hammonton application because of possible prejudice to his own pending application for Mount Holly; however, Farina did request that those present at the meeting advance him $5,000 each to demonstrate the proposed applicant's financial qualifications. Since none of the participants at the meeting desired to advance funds to Farina without some evidence of an investment (such as stock or receipts), Marano avers that the matter ended promptly. Marano states that he next met Farina in the Spring of 1961 at Fernicola's home, along with Santangelo, Charles Fernicola, McSweeney, McDonald, Izzo and Regan (all Radio Voice principals). Farina suggested that the group participate in a venture to acquire an available radio frequency at Rochester, New York, and he requested and received $2,000 from each participant in order to cover initial expenses of the venture. Farina indicated that there was no connection between the Rochester venture and his Mount Holly application and that he would participate in the Rochester proposal. Marano further claims in his affidavit that the Rochester venture subsequently failed because of engineering problems and that he received no accounting of his investment therein.[11] Thereafter, Marano joined in the Radio Voice application but he did not mention the Rochester venture in the Radio Voice application. Marano specifically claims that he was not required to disclose information concerning these matters to the Commission in the Radio Voice application since: (1) he never had any interest in Farina's Mount Holly application or station; (2) the Rochester venture never materialized as a business enter-

[11] Marano points out that he had no knowledge of how the money was spent by Farina but that no authorization was given to spend the money on Farina's Mount Holly application or on anything other than the Rochester venture.

prise or broadcast application; and (3) even if Rochester might be assumed to be a business enterprise, Marano did not have a 25% interest therein and had not been elected or designated as an officer.

15. In his affidavit of October 24, 1964, Fernicola denies that he was personally involved in Farina's financial affairs and states that he did not *intentionally* provide funds for Farina's Mount Holly application or station. When at the March 1960 meeting it was decided that the group would not apply for Hammonton, Fernicola claims that Farina advised him to go ahead alone and, as a result, Fernicola advanced $25,000 to Farina to prepare an application. The $25,000 was given to Farina about May 1960 in the form of three checks, including the $10,000 check which was obtained as a loan from Fernicola's brother-in-law, McDonald.[12] Fernicola states that he did not receive a regular receipt for this money but that Farina did give him a personal check for $25,000 drawn on Farina's account with a Newark bank. When the Hammonton venture fell through,[13] Fernicola agreed to Farina's suggestion that the $25,000 be invested in a patentable control process. Fernicola does admit that, thereafter, he acted as a contact between Farina and the other participants in the Rochester venture and that, in consideration of services rendered, Fernicola was to receive an interest therein. Fernicola also admits that he induced participation in the Radio Voice application. However, he denies that he ever had any interest in Farina's application and he states that Farina does not have any interest in Fernicola's Bridgeport, Connecticut, application.[14]

16. Fernicola denies that he has knowingly failed to disclose, or knowingly concealed, any information from the Commission in the Radio Voice or Connecticut Coast applications. He explains that the Rochester venture never materialized and that the patent investment was too speculative to be treated as a business enterprise. However, upon review of his financial position as of January 23, 1962, Fernicola does note that all of the stocks upon which he relied to claim net liquid assets of $25,000 were not listed on major exchanges as is claimed in the Radio Voice application. Fernicola points out that his financial statement should have simply stated that he had cash and other liquid assets over liabilities in excess of $25,000. As a result, Fernicola attaches a revised financial statement as of January 23, 1962, to his affidavit

[12] Fernicola denies that either McDonald or his wife (Fernicola's sister) knew of the purpose of the loan. In his affidavit, McDonald states that he did not make the loan to Fernicola with the understanding that the $10,000 was to be turned over to Farina for his Mount Holly station.

[13] Fernicola avers that no application was filed for Hammonton and that he was advised by Farina that the filing of applications had been cut off, Fernicola also notes that he has been recently advised that it was already too late to file an application for Hammonton at the time he advanced the $25,000 to Farina; Fernicola does not know whether or not Farina was aware of this fact.

[14] Fernicola explains that the $6,000 payment made to Farina by check of April 8, 1964, was for Farina's consultant services on the Connecticut Coast application. Fernicola denies that Farina ever requested or received an interest in the Connecticut Coast application. Fernicola's partner in that application, Salvatore A. Bontempo, confirms the purpose of this $6,000 payment in his attached affidavit. Bontempo also asserts that he introduced another credit source to Farina and that Farina subsequently had financial dealings with this other source, but Bontempo disclaims any interest in Farina's Mount Holly application and station. Thus, it appears that Bontempo's involvement with Farina must also be explored in the *Connecticut Coast* proceeding in light of the Board's ultimate disposition of the instant motion.

but notes that said statement does not include, as an asset or otherwise, the $25,000 payment to Farina.[15]

| | |
|---|---|
| Assets: | |
| Cash in banks and on hand | $7,870.95 |
| Cash value life insurance | 4,045.53 |
| Cash value stocks | 21,845.00 |
| Accounts receivable | 3,000.00 |
| Real estate | 6,000.00 |
| Personal property | 5,000.00+ |
| Total assets | 47,761.48 |
| Liabilities: | |
| National State Bank, Newark, N.J. | 4,000.00 |
| Metropolitan Life Ins. Co. | 1,450.00 |
| Total Liabilities | 5,450.00 |
| Net worth | 42,311.48 |
| Total liabilities and net worth | 47,761.48 |

17. The questions which the Bureau raises concerning the accuracy and completeness of representations made in the Radio Voice application may affect Radio Voice's qualifications to be a broadcast licensee. The Bureau bases its assertions upon material that was developed in preparation for the reopened hearing in the Mount Holly proceeding. That newly-discovered material [16] allegedly links principals of Radio Voice with the financial aspects of Farina's application for the Mount Holly facility. Radio Voice readily admits that funds were made available to Farina by Radio Voice principals and that a substantial portion of these funds were subsequently used by Farina in the prosecution of his application and the operation of his facility. However, Radio Voice denies that these funds were advanced to Farina for use in connection with his Mount Holly application and facility or were so used with the knowledge and consent of Radio Voice principals. Radio Voice also denies that its principals received, or were to receive, an interest in Farina's application and station in consideration for the advanced funds. Radio Voice, in attached affidavits, explains that: (1) the $2,000 checks advanced to Farina by seven of it sprincipals were intended to cover preliminary expenses of the proposed application for a Rochester station; (2) the $25,000 advanced to Farina by Fernicola was initially given in connection with a proposed application for a Hammonton, New Jersey, station, but was later committed to Farina for the purpose of an investment in a patentable control process; and (3) the $6,000 paid to Farina by Fernicola in April, 1964, was for consultant services in connection with Fernicola's Connecticut Coast application. Radio Voice contends that the attached affidavits establish the absence of any interest in Farina's application by Radio Voice principals; that there were no misrepresentations or concealment of facts in the Radio Voice application since the broadcast application does not apply to speculative ventures such as Rochester or the control process; and that the Bureau's motion recites no facts to justify inquiry into Radio Voice's financial qualifications.

[15] Fernicola's revised financial statement includes the following items:

[16] In view of the extensive investigation required to elicit the facts alleged in the subject motion, good cause exists for consideration of the matters raised by the Bureau at this stage of the proceeding.

CONCLUSIONS

18. The Board is of the opinion that the Radio Voice response does not contain a satisfactory explanation of the questions raised by the Bureau in its verified motion. The undisputed facts indicate that several Radio Voice and Connecticut Coast principals advanced $45,000 to Farina at different periods and that Farina used a substantial portion of those funds in the prosecution of his application and the operation of his Mount Holly station. Even though these same principals deny an intention to invest in Farina's Mount Holly facility, the Board notes the complete absence of any corroborating evidence in this regard, either from Farina or from other independent sources. The undisputed facts also disclose that these same principals received no receipt or other evidence of their investments and no accounting of their funds from Farina regardless of the purpose involved. It is claimed that these same individuals had no knowledge of Farina's financial dealings until so informed by Bureau counsel. Nevertheless, several Radio Voice principals aver that they refused to participate in the Hammonton venture, as proposed by Farina, without *some evidence* of their investments. In light of these apparently inconsistent actions by Radio Voice principals and the subsequent default by Farina on his own application, the Board cannot reasonably conclude that the funds did *not* involve some interest in Farina's application or station. Under these circumstances, there is a demonstrated need for further hearings in this proceeding and in the *Connecticut Coast* proceeding to inquire into the financial transactions between Radio Voice and Connecticut Coast principals and Farina and into the representations made in both applications concerning the business and broadcast interests of their principals.

19. Intimately connected with the inquiry must be a complete investigation of the obvious involvement of Fernicola in the financial dealings of Farina. A serious question is raised as to Fernicola's interest in Farina's application in view of the substantial sums advanced by him to Farina and in view of Fernicola's admittedly active role in obtaining additional funds for Farina from other Radio Voice principals. Fernicola's attempt to explain his claimed investments in a proposed Hammonton station and in a patentable control process is completely unsatisfactory since he is unable to furnish the details of said investments for lack of knowledge. Even though Fernicola admits his role as a contact between Farina and Radio Voice principals and states that he advanced money to Farina between 1960 and 1964, he disclaims any knowledge of Farina's use of the advanced funds. Such statements made in the Radio Voice response serve only to create the doubt that they were intended to destroy. It must be noted that, if Fernicola or any other Radio Voice principals possessed other business or broadcast interests when the Radio Voice application was filed, such interests should have been disclosed to the Commission.

20. Another question raised by the Bureau's investigation concerns the accuracy of financial representations made by Fernicola in the Radio Voice application. In order to advance $25,000 to Farina in 1960, Fernicola admits that he was required to use his

brother-in-law's credit resources insofar as a $10,000 loan was concerned, to sell a stock interest, and to borrow on his life insurance. Despite Fernicola's claim in the Radio Voice application of net liquid assets (including cash, cash surrender value of life insurance, government bonds and securities listed on major exchanges) of more than $25,000 as of January 23, 1962, the Board notes, at the Bureau's suggestion, that Fernicola continued to repay the $10,000 loan in modest amounts. Fernicola admits that his previous financial claim concerning the listing of his stocks on major exchanges was in error and, in an attempt to cure this deficiency, he submits a revised financial statement of January 23, 1962. He makes no effort, however, to explain the effect of subsequent events (such as the payment to Farina in April, 1964) upon his financial condition. In view of the serious doubts raised by the Bureau's motion and compounded by the Radio Voice response; and in view of the statements of net worth submitted by Radio Voice principals and of the subsequent funds advanced to Farina by Fernicola and other principals, the Board will include a financial qualifications issue in the remanded proceeding.

21. The Board's decision to reopen the record in this proceeding does not represent a determination of the questions raised by the Bureau. However, it is clear that the Bureau has adequately demonstrated the need for further inquiry into the areas already discussed in this opinion. Accordingly, the Board will grant the Bureau's requests to reopen the record and to enlarge the issues in this proceeding and in the *Connecticut Coast Broadcasting Company* (Bridgeport, Connecticut) proceeding (Docket No. 14830).[17] Insofar as these proceedings involve a determination of common issues, the Board will order consolidation of the proceedings in order to avoid duplication of work and to expedite the resolution of both proceedings. The Board, therefore, will remand these proceedings to the Hearing Examiner for further hearings and for the issuance of a Supplemental Initial Decision. In the event that the Examiner concludes that Radio Voice possesses the requisite basic qualifications to be a Commission licensee, he may re-evaluate the comparative qualifications of the applicants on the basis of any additional findings and conclusions made by him. In this regard, the Board recommends that the Chief Hearing Examiner designate the Examiner who earlier presided at the Radio Voice proceedings to preside at the further consolidated hearings.

Accordingly, IT IS ORDERED, This 15th day of February, 1965, That the verified motion to reopen record and add issues, filed July 31, 1964, by the Broadcast Bureau IS GRANTED, and this proceeding IS REMANDED to the Hearing Examiner for further proceedings consistent with this opinion, and the issuance of a Supplemental Initial Decision in accordance with such additional findings; and

IT IS FURTHER ORDERED, That, insofar as this proceeding and the *Connecticut Coast Broadcasting Company* (Bridgeport, Connecticut) proceeding (Docket No. 14830) involve common is-

[17] By separate Order issued this date, the Board also granted the Bureau's request to reopen the record and to enlarge the issues concerning the qualifications of Connecticut Coast Broadcasting Company, of which Daniel J. Fernicola is one of the principals (co-partner).

sues, the said proceedings ARE CONSOLIDATED for the presentation of evidence pursuant to these common issues and for the evaluation of such evidence in the Supplemental Initial Decisions to be issued with respect to both proceedings; and

IT IS FURTHER ORDERED, That the following issues ARE ADDED to this proceeding:

(a) To determine all facts regarding financial transactions involving principals of Radio Voice of Central New York, Inc., on the one hand and John J. Farina on the other hand.

(b) To determine whether any of the principals of Radio Voice of Central New York, Inc., had knowledge of or participated in misrepresentations or concealments of fact with regard to the application of John J. Farina tr/as Mount Holly-Burlington Broadcasting Company.

(c) To determine whether any of the principals of Radio Voice of Central New York, Inc., misrepresented or concealed facts in applications filed with the Federal Communications Commission.

(d) To determine in light of the foregoing whether Radio Voice of Central New York, Inc., and its principals have the requisite qualifications to be licensees of the Federal Communications Commission.

(e) To determine whether Radio Voice of Central New York, Inc., is financially qualified to construct and operate its proposed broadcast facility at Syracuse, New York.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–121

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Application of<br>ALVIN B. CORUM, JR., LENOIR CITY, TENN.<br>Requests: 1360 kc., 1 kw., Day<br>For Construction Permit | File No. BP–15512 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY NOT PARTICIPATING.

1. The Commission has before it for consideration (1) the above-captioned and described application granted without hearing on October 21, 1964; (2) a "Petition for Reconsideration" and a "Petition for Stay" filed on November 20, 1964, by WLIL, Inc., (petitioner), licensee of standard broadcast station WLIL, Lenoir City, Tennessee; (3) the applicant's oppositions to the petitions; (4) the applicant's supplement to his opposition to petition for stay[1]; and (5) the petitioner's replies to the applicant's oppositions.[2]

2. Petitioner did not file formal or informal pre-grant objections directed against a grant of the above-captioned application, and has not alleged facts which show good cause for its failure to file such pre-grant objections as required by Section 1.106(c) (1)–(2) of the Commission's Rules.[3] Taking into account their failure to comply with (1) and (2), we turn now to the question of whether this petition satisfies the requirements of Section 1.106(c) (3) of the Rules[3]. The Commission has examined petitioner's allegations but does not consider that consideration of these allegations is required in the public interest, for the reasons set forth below.

3. The petitioner alleges (a) that the applicant misrepresented the dates on which it gave public notice of the filing of an amendment to its application; (b) that other persons hold undisclosed interests in the application, and that the applicant was therefore guilty of misrepresentation in representing that he is the sole

[1] The supplement to the opposition consists of an affidavit by the applicant's father which the Commission has considered.

[2] The petitioner's replies were not filed within the time specified in Section 1.45 of the Commission's Rules, but the petitioner requested additional time in which to file its replies. Therefore, the replies have been considered.

[3] Section 1.106(c) of the Rules states that,

"A petition for reconsideration which relies on facts which have not previously been presented to the Commission or to the designated authority, as the case may be, will be granted only under the following circumstances:

"(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;

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

"(3) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest."

applicant; (c) that the applicant misrepresented his ownership of the Riverside Lumber Co., Lenoir City, Tennessee; (d) that the applicant misrepresented his financial qualifications; (e) that the applicant misrepresented the dimensions of the transmitter site originally proposed; and (f) that the alleged "principals" are preparing to sell their interests in the construction permit. These allegations are considered below.

4. The first allegation is that the applicant was in error in advising the Commission of the dates on which it gave public notice of the filing of an amendment to its application. No claim is made that the notice required by the Act was not given, and no showing has been made that the incorrect dates were other than an honest mistake. Accordingly, the Commission does not consider this matter entitled to consideration at this late date.

5. The record contains various anonymous letters and heresay statements which the petitioner urges indicate the applicant has undisclosed partners or principals in this application[4]. This allegation has been categorically denied by the applicant, and, without factual support by the petitioner, is not entitled to consideration at this late date. *Inter alia*, it may be noted that the Commission itself investigated these charges prior to grant and satisfied itself that they were unjustified.

6. Petitioner urges that the applicant inaccurately described his ownership of the Riverside Lumber Co.[5]. However, it appears that the applicant is, at present, the sole owner of this company. Under the circumstances, although the Commission has carefully considered the information furnished it, it considers that the information supplied by the applicant was sufficient to disclose his interest in the lumber company and that no significance need be attached to this allegation.

7. The petitioner bases its charges that the applicant misrepresented its financial position on the grounds that it filed a balance sheet dated June 27, 1961. Petitioner alleges that a balance sheet dated on other than the last day of the month does not accurately reflect the financial condition of a business. However, there is no recognized accounting requirement that a balance sheet must be prepared as of the end of the month, and the petitioner has not shown that the difference in date is here relevant. Petitioner further argues that the applicant misrepresented his financial condition because the balance sheet failed to show offsetting items for depreciation, for liens on commercial vehicles and for an encumbrance on residential property. However, the balance sheet supplied by the applicant was condensed and contained only net figures. The petitioner does not contend that these net figures were incorrect. Finally, since it appears that the lumber company was incorporated in 1963, the petitioner argues that other balance sheets submitted by the applicant contained errors. However, since the applicant is the undisputed sole owner of the concern,

[4] The petitioner made similar charges to personnel of the Commission's Field Engineering Bureau but did not wish to file any formal or informal objections.

[5] There is dispute as to when the applicant became sole owner of the concern. Further, the applicant incorporated the concern without amending its application. No showing has been made that this affected the applicant's financial qualifications in any way.

the Commission fails to see in what way the showing made departed from the applicant's actual financial position.

8. The charge that the petitioner misrepresented the dimensions of its proposed transmitter site is based on an affidavit by the owner of the site originally proposed. No showing has been made that the discrepancies resulted from other than an honest mistake by the applicant. Furthermore, since the applicant is now utilizing another transmitter site, this discrepancy does not appear relevant.

9. The petitioner's final charge that the "principals are preparing to sell their interest in the construction permit" is based on a heresay statement by a third party. Since the applicant has categorically denied this charge and the Commission has concluded that there are no undisclosed principals, it is clear that this allegation is entitled to no weight.

10. The Commission has carefully considered the allegations relied upon by the petitioner and has concluded that consideration of the matters relied upon by the petitioner is not required in the public interest. Consequently, the petitions filed by the petitioner will be dismissed since the petitioner failed to file pre-grant objections. *Springfield Television Broadcasting Corporation* v. *Federal Communications Commission,* 328 F.2d 186, 1 R.R. 2d 2083; *Valley Telecasting Co., Inc.* v. *Federal Communications Commission,* 336 F.2d 914, 2 R.R. 2064.

In view of the foregoing, IT IS ORDERED, That the "Petition for Reconsideration" filed by WLIL, Inc., on November 20, 1964, directed against the Commission's action of October 21, 1964, IS DISMISSED.

IT IS FURTHER ORDERED, That the "Petition for Stay" filed by WLIL, Inc., IS DISMISSED AS MOOT.

Adopted February 17, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–127

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of<br>WILLIAM A. CHAPMAN AND GEORGE K. CHAPMAN D.B.A. CHAPMAN RADIO & TELEVISION CO., ANNISTON, ALA. | Docket No. 15856<br>File No. BPCT–3317 |
| ANNISTON BROADCASTING CO., ANNISTON, ALA. | Docket No. 15857<br>File No. BPCT–3320 |
| For Construction Permit for New Television Broadcast Station | |

ORDER

BY THE COMMISSION: CHAIRMAN HENRY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER HYDE CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER LEE CONCURRING IN THE RESULT; COMMISSIONER LOEVINGER DISSENTING AND ISSUING A STATEMENT.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 17th day of February, 1965;

The Commission, having under consideration the above-captioned applications, each requesting a construction permit for a new television broadcast station to operate on Channel 70, Anniston, Alabama; and

IT APPEARING, That the above-captioned applications are mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference; and

IT FURTHER APPEARING, That the following matters are to be considered in connection with the issues specified below:

a. Based on information contained in the application of Chapman Radio and Television Company, it appears that cash in excess of $38,000 will be required for the construction and initial operation of the proposed new station, but the exact amount of cash required cannot be determined because the amount which applicant has allocated for the costs of professional fees, freight, installation, non-technical studio furnishings and contingencies ($2,000), appears to be unreasonably low in view of the type of operation proposed. Moreover, the applicant has not shown how it proposes to finance the costs of construction and initial operation, as required by Section III, Paragraphs 1(a) and 4 of FCC Form 301. Additionally, the applicant is committed to furnish funds in excess of $105,000 in connection with its application (BPCT–3282) for a construction permit for a new television broadcast station in Homewood, Alabama, presently in hearing in Docket No. 15461 and cash of approximately $10,000 will be required to meet

the personal commitments of the partners in connection with the proposal to construct a new television broadcast station in Tuscaloosa, Alabama. The information contained in the balance sheets of the partners, however, does not disclose sufficient current and liquid assets in excess of current liabilities to meet their commitments with respect to the instant proposal without regard to such other commitments as they may have in connection with other pending applications, nor have they shown the current portion of long-term liabilities. It cannot be determined, therefore, that the applicant is financially qualified.

b. The programming proposals contained in the application of Chapman Radio and Television Company are identical to those contained in the applicant's applications for construction permits for new television broadcast stations in Tuscaloosa, Alabama (BPCT–3309), and Gadsden, Alabama (BPCT–3316), the latter having been dismissed. The applicant, in an amendment to its Anniston application, filed October 2, 1964, in response to a letter from the Commission, acknowledged that the programming proposals for the three cities were identical, but stated that it had "studied" the three cities and found that "all people—wherever they are interviewed—want practically the same programming." The applicant also indicated that it could see no reason why the three cities should differ in programming needs and interests, living conditions and standards being practically the same in all three cities. In an amendment to the Tuscaloosa application, filed November 6, 1964, the applicant stated that "much study was given to the programming before applications were submitted for Tuscaloosa, Anniston and Gadsden, Alabama," and indicated that "much discussion has taken place between members of the new Corporation, with persons outside the Corporation, both in the business world of Tuscaloosa, and outside the business world, concerning the programming of the station." The applicant also stated that it has "made studies of the three cities up to the past few days,—have studied rates and desires of the local radio stations, have discussed the programming and rates with regular citizens, some of which are potential advertisers, and find the cities to be similar in their various respects." On other occasions where identical or substantially similar programming proposals have been submitted by an applicant for different communities and no detailed showing has been made that the proposals were based upon surveys of the communities, the Commission has held that an issue was warranted to determine the efforts made by the applicant to ascertain the programming tastes, needs and interests of the area it proposes to serve and the manner in which the applicant will meet such needs and interests. *Suburban Broadcasters,* FCC 61–825, 30 FCC 1021, 20 RR 951; affirmed *sub nom Patrick Henry et al.* v. *Federal Communications Commission,* 112 U.S. App. D.C. 257, 302 F. 2d 191, 23 RR 2016; *Don L. Huber,* FCC 62–142, 22 RR 954; *Kent-Ravenna Broadcast-*

*ing Co.*, FCC 61–1219, 22 RR 230; *Frederick County Broadcasters*, FCC 62–499, 23 RR 582; *Bigbee Broadcasting Company*, FCC 62–1124, 24 RR 497. On the basis of the record before us, and in view of the identical programming proposals contained in the three applications, we believe that Chapman Radio and Television Company has not furnished sufficiently detailed information with respect to the efforts it has made to ascertain the programming needs and interests of the area it proposes to serve, how it has evaluated the information thus obtained, and how it proposes to meet those needs and interests as it has determined them to be. Therefore, a programming issue will be specified.

c. Chapman Radio and Television Company has estimated its first-year operating expenses to be $25,000, including a staff of seven persons, plus the two partners, who will be General Manager and Chief Engineer, respectively, of all three proposed stations (Homewood, Tuscaloosa, and Anniston). The applicant has based its estimate of first-year operating expenses upon, *inter alia*, total annual salary expense for the staff of seven persons of $12,500. An issue will be specified, therefore, to determine the basis for the estimate and whether the estimate is reasonable in the light of the type of operation proposed.

d. Chapman Radio and Television Company proposes a total staff of seven persons plus the two partners. The applicant, however, operates a standard radio broadcast station (Station WCRT) and an FM radio broadcast station (Station WCRT–FM), both in Birmingham, Alabama, and the applicant states that the partners will participate on a full-time basis in the operation of the proposed television broadcast stations in Homewood, Tuscaloosa, and Anniston, Alabama, as well as the radio stations. The applicant proposes to broadcast 63.2 hours per week, of which 35.1% will be local live programming, using a total staff of seven persons plus the two partners, as aforesaid. The staffing proposal is identical to that proposed in the Tuscaloosa application (BPCT–3309), and it cannot be determined, from the information contained in the application, whether separate staffs are proposed for the two stations, or whether the applicant proposes a single staff for both stations. In either event, however, an issue appears warranted to determine whether the staff proposed would be adequate to effectuate the type of operation proposed.

e. Anniston Broadcasting Company has not shown the efforts, if any, which it has made to ascertain the programming tastes, needs and interests of the area which it proposes to serve, how it has evaluated the information thus obtained, and the manner in which it proposes to meet such needs and interests as it has determined them to be. An issue will be specified, therefore, to determine the efforts made by the applicant to ascertain the programming needs and interests of the area it proposes to serve and the manner in which it will meet such needs and interests.

IT FURTHER APPEARING, That Anniston Broadcasting Company or its principals own and operate FM Radio Broadcast Station WHMA–FM, the only FM radio broadcast station in Anniston; Standard Radio Broadcast Station WHMA, one of three standard radio broadcast stations in Anniston; and the *Anniston Star*, the only daily newspaper of general circulation published in Anniston, Alabama; that these facts may be considered under the standard comparative issue in this proceeding. *Midwest Television, Inc.*, FCC 64–1158, released December 18, 1964.

IT FURTHER APPEARING, That, except as indicated above, William A. Chapman and George K. Chapman, d/b as Chapman Radio and Television Company, are legally and technically qualified to construct, own and operate the proposed television broadcast station; and Anniston Broadcasting Company is legally, technically, financially, and otherwise qualified to construct, own and operate the proposed television broadcast station; and

IT FURTHER APPEARING, That, upon due consideration of the above-captioned applications, the Commission finds that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, a hearing is necessary and that the said applications must be designated for hearing in a consolidated proceeding on the issues set forth below:

IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications of William A. Chapman and George K. Chapman, d/b as Chapman Radio and Television Company and Anniston Broadcasting Company ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Chapman Radio and Television Company is financially qualified to construct, own and operate the proposed television broadcast station.

2. To determine the efforts, if any, made by Chapman Radio and Television Company to ascertain the programming needs and interests of the area proposed to be served and the manner in which the applicant proposes to meet such needs and interests.

3. To determine the basis for the estimate of Chapman Radio and Television Company of its costs of operation for the first year and whether such estimate is realistic.

4. To determine whether the staff proposed by Chapman Radio and Television Company would be adequate to effectuate the type of operation proposed.

5. To determine the efforts, if any, made by Anniston Broadcasting Company to ascertain the programming needs and interests of the area proposed to be served and the manner in which the applicant proposes to meet such needs and interests.

6. To determine, on a comparative basis, which of the operations proposed in the above-captioned applications would better serve the public interest, convenience and necessity in light of the significant differences between the applicants as to:

(a) The background and experience of each, bearing on its

ability to own and operate the proposed television broadcast station.

(b) The proposals of each with respect to the management and operation of the proposed television broadcast stations.

(c) The programming services proposed in each of the above-captioned applications.

7. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the instant applications should be granted.

IT IS FURTHER ORDERED, That the issues in the above-captioned proceeding may be enlarged by the Examiner with respect to the application of Anniston Broadcasting Company, on his own motion or upon petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, William A. Chapman and George K. Chapman, d/b as Chapman Radio and Television Company, and Anniston Broadcasting Company, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date set for the hearing and present evidence on the issues specified in this Order.

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

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF CHAIRMAN HENRY

I agree that we must inquire further as to the efforts of Chapman Radio and Television Company to ascertain the programming needs of Anniston.

Anniston, Alabama, is a city of approximately 34,000 people in the eastern portion of the state. Anniston is immediately adjacent to Fort McClellan, a military reservation of substantial size. Tuscaloosa, Alabama, roughly 100 miles to the west, is the home of the University of Alabama, the state's largest institution of higher learning with a student body and faculty amounting to some 14,000 persons. Gadsden, Alabama, which has neither a major university nor a military installation, is located twenty-five miles north of Anniston.

Chapman Radio and Television Company has filed applications

for authority to build television stations at these three cities and also at Homewood, Alabama, a suburb of Birmingham.[1] Apart from the engineering exhibits, the applications for Anniston, Tuscaloosa, and Gadsden are virtually identical. The programming schedules for the three cities were run off on a duplicating machine from a single master copy and, therefore, are the same—hour by hour, minute by minute, for every day of the week.

Chapman claims that the three communities are basically similar and that the programming needs and interests of their inhabitants do not vary. Although this basic similarity is anything but self-evident, I would accept Chapman's judgment without further inquiry if I felt that it was based upon a serious attempt to ascertain the programming needs of the three communities. However, nothing in the three applications persuades me that Chapman has made such an attempt.

Chapman tells us only that it has "studied the three cities as well as the Birmingham and Homewood areas" and has found that "all people—wherever they are interviewed—want practically the same programming".[2] But the Anniston application fails to tell us what sort of "study" produced this general observation, nor does the application mention any individual or group whose opinion was solicited as to desired programming. The application for Tuscaloosa says little more. In an amendment to that proposal, Chapman states that it has had "much discussion" and, "The people like what we have shown them as a sample." If I understand this sentence correctly, what we have before us is at best a pre-planned program submission accompanied by complimentary references from anonymous local citizens. This is precisely what the Commission said would not be acceptable in the Program Policy Statement of 1960 (20 Pike & Fischer, R.R. 1901, 1915).

Finally, I think it is important to note that the Chapman partners do not live in Anniston and have not had past broadcast experience in that city. The two partners are residents of Birmingham, an urban center of 340,000 and, so far as we are told, have had their entire past broadcast experience in operating radio stations there.

There is more reason to assume community familiarity on the part of the other applicant in this proceeding, Anniston Broadcasting Company, since it has operated an AM and an FM station in Anniston for a number of years. Were Anniston Broadcasting Company the only applicant here, I would not specify a hearing issue as to its program planning. However, since there must be a comparison of the two applicants' program planning in any event, I concur in the addition of a specific issue as to Anniston Broadcasting so as to provide a complete record in the proceeding.

### STATEMENT OF COMMISSIONER HYDE CONCURRING IN PART AND DISSENTING IN PART

I concur in the action but dissent as to the statement of the issues.

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[1] The Gadsden application has been dismissed at Chapman's request.

[2] Despite this unequivocal finding, Chapman's programming proposals for Homewood are markedly different from the tintype proposals for the other three cities.

DISSENTING OPINION OF COMMISSIONER LOEVINGER

This proceeding involves mutually exclusive applications for authority to construct a new UHF television station on Channel 70 in Anniston, Alabama. Since the applications are mutually exclusive, it is necessary and proper for the Commission to order a hearing. However, the rationale and specification of the issues involving programming in the Commission order seem to me to be completely unwarranted and to constitute pointless harrassment of the applicants. Accordingly, I dissent from the specification of these issues.

One of the applicants, Chapman, is now engaged in broadcasting in Birmingham, Alabama, which is a one-hour drive from Anniston. The principals of Chapman frequently travel to Anniston in the course of their business day and are personally familiar with the community. They are also familiar with the broadcasting business being engaged in broadcasting in Birmingham.

After receiving the Chapman application, the FCC staff asked the applicant why the proposed programming was the same as that contained in applications filed by the applicant for Gadsden and Tuscaloosa, Alabama. The three cities involved are all located in the central part of Alabama and range in population from 34,000 to 64,000.

Chapman replied specifying its grounds in great detail and stating that its study and knowledge of these communities and the entire area have demonstrated to it that the programming needs and desires of the three communities are substantially the same. Chapman further stated that it could not decide precisely what the public would want and intended to change the program as it secured experience with the public demand in the community. Its statement gave considerably more detail all of which supported the conclusion that it was familiar with the public and the public demands in this community and had given much thought to the program proposal.

The Chapman program proposal is given in terms of broad categorical descriptions such as "news," "sports review," and "local discussion programs." About a third of the programs proposed would be live and local. It is obvious that the specific content of the programs will necessarily vary from time to time and all that the proposal at this time can do is to indicate the general nature of the intended programs.

Anniston filed a program proposal in which it stated that it intended to affiliate with a major network. This left less programming time to be filled in by its own proposal. However, as to the local programming the Anniston application stated that applicant would "identify itself thoroughly with community activities in the city of Anniston and its environs." It promised to afford adequate opportunity for the use of its facilities for the discussion of public questions, and to use forums, panel discussion groups and community leaders. The Anniston applicant has been engaged in operating an AM and an FM broadcasting station in Anniston, Alabama, for about a quarter of a century. All of the officers of Anniston are either employees of the Anniston broadcasting stations

or affiliated with the publisher of the daily newspapers published in Anniston, Alabama.

Although the staff of the Commission raised a number of questions concerning the Anniston application, up to the time of issuing this order, it has not raised any question concerning the programmig plans of Anniston or the efforts made by Anniston to ascertain the public needs and interests of this community.

Anniston, Alabama, is a community of about 34,000 population with a CATV system which brings the signals of distant stations to the residents. There is no substantial number of UHF receivers in the community and the successful applicant must depend upon creating enough interest in his program among local residents to compete with the other station on the cable system and to generate an audience. It is apparent that any UHF station in this situation will have a struggle to survive at best and will be forced to exert every effort to meet the public demands.

In these circumstances, specification of issues requiring these applicants to come forward with more detailed evidence as to their efforts to ascertain the programming needs and interests of the area is nothing short of absurd.

The excuse given for such an issue as to Chapman is the similarity in the programming proposal it has made for the three Alabama communities for which it has filed an application. However, this can furnish a logical basis for such an order only on the basis of a strongly implied presumption that the programming needs and interests of different municipalities are substantially different regardless of geographical propinquity and cultural similarity between the cities. It seems to me that this presumption is unfounded and erroneous on all counts. There is no basis in law, in logic or in experience for assuming that the programming needs and interests of three cities all located in the central part of a single state and ranging in population from 34,000 to 64,000 are likely to be different. My judgment is that the programming needs and interests of such similar communities are most likely to be substantially identical. In any event, Chapman has made a very full and explicit statement of the grounds of its judgment as to programming in this matter and there is no basis whatever for assuming that the Commission or its staff is warranted in substituting an unsupported and unarticulated presumption for the carefully formulated conclusions of this applicant.

There is even less excuse for specifying such an issue as to Anniston. This applicant has been engaged in the broadcast business in the very community involved here for 25 years. If it has not become familiar with the tastes, needs, and interests of its community in that time it must be managed by remarkably obtuse individuals and the Commission should have investigated its operation long before this. In any event, the application form Anniston was required to file does not inquire as to the efforts it has made to investigate the public mood regarding television and no inquiry has yet been made to Anniston on this point by the Commission or its staff. So this applicant is being ordered to trial to provide information which the Commission has not previously intimated was being sought.

There is no rational foundation for specifying a programming issue in this proceeding except bureaucratic hubris and an obdurate determination to supervise broadcast programming by one device or another regardless of the Commission's lack of qualification, the burden it may impose upon applicant or the degree to which it may in fact frustrate the public desire.

It is actions such as this which have made the term "bureaucrat" an epithet of opprobrium rather than of approbation, which it should be. I dissent and hereby record my vigorous protest.

F.C.C. 65–119

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of<br>NATIONAL BROADCASTING CO., INC., (ASSIGNOR)<br>and<br>WESTINGHOUSE BROADCASTING CO., INC. (ASSIGNEE)<br>For Assignment of Licenses of Stations WRCV (AM and TV), Philadelphia, Pa. | Files Nos. BAL–5242; BALCT–246 |
| WESTINGHOUSE BROADCASTING CO., INC. (ASSIGNOR)<br>and<br>NATIONAL BROADCASTING CO., INC. (ASSIGNEE)<br>For Assignment of Licenses and Construction Permit of Stations KYW (AM, FM and TV), Cleveland, Ohio | Files Nos. BAL–5243; BALH–725; BAPLCT–66 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS COX AND LOEVINGER NOT PARTICIPATING.

1. The Commission has before it for consideration (a) the above-captioned applications; (b) a Petition to Deny the applications filed on November 2, 1964, by RKO General, Inc. (RKO); (c) an opposition to the Petition to Deny filed on November 17, 1964, by the National Broadcasting Company, Inc. (NBC); and (d) a motion to strike or to dismiss the petition to deny filed on November 17, 1964, by Westinghouse Broadcasting Company, Inc. (Westinghouse). All pleadings have been timely filed. Petitioner has not filed a reply to the opposition pleadings. In addition, a petition was filed on October 2, 1964 by Local No. 27, International Association of Theatrical Stage Employees, Cleveland, Ohio, (union), seeking a protection of pension rights at the Westinghouse Cleveland station, KYW–TV. No responses have been filed against the union's petition.

2. RKO's petition to deny requests that the Commission deny the applications or defer action on them pending decision by the court of appeals on petitioner's appeal [1] from the Commission's decision which prompted the filing of these applications. In the

[1] *RKO General, Inc. v. Federal Communications Commission*, Case No. 18979, filed on November 2, 1964 in the United States Court of Appeals for the District of Columbia Circuit.

alternative, RKO requests that any grants of the applications be expressly conditioned upon the outcome of the court appeal and upon affirmative representations by both NBC and Westinghouse that no long term commitment, moral or legal, exists for the continued affiliation of the Westinghouse stations in Boston with NBC.

3. The Commission has previously determined to renew NBC's licenses in Philadelphia on condition of the submission of the applications now being considered. See *National Broadcasting Co., Inc.*, 2 R.R. 2d 921, July 29, 1964. The grounds of that decision are fully set out there and need not be repeated here. RKO bases its claim of standing as a party in interest to file the petition to deny [2] upon the following allegations: (a) grant of the applications pending the appeal from the earlier decision will prejudice its efforts to obtain the Philadelphia licenses from NBC, since the unscrambling of assets in case of reversal by the court would be complicated, and since a favored position would be created for Westinghouse in any subsequent proceeding; (b) RKO is a competitor with Westinghouse in Boston, and RKO's ability to compete for an NBC affiliation in Boston will be adversely affected (absent the condition requested by RKO); and (c) RKO will generally be less able to compete with Westinghouse not only in Boston but also in other cities, such as New York and San Francisco, where both are in competition for advertising revenues, programs, and audience.

4. We find that RKO lacks standing as a party in interest. NBC has terminated its assignment agreement with RKO, has withdrawn its application for the assignment of its Philadelphia stations to RKO and has instead filed the pending assignment applications with Westinghouse. On these facts, the Commission found that RKO no longer was a party to the earlier proceeding in which we made the basic decision that NBC's Philadelphia license should be renewed on condition that they be returned to Westinghouse. Nothing in RKO's present pleading warrants any change in our views that RKO has no substantial interest in the present assignments based on its own previous applications. Furthermore, both NBC and Westinghouse have included a provision in the agreement to exchange the stations that the closing would be delayed during the pendency of any court appeal. Thus, RKO's claimed prejudice due to "scrambling" of assets is avoided and gives no grounds for standing.

5. RKO's claim that it will in general suffer competition with Westinghouse for an NBC affiliation in Boston, and for advertising and programs generally, is so general that it cannot support standing. It is not supported by any of the "specific allegations of fact" required by Section 309(d)(1) of the Communications Act,[3] but is made on allegations which are general and conclusionary in nature. See *ABW Broadcasters, Inc.*, 1 R.R. 2d 65 (1963); *Miami Broadcasting Co.*, 1 R.R. 2d 43 (1963). The claim is that Phila-

[2] See Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d)(1).
[3] Similarly lacking is the required affidavit of personal knowledge supporting these allegations.

delphia is a larger market than any other in which Westinghouse now operates television stations, and that its increased revenues in Philadelphia will make it a stronger competitor of RKO nationwide, and particularly in Boston, the one city where both are television licensees. But this is such a tangential and conjectural effect that it cannot meet the test of direct and substantial injury. See *United States Sugar Refiners' Ass'n.* v. *McNutt,* 138 F. 2d 116 (C.A. 2, 1943); *Red River Broadcasting Co., Inc.* v. *Federal Communications Commission,* 105 U.S. App. D.C. 377, 267 F. 2d 653. On RKO's theory, any multiple owner could object to any acquisition of a new station in a slightly larger city by any other multiple owner. We do not think the statute confers standing on that basis.

6. The petition therefore must be dismissed for lack of standing. We note, in addition, that petitioner's request for a representation by Westinghouse and NBC that no long-term illegal affiliation agreement exists, has been met. Both NBC and Westinghouse have specifically stated that no agreement exists beyond the one on file with the Commission. Finally, although RKO concedes that its other requested condition—that any grant be made expressly subject to RKO's appeal—is not necessary, we will add such a condition to the grants.

7. With respect to the petition of the union, we believe that there may be prejudice to them in the assignments sufficient to confer standing, but we do not believe that the question of pension rights, in this instance at least, is a matter for Commission determination. No unfair labor practice has been suggested, and we think the matter must be left to either a bargaining process or to a more appropriate forum.

8. We have focussed in the foregoing discussion on the relief requested by petitioner (and the points made in support thereof). We wish to make clear that we have examined the applications and are persuaded that in all respects the public interest would be served by a grant. That determination subsumes the overlap issue tentatively treated in our opinion, *National Broadcasting Co., Inc.,* 37 F.C.C. at 449, 709. Since no issue has been raised in this respect, we shall not go over the grounds tentatively set out previously. The same consideration is applicable to other facts touched on in the prior opinion and not put in issue before as to these pending applications (e.g., allegations concerning misconduct by Westinghouse in the course of the 1955 negotiations with NBC). Since no specific issue is now raised in this respect, we need not burden this opinion with matters discussed in prior opinions (e.g., 37 F.C.C. at 709–10; *In re Applications for Renewal of Westinghouse Licenses,* 22 R.R. 1023 (1962)), or with any additional matters.

9. Accordingly, IT IS ORDERED, That the petition of RKO General, Inc. to deny the above-captioned applications for assignment of licenses IS DISMISSED; the petition of Local No. 27, International Association of Theatrical Stage Employees, Cleveland, Ohio IS DENIED; and the above-captioned applications for assignment of licenses ARE GRANTED with the condition that

the grants are expressly subject to RKO General, Inc.'s appeal in *RKO General, Inc.* v. *Federal Communications Commission*, Case No. 18979, in the United States Court of Appeals for The District of Columbia Circuit.

Adopted February 17, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–68

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
|---|---|
| KFOX, INC. (KFOX), PASADENA, CALIF. | Docket No. 15751<br>File No. BP–16149 |
| CHARLES W. JOBBINS, COSTA MESA-NEWPORT BEACH, CALIF. | Docket No. 15752<br>File No. BP–16157 |
| RADIO SOUTHERN CALIFORNIA, INC., PASADENA, CALIF. | Docket No. 15753<br>File No. BP–16158 |
| GOODSON-TODMAN BROADCASTING, INC., PASADENA, CALIF. | Docket No. 15754<br>File No. BP–16159 |
| ORANGE RADIO, INC., FULLERTON, CALIF. | Docket No. 15755<br>File No. BP–16160 |
| PACIFIC FINE MUSIC, INC., WITTIER, CALIF. | Docket No. 15756<br>File No. BP–16161 |
| THE BIBLE INSTITUTE OF LOS ANGELES, INC., PASADENA, CALIF. | Docket No. 15757<br>File No. BP–16162 |
| C. D. FUNK AND GEORGE A. BARON, A PARTNERSHIP D.B.A. TOPANGA MALIBU BROADCASTING CO., TOPANGA, CALIF. | Docket No. 15758<br>File No. BP–16164 |
| CALIFORNIA REGIONAL BROADCASTING CORP., PASADENA, CALIF. | Docket No. 15759<br>File No. BP–16165 |
| STORER BROADCASTING CO. (KGBS), PASADENA, CALIF. | Docket No. 15760<br>File No. BP–16166 |
| MITCHELL B. HOWE, PETER DAVIS, EDWIN M. DILLHOEFER AND C. HUNTER SHELDEN D.B.A. PASADENA CIVIC BROADCASTING CO., PASADENA, CALIF. | Docket No. 15761<br>File No. BP–16167 |
| ROBERT S. MORTON, ARTHUR HANISCH, MACDONALD CAREY, BEN F. SMITH, DONALD C. MCBAIN, ROBERT BRECKNER, LOUIS R. VINCENTI, ROBERT C. MARDIAN, JAMES B. BOYLE, ROBERT M. VAILLANCOURT, AND EDWIN EARL D.B.A. CROWN CITY BROADCASTING CO., PASADENA, CALIF. | Docket No. 15762<br>File No. BP–16168 |
| PASADENA COMMUNITY STATION, INC., PASADENA, CALIF. | Docket No. 15763<br>File No. BP–16170 |
| VOICE OF PASADENA, INC., PASADENA, CALIF. | Docket No. 15764<br>File No. BP–16172 |
| WESTERN BROADCASTING CORP., PASADENA, CALIF. | Docket No. 15765<br>File No. BP–16173 |
| PASADENA BROADCASTING CO., PASADENA, CALIF. | Docket No. 15766<br>File No. BP–16174 |

For Construction Permits

## MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING; BOARD MEMBER KESSLER CONCURRING IN RESULT.

1. Pasadena Broadcasting Company (Pasadena Broadcasting) requests enlargement of issues with respect to the application of Charles W. Jobbins.[1] The requested issues read as follows:

1. To determine what efforts have been made by Charles W. Jobbins to determine the programming needs of the area he proposes to serve and the manner in which he proposes to meet such need.

2. To determine whether Charles W. Jobbins, in view of his proposal as to staff, is qualified to operate his station in the manner proposed in his application.

3. To determine whether Charles W. Jobbins has reasonable assurance of being able to secure his proposed transmitter site.

4. To determine whether Charles W. Jobbins has misrepresented the availability of the transmitter site specified in his application.

### *Programing Issue*

2. Pasadena Broadcasting contends that comparison of Jobbins' proposal in this proceeding with another filed by Jobbins in Docket No. 13997 for a station in Grass Valley, California, reveals the percentage of time allotted for various types of programs are practically identical, with the exception of agricultural and educational programs; that the wording of the commercial spot policy is identical, word for word; and that the program log analysis, hours of operation, number of commercial spot announcements, and number of non-commercial spot announcements are identical, number for number. With respect to the program schedule, the titles of the programs are the same in most instances, the difference being in the educational programs which accounts for five of the six half-hour segment variations on Sunday and two of the three half-hour variations on week days. As to program policy, the response is identical, word for word, in each application. Pasadena Broadcasting contends its president, Edward J. Flynn, contacted some sixteen important local organizations in the Costa Mesa-Newport Beach area to determine whether or not these organizations have been approached by Jobbins in the planning of his proposed programming but that none was contacted by Jobbins. Pasadena Broadcasting argues that the combination of substantially identical program proposals for entirely different communities, failure to make a community survey, and the scheduling of large segments of time for local schools and colleges without any apparent consultation with their officials amply justifies the addition of a programming issue. Charles W. Jobbins replies that every multiple station operator is going to operate each of his stations in a way that would show some similarities but important changes are made in the programming in recog-

[1] The Review Board has before it: (a) petition of Pasadena Broadcasting Company to enlarge issues with respect to application of Charles W. Jobbins, filed January 8, 1965; (b) Broadcast Bureau's partial opposition, filed January 22, 1965; (c) reply of Charles W. Jobbins, filed January 28, 1965; and (d) reply of Pasadena Broadcasting Company, filed January 29, 1965.

nition of the needs of each community; that in the passage of time interest in agricultural programs would decline; that since the University of California at Irvine is not yet operating, the percentage of time devoted to educational activities might be less during initial program planning; and that these two factors would make the application for Costa Mesa-Newport Beach even more similar. Jobbins contends that his investigation of the sixteen people named by Mr. Edward J. Flynn reveals that, among those he contacted, none had heard of Mr. Flynn or remembered receiving a call. Jobbins asserts that surveys have been taken of local needs and a large amount of evidence will be submitted in the event the hearing is to be decided on comparative issues.

3. The petitioner has shown that there are similarities in the program planning between Jobbins' proposal in this proceeding and that for Grass Valley, California. Thus, the Review Board concurs with the Broadcast Bureau that the programming issue as to the application of Charles W. Jobbins should be added. This would be in accordance with our previous ruling in *United Artists Broadcasting, Inc.*, FCC 64R–551 (1964), wherein we stated "Where an applicant's program proposal is the same as that which he has proposed for another community, a 'Suburban' issue will be added, absent a showing by the applicant that he is familiar with the needs of the community he proposes to serve." Jobbins has not made this showing. He asserted that a survey was made but failed to submit any information supporting his assertion. *Taylor Broadcasting Company*, FCC 65–57 (1965).

*Adequacy of Staff Issue*

4. Pasadena Broadcasting also requests an issue inquiring whether, with the proposed staff, Jobbins is qualified to operate his station in the manner set forth in his application. Petitioner contends that, of the five staff members, there will be two announcers, who have other duties, working 84 hours a week and there will be live programming for ten percent of the time. In support, it cites *Semo Broadcasting Corp.*, FCC 62R–132, 24 RR 605 (1962), where a staffing issue was added when it was shown that a station, which proposed to operate 84 hours a week, had two announcers, without other duties, only one engineer and proposed to operate 7.75% of its weekly program as "live". As to the use of part-time staff, Pasadena Broadcasting questions the extent of their employment, citing *KWEN Broadcasting Co.*, FCC 62–654, 23 RR 900 (1962). Jobbins replies that his proposed staff is typical of many small station operations which are designed to serve the needs of relatively small communities, and that proximity of Orange Coast College and University of California at Irvine makes the hiring of qualified part-time employees much easier than is usually the case, and states for the first time that the general manager and salesman will announce. The staff proposed by Jobbins, and the demands made upon his staff, are not substantially different from those involved in *Semo Broadcasting Corp.*, and *KWEN Broadcasting Co., supra.* Accordingly, an issue to determine the adequacy of staff proposed by Jobbins will be added.

*Site Availability*

5. Pasadena Broadcasting also requests an issue which would inquire whether Jobbins has the reasonable assurance of being able to secure his proposed transmitter site. Pasadena Broadcasting contends that its inquiry of the real estate firm reveals that "while various persons have shown interest in using Irvine Company property for radio towers, it has not leased the property for a radio tower and does not favor radio towers in the area proposed to be used by Jobbins." Jobbins, however, contends that he has been given sufficient evidence demonstrating that he is reasonably assured that the proposed transmitter site will be available to him. The problem herein appears to depend upon which persons in the real estate firm were contacted. However, the examination of the letters appended to the pleadings indicate that the real estate firm does not contemplate any type of development in the area in question within the next few years; that it does not have a firm policy regarding construction of a tower in a low pastureland where Jobbins has planned to erect his tower; and that the real estate firm is very much interested in any development that will benefit Costa Mesa, Newport Beach, and the surrounding area. It thus appears that the real estate firm has not rejected Jobbins' overture to secure a transmitter site and that the firm does not wish to foreclose future negotiations. Under the circumstances, there appears to be no need for a site availability issue. As to the question of whether Jobbins misrepresented to the Commission the availability of a transmitter site, Pasadena Broadcasting withdrew its request in its reply for the inclusion of an issue.

Accordingly, IT IS ORDERED, This 23rd day of February, 1965, That the petition of Pasadena Broadcasting Company to enlarge issues with respect to the application of Charles W. Jobbins, filed January 8, 1965, IS GRANTED to the extent indicated below and IS DENIED in all other respects; and

IT IS FURTHER ORDERED, That the Commission's Memorandum Opinion and Order (FCC 64–1195), released December 31, 1964, IS AMENDED by the addition of the following issues:

To determine what efforts have been made by Charles W. Jobbins to determine the programming needs of the area he proposes to serve and the manner in which he proposes to meet such needs.

To determine whether the staff proposed by Charles W. Jobbins would be adequate to operate his proposed station.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–151

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>McLEAN COUNTY BROADCASTING CO., INC.<br>(WIOK), NORMAL, ILL.<br>Has: 1440 kc., 1 kw., DA–Day.<br>Has CP: 1440 kc., 500 w., 1 kw.–LS,<br>DA–2, U<br>For Construction Permit | File No. BMP–10066 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration a petition for reconsideration, filed December 21, 1964 by WROK, Inc., licensee of Station WROK, Rockford, Illinois, directed against the Commission's Order of November 18, 1964 (FCC 64–1073, released November 19, 1964) granting without hearing the above application, and a response thereto by WIOK.

2. In the aforementioned Order of November 18, 1964 the Commission noted that WROK had filed pre-grant petitions to deny the WIOK application but found that subsequent amendments thereto resolved the objections raised with respect to the interference to WROK. Consequently, since no substantial or material questions of fact remained, the application was granted. The usual condition was imposed requiring nondirectional and directional proof-of-performance and the specification of eight radials [1] along which measurements were to be taken.

3. Because of the rather short (127 miles) co-channel spacing involved and the relatively complex nature of the six tower nighttime directional antenna system proposed, WROK maintains that the Commission should, in order to provide more adequate protection, designate the WIOK application for hearing or, in the alternative, impose the following additional conditions:

> 1. The permittee shall make non-directional proof-of-performance prior to adjustment, using one tower erected prior to the erection of other towers, and
> 2. The permittee shall submit complete measured radials in the directions N342°E, N355°E and N001°E with specified values of radiation in each direction."

4. The Commission finds that the request for imposition of the first condition is without merit. The construction permit presently requires WIOK to conduct a satisfactory non-directional as well as a directional proof prior to the issuance of program test

[1] 28°, 80°, 124°, 160°, 215°, 256°, 330°, and 356° true.

authority. To demand that the non-directional proof be made prior to the erection of the entire six tower array would place an unnecessary financial burden on WIOK and unduly delay construction and operation of the WIOK facilities. Customarily a permittee is allowed to construct a multi-tower array and then use only one tower to conduct the non-directional proof-of-performance. No compelling reasons such as serious questions of re-radiation problems due to man-made structures or terrain irregularities have been presented which would persuade the Commission to abandon its usual practice in this particular instance.

5. With respect to the request for additional measured radials on azimuths of 342°, 355° and 001° true, it is noted that for all practical purposes the 355° radial is identical to the 356° radial already specified in the construction permit. The azimuth 342° is in a direction of maximum radiation from a minor lobe and the azimuth 001° true is off the side of a radiation lobe. While neither of the latter two azimuths are directly toward WROK, they are pertinent in determining whether the nighttime service area of WROK will receive adequate protection from WIOK's operation. Thus, in order to provide more satisfactory assurance of protection to WROK, the Commission will require additional field intensity measurements on the bearings 342° and 001° true to establish that the inverse distance fields obtained do not exceed the proposed pattern values. However, since the construction permit already requires that monitoring points be established on eight radials, monitoring points for the two additional radials will not be required.

Accordingly, IT IS ORDERED, That the "Petition For Reconsideration" filed December 21, 1964 by WROK, Inc. IS GRANTED to the extent indicated above and IS DENIED in all other respects.

IT IS FURTHER ORDERED, That, in addition to the radials specified in the construction permit now held by McLean County Broadcasting Co. Inc., the permittee shall submit proof-of-performance measurements on azimuths 342° and 001° true.

Adopted February 24, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–146

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>JAMES B. HOLDER, NORMAN SWIDLER, AND HAROLD SWIDLER, CARLISLE, PA.<br>Requests: 1000 kc., 1 kw., Day<br>For Construction Permit | File No. BP–15526 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX DISSENTING.

1. The Commission has before it for consideration (a) the above-captioned application filed on April 27, 1962, and amendments thereto; (b) a Petition to Deny filed by Richard F. Lewis, Inc. licensee of Station WHYL, Carlisle, Pennsylvania on November 26, 1963; (c) an Opposition to Petition to Deny filed by the applicant on January 30, 1964; and (d) a Reply to Opposition to Petition to Deny filed by WHYL on February 10, 1964.

2. The Commission faces the threshhold question of whether to grant a waiver of the filing requirements under the "cut-off" provisions of Section 1.580(i). The "cut-off" date for the application was April 30, 1963, but the petition to deny was not filed until November 26, 1963. The application as originally filed contained certain inadequacies which necessitated amendment and complicated the petitioner's ability to file his pleadings within the time specified. In view of this fact, we find that good cause for the delay in filing exists. Therefore, we will waive the above provisions on our own motion [1] and consider the pleadings on their merits.

3. The petitioner bases its claim of standing on the ground that it is the licensee of Station WHYL, Carlisle, Pennsylvania, and that the applicant would compete with it for listening audience and advertising revenues. We find that WHYL is a "party in interest" under Section 309(d)(1) of the Communications Act of 1934, as amended, *F.C.C.* v. *Sanders Brothers*, 309 U.S. 470, 9 RR 2008 (1940).

4. Three issues are raised in the petition to deny in support of the position that a grant of the application would be contrary to the public interest, convenience, and necessity. It is alleged that there are inadequate revenues in the area to support another broadcast station and the result of increased competition would be a net loss of service to the community. Furthermore, it is claimed, the applicant is not financially qualified, has underestimated expenses,

[1] Section 1.3 permits waiver of the rules when the Commission determines good cause is shown.

and has failed to ascertain the program needs of the community to be served. These issues will be discussed seriatim.

5. It is asserted that a grant of the application would "inflict serious economic injury upon WHYL", resulting in "staff and program modifications", and necessitating elimination of their unprofitable FM affiliate. The petitioner claims that another local station in Carlisle (Population 16,812 in 1960) would result in an estimated loss in net revenue of $10,000, caused by the shift of certain unspecified local advertisers to the new facility. It is further alleged that five AM stations presently transmit "listenable" signals over the Carlisle market and the intensity of the competition for such a limited area is reflected by WHYL's modest profit. On August 10, 1964 the Commission sent a letter offering the petitioner the opportunity to amend and amplify its allegations of economic injury. The authority of the Commission to require such additional information was affirmed in *KGMO Radio-Television, Inc.* v. *F.C.C.*, 2 RR 2d 2057 (1964). The petitioner has failed to reply, so the request for an economic issue must be considered upon the basis of the pleadings on file. We believe that in this case the facts alleged by the petitioner in support of its request for a Carroll issue are too generally stated and are not sufficiently related to the conclusions drawn by the petitioner to show *prima facie* that a grant of the application would be inconsistent with a finding by the Commission that it would serve the public interest, convenience and necessity, or to raise any substantial or material questions of fact concerning the effect of a second AM station entering the Carlisle market. The requested issue will not be specified.

6. The petitioner alleges that the applicant is not financially qualified to construct and operate the station as proposed. The original application was amended on January 24, 1964 to add Norman and Harold Swidler as partners. James B. Holder now has a 50% interest in the partnership and the Swidler brothers 25% each. These two additional partners will each contribute $3853 to the applicant partnership. They have further agreed, conditioned upon a grant of the application, to a $25,000 unsecured loan to the partnership which will be repaid at the rate of $300 per month plus 6% interest. The repayment on either principal or interest will be delayed until one year after the commencement of the station's operation. The cost of construction and operation for a reasonable length of time will be approximately $24,000. The partners have submitted balance sheets and supporting documents indicating that they are capable of successfully meeting these expenses. On the basis of the foregoing, the Commission finds that the applicant is financially qualified to construct and operate as proposed. The request for a financial issue will therefore be denied.

7. The petitioner further alleges that the estimate of operating expenses is unrealistic. By amendment filed January 24, 1964, the applicant increased the estimate of expenses from that submitted in the original application. The application, as amended, lists annual operating expenses as $40,000, estimated cost of construction as $14,286, and the estimated annual revenue as $46,000. The petitioner has failed to challenge these revised figures in its reply.

The Commission finds these estimates reasonable, and absent a factual showing that such estimates are unrealistic, the Commission will not substitute the petitioner's judgment for the applicant's. Therefore, the requested issue will not be specified.

8. The petitioner alleges that the application does not indicate the proposed programming was prepared after an attempt had been made to ascertain the needs of the community. The application, as amended, was filed by a partnership consisting of three long time residents of Carlisle. James B. Holder has had extensive broadcasting experience in the community. For three and a half years (July 1957 to December 1961) he was employed as the general manager of the petitioner's station, WHYL, located in Carlisle. During this period he was not only involved in managing the station, but was called upon to address various civic organizations in the area on the subject of broadcasting. Afterward, he would discuss with the members their ideas for effectuating desirable programming modifications. While employed at WHYL, Mr. Holder had occasion to contact by phone over 160 residents of Carlisle to ascertain their views on participation in station activities and programming improvements. As a result of these experiences, Mr. Holder stated, "An attempt has been made in the program schedule . . . to include as many of these ideas and suggestions as possible". On the basis of this showing, the Commission is of the opinion that the requirements of the *Suburban* case have been satisfied, and the requested issue will not be specified. *Community Telecasting Corporation* 24 R.R. 1 (1962).

In view of the foregoing, the Commission finds that no substantial and material questions of fact exist, and that a grant of the application would serve the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, That the petition to deny filed by WHYL, IS DENIED, and that the above-captioned application IS GRANTED, subject to the conditions and specifications set forth in the construction permit.

Adopted February 24, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–149

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>BOISE VALLEY BROADCASTERS, INC. (KBOI),<br>BOISE, IDAHO<br>Has: 950 kc., 5 kw., DA–N, U, Class III<br>Requests: 670 kc., 25 kw., 50 kw.,–LS, DA–N, U, Class II–A<br>For Construction Permit | File No. BP–15769 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE NOT PARTICIPATING.

1. The Commission has before it for consideration (a) the above-captioned application, as amended; (b) the "Petition to Deny or for Other Relief" filed on July 1, 1963 by the National Broadcasting Company, licensee of Station WMAQ, Chicago, Illinois; (c) pleadings in opposition and reply to the NBC petition to deny; (d) the "Petition to Designate Application for Hearing" filed on January 20, 1964 by Gem State Broadcasting Corporation, licensee of Station KGEM, Boise, Idaho; (e) pleadings in opposition to the petition filed by Gem State; (f) the "Objection to Grant" filed on June 16, 1964 by Mesabi Western Corporation, licensee of Station KIDO, Boise, Idaho; (g) a pleading in response to the Mesabi Western objection; and (h) two informal letters of protest claiming that a grant would interfere with reception of Station KNBR, San Francisco, California.

2. The application as originally filed requested a power of 50 kilowatts, both day and night. NBC filed a petition to deny directed against the 50 kilowatt proposal. By an amendment, filed simultaneously with its opposition, KBOI reduced power to 25 kilowatts for its nighttime operation. NBC then filed its reply to the opposition directed against the amended proposal specifying 25 kilowatts power during nighttime hours.

3. NBC, in the petition to deny, claimed standing on the grounds that KBOI's proposed operation would cause interference within the 0.5 mv/m-50% skywave contour of Station WMAQ, if KBOI should operate within the 5% variation of antenna current ratios permitted by Section 73.57 of the Rules. NBC claims that, due to nighttime FM service in the area, KBOI has not made the showing, required of Class II–A proposals, that it will provide a first nighttime interference-free service to 25% or more of the area or population within its nighttime interference-free service contour and also that the KBOI application is incomplete in cer-

tain respects. For these two reasons, NBC asserts that the KBOI application should be dismissed for noncompliance with the Commission's Rules. In the event the KBOI application is not dismissed, NBC requests that the application be designated for hearing on the grounds, as set forth in its claim of standing, that KBOI, operating as proposed, would cause interference within the 0.5 mv/m-50% skywave contour of WMAQ. In opposition, KBOI claims that its proposal, as amended to specify a nighttime power of 25 kilowatts, provides a greater tolerance in the operation of KBOI and does not cause interference to the protected contour of WMAQ and also affords a greater protection to Station KNBR, San Francisco, California. KBOI also claims that its proposal brings a first nighttime interference-free primary standard broadcast service to over 25% of the area or population within its nighttime interference-free service contour and that FM service is not a consideration in determining "white area" of Class II–A proposals.

4. In reply, NBC contends that the amended proposed operation of KBOI will not provide coverage to the business and factory areas of Boise as required by Section 73.188(b)(1) of the Rules. NBC then claims that KBOI has not considered the effect of public service power lines in the vicinity of KBOI's proposed transmitter site which would cause reradiation increasing radiation in the direction of the WMAQ protected contour, very possibly resulting in interference within the 0.5 mv/m contour of Station WMAQ. Because of the omission in failing to consider the effect of the power lines, NBC contends that the application should be dismissed. NBC reiterates that the KBOI proposed operation will, even with a nighttime power of 25 kilowatts, cause interference to the 0.5 mv/m-50% skywave contour of WMAQ in violation of Section 73.22(d) of the Rules. NBC also reiterates its contention that KBOI will not provide a new nighttime primary service to 25% of the area or population within its interference-free contour, as required by Section 73.24(i) of the Rules, because of FM service in the AM "white area". NBC cites the Commission's decision in Docket No. 15084 (the proceeding adopting new rules for the allocation of AM stations) in support of this contention.[1] Even conceding that KBOI will provide a new service to at least 25% of the area, NBC claims that a grant is contrary to the public interest because the additional population served is only 2,977 persons and, therefore, amounts to a waste of spectrum space. This concludes the pleadings by NBC.

5. Station KGEM, Boise, Idaho, requests that the application be designated for hearing on the grounds that KBOI is seeking to become the "dominant" station in Idaho and that the grant to KBOI will adversely affect, in the economic sense, the other existing stations located in Boise. KGEM also contends that the additional population served by the proposed operation and its FM affiliate amounts to 370 persons in an area of 899 square miles and therefore is not consistent with Section 73.22 of the Rules as

[1] 2 R.R. 2d 1658 (1964).

promulgated in the Commission's clear channel proceeding (Docket No. 6741) 21 RR 1801 (1961). Also, KGEM supports the NBC contention that interference will be caused to WMAQ and that, due to the "tight" directional antenna system, a question is raised as to whether the antenna system can be installed, adjusted, and maintained in accordance with the specifications contained in the application. KBOI denies that a grant of its proposal will affect the other Boise stations and that, in any event, KGEM has not supported its claim of economic injury by specific allegations of fact that demonstrate any injury to the public. As to lack of population in the "white area", KBOI concedes that its proposal will result in only a nominal increase, but that the population in the "white area" will substantially increase in the forseeable future and that its proposal is consistent with all the Commission's Rules and policies. KBOI repeats that FM service is not a factor in determining "white area" for Class II–A stations and that the amendment to reduce nighttime power to 25 kilowatts and other amendments moot any question of interference to WMAQ or stability of the proposed antenna system. In reply, KGEM claims that FM service to "white area" is a factor to determine if a grant is in the public interest. In support of this proposition it cites the decision in Docket No. 15084, *supra,* and the *Carter Mountain Transmission Corporation* case, 321, F.2d 359, 25 R.R. 2055 (1963).

6. Station KIDO, Boise, filed an objection on the grounds that the grant would not be in the public interest and would aggravate the financial and competitive problems of other stations in Boise and the surrounding area without an offsetting public benefit and also concurs in the contentions of NBC and KGEM. KBOI denies that it will aggravate the economic difficulties of the other Boise stations and states that KBOI, at considerable expense, is attempting to improve service to the public by providing service to Idaho citizens in remote areas.

7. Because of the competition for revenues and audience, KGEM and KIDO are "parties in interest" and the Commission will consider their pleadings on their merits. *F.C.C.* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940). Since the KGEM and KIDO pleadings incorporate the pleadings of NBC, the allegations of the NBC pleadings will be considered on their merits, even though the Commission will dismiss the NBC petition for lack of standing for the reasons set forth in succeeding paragraphs.

8. In summary, the objections set forth against the KBOI Class II–A application, as amended, to specify 25 kilowatts as the nighttime power are:

(a) The application is not consistent with the "white area" requirements required by Section 73.24(i) of the Commission's Rules;

(b) The application causes interference within the 0.5 mv/m-50% skywave contour of Class I–A Station WMAQ, Chicago, Illinois;

(c) The proposed directional antenna system may not be able to be installed, adjusted and maintained in accordance with the specifications contained in the application because of

the presence, in the vicinity of the antenna site, of public service power lines;

(d) The proposal will not provide the required coverage to the business and factory areas of Boise, in violation of Section 73.188(b)(1) of the Rules;

(e) A grant of the application, even conceding compliance with the "white area" requirements, would not be in the public interest because the additional population served in the "white area" is not significant;

(f) A grant of the proposal will have an adverse economic effect on the other stations licensed to Boise and surrounding cities.

9. The contention of NBC, which is supported by KGEM and KIDO, that the application is not consistent with the objectives for Class II–A stations as set forth in Section 73.24(i) of the Rules (which were promulgated by the Commission's Report and Order in the Clear Channel proceeding (Docket No. 6741)) must be rejected. NBC and KGEM claim that the "white area" proposed to be served by KBOI is less than 25% of the area or population because of the existence of FM signals available, during nighttime hours, in the area. The proposed operation will provide a first nighttime standard broadcast primary service to over 25% of the area within the nighttime interference-free contour of KBOI. The allocation of Class II–A stations was based on standard broadcast service available to the area. The "white area" determination was not affected by the availability of FM or TV signals to the area. The presence of a TV signal either through a delivery by a CATV or translator system was also not a factor in the allocation of the Class II–A frequency. KBOI states that its proposal is to provide service to remote areas and that the population in the "white area" will increase substantially in the forseeable future. Since the application meets the requirements of the Commission's Rules and policies and the intent of the Clear Channel decision, this contention raised by NBC and supported by KGEM and KIDO is not well taken.

10. NBC bases its claim of standing on the grounds that the proposed operation of KBOI will cause interference within the 0.5 mv/m-50% skywave contour of Station WMAQ, which constitutes a modification of the license of Station WMAQ, and, therefore, an evidentiary hearing is necessary under Section 316 of the Communications Act of 1934, as amended, and the case of *F.C.C.* v. *N.B.C. (KOA)*, 319 U.S. 239 (1943). The Commission has considered the engineering data submitted by the parties and other engineering information available in the Commission's files and finds that the proposed operation of KBOI will not cause interference within the 0.5 mv/m-50% skywave contour of WMAQ. Because there is no interference within the protected contour of Station WMAQ, NBC is not a "party in interest" under Section 309 of the Act. Accordingly, the petition to deny filed by NBC will be dismissed.

11. It has been alleged that the degree of suppression incorporated in the proposed directional antenna system and the presence

of power lines in the vicinity of the antenna site may preclude adjustment and maintenance of the array within the proposed pattern values of radiation. By an amendment submitted in response to a Commission letter, the proposed MEOV's have been increased to 29 mv/m in the null area towards WMAQ, and KBOI has stated that it will take all necessary technical precautions to provide complete protection to Station WMAQ and other existing stations. The Commission has studied the proposed antenna system, the site photographs and all the engineering considerations submitted by the applicant, including specific construction details to be employed to enhance the stability of the array, and is of the opinion that the applicant has reasonably demonstrated that the array can be adjusted and maintained in a manner to protect WMAQ and other existing stations, including KNBR, San Francisco, California. In any event the grant will be conditioned to insure the proper adjustment and maintenance of the directional antenna system. Therefore the requested issue regarding the antenna system and antenna site will be denied.

12. As to the coverage of the business and factory areas of Boise as required by Section 73.188(b)(1), the Commission has considered the engineering data submitted by the parties and other available engineering data and finds that the coverage to be provided by the proposed KBOI operation is in substantial compliance with the Commission's Rules.

13. The contention that a grant would not serve the public interest because of the small increase in population served by the proposed operation will be rejected. The application meets all the rules and policies of the Commission and, most important, will provide a first primary standard broadcast service to remote areas in Idaho. KBOI also states that the population in the white area will increase substantially in the foreseeable future. The request for an issue in this regard will be denied.

14. We now turn to the final contention raised by KGEM and KIDO which deals with the economic effect of a grant of this application on them and the other stations in the area. No facts have been alleged to show that a grant will have an adverse impact on the public. Before the Commission will specify an economic issue, specific facts must be alleged to show that a grant would result in a loss or degradation of service to the public.[2] The contention raised by KGEM and KIDO is not supported by any specific facts, and therefore the request for the specification of an economic issue will be denied.

15. In view of the foregoing it appears that no substantial or material questions of fact have been presented by the pleadings and that a grant of the KBOI application will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the petition to deny filed by the National Broadcasting Company IS DISMISSED; the pleadings filed by Gem State Broadcasting Corporation and Mesabi

[2] *Carroll Broadcasting Company* v. *F.C.C.*, 258 F.2d 440, 17 RR 2066 (1958); *KLMO Radio-Television, Inc.*, v. *F.C.C.*, —— F.2d ——, 2 RR 2d 2057 (1954); *Missouri-Illinois Broadcasting Co.*, 3 RR 2d 232 (1954).

Western Corporation ARE DENIED; and the application of Boise Valley Broadcasters, Inc., IS GRANTED, upon the conditions and specifications contained in the construction permit.

Adopted February 24, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

F.C.C. 65–147

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>CHARLOTTESVILLE BROADCASTING CORP. (WINA), CHARLOTTESVILLE, VA.<br>Has: 1400 kc., 250 w., 1 kw.–LS, U, Class IV<br>Requests: 1070 kc., 5 kw., DA–N, U, Class II | Docket No. 15861<br>File No. BP–15768 |
| WBXM BROADCASTING CO., INC., SPRINGFIELD, VA.<br>Requests: 1070 kc., 5 kw., D, Class II<br>For Construction Permits | Docket No. 15862<br>File No. BP–15808 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration (a) the above-captioned and described applications; (b) a "Petition to Deny" filed on September 3, 1963, by WBXM Broadcasting Company, Inc. (hereinafter referred to as WBXM Broadcasting); and (c) an "Opposition to the Petition to Deny", filed on September 13, 1963, by Charlottesville Broadcasting Corporation (hereinafter referred to as WINA). The Commission also has before it for consideration a letter, filed on July 31, 1963, by WINA which relates to the Virginia Broadcasting Company application, File No. BP–15949, and a letter in response to the WINA letter, filed on August 9, 1963, by the Virginia Broadcasting Company, licensee of Station WELK, Charlottesville, Virginia.

2. WBXM Broadcasting Company, Inc. requests that consideration of the question of standing to file its petition be deferred until the decision is rendered by the Court of Appeals for the District of Columbia Circuit in its appeal of the Commission's Order (FCC 62–1052, 24 RR 1540) returning the WBXM Broadcasting application. WINA, in its opposition to the petition to deny, claims that WBXM Broadcasting lacks the requisite standing to file its petition. However, in view of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in the case of *Kessler* v. *F.C.C.*, 326 F. 2d 673, 1 RR 2d 2061 (1963) and the Commission's subsequent acceptance of its application for filing (the Commission's Order, FCC 64–433, released May 14, 1964), the WBXM Broadcasting application is entitled to a comparative hearing under the case of *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945) with the mutually exclusive WINA application. WBXM Broadcasting Company, Inc., as a competing applicant, has the status of a "party

in interest" entitled to file a pre-grant petition pursuant to Section 309(d) of the Communications Act of 1934, as amended, and Section 1.580(i) of the Commission's Rules.

3. In the petition to deny, WBXM Broadcasting requests that the WINA application be designated for hearing on appropriate issues arising out of the objections raised in the petition. WBXM Broadcasting alleges that the WINA proposal is an inefficient use of the frequency in violation of Note (b) to Section 73.24 of the Commission's Rules. The WINA application indicates that the proposal will have a nighttime limitation of 31.6 mv/m resulting in a population loss of approximately 28 percent and an area loss of approximately 91.5 percent within its normally protected nighttime contour. The Commission has considered the contentions of the parties as well as the WINA proposal and is of the opinion that a substantial and material question exists as to whether the proposal is an efficient use of the frequency as required by Note(b) to Section 73.24 of the Commission's Rules. Accordingly, an issue will be specified to determine whether the WINA proposal would be consistent with Note(b) to Section 73.24 of the Commission's Rules.

4. In view of the substantial geographic separation (approximately 80 miles) of the proposed station locations specified in the above-captioned applications, a clear choice may be made under Section 307(b) of the Communications Act of 1934, as amended, assuming the chosen applicant is legally, technically, financially and otherwise qualified. Therefore, as requested by WBXM Broadcasting, an issue will be specified to determine, in the light of Section 307(b) of the Act, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

5. The Commission finds that, except as indicated above, there are no other material or substantial questions of fact presented in the petition to deny, filed by WBXM, which would warrant the specification of issues in this proceeding. Accordingly, the petition to deny will be granted to the extent that the WINA application will be designated for hearing in a consolidated proceeding with the WBXM Broadcasting application specifying, among other issues, a Section 73.24(Note(b)) issue as to the WINA proposal and a Section 307(b) issue.

6. The Commission also has before it the letter, filed on July 31, 1963 by WINA, requesting that consideration of the application, File No. BP–15949, of the Virginia Broadcasting Company (Station WELK, Charlottesville, Virginia) be deferred until the Commission has had an opportunity to grant the WINA application or, in the alternative, that the WELK application be designated for hearing in a consolidated proceeding with the WINA application. As grounds for the request, WINA noted that its application, when filed, complied with the NOTE to Section 1.571 of the Commission's Rules as in force prior to July 1, 1964, which set forth the interim criteria governing the acceptance of standard broadcast applications during the AM "freeze". This included the requisite showing as to "white area" coverage. WINA contends that a grant of the WELK application prior to a grant of the WINA application would affect the "white area" status of certain portions of the coverage area proposed to be served by the WINA applica-

tion. Such grant, WINA contends, would deprive WINA of its right to comparative consideration with the WELK application under the *Ashbacker* doctrine.[1] The Virginia Broadcasting Company filed a letter in opposition to the WINA request. It has been the Commission's long-standing position that it is not required to maintain the status quo with respect to all facts which may be relevant to a determination on a pending application and upon which an applicant may rely in support of a grant of its application. *Mansfield Journal Co., et al,* 4 R.R. 129, 132–133 (1948), aff'd, *Mansfield Journal Co.* v. *F.C.C.* 84 U.S. App. D.C. 341, 173 F. 2d 646, 4 R.R. 2123 (1949); *Malrite Broadcasting Co.*, 18 R.R. 589 (1959); *Greater Minnesota Broadcasting Co.* 1 R.R. 2d 21 (1963). This is especially true in cases where considerations under Section 307(b) of the Act are involved. *Big Sioux Broadcasting Co.*, 3 R.R. 1407 (1947); *Seaside Broadcasting Co.*, 3 R.R. 655 (1946); *Central Michigan Radio Corp.*, 3 R.R. 735 (1947); *WKAP, Inc. (WKAP)*, 6 R.R. 814, 817–818 (1950); *Easton Publishing Co.*, 9 R.R. 887, 890 (1953)[2]; *Cofey and Oswalt* 19 R.R. 12 (1959). The *Ashbacker* case certainly did not hold that an applicant is denied a hearing on its application whenever, during the pendency of that application, the Commission takes action otherwise within its authority, one of the consequences of which may be to diminish the probabilities in favor of a grant of the pending application. The Commission is aware of the fact that, as a practical matter, a grant of the WELK application prior to a decision in this proceeding might tend to weaken WINA's competitive position *vis-a-vis* the WBXM Broadcasting application in a Section 307(b) hearing. This possible adverse effect, however, does not of itself confer the right to consolidation under the *Ashbacker* doctrine. It should also be noted that there is no electrical interference between the WINA and WELK proposals. Based on existing Commission precedent, the Commission is of the view that WINA does not have a right to a comparative hearing with the WELK application. The Commission is not required to defer consideration of the WELK application until a determination is made in the proceeding ordered below. Accordingly, the WELK application will be processed in the normal course of business pursuant to Section 1.571 of the Commission's Rules.

7. It should be noted that, in the event of a grant of the WELK application, a reduction in WINA's potential "white area" coverage would in no way alter WINA's status under the NOTE to Section 1.571 of the Commission's Rules, as in force prior to July 1, 1964, which set forth the interim criteria governing the acceptance of standard broadcast applications during the AM "freeze". The "freeze" criteria established standards relating only to the acceptance of applications. It did not alter or create the standards gov-

[1] *Ashbacker Radio Corp.* v. *F.C.C.* 326 U.S. 327 (1945).

[2] The *Easton Publishing Co.* matter was involved in an appeal to the United States Court of Appeals for the District of Columbia Circuit, *Allentown Broadcasting Corporation* v. *F.C.C.*, 94 U.S. App. D.C. 353, 222 F.2d 781, 10 R.R. 2086, in which the Court reversed the Commission on grounds not here involved. In that case, the appellant contended that grants of applications proposing operations in the same city in which the appellant proposed to operate (Allentown, Pennsylvania) had prejudiced its position with respect to 307(b) considerations. In disposing of this and other contentions the Court stated: "We have considered other contentions advanced by appellant and find them without merit." See 94 U.S. App. D.C. 353, 360; 22 F.2d 781, 788; 10 R.R. 2086, 2094.

erning the processing of applications once the applications were accepted for filing. Once accepted for filing under the "freeze" criteria, applications are treated like any other applications pending under the then existing rules. Therefore, on this basis, it cannot be said that a grant of the WELK application would effectively preclude a grant of WINA's application so as to entitle WINA to comparative consideration with WELK under the *Ashbacker* doctrine.. In view of the existing Commission policy as outlined above the WINA request will be denied.

8. Except as indicated by the issues specified below, each of the above-captioned applicants is legally, technically, financially, and otherwise qualified to construct and operate as proposed.

9. The following matters are to be considered in connection with the aforementioned issues specified below:

a. The above-captioned proposals appear to be mutually exclusive in that concurrent operation would result in mutually destructive interference.

b. WINA, in its application, indicates that, on the basis of Figure M–3 values of conductivity, the proposed operation complies with the coverage requirements of Section 73.188 of the Commission's Rules. It is noted, however, that if the values of conductivity from the proposed antenna site towards the city were slightly less than is indicated by Figure M–3, the proposal would not comply with Section 73.188(b)(1) of the Rules in that a minimum field intensity of 25 mv/m would not be obtained over the business or factory areas of the city during both daytime and nighttime operation. In addition, if the values of conductivity from the proposed antenna site were slightly less than is indicated by Figure M–3, the proposed nighttime limitation contour would not cover the city as required by Section 73.188(a)(1) of the Commission's Rules. Since Figure M–3 values of conductivity are not intended to accurately indicate the conductivity over short paths, as herein involved, the applicant will be required to submit field intensity measurement data made from the proposed antenna site in a direction towards the city so that a determination can be made as to whether or not the proposed operation would provide adequate coverage to the city as required by Section 73.188(a)(1) and (b)(1) of the Commission's Rules.

c. WBXM Broadcasting Company, Inc., in its application, indicates that, on the basis of Figure M–3 values of conductivity, the proposal will comply with Section 73.37 of the Commission's Rules in that there will be no overlap of the 2 mv/m contour of the proposed station with the 25 mv/m contour of Station WQMR, Silver Spring, Maryland. It is noted, however, that if the values of conductivity from the proposed antenna site toward Station WQMR were slightly greater than is indicated by Figure M–3, the proposal would be in violation of Section 73.37 of the Commission's Rules. Since Figure M–3 values of conductivity are not intended to accurately indicate the conductivity over short paths, as herein involved, the applicant will be required to submit field intensity measurement data made from the proposed antenna site in a direction

towards Station WQMR to establish that the proposed 2 mv/m contour will not overlap the 25 mv/m contour of WQMR.

d. The WBXM Broadcasting Company, Inc., proposal involves mutual co-channel interference with Station WKOK, Sunbury, Pennsylvania. Accordingly, an appropriate issue will be specified and Sunbury Broadcasting Corporation, the licensee of Station WKOK, will be made a party respondent to the hearing proceeding.

10. In view of the foregoing, the Commission is unable to make the statutory finding that a grant of the subject applications would serve the public interest, convenience, and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below.

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

1. To determine the areas and populations which would receive primary service from the proposal of WBXM Broadcasting Company, Inc. and the availability of other primary service to such areas and populations.

2. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WINA, Charlottesville, Virginia, and the availability of other primary service to such areas and populations.

3. To determine whether the proposal of Charlottesville Broadcasting Corporation (WINA) would provide coverage of the city sought to be served, as required by Section 73.188 (b) (1) of the Commission's Rules, and, if not, whether circumstances exist which would warrant a waiver of said Section.

4. To determine whether the proposed nighttime limitation contour of Charlottesville Broadcasting Corporation (WINA) would adequately serve the center of population of the city in which the studio is located as required by Section 73.188(a) (1) of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of said Section.

5. To determine whether the proposed operation of Charlottesville Broadcasting Corporation (WINA) would be consistent with Note (b) to Section 73.24 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of said Section.

6. To determine whether overlap of the 2 and 25 mv/m contours would occur between the proposal of WBXM Broadcasting Company, Inc. and Station WQMR, Silver Spring, Maryland in contravention of Section 73.37 of the Commission's Rules, and, if so, whether circumstances exist which would warrant a waiver of said Section.

7. To determine whether the proposal of WBXM Broadcasting Company, Inc., would cause objectionable interference to Station WKOK, Sunbury, Pennsylvania, or any other existing standard broadcast stations, and, if so, the nature and

extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

8. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

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

IT IS FURTHER ORDERED, That, Sunbury Broadcasting Corporation, licensee of Station WKOK, Sunbury, Pennsylvania, IS MADE A PARTY to the proceeding.

IT IS FURTHER ORDERED, That the Petition to Deny, filed by WBXM Broadcasting Company, Inc., IS GRANTED to the extent indicated above.

IT IS FURTHER ORDERED, That the request of Charlottesville Broadcasting Corporation (WINA) contained in its letter of July 31, 1963 IS DENIED.

IT IS FURTHER ORDERED, That, in the event of a grant of either of the above-captioned applications, the construction permit shall contain the following condition:

Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

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

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

IT IS FURTHER ORDERED, That, the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

Adopted February 24, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–70

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| AUGUSTINE L. CAVALLARO, JR., D.B.A. COLLEGE RADIO, AMHERST, MASS. | Docket No. 15562<br>File No. BPH–4323 |
| PIONEER VALLEY BROADCASTING CO., NORTHAMPTON, MASS. | Docket No. 15563<br>File No. BPH–4393 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it for consideration a joint petition filed January 25, 1965, by Augustine L. Cavallaro, Jr., d/b as College Radio (College Radio) and Pioneer Valley Broadcasting Company (Pioneer Valley) seeking approval of an agreement for dismissal of the College Radio application, and grant of the Pioneer Valley application; comments on such petition, filed by the Broadcast Bureau on February 9, 1965; and a reply, filed by College Radio on February 23, 1965. By Order (Mimeo No. 54600), released July 17, 1964, the above-captioned mutually exclusive applications were designated for hearing by the Chief, Broadcast Bureau, pursuant to delegated authority, on a standard coverage issue, a Section 307(b) issue and a contingent comparative issue.

2. The joint request satisfies the requirements of Section 1.525 of the Rules. Pioneer Valley has agreed to reimburse College Radio in the amount of $8,937.28. Itemized out-of-pocket expenses reported by College Radio total $9,167.78, including legal fees of $6,034.61; engineering fees of $1,525.34; and incidental expenses of $1,607.83. Of the total incidental expenses claimed, Item No. 3 in the amount of $230.50 is not allowable, because it represents the difference in cost of a utility #120 tower and utility #180 tower. The remaining balance of $8,937.28 in fees and expenses have been adequately substantiated by affidavits. Payment of this amount is proper under the Rules.

3. Upon execution of the agreement, Pioneer Valley delivered its check in the amount of $8,937.28 to an escrow agent to be deposited in a savings account in any savings institution insured by the United States Government. The agreement provides for the payment of interest to the dismissing applicant. This provision must be disallowed since payment of any accrued interest would increase the amount to be paid to College Radio above the $8,937.28 amount permitted by the Rules. Thus, approval of the agreement

herein will require payment of the stipulated amount of $8,937.28 only.

4. The 1 mv/m and 3.16 mv/m contours of the Pioneer Valley proposal for Northampton encompass the entire Amherst community. Northampton has a population of 30,058 and the unincorporated community of Amherst has a population of 10,306. The population within Pioneer Valley's proposed 1 mv/m contour (478,369) is more than ten times that within College Radio's proposed 1 mv/m contour (42,140), and College Radio's 1 mv/m contour is completely encompassed by the 1 mv/m contour of Pioneer Valley. While neither Amherst nor Northampton has an FM station, both applicants are licensees of standard broadcast stations in their respective communities (WTTM, Amherst, and WHMB, Northampton) and the proposed programming of each of them largely duplicates that of its existing facilities. In view of these facts, dismissal of the Amherst application and grant of the Northampton application, as suggested by the Broadcast Bureau, would not defeat the objectives of Section 307(b) of the Communications Act of 1934, as amended, and hence, publication under Section 1.525(b) of the Rules is not necessary. With the dismissal of the College Radio application, no bar exists to grant of the Pioneer Valley application; accordingly, that application will be granted.

5. Finally, College Radio requests that its application be dismissed without prejudice. In support of this request, the applicant avers that Cavallaro has been interested in providing Amherst with its first FM station; that he decided to withdraw his application because of the greater coverage of Pioneer Valley's proposal; and that Cavallaro hopes to bring Amherst an FM station since he is willing to invest the time, money, and effort needed to search for a frequency which may be used in Amherst (none is presently available). Section 1.568(c) of the Rules states that requests for dismissal of an application without prejudice after designation for hearing will be granted only for good cause shown. The basis for the request herein, *viz.*, Pioneer Valley's superior coverage, does not arise from circumstances over which the movant has no control. College Radio's decision to dismiss is purely a personal judgment which does not demonstrate the "good cause" required by the Rule. College Radio also requests, in the alternative, a waiver of Section 1.568(c) arguing that a dismissal with prejudice will make Mr. Cavallaro's future efforts to find a new frequency for Amherst useless since he will be precluded from filing another application, should those efforts be fruitful. The waiver request is, in the Board's judgment, premature inasmuch as it is based upon contingent facts. Therefore, the application will be dismissed with prejudice. *KTAG Associates,* FCC 61–1172, 22 RR 184. Our denial of the relief sought herein, however, does not bar College Radio from requesting waiver of the "repetitious application rule" (Section 1.519), based upon a showing of its continuing efforts to locate a new frequency for Amherst, should those efforts be successful in the future.

Accordingly, IT IS ORDERED, This 25th day of February,

1965, that the joint petition for approval of agreement filed January 25, 1965, by Augustine L. Cavallaro, Jr., d/b as College Radio and Pioneer Valley Broadcasting Company IS GRANTED; that such agreement IS APPROVED in conformity with the views expressed above; that the application of Augustine L. Cavallaro, Jr., d/b as College Radio (BPH–4323) IS DISMISSED, and that the application of Pioneer Valley Broadcasting Company for a construction permit for a new FM broadcast station at Northampton, Massachusetts (BPH–4393), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–74

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| DAVID F. STEVENS, JR., TRADING AS TRI-CITIES BROADCASTING CO., COZAD, NEBR. | Docket No. 15679<br>File No. BP–15052 |
| DAWSON COUNTY BROADCASTING CORP., COZAD, NEBR. | Docket No. 15680<br>File No. BP–15679 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has under consideration the petition of David F. Stevens, Jr., tr/as Tri-Cities Broadcasting Co. (Stevens) to enlarge the issues originally designated (FCC 64–990, released November 2, 1964) in this comparative proceeding to determine: (1) whether Dawson County Broadcasting Corporation (Dawson) concealed the identity of certain principals when it first filed its application; (2) the real parties in interest in the Dawson application; and (3) whether Dawson and its principals possess the requisite character qualifications to become a Commission licensee.[1]

2. Stevens alleges that several of Dawson's original stockholders were in fact "straws" for parties in interest whose identity was concealed from the Commission. As evidence that William P. Trusdale, counsel for Dawson and originally a 5% stockholder, was never a real party in interest in Dawson's application, Stevens submits an affidavit concerning a conversation of January 3, 1963, in which Trusdale allegedly told Stevens that he was "actually not a stockholder but just a 'front' for another individual who actually owned the stock," and who did "not want it known" that he was the true owner of the stock in Dawson. Trusdale was owner of record of his stock until July 1, 1964, according to amendment filed by Dawson on August 14, 1964, which substituted the name of Wayman E. May, who presently holds the stock. Stevens also alleges that "in view of the affidavit concerning Mr. Trusdale," a question arises as to whether two other stockholders, Herman Hanson and Dean Winegar, whose interests were also reported transferred to new owners in the August amendment, "ever did have an interest in Dawson County Broadcasting Corporation, or whether they were merely 'front men'." Stevens also questions

[1] Before the Review Board are: petition to enlarge issues, filed November 23, 1964, by Stevens; motion to supplement motion to enlarge, filed November 24, 1964, by Stevens; comments, filed December 9, 1964, by the Broadcast Bureau; opposition, filed December 22, 1964, by Dawson; and reply, filed January 5, 1965, by Stevens. Good cause having been shown for the late filing, the affidavit submitted with Stevens' motion to supplement motion to enlarge will be considered by the Board.

whether Eugene Dodds, reported both on the original application and in the amendment as Director and a 15% stockholder, is in fact a party in interest. The basis for this challenge is another affidavit of Stevens relating a November 18, 1964, telephone conversation with one Kenneth Bowman, who allegedly claimed to have been told by Dodds on November 14, 1964, that "he wanted out of the deal," that "he wanted nothing to do with any business in which his father [D. L. Dodds, a 10% stockholder] was involved," and that "he thought he was out of the deal."

3. The qualifications of the Dawson applicant are further questioned because of two circumstances involving other stockholders. Kermit G. Kath, listed as Vice President, Director and 15% stockholder of Dawson, who is also a 27% owner of Radio Station KOLR, Sterling, Colorado (the remaining shares being held by his wife, his brother and his brother's wife) has allegedly fallen two and one-half years behind on payments for that station. Stevens requests official notice of BAL–3153, granted October 8, 1958, to the effect that: Kath originally acquired his interest in common with the two Dodds (who sold their interests in January, 1962—see BTC–3883, granted January 3, 1962); the sale price was $45,000—$10,000 down and $35,000 balance to be paid in yearly installments of $3,500 plus interest; according to the attached November 18, 1964, letter [2] of Russell M. Stewart, President of the seller, Platte Valley Broadcasting Corporation, balance due on the sale price is $27,000 and the Kaths have made no payments on the purchase price for two and one-half years. A second circumstance which allegedly discredits Dawson's character involves a civil judgment against D. L. Dodds for non-payment of rent on leased premises. According to the affidavit of Ivan Van Steenberg, attorney of the lessor in lease negotiations, Dodds leased the premises on or about June 8, 1957, and subsequently subleased them to one Verssia Marie Thienhardt, remaining responsible for the rent himself. Mrs. Thienhardt "eventually gave up the sublease but said D. L. Dodds refused to pay the rent." Affiant referred the amount for collection and suit was brought by the collection agency, which obtained judgment on January 16, 1963. The judgment was subsequently executed and the full balance collected. Mrs. Thienhardt's affidavit contains the additional information that her sublease, effective August 1, 1961, when Dodd's lease had one year remaining, called for payment of her rent direct to lessor but with Dodds remaining liable. However, after two months Dodds instructed her to pay the rent directly to him instead of to the lessor as stipulated in the contract. It was further agreed that Dodds would pay lessor on the first of each month. For ten months Mrs. Thienhardt made payments to Dodds but no payments to the lessor were made by Dodds during this time. Personal property of Mrs. Thienhardt on the premises was

[2] Stewart's letter is followed by a statement, signed and sealed by a notary public of Nebraska, which states merely that Stewart is known to and came before the notary public. The "jurat" does not state that the affiant subscribed and swore to the statement. Under Nebraska law, an affidavit must bear the certificate of the officer before whom the statement was sworn that the oath was administered to the affiant. *Kennedy & Parsons Co.* v. *Schmidt*, 152 Neb. 637, 42 N.W. 2d 191. Despite the deficiency in the Stewart attachment, we note that Dawson does not controvert the statements made therein.

subsequently confiscated by lessor for non-payment of rent.

4. Several allegations in Stevens' petition can be disposed of summarily as totally devoid of the factual foundation required by Rule 1.229. The only support for Stevens' inference that Hanson and Winegar may have been "front men" for unnamed parties in interest in the Dawson application is the bare fact that transfers of their interests in the corporation coincided in time with sale of Trusdale's interest.[3] Also insufficiently documented under Rule 1.229(c) is the allegation that Eugene Dodds believes himself to be "out of the deal." This allegation, supported only by Stevens' statement of something told him by Bowman about a conversation between Bowman and Dodds, is patently hearsay.[4] See *Smackover Radio, Inc.*, FCC 62–81, 22 RR 865. Finally, the fact that Kath has failed to make payments on the mortgage of Station KOLR for two and one-half years is without significance in view of the fact that the seller, Platte Valley Broadcasting Corporation, has concurred.[5] The letter of Russell M. Stewart attached to Stevens' petition concludes with the statement that: "Platte Valley Broadcasting Corporation held a mortgage of some $35,000 on KOLR, which still has a balance of some $27,000. We have not received payments on this balance for the past two and a half years, but have gone along with the Kaths in the hope the station could be resold."

5. As to the remaining allegations, Dawson's answer to the charge that Trusdale was a "straw" includes affidavits by Trusdale and Wayman E. May, who was substituted in the August amendment, denying the truth of the assertion. Trusdale attests that he has no recollection of the meeting or the conversation referred to in Stevens' affidavit; that his decision to sell to May was reached at the time of transfer; that prior to July 1, 1964, he held the stock solely for his own benefit; that he acted for no one else in acquiring and holding his equity; and that he "had an actual, valid and complete equity in ownership in Dawson . . .". May's affidavit similarly attests the completeness of his own equity, and states that the purchase from Trusdale was arranged after May "informed another stockholder" of his interest in buying stock "sometime prior to his purchase." Dawson further states that "even if it be assumed, *arguendo*, that Mr. Trusdale actually did act as a 'front', the existing shareholders of Dawson County are free from fault."

6. With respect to the judgment against D. L. Dodds, both Dawson and the Broadcast Bureau state that the civil suit does not warrant addition of a character qualifications issue, and that Stevens may attempt to explore the matter under the existing

[3] All parties to the transfers of stock filed affidavits denying Stevens' charges and attesting that ownership of their respective equities in Dawson was and is entirely individual and independent.

[4] Dodds, by affidavit, denies the occurrence of any such discussion during any conversation with Bowman, adding the further hearsay assertions that Bowman likewise denies the statement, and that a third party who overheard the call on an extension telephone similarly denies it. As of the present date, however, it should be noted that both Dodds and Kermit Kath have given Dawson options to purchase their interests. See Memorandum Opinion and Order, FCC 65M–46, released January 14, 1965, granting amendment.

[5] The only possible question raised might be with respect to Kath's ability to pay, and a financial issue was designated against Dawson by the Commission (FCC 64–990, released November 2, 1964).

standard comparative issue. The Broadcast Bureau, however, would have the Board add issues on the basis of the allegations as to Trusdale's interest in Dawson, framed to determine whether Dawson's application or amendments contain misrepresentations as to ownership or subscription of stock, and whether, in light of that issue, the officers, directors and stockholders of Dawson have the requisite character qualifications.

7. Stevens' allegations as to Trusdale do not justify addition of an issue. It is difficult to speculate as to any possible motive for concealing the identity of a 5% stockholder. Even if it were assumed that Trusdale was a "front", no challenge is made of May's *bona fides*, and hence Trusdale would necessarily have been fronting for the original party in interest whose shares were sold to May. Such an hypothesis would not warrant enlargement of the issues even if there were clear evidence in its support since the concealment was practiced by persons who are no longer parties to the application and no supported allegations have been offered as to the remaining stockholders. No more does the 1963 judgment against a 10% Dawson stockholder for non-payment of rent sufficiently put in question the character of the applicant corporation to warrant addition of a specific issue. No showing of misconduct by the applicant "insofar as it may relate to matters entrusted to the Commission" (see *Report on Uniform Policy as to Violation by Applicants of Laws of the United States*, 1 RR (Part 3), 91:495, 91:499 (1961)) has been made, and accordingly no issue will be added. See *Spanish International Television Company, Inc.*, FCC 64R–239, 2 RR 2d 853.

Accordingly, IT IS ORDERED, This 26th day of February, 1965, That the petition to enlarge issues, filed November 23, 1964, by David F. Stevens, Jr., tr/as Tri-Cities Broadcasting Co. IS DENIED.

IT IS FURTHER ORDERED, That the motion to supplement motion to enlarge, filed November 24, 1964, by David F. Stevens, Jr., tr/as Tri-Cities Broadcasting Co., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

F.C.C. 65R–83

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>NED N. BUTLER AND CLAUDE M. GRAY D.B.A.<br>THE PRATTVILLE BROADCASTING CO.,<br>PRATTVILLE, ALA. | Docket No. 14878<br>File No. BP–14571 |
| BILLY WALKER, PRATTVILLE, ALA.<br>For Construction Permits | Docket No. 14879<br>File No. BP–14729 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER SLONE NOT PARTICIPATING.

1. Before the Review Board for consideration is the Broadcast Bureau's petition, filed December 23, 1964, to further enlarge issues in this proceeding:[1]

(1) To determine whether in connection with the last filed renewal application, Ned N. Butler, licensee of Station WTLS, submitted falsified program logs to the Commission in violation of Sections 73.111 and 73.112 of the Commission's Rules;

(2) To determine whether Ned N. Butler has engaged in the practice of "double billing" subsequent to the issuance on March 9, 1962, of the Commission's Public Notice concerning "double billing."[2]

2. On September 29, 1964 (FCC 64R–464) the Review Board reopened the record in this proceeding, enlarged the issues against Billy Walker, and remanded the proceeding to the Hearing Examiner.[3] On December 11, 1964, Bureau counsel received informal notice of allegations made during the week of December 7, 1964 to the Chief of the Commission's Compliance Branch about a principal of Prattville. Charges to the effect that Ned N. Butler, who is also licensee of Station WTLS, Tallassee, Alabama, had falsified the program logs of WTLS and engaged in double billing were made by Donald Tucker, a former WTLS employee. On December 14, 1964, Tucker executed an affidavit which forms the basis of the Bureau's request for program log and double billing issues.[4]

3. Prattville categorically denies the truth of the allegations made in support of the requested program log issue, but, rather

[1] Also before the Board are the response of Ned N. Butler and Claude M. Gray, d/b as The Prattville Broadcasting Company (Prattville), filed January 26, 1965, and the Bureau's reply, filed February 5, 1965.

[2] Also requested was an issue as to the accuracy of Station WTLS' operating logs. In view of Prattville's full explanation in its responsive pleading, the Bureau withdrew this request.

[3] The hearing has several times been postponed and an unopposed request was filed on February 11, 1965, by Prattville for a further postponement until April 6, 1965.

[4] In this connection it should be noted that the extensive attacks on Tucker's credibility in Prattville's response do not go to the admissibility but, at most, to the weight of the evidence and cannot therefore be considered at this time. The weight to be given evidence on the issues is a matter of fact for the Hearing Examiner who will have an opportunity to evaluate the testimony of Tucker and make a determination as to credibility.

than presenting evidence in support of the denial, it "requests a further opportunity to answer this charge in the hearing." Accordingly, the Bureau's first requested issue will be added.

4. The requested issue as to whether Butler engaged in double billing subsequent to the Commission's Public Notice (FCC 62–272), of March 9, 1962 (see also Notice of Proposed Rule Making on the subject released March 31, 1964 (FCC 64–258)) is based upon the following statements in Tucker's affidavit:

> During my employment the station had a co-op account with George B. Johnson Hardware, the G.E. dealer in Eclectic, Alabama. Johnson would buy 100 spots a month at $1.00 a 60 second spot, 12 months a year, under an oral agreement. A certification would be prepared and signed by Butler that 100 spots were broadcast at $1.00 a spot. The distributor (name unknown) would get this certification. Johnson Hardware would be billed $50.00 for the 100 spots. On occasion, I personally delivered the bill and a copy of the certification to Johnson Hardware.

The Bureau apparently concluded from Tucker's statement that WTLS was in fact billing Johnson only $50.00 per month and that the $100.00 certifications were prepared solely for the purpose of misleading Johnson's distributor with the result that the distributor would pay Johnson its full actual ($50.00) cost while the contract specified 50% ($25.00). Such a billing system would clearly constitute the kind of fraud which the Commission has called the essence of double billing.

5. According to Johnson, Butler and Johnson had a 2 year, oral agreement under which WTLS broadcast 100, $1.00 spots a month at a monthly charge of $100. Under the terms of the agreement Johnson received monthly bills certifying that 100 spots had been broadcast and paid $50.00 in cash, the other $50.00 to be taken by Butler in tradeout. WTLS was to be charged the wholesale price on merchandise purchased and "the difference between the wholesale price and retail price (profit) will be applied toward the $50.00 credit accumulated as the result of the advertising placed with WTLS." Johnson's monthly $100.00 bills were forwarded to General Electric Distributor in Birmingham, Alabama, and Johnson received a credit of $50 a month. Both Johnson and Butler categorically deny the double billing charge, but no explanation is offered of Butler's failure during the entire contract term to use any portion of the credit which allegedly constituted 50% of the payment from Johnson. Both the facts relating to the billing arrangement between Butler and Johnson and Butler's and Johnson's explanation raise substantial questions which require the full exploration of the hearing process. Inquiry is warranted into all the facts and circumstances of these matters.

6. In the event that the issues to be added are found not to be disqualifying, the Examiner may reevaluate the comparative qualifications of the two applicants based on any of the findings and conclusions he makes.

Accordingly, IT IS ORDERED, This 5th day of March, 1965, That the Broadcast Bureau petition to further enlarge issues, filed December 23, 1964, IS GRANTED; and

IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by addition of the following:

To determine whether in connection with the last filed renewal application, Ned N. Butler, licensee of Station WTLS, submitted falsified program logs to the Commission in violation of Sections 73.111 and 73.112 of the Commission's Rules;

To determine whether Ned N. Butler, licensee of Station WTLS, has engaged in the practice of "double billing" subsequent to the issuance on March 9, 1962, of the Commission's Public Notice concerning "double billing;"

To determine in light of the evidence adduced pursuant to the foregoing issues whether The Prattville Broadcasting Company has the requisite qualifications to be a Commission licensee.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–84

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| FREDERICK B. LIVINGSTON AND THOMAS L. DAVIS D.B.A. CHICAGO TV CO., CHICAGO, ILL. | Docket No. 15668<br>File No. BPCT–3116 |
| WARNER BROS. PICTURES, INC., CHICAGO, ILL. | Docket No. 15669<br>File No. BPCT–3271 |
| CHICAGO FEDERATION OF LABOR AND INDUSTRIAL UNION COUNCIL, CHICAGO, ILL. | Docket No. 15708<br>File No. BPCT–3439 |
| For Construction Permit for New Television Broadcast Station | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it for consideration a petition to enlarge issues, filed by Chicagoland TV Company (Chicagoland) on January 19, 1965, to determine whether the Chicago Federation of Labor and Industrial Union Council has intentionally failed to disclose the other business interests of its officers, directors and members, and if so, whether the Federation has the requisite character qualifications to be a broadcast licensee.[1] The above applications were designated for comparative hearing by Commission Order (FCC 64–1076) published in the Federal Register on November 25, 1964.[2]

2. Chicagoland alleges that on September 23, 1964, after several unsuccessful attempts to reach the management of Marina City by telephone, Mr. Frederick Livingston, a partner in Chicagoland, wrote a letter inquiring as to the possibility of locating an antenna at Marina City Towers, a building where other Chicago television stations have located transmitters; no response to this inquiry was received; on October 13, 1964, the Federation filed its mutually-exclusive application for Channel 38 specifying Marina City as its proposed antenna site; petitioner subsequently learned through an examination of old newspaper articles that Marina City was "controlled" by the Building Service Employees Union, a member of the Federation, and that William McFetridge, a delegate to the Federation, President of the Chicago Flat Janitor's Local #1 and one of the five persons listed on the ownership report of WCFL as re-

[1] Other pleadings before the Board are: response, filed February 3, 1965, by the Broadcast Bureau; and opposition, filed February 3, 1965, by the Federation.

[2] Under Section 1.229 of the Rules, petitions to enlarge issues were to be filed on or before December 10, 1964. As good cause for the late filing of this petition, Chicagoland alleges that the facts giving rise thereto did not become known to it until after December 10, 1964.

sponsible for the management of the Federation's radio station is also President of the Marina City Corporation; and that no evidence of McFetridge's connection with Marina City appeared on the WCFL ownership report. Petitioner contends that it must be assumed McFetridge was aware of the Federation's intention to file a mutually-exclusive application at the time the Marina City Corporation failed to respond to Chicagoland's September 23, 1964 inquiry and that the failure to respond to that inquiry was intended to give the Federation a comparative advantage in this proceeding. Petitioner argues that immediately after designation for hearing, the Federation filed a petition to add a comparative coverage issue against Chicagoland [3] and that this fact substantiates Chicagoland's allegations of unfair dealing.

3. The Federation contends in opposition that the relationship of McFetridge, the union, and Marina City Corporation has been widely publicized for the past five years and that the Federation's failure to note such information on reports submitted to the Commission was due merely to innocent inadvertence. Further, the Federation alleges that Warner Bros. and Kaiser Industries,[4] the other applicants for Channel 38, have proposed to locate their antennas at Marina City; that Chicagoland's application proposing a different site has been on file since 1962 and until 1964 Chicagoland evinced no interest in changing its antenna site to Marina City; and that after its September, 1964, inquiry Chicagoland evidenced no further interest in Marina City until the filing of this petition. The Federation has submitted an affidavit of Charles Swibel, owner of the Marina City Management Corporation, stating that the September 23, 1964 inquiry was addressed to him and nowhere in the letter was there any mention of the "Chicagoland TV Company"; that he did not consider it a serious inquiry and therefore did not communicate the fact of its receipt to anyone, including McFetridge, until Chicagoland made the instant charges; and that the Marina City Management Corporation will extend an option to Chicagoland if it can demonstrate "financial responsibility, pay our standard option fee and satisfy us that upon grant by the FCC of an appropriate authorization it will enter into a firm lease at our standard fixed price for the requisite number of years."

4. The Board is not persuaded that petitioner has shown good cause for the late filing of its petition, and the petition will for that reason be denied. But even if the petition had been timely filed, it would nevertheless be denied on the merits. Chicagoland's requested issue seeks to ascertain whether the Federation "has *intentionally* failed to disclose other business interests of its officers, directors and members". (Emphasis added.) The petitioner's allegations are directed solely to the undisclosed interest of William McFetridge in the Marina City Corporation; no allegations are made that there are possibly undisclosed activities of any other officer, director or member of the Federation. Chicagoland presents no evidence which indicates the Federation's error was the result of an intent to mislead any competing applicant or the Com-

[3] This petition was granted on January 26, 1965 (FCC 65R-28).
[4] The application of Kaiser Industries has been dismissed from this proceeding.

mission. The Board agrees with the Bureau's statement that this omission, in itself, does not warrant the addition of an issue. It is apparent from Chicagoland's pleading that Marina City has not excluded possible television competitors of the Federation, as petitioner acknowledges several other television stations have already located their antennas on the rooftop at Marina City. This fact, when considered with Swibel's sworn statement that Chicagoland is welcome to purchase an option, rebuts any contention of unfair dealing.

Accordingly, IT IS ORDERED, This 5th day of March, 1965, That the petition to enlarge issues, filed January 19, 1965, by Chicagoland TV Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–172

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of<br>AMENDMENT OF SECTION 73.682 OF THE COMMISSION'S RULES AND REGULATIONS TO SPECIFY THAT THE EFFECTIVE RADIATED POWER OF THE AURAL TRANSMITTER SHALL NOT BE LESS THAN 10 PERCENT NOR MORE THAN 20 PERCENT OF THE PEAK RADIATED POWER OF THE VISUAL TRANSMITTER | Docket No. 15405 |

REPORT AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND BARTLEY ABSENT.

1. The Commission, on April 2, 1964, issued a Notice of Proposed Rule Making (FCC 64–300) in the above-entitled matter. Interested parties were invited to submit comments on or before June 10, 1964; reply comments, on or before June 25, 1964. This action came about as the result of earlier proceedings (Docket Nos. 14229 and 15208) in which the rules were amended to allow TV broadcast stations to operate with aural powers of as little as 10 percent of the visual peak radiated power. The earlier actions left the upper aural power limit at 70 percent of the visual power. In petitions for reconsideration, some of the TV receiver manufacturers urged, among other things, the Commission to reduce the range of permissible aural power to ease certain receiver design problems.

2. In response to a petition filed by the Electronic Industries Association (EIA), the Commission, on June 12, 1964, extended the time for filing comments and reply comments to July 10, 1964, and July 25, 1964, respectively. On July 13, 1964, a further extension requested by EIA was granted and time for filing comments and reply comments was extended to August 25 and September 11, 1964, respectively. All comments and replies have now been carefully reviewed and have been given consideration in formulating the action announced herein.

3. Comments were received from the Radio Corporation of America, A. Earl Cullum, Jr., and Associates; Wells-Gardner Electronics Corporation; Columbia Broadcasting Corporation; Zenith Radio Corporation; Crosley Broadcasting Corporation; Time-Life Broadcast, Inc.; American Broadcasting Company; King Broadcasting Company; Meredith Broadcasting Company; a group of twelve broadcasting entities represented by the firm of Haley, Bader and Potts; Philco Corporation; the Committee for the Full Development of All-Channel Broadcasting; Springfield Broadcast-

ing Corporation; EIA; Western Auto Supply Company; and the Gerity Broadcasting Company. King and Meredith also filed reply comments.

4. In the Notice of Proposed Rule Making in the present proceeding issued April 2, 1964, it was stated that "after an exhaustive study . . . the Commission is satisfied that operation with aural power of 10 percent of the peak visual power is feasible and advantageous." Since that time, a considerable number of television broadcast stations in both VHF and UHF bands, with Commission approval, have experimented with operation at reduced aural power, including the 10 percent level. No substantial degradation of service to the audience of these stations has been reported. Accordingly, the feasibility and desirability of maintaining the 10 percent lower limit is considered to have been well established. The burden of the present proceeding (Docket 15405), then, is to determine the permissible upper limit for aural power, taking into account the apparent desirability for restricting the permissible range to some convenient value, and other pertinent factors.

5. For reasons discussed in the Notice of Proposed Rule Making, we proposed an upper limit of 20 percent; comments received to date provide no compelling reason for adopting some other value. CAB and EIA suggested that a range of ratios between 20 percent and 30 percent was acceptable. They refer to certain tests conducted by receiver manufacturers which indicates that, on extremely marginal signals, an aural-to-visual ratio of less than about 20 percent to 30 percent would produce a degraded aural service to a substantial fraction of receivers in fringe areas. However, a majority of receiver manufacturers participating in the preparation of the EIA comments approved of ratios as low as 20 percent.

6. Several of those commenting on the proposal expressed a view that no reduction in the present upper limit (70 percent) should be undertaken until after further data has been obtained which would support such a reduction. We are of the view that the results of actual on-the-air tests conducted by numerous television stations during the past year do in fact supply the desired data. It does not seem that further postponement of action in this proceeding in order to conduct additional tests is justified.

7. We find that practical experience and theoretical considerations support the practicability and desirability of permitting television broadcast stations to use aural power as little as 10 percent of visual power. We find that, in the interests of achieving economy in receiver design, the range of permissible aural-to-visual power ratios should be reduced from the present range of 10 percent to 70 percent. We further find that the proposed permissive range of aural-visual power ratios, 10 percent to 20 percent, is a reasonable range which will achieve the advantages of a low ratio while at the same time permitting an individual broadcaster to raise aural power 3 decibels above the minimum if circumstances so indicate.

8. Accordingly, IT IS ORDERED, That effective April 19, 1965, § 73.682(a) (15) of the Commission's Rules IS AMENDED to read as follows:

§ 73.682 *Transmission standards and changes.*

(a) *Transmission standards.* * * *

(15) The effective radiated power of the aural transmitter shall not be less than 10 percent nor more than 20 percent of the peak radiated power of the visual transmitter.

NOTE: Existing licensees presently authorized an aural effective radiated power greater than 20 percent of the peak visual effective radiated power may continue to so operate until March 1, 1966.

9. Authority for the amendment adopted herein is contained in § 4(i) and 303(c) of the Communications Act of 1934, as amended.

Adopted March 10, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

NOTE: Rules changes herein will be covered by T.S. III(64)-7.

F.C.C. 65–178

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>JONES T. SUDBURY (ASSIGNOR)<br>and<br>SUDBURY BROS. BROADCASTING CO. (ASSIGNEE)<br>For Assignment of License of Station WCMT, Martin, Tenn. | File No. BAL–5166 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND BARTLEY ABSENT.

1. The Commission has before it (1) the above-captioned assignment application which was dismissed on December 16, 1964, because of overlap of the 1 mv/m contours of WCMT and KLCN, Blytheville, Arkansas, owned by individuals who own 50.05% of the assignee; and (2) a petition for reconsideration filed by the applicants, in timely fashion, on January 15, 1965.

2. The petition repeats the argument, made with the original application, that there is privity between Jones Sudbury and his brothers, Harold and Graham, who control KLCN and own 50.05% of the assignee so that the applicants have grandfather rights to an existing overlap situation; states that slight engineering modifications could remove the overlap; states that a grant of the application would bring financial and administrative advantages to WCMT which outweigh any other public interest factors; and maintains that the Commission should waive Section 73.35(a) of the Rules.

3. When we dismissed the application on December 16, 1964 (FCC 64–1153), we considered the applicants' argument that Jones Sudbury had been employed at KLCN for 20 years, and that Harold Sudbury had actively assisted his brother Jones in the construction, financing, and operation of WCMT, but we still concluded that these relationships did not create grandfather rights so as to prevent dismissal of the application for overlap in violation of Section 73.35(a) of the Rules. We noted that in a comparative hearing (Docket No. 12,839), Harold Sudbury maintained that he did "not consider that he in any way, shape, manner or form has any ownership or any other type of interest or control in his brother's station at Martin" (page 5 of Reply to Proposed Findings of Fact and Conclusions, filed by Harold Sudbury's Newport Broadcasting Company). As noted in the petition, Harold Sudbury made this statement to counter charges that he had a hidden interest in his brother's station. The Examiner agreed that there was no hidden interest, and also found that, for comparative purposes, WCMT should not

be attributed to Harold Sudbury. (FCC 61D–58)[1] The applicants have not submitted any information which indicates that the relationship between Jones and Harold Sudbury is now closer than it was at the time of that decision in 1961.

4. In their second argument, the petitioners maintain that the overlap only involves 7.4% of the area within the 1 mv/m contour of WCMT and 0.37% of the area within the 1 mv/m contour of KLCN, in an area of 65.4 square miles in which an estimated 1,761 persons reside; and that this overlap could be removed by (a) a move of the KLCN transmitter site, or (b) by reductions in the efficiencies of the antenna systems of the two stations to the minimum permitted by Section 73.189(b)(2)(ii) of the Commission's Rules.

5. As we stated when we adopted the recent amendments to the overlap rules (FCC 64–445, released on June 9, 1964, in Docket No. 14711) we are concerned about proposed modifications of facilities designed solely to avoid overlap problems, particularly when these changes result in less than maximum use of the facilities involved. Accordingly, we find that the proposed engineering modifications for the purpose of removing objectionable overlap do not warrant a waiver of Section 73.35(a) of the Rules.

6. Finally, the petitioners contend that a waiver is warranted because Station WCMT will be put "in a much sounder financial position", and a grant of the application "will make available, on a more formal and increased basis, the background and experience of Harold L. Sudbury for the day-to-day operation of WCMT." These generalized conclusions are not supported by any specific allegations and are inadequate to justify a waiver of the rule. cf. *American Colonial Broadcasting Corporation,* FCC 64R–494; and *North Cado Broadcasting Company,* FCC 64–694.

7. In summary, since there are no remaining factual questions about the existence of overlap prohibited by Section 73.35(a) and since the petitioners have not set forth reasons sufficient, if substantiated, to warrant a waiver of that rule, we find that a dismissal of this application is in accordance with the Supreme Court's decision in *U.S. v. Storer Broadcasting Co.,* 351 U.S. 192, 13 RR 2161 (1956).

Accordingly, IT IS ORDERED, this 10th day of March, 1965, that the Petition for Reconsideration filed by Jones Sudbury and Sudbury Brothers Broadcasting Company IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[1] No exceptions were taken to this Initial Decision, which became final on June 21, 1961, pursuant to Section 1.267 of the Commission's Rules.

F.C.C. 65–179

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Petition to Revoke License of SPRINGFIELD TELEVISION BROADCASTING CORP., STATION WRLP–TV, GREENFIELD, MASS.

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND BARTLEY ABSENT.

1. The Commission has before it for consideration (1) a "Petition to Revoke" the license of Springfield Television Broadcasting Corporation for Station WRLP–TV, Greenfield, Massachusetts, filed on September 1, 1964 by F. Elliott Barber, Jr., President of Brattleboro TV, Inc. (hereinafter referred to as Barber); (2) an "Opposition to the Petition to Revoke" filed on September 25, 1964 by Springfield Television Broadcasting Corporation (hereinafter referred to as Springfield); and (3) a "Reply to Opposition", filed on October 21, 1964.[1]

2. In the petition, it is alleged that Brattleboro TV, Inc. is a CATV company operating in Brattleboro, Vermont, which, since Station WRLP–TV began broadcasting in 1957, has carried that station's signal. Petitioner claims, in substance, that in 1964 Springfield, to further its "private business interests"[2] and without affording a reasonable opportunity for response, broadcast a series of editorials over WRLP–TV which were highly critical of CATV operations in the Brattleboro-Greenfield area and some of which constituted "attacks of a personal nature" against Barber and other CATV operators. According to petitioner, Springfield has therefore willfully and repeatedly violated the Commission's fairness doctrine (*Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949)), as codified in Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. 315(a), warranting "revocation proceedings, or, at the very least . . . a cease and desist order and . . . the maximum forfeiture permissible."[3]

3. In support of its contention that Springfield has violated the fairness doctrine, petitioner submitted copies of 26 editorials broadcast by WRLP–TV during the period from March 23, 1964 through June 22, 1964. These editorials clearly support peti-

[1] Pursuant to letter requests, the times for filing the Opposition and the Reply were, respectively, extended.

[2] For example, petitioner claims that Springfield broadcast the editorials in question to intimidate petitioner into carrying WRLP–TV as the exclusive NBC outlet on petitioner's cable.

[3] Petitioner also claims that Springfield's failure to comply with the fairness doctrine is compounded by "reckless . . . [dis]regard for the truth", which also shows that Springfield failed to act in good faith.

tioner's allegation that WRLP–TV has presented (i) its own viewpoint concerning the operations of CATV systems and (ii) in some instances personal attacks on Barber and other CATV operators. Petitioner states that neither Barber nor Brattleboro, TV, Inc. was ever specifically offered an opportunity to respond to the editorials, and that to its knowledge Springfield never made a reasonable effort to present any viewpoint which would differ with the station's editorials.

4. In its opposition, Springfield did not deny that some of its editorials constituted personal attacks on Barber and other CATV operators. Springfield also acknowledged (Opp., p. 6) that the question of CATV operations in the Brattleboro area is a controversial issue of public importance. But it asserted that it is the only local television station serving that area and that, over a period of several years, some 20 CATV systems have commenced operations. Springfield alleged that the area suffered from an almost total lack of information relating to CATV operations and their over-all effect upon continued local television service; that there was thus "no one well-known source" to which the public could turn for such information; and that Springfield in its judgment as a licensee therefore decided to broadcast the editorials in question to insure that the public was not "totally deprived of any information concerning these matters."

5. Springfield did not dispute petitioner's allegation that petitioner had not been specifically offered time to respond to the editorials in question.[1] But Springfield claims that, nevertheless, petitioner was afforded "every opportunity" to respond to the editorials. Springfield stated that it mailed transcripts of the editorials to petitioner, every known CATV operator in the area, newspapers, and members of the public who requested them, and that in instances where petitioner was mentioned by name, a copy of the editorial was sent to petitioner on or before the day of broadcast. Springfield claims that "Despite the mailings of its editorials to interested parties . . . WRLP–TV in the entire period did not receive one request, or even any inquiry, concerning the use of its facilities for an opportunity to respond to the editorials."

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[1] Springfield did claim that it made a "specific offer" of an opportunity to respond in an editorial which was broadcast on June 17, 21, and 22, 1964. But from a review of the editorial, it appears that this "offer" was, in itself, in the nature of another attack on CATV operators. Thus, the editorial stated that Springfield:

". . . would be happy to entertain such a request, [for 'equal time'] if it came from a responsible cable operator, if there is such a thing. But we doubt very much if any such request will be forthcoming. You see, there aren't very many cable owners in these parts anyhow; most of them are owned by fat cats who live in New York penthouses, and regard their investments in cables hereabouts as an excellent way to have you pay their bills, maintain their ski resorts, etc. Some cables are owned by people who might hear this offer, if they were at home, but you are paying their traveling bills. Then there are some cable operators who don't have the nerve to ask for an appearance on camera.

"What it all adds up to is that there can be no question as to the truth of everything we have said to you on the subject of these pirates and their takings over all these years. If there were the slightest place where we were off base, you can bet your bottom dollar they would be beating on our door demanding a chance to give their side of the story. So the story will stand, just as we have given it to you, for you know just as well as we do that Able Cable is a liar. How many times did he promise you that your capital contribution would be refunded when you wanted it? And how readily has he given it to you? All his other lies and deceitful practices are pretty well known too, if you care to think about them."

In any event, we note that this "offer" was not broadcast until the end of the editorial campaign, some 13 weeks after it had begun, and long after the broadcast of several personal attacks against Barber and others (see, e.g., editorial broadcast, No. 1 (Apr. 7, 8); No. 6 (May 8, 9, 11); No. 15 (June 5, 7, 8); No. 16 (June 12, 14, 15); No. 17 (June 17, 21, 22).

According to Springfield, petitioner's "prior inaction and silence and nature of his present request" demonstrate that the purpose of the petition "is to still any public discussion of the operations of CATV systems within the WRLP–TV service area."

6. Springfield also argues that, in any event, revocation or forfeiture would be inappropriate here since Springfield has not been shown to have violated any specific provisions of the Communications Act or the Commission's rules. Springfield states that "the Commission to this date, has declined to adopt concrete rules governing the application and enforcement of the Fairness Doctrine" and that Section 315(a) of the Communications Act "does no more than embody the general and flexible standard of fairness established in the Report on Editorializing and the procedures created to provide compliance therewith."

7. First, we emphasize that Springfield's right to editorialize is not at issue here; we repeatedly have made clear that licensees have a right to editorialize. Moreover, the fact that Springfield is personally involved in the controversy upon which it editorialized is immaterial, so long as its editorials were based upon a good faith judgment of the needs and interests of its community. There has been no showing that such is not the case here. Further, we do not believe that in the circumstances of this case, the question of the truth of statements and charges contained in the editorials is crucial to our disposition of the petition. Rather, the essential question here is whether in presenting its viewpoint on a controversial issue of public importance (and in connection therewith, personal attacks upon petitioner and other CATV operators), Springfield discharged its obligations under the fairness doctrine simply by transmitting the texts of the editorials to the persons concerned. So stated, the question presented does not require the adoption of new policies or doctrines, or a new interpretation of the scope of a licensee's responsibilities under the fairness doctrine. The Commission has already passed upon the question and has made clear that a pattern of conduct, such as that of Springfield here, falls far short of meeting such responsibilities.

8. Thus, we have repeatedly stated that when a licensee, in connection with its coverage of a controversial issue, broadcasts a personal attack on an individual or organization, it must "transmit the text of the broadcast to the person or group attacked . . . either prior to or at the time of the broadcast, *with a specific offer of his station's facilities for an adequate response.*" Public Notice of July 26, 1963; *Controversial Issue Programming,* FCC 63–734 (emphasis supplied). See also *Capitol Broadcasting Company, Inc.,* FCC 64–774; *Clayton W. Mapoles,* 23 Pike & Fischer, R.R. 586 (1962).[5] We have also stated that a licensee's obligation to provide a reasonable opportunity for the presentation of contrasting viewpoints on a controversial issue of public importance is not met by "the mere sending of a copy of [the] editorial to an interested person." *Capitol Broadcasting Company, Inc., supra.* As we explained in that opinion, "The fairness doctrine is not so well

[5] Copies of the Commission's July 26, 1963 Public Notice were sent to all licensees, including Springfield, at the time of its release.

known that persons receiving copies of station editorials know that they are being offered an opportunity to respond; indeed, it is our experience that many licensees send out copies of their editorials to hundreds of persons, with no intention of offering time to this large number."[6]

9. Further, we have made clear that broadcast stations must "be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal interests of the licensee" (*Editorializing Report*, 13 F.C.C. at 1248), and that, therefore, where a licensee has made a good faith judgment that it should present its viewpoint on a matter in which it is personally involved, the licensee has a particular duty to insure that the requirements of fairness are satisfied. See *Letter to Emerson Stone, Jr.*, FCC 64-362 (1964); *WSOC Broadcasting Co.*, 17 Pike & Fischer, R.R. 548 (1958). Thus, the fact that Springfield is the only TV station in this area of substantial CATV penetration (par. 4, *supra*) rather than giving it a license to ignore its public interest responsibilities imposes upon it the particular duty to observe the requirements of the fairness doctrine when it decided to editorialize on CATVs. Springfield, however, far from making the special efforts to achieve fairness required in this case, has not shown that it made the minimum efforts required in the ordinary case. We find, therefore, that Springfield, particularly in view of its failure to comply with the requirements of the personal attack principle on a matter in which it was personally involved, has seriously failed to discharge its responsibility to operate in the public interest.[7]

10. However, we believe that even though there has been this serious failure, the case does not warrant the extraordinary relief requested by petitioner. Rather, we shall follow our usual practice in cases of this nature of considering the matter at license renewal time. See, e.g., *National AntiVivesection Society* v. *Federal Communications Commission*, 234 F. Supp. 696 (1964); *Clayton W. Mapoles*, 23 Pike & Fischer, R.R. 586 (1962). In considering the matter at that time, we will require Springfield to submit a detailed showing as to its operations in the area of controversial issue programming during the license period and particularly its efforts affirmatively to encourage and implement the presentation of contrasting viewpoints with respect to the issues it has covered (including the issue of CATV).

11. Thus, from a procedural point of view, there are two distinct issues before us. The first is whether the station has complied

[6] Our ruling in the *Capitol Broadcasting* case was released after the conclusion of Springfield's editorial campaign. However, we made clear long before the broadcast of the editorials in question that the mere sending of a script to a person who has been personally attacked is not sufficient to satisfy a licensee's obligations under the fairness doctrine.

[7] We have noted here Springfield's claim that petitioner is not interested in presenting contrasting viewpoints—that rather, his purpose is to still any public discussion of CATV operations within the WRLP-TV service area. In this regard, Barber has stated in an affidavit submitted with the petition that "speaking for my company and myself, I would not bother to dignify the rantings of the station manager of WRLP with the use of his facilities to answer his personal attacks on me." But the short answer is that Springfield was required affirmatively to encourage and implement the presentation of contrasting viewpoints and thus to afford the opportunity to inform the public of both sides of the issue. If it had done so, its obligation under the fairness doctrine would have been met—and public discussion would not, in any event, be stilled (see par. 8, *Editorializing Report*, 13 F.C.C. at 1250-1; see also Public Notice of July 1, 1964, *Handling of Controversial Issues of Public Importance*, Ruling No. 19, 29 F.R. 10415, 10420.

with the requirements of the fairness doctrine on a specific controversial issue during an appropriate time period. For the reasons stated in our *Letter to Chairman Oren Harris,* FCC 63–851 (1963), generally speaking, we rule upon that question at the time of complaint. We therefore did so in this case, and have found that there has been a failure to comply with the requirements of the fairness doctrine as to the controversial issue (and personal attacks made in connection with that issue) presented in the above-noted editorial series. There is a second question—whether the licensee is operating in the public interest in the area of controversial issue programming on an overall basis (that is, as to all its controversial issue programming and not just a complaint directed to a specific issue). As we stated in the above-noted *Letter to Chairman Oren Harris,* this second question is most suitably determined at the time the licensee submits an application for renewal of license. This is because, as the *Editorializing Report* states (13 F.C.C. at 1255) :

> . . . actual consideration of [licensee's programming] service has always been limited to a determination as to whether the licensee's programming, taken as a whole, demonstrates that the licensee is aware of his listening public and is willing and able to make an honest and reasonable effort to live up to such obligations. The action of the station in carrying or refusing to carry any particular program is of relevance only as the station's actions with respect to such programs fits into its overall pattern of broadcast service, and must be considered in the light of its other program activities. This does not mean, of course, that stations may, with impunity, engage in a partisan editorial campaign on a particular issue or series of issues provided only that the remainder of its program schedules conform to the statutory norm of fairness; a licensee may not utilize the portion of its broadcast service which conforms to the statutory requirements as a cover or shield for other programming which fails to meet the minimum standards of operation in the public interest. But it is clear that the standards of public interest is not so rigid that an honest mistake or error in judgment on the part of a licensee will be or should be condemned where his overall record demonstrates a reasonable effort to provide a balanced presentation of comment and opinion on such issues.

In short, petitioner has presented no compelling reasons which would warrant a departure from our usual practice in this case. Rather, we believe that Springfield's violation of the fairness doctrine, while serious, would be better considered at the time Springfield next files an application for renewal of license for WRLP–TV.

12. For the foregoing reasons, IT IS ORDERED this 10th day of March, 1965, that the Petition to Revoke filed by F. Elliott Barber, Jr., President of Brattleboro TV, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–194

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In the Matter of AMENDMENT OF SECTION 73.316 CONCERNING ANTENNA SYSTEM FOR FM BROADCAST STATIONS (HORIZONTAL AND CIRCULAR OR ELLIPTICAL POLARIZATION) | Docket No. 15521 |

### REPORT AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND BARTLEY ABSENT.

1. The Commission has under consideration its Notice of Proposed Rule Making (FCC 64–578) issued in this proceeding on June 25, 1964 and published in the Federal Register on June 30, 1964 (29 FR 8233) in which it invited comments and data on a proposal to add the following to the text of Section 73.316(a):

> Stations authorized as of September 10, 1962 with powers in excess of those specified in Section 73.211 or their equivalents, will not be permitted to operate with vertically polarized effective radiated power in excess of those maximum powers or their equavalents listed in that section.

The present rule reads as follows:

> It shall be standard to employ horizontal polarization; however, circular or elliptical polarization may be employed if desired. Clockwise or counterclockwise rotation may be used. The supplemental vertically polarized effective radiated power required for circular or elliptical polarization shall in no event exceed the effective radiated power authorized.[1]

Thus, it was proposed that stations which were super-maximum (those which have power in excess of the maximum in Section 73.211 or the equivalents of these powers and antenna heights), some of which are also short-spaced with respect to one or more other FM stations, would not be permitted to employ vertical power in excess of the maximum authorized for the class of station involved even though the power in the horizontal plane was above these maximums.

2. It was stated in the Notice that we would continue to permit FM stations to employ power in the vertical plane equal to that authorized for the horizontal up to the maximum permissible for the class of station but that we were reluctant to do the same for the super-maximum stations until we had more information on the effect of adding a vertical component of power on the potential interference to other stations. Comments and measurement data

[1] If a vertical component is added which is equal to the horizontal component and exactly 90 degrees out of phase, the resultant wave is a circularly polarized wave. If the vertical component is not equal to the horizontal or not exactly 90 degrees out of phase, the resultant wave is elliptically polarized.

were filed by the following parties: Mid-States Broadcasting Corp., licensee of FM Stations WSWM, WQDC, WABX and WGMZ, all in Michigan, KCBH–FM, Beverly Hills, Calif., Chronicle Publishing Co., licensee of KRON–FM, San Francisco, Calif., KBRG, San Francisco, Calif., Kaiser Broadcasting Corp., licensee of KFOG, San Francisco, Calif., National Association of FM Broadcasters (NAFMB), Triangle Publications, Inc., licensee of WNHC–FM, New Haven, Conn., Pacifica FM, Inc., licensee of KPEN, San Francisco, and KMLA Broadcasting Corp., licensee of KMLA, Los Angeles, Calif. All but Mid-States oppose the proposed amendment to the rules. Triangle and Pacifica submitted measurements in support of their comments.

3. The party supporting the proposal urges that no increase in effective radiated power beyond the present rules be authorized and in addition that if a vertically polarized antenna is to be used, the power be divided between the horizontally polarized antenna and the vertical one. In support of these requests the party states that cancellation and addition of wave fronts due to the addition of vertically polarized power will cause loss of signal in some areas and create interference in others. Finally, this party submits that service to FM automobiles should come about through improved reception techniques rather than transmission techniques which tend to add questionable characteristics into the FM spectrum.

4. The parties opposing the amendment of the rule, most of which are super-maximum stations in the Los Angeles and San Francisco areas, advanced various reasons in opposition. They point out that the proposal would seriously limit the benefits of vertical polarization, especially in areas of rugged terrain such as prevail in some parts of California. They submit that in "grandfathering" in the super-maximum stations the Commission recognized the need for greater power to serve extensive urbanized areas and rugged terrain. It is urged that several super-maximum stations have had experience with vertical polarization (15 out of 19 Class B stations in the San Francisco area are super-maximum) and that they report it to be quite helpful in minimizing multipath FM distortion problems and improving reception by mobile receivers without any noted increase in interference. They argue that because of the great reduction in power due to high antenna heights generally used in the areas, the many Class A stations which operate often within the 1 mv/m contours of these stations, and the improvement made in the facilities of other stations as a result of the Fourth Report and Order in Docket 14185, the use of vertical polarization is the only partial relief these stations have to improve their service to the public. From the technical point of view they contend that vertically polarized signals are essentially the same as horizontally polarized ones within radio line-of-sight but that they fall off more rapidly at greater distances. Thus, they should not significantly increase co-channel interference but would provide a more uniform field where hills, mountains, large buildings etc. present multipath and shadow conditions.

5. NAFMB states that they have concluded from a number of measurements conducted by member stations (not submitted) that

power in the vertical plane in addition to the horizontal power improves service within the station's coverage substantially but does not significantly increase the potential of interference to other stations. They urge that the proposal would foreclose many FM stations from utilizing power in the vertical plane equal to that in the horizontal plane and that a particular advantage of circular polarization (which can be properly accomplished only by the addition of an equal vertical component) is the resulting improvement in automobile reception.

6. Triangle submits the results of a measurement program involving WNHC–FM which is authorized to operate with both horizontal and vertical power at the present time. The purpose of the program was to determine the overall effect of adding vertically polarized power on the radiated signal of an FM station and to determine whether or not this addition increases the interference potential in the area of home receiving antennas. Measurements were made within the service range of the station in New Haven and Hartford and at distances ranging up to 85 miles in order to determine the impact on both the service fields and interference fields. The conclusions drawn from these measurements with respect to the service fields are as follows:

(a) In the absence of shadowing or diffraction effects, transmission of a vertical component adds little to the signal received on a horizontal receiving antenna but a substantial improvement results in the presence of shadow and diffraction effects.

(b) When receiving antennas have a substantial vertical component, as is the case with auto radios, a substantial improvement is obtained at distances up to 50 miles from the transmitter.

(c) With respect to the interference potential, the conclusion drawn is that the field received at distances of 60 to 80 miles for 10% of the time, increases about 12% (approximately 1 db) over the horizontal component of the field when horizontally polarized transmissions are used alone.

7. Pacifica FM states that it has operated with elliptical polarization for a period of 9 months and that it has made measurements and observations which lead it to conclude that the addition of a vertical component equal to the horizontal component will in no significant way increase the service range of a station. It contends, however, that such operation does greatly improve coverage within the service range especially in shadowed terrain. The noted improvements were less multipath distortion, better reception in homes and in automobiles, and fewer reception problems. They urge that if such improvements are obtained with elliptical polarization, even better results would be obtained from circular polarization.

8. In conclusion it appears that the use of vertical polarization results in an improvement of service to the public, both in home receivers and in automobile receivers and that the improvement is greatest where the terrain conditions are poor. Furthermore, this improvement does not result in any significant increase in inter-

ference to other stations. The measurements of Triangle do show a potential increase in interference fields of about 1 db. However, any station which would be affected by such an increase could improve its own service by using vertical polarization and recover any resulting loss. We are, therefore, of the view that our rule governing the use of circular or elliptical polarization should not be changed as proposed but that all stations, whether they are super-maximum or not, should be permitted to add a vertical component of power up to the value of the horizontal component. In view of the above Section 73.316(a) will be retained as presently written.[2]

9. IT IS ORDERED, That this proceeding IS TERMINATED.

Adopted March 10, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] There has been some misunderstanding concerning this rule with respect to the location of the vertical antenna, if a separate one is used. It is intended that the vertical antenna will be close to the horizontal antenna in both the vertical and horizontal directions.

F.C.C. 65–195

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES, REGARDING AM STATION ASSIGNMENT STANDARDS AND THE RELATIONSHIP BETWEEN THE AM AND FM BROADCAST SERVICES | Docket No. 15084 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND BARTLEY ABSENT.

1. The Commission has before it for consideration nine petitions for reconsideration of the Report and Order released July 7, 1964 (FCC 64–609, 29 F.R. 9492, 2 Pike & Fischer R.R. 2d 1658), adopting new AM rules and a rule limiting FM "duplication" of AM programming in cities of more than 100,000 population.

### I. *The New AM Assignment Rules*

2. Only three parties filed petitions objecting to the new rules governing authorization of new and changed AM facilities: the National Association of Broadcasters (NAB), Greater Indianapolis Broadcasting Company, Inc. (WXLW, Indianapolis), and Paul E. Taft d/b as Taft Broadcasting Company (KODA, Houston, Texas). To some degree, Greater Indianapolis and Taft repeat generalized arguments in favor of *ad hoc* decisions and against the adoption of fixed standards to define the overlap of signal intensity contours which will be prohibited. To the extent these arguments are advanced, they are rejected for the reasons stated at length in the Report and Order (paragraphs 11–13) and in the Report and Order in Docket No. 14711, adopting the new "duopoly" rules (FCC 64–445, 29 F.R. 7535, 2 Pike & Fischer R.R. 2d 1588, 1593–1595). Our action in this respect is thoroughly consistent with Sections 307(b) and 309(a) of the Communications Act. It is clearly within the scope of our statutory authority and not unreasonable.[1]

3. The NAB and Greater Indianapolis object more specifically to the standards adopted for new nighttime authorizations, particularly the requirement that no new nighttime operation will be authorized unless it will bring a first nighttime primary service to 25% or more of the station's primary service area—the "25% white area" requirement. Petitioners contend that the standards should be more liberal in permitting existing daytime-only stations

[1] *National Broadcasting Company* v. *U.S.*, 319 U.S. 190 (1943); *U.S.* v. *Storer Broadcasting Company*, 351 U.S. 192, 13 R.R. 2161 (1956); *Logansport Broadcasting Corporation* v. *F.C.C.* 210 F. 2d 24, 10 R.R. 2008 (1954).

to obtain full-time facilities. NAB attacks as unsupported our statement that new nighttime operations would generally serve little "white area" and would cause losses in existing service, and asserts that we have ignored the public interest in having a second or third nighttime service available to a particular community or area, providing diversity of programming and avoiding monopoly situations. It is also urged that we are inconsistent in saying that AM radio service is no longer a dominant medium at night, and at the same time protecting present service from existing outlets in this "non-dominant" medium.

4. Greater Indianapolis, licensee of daytime-only station WXLW in Indianapolis, is concerned about loss of "pre-sunrise" operating hours if our proposal in the "pre-sunrise") rule making proceeding (Docket No. 14419) should be adopted.[2] It urges that the present proceeding cannot be decided separately from the "pre-sunrise" proceeding; and that, if the problem is avoiding interference to existing service, we should approach this through a more exact definition of ("objectionable interference" rather than imposing a "25% white area" standard. Greater Indianapolis contends that, at the very least, daytime-only stations which would lose their pre-sunrise privileges under the proposal in Docket 14419 should be permitted to operate nighttime.

5. Neither party seriously controverts our statement in the Report and Order that all new nighttime operations do cause some interference to existing service, whether or not this new interference is recognized under our present rules. (Report and Order, paragraphs 25–27.)[3] We stated in the Report and Order (paragraph 26) that the basic question before us was whether the losses involved in authorizing new nighttime operations on a less restrictive basis would be justified by the benefits resulting from providing additional local fulltime AM outlets. We concluded that the benefits would not outweigh the losses. In reaching this conclusion we considered the various arguments in favor of additional local outlets that NAB now urges upon us again. Upon reconsideration, we find no reason to strike a different point of balance and, therefore, we adhere to the decision reached previously.[4]

6. As to Greater Indianapolis' contentions, we noted in the Report and Order (footnote 13) that the decision reached as to nighttime authorizations relates to continued operation throughout the evening, and not to "pre-sunrise" operation, the subject of another proceeding. There is no reason why these matters should not be treated separately. The "pre-sunrise" problem, with its many complexities, differs from the more general matter of new nighttime authorizations in at least two significant respects: (1) the hours involved in the former are in part "transitional" hours, when full nighttime propagation conditions do not apply; and (2) for the most part, the "pre-sunrise" proceeding relates to existing service

[2] The proposal in Docket 14419 would limit such operation to cases where there is no fulltime station in the community.

[3] As petitioner Taft mentioned: "It is well-known that nighttime sky-wave interference contributes to actual interference beyond that measured by the Commission's RSS rule. . . .".

[4] NAB's argument concerning "inconsistency" is without substance. The fact that AM radio is no longer a dominant broadcast medium at night is no reason why such service should not be protected where it now exists.

and the extent to which it can and should be present. It may be appropriate to adopt different standards for the limited time period involved in "pre-sunrise" operation, in view of the different consideration obtain. We emphasize again that the conclusions we have reached in this proceeding apply to grants of full nighttime facilities, not to the question of "pre-sunrise" operation.

7. Greater Indianapolis contends that if our concern is avoiding reference to existing stations, we should do it by tightening the rules concerning what is objectionable nighttime interference and do away with the "25% white area" concept. However, for reasons stated in paragraph 25 of the Report and Order concerning the nature of nighttime interference, this is not a feasible approach to the problem. It would be extremely difficult to draw rules in this respect enough to prevent the degrading effect of interference, especially with respect to the regional channels—including 950 kc/s, on which WXLW operates—where there are already multiple nighttime signals. If made sufficiently restrictive to prevent this undesired effect, any such rules would probably operate to preclude full time operations except in a very few cases. We believe it preferable to the nighttime interference rules as they are, and make grants of new nighttime facilities only where really substantial service benefits will result—i.e. service to "25% white area".[5]

8. Taft's petition relates to its daytime-only station KODA, Houston. It has tendered an application (along with a petition for waiver of the applicable rules if its petition for reconsideration is denied) for increase in power and change in directional array, which presents the following considerations: (1) overlap of KODA's 0.025 mv/m contour with the 0.5 mv/m contour of one co-channel station would exist in an area where it does not now occur, but would be eliminated elsewhere so that there would be a net decrease in proscribed overlog area; (2) the extension of KODA's 0.5 mv/m contour in another direction would result in an increase in the area of "interference received" overlap with another co-channel station's 0.025 mv/m contour. In other words, there would be a —— area of "interference caused" to one station but a net decrease in that area with respect to that station; and there would be an increase in area of "interference received" from another station. Taft's petition for reconsideration urges that, with respect to major changes in daytime facilities: (1) where "interference caused" is involved, such changes should be permitted if the net result would be a decrease in the area of overlap, even if some new area is involved; (2) where the only consideration is "interference received", the change should be permitted if general improvement in service would result.

9. As to the first point, we agree with Taft. As in the case of the new "duopoly" rules, it appears appropriate to permit a major change in daytime facilities if the net result—with respect to each and every station with which prohibited overlap now exists—is to decrease the area of overlap, even though some new area may be

[5] Greater Indianapolis' petition actually amounts to more than a petition reconsideration. As stated therein, WXLW has for some time been trying t Dept. Please supply missing copy. . . . . .

involved, and where no new overlap will occur with respect to any station not now involved. Section 73.37 is amended accordingly in the Appendix hereto.

10. However, Taft's second point, concerning "interference received", must be rejected. Taft recognizes that "the new 'go-no go' prohibited overlap system of AM station allocation is primarily directed at spacing new AM stations and regulating spatially change of frequencies of existing AM stations" (Petition for Reconsideration, page 3). In its petition for waiver of the rules, Taft also concedes that "there is a logical basis for requiring applications for changes in frequencies of existing stations [and, of course, for new stations] to comply with the new 'go-no go' rules" (Petition for Waiver, page 3). Taft argues, however, that this logical basis for the rules may disappear when an existing station merely seeks to improve its facilities in a manner which will *cause* no new prohibited overlap. In this situation, Taft contends, increased areas of *received* overlap will not result in a loss of service to anyone previously involved and will enable the station to render better service to more people.

11. Taft's argument is based upon an unreal distinction between applications for new stations and major changes. Taft concedes that a go-no go prohibited overlap system is a reasonable method to determine required separations between new stations. Thus it would be reasonable, using this system, to require a 100 mile spacing between two new one kilowatt stations and to require a somewhat larger spacing, e.g., 120 miles, between the same two new stations operating with five kilowatts. Since this is so, it is impossible to follow Taft's logic in arguing, in effect, that the two new stations should be allowed finally to operate at a 100 mile spacing with five kilowatts, so long as the facilities are achieved through two successive applications: the first for a new one kilowatt station and the second for a power increase to five kilowatts. If there is a logical basis for the prohibited overlap rules as applied to new facilities or frequency changes, as Taft concedes, this basis must apply equally to applications for major changes.

12. The plain fact is that Taft's argument against the rule limiting received prohibited overlap may be made against any rule restricting overlap or interference received, whether a zero percent rule, a 10% rule, or some other variant. The reasons justifying a rule restricting interference received were set out in the Report and Order in this proceeding (see, particularly, paragraph and in previous Commission statements. See *In the Matter of Amendment of Section of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations,* 10 Pike & Fischer R.R. 1595, 1598. Unless Taft means to contend that no limitation on received interference is justifiable where applications for major changes are involved, its contentions must come down to a disagreement with the precise point at which we have chosen to draw the line. We have been shown no reason why our decision as to the general rule is unreasonable in this respect.

13. We do not say that the rule concerning received overlap should never be waived. If the service that an existing station is

able to provide with authorized facilities is patently inadequate, it is possible that a waiver of the rules may become necessary to make the best of a bad existing situation. Whether or not such a waiver is justified, however, will depend on a number of variables peculiar to the individual situation involved.

*Other AM matters*

14. Two other matters concerning AM assignments have been raised by certain pending applications tendered along with requests for waiver, and we believe the matters involved may be handled by clarification of the rule rather than in individual cases on petition. These are overlap occurring entirely over sea water, and overlap with foreign stations.

15. *Overlap over sea water:* Four applications recently tendered present situations where "prohibited overlap" with existing stations occurs entirely over sea water. Typically, the stations involved are separated by distances greatly in excess of those necessary to avoid overlap over land areas, and the overlap occurs only as a result of the extremely high conductivity of the sea water path. We believe that rigid application of the overlap rules in such cases is an unnecessary restriction on our ability to assign stations in coastal areas. Therefore, a note is added to Section 73.37 of the Rules, to the effect that the overlap of contours mentioned therein will not bar the grant of an application where the area of overlap occurs only over sea water.

16. *Overlap with foreign stations.* As literally interpreted, new Section 73.37 would completely forbid overlap of a proposed U.S. station with a particular foreign station—e.g., the proposed new 0.025 mv/m contour with the 0.5 mv/m contour of a Canadian station even where the overlap area is entirely within the United States and no other prohibited overlap would exist. Such an assignment would not be prohibited by applicable international agreements (the North American Regional Agreement (NARBA)) and the U.S./Mexican Agreement). This situation appears undesirable if for no other reason that it would permit foreign countries to make assignments close to the border where we could not. Therefore, it appears that, while with respect to "interference received" there is no reason to differentiate between that from existing foreign and existing domestic stations, with respect to "interference caused" (as in the example mentioned) the criteria should be those of the pertinent international agreement instead of those set forth in Section 73.37. The new note to that section, contained in the Appendix hereto, so states.

17. The additions to the rules mentioned above are interpretative in character, and relax existing restrictions. Therefore, notice and rule making proceedings as specified in Section 4 of the Administrative Procedure Act are not required.

II. *Limitation on FM Duplication of AM Programming*

18. We turn now to the petitions for reconsideration directed at the new rule—Section 73.242—providing that after August 1, 1965, FM stations in cities of over 100,000 population shall not devote more than 50% of their average broadcast week to duplication of

the programs of a commonly owned AM station in the same local area. In addition to NAB, these petitioners (and their AM–FM holdings) are as follows:

(a) Columbia Broadcasting System, Inc. (CBS), 7 AM–FM in same cities (all over 100,000), all duplicating completely or nearly so.

(b) Storer Broadcasting Company (Storer), 5 AM–FM in same cities (all over 100,000) all duplicating completely or nearly so.

(c) Capital Cities Broadcasting Corporation (Capital Cities), 2 AM–FM in same cities (over 100,000), one duplicating completely and one independently programmed.

(d) Interstate Broadcasting Company, Inc. (Interstate), one AM–FM (New York City), duplicating completely or nearly so.

(e) Kaiser Industries Corporation (Kaiser), licensee of one FM station (San Francisco) not affiliated with an AM station, and permittee of another (Honolulu) which proposes a small amount of duplication of the AM affiliate.

(f) Newhouse Broadcasting Corporation and Mount Hood Radio and Television Broadcasting Corporation (joint petition; Newhouse owns 50% of Mount Hood). Newhouse is licensee of three AM–FM combinations in cities of over 100,000, two duplicating completely or nearly so and one programmed independently; Mount Hood holds one such combination, (Portland, Oregon), duplicating completely or nearly so.

19. We also have under consideration a statement opposing these petitions filed by the National Association of FM Broadcasters (NAFMB), which is hereby accepted.[6]; the NAB's "Petition to Stay Effective Date of Rules Regarding Non-Duplication of Programs on Jointly Owned AM–FM Stations", various informal communications supporting that petition or urging postponement of the effective date for a lengthy period; and the NAFMB's statement concerning the NAB's request (opposing the postponement of the effective date but agreeing that requests for individual exemption might be filed up to three months before that date).

20. In dealing with these petitions, it is appropriate to point out initially the limited scope and effect of the rule. In the 125 cities to which it applies, there are some 551 authorized FM stations in the commercial FM band. 214 of these are not affiliated with AM stations in the same city or nearby, and therefore are not covered by the rule. Of the remaining 337, more than 137 presently are programmed separately, entirely or 50% or more of the time, leaving fewer than 200 which would have to change their mode of operation in greater or lesser degree.[7] A number of these are associated with daytime-only AM stations, and numerous others now

[6] The NAFMB "Statement" was originally timely filed (August 19, 1964) but was inadvertently not served on the petitioners. On September 22, 1964, it was retendered after having been duly served, together with a petition requesting its acceptance. No opposition thereto was filed, and the "Statement" is accepted.

[7] There are 132 cities in the United States (including Alaska, Hawaii and Puerto Rico) with more than 100,000 population. Of these, 7 are near larger metropolitan centers and have no FM channels assigned to them. In addition to Commission records, the figures in this paragraph are based on information from Standard Rate & Data Service and Broadcasting Yearbook (1965). The figure of 200 stations includes several in CP status, not yet on the air.

program separately to a considerable extent. In these cases no radical change in operation would be required, since the rule requires only 50% separate programming. Additionally, we have specifically provided in the rule for exemption in appropriate circumstances, on the basis of individual requests.

21. We turn first to the argument advanced by some of the petitioners that by this rule the Commission is usurping the responsibility and right of the licensee to make the judgments concerning the programming to be presented over his stations, based on his ascertainment of the needs and interests of his community and effort to meet those needs and interests and his judgment as to whether and to what extent separate programming is economically feasible.[8] This argument is without substance. Under Section 303(g) of the Communications Act, we are required generally to "encourage the larger and more effective use of radio in the public interest". This mandate clearly requires us to make a decision as to what extent we should permit two frequencies to be used to transmit the same signal in the same general area. We were of the view that the course of action taken—requiring a reasonable degree of separate use of AM and FM channels in the larger markets where there is a growing demand for channels—is in furtherance of this objective. We adhere to that view. Moreover, our action in this area is of the character contemplated by paragraphs (a), (b) and (c) of Section 303—under which we are directed to classify stations, assign bands of frequencies for, and prescribe the nature of the service to be rendered by, each class. Our action here is within the area of our responsibility.

22. The other arguments advanced by the petitioners may be summarized as follows (as NAFMB mentions in reply, most of them have been advanced before):

(a) Economic arguments—the asserted increased costs entailed by separate programming (Storer estimates a minimum of $3,000 or $4,000 a month), the fact that in a number of the markets involved total radio operations show a loss, the fact "independent" (non-AM-affiliated) FM stations in general do not show a profit; the assertion that there will be little additional revenue available for the new separate FM operations; the assertion (by Interstate on behalf of WQXR and WQXR–FM, New York) that its rates will have to be cut because each service will lose about half of the present WQXR AM–FM audience).

(b) Technical arguments, concerning how FM supplements AM coverage, for example in the case of AM stations highly limited in service area at night because of interference, and FM's greater serviceability of FM in areas of high noise and electrical interference levels.

(c) Programming arguments: the argument that increased costs will require stations to trim their programming expenditures and less desirable programming will result; that (because of the technical factors mentioned above) many listeners

[8] Capital Cities and Newhouse, which program some of their AM-FM combinations separately and duplicate others, call attention to their own judgments that separate programming is appropriate in one market, while duplicated programming is appropriate in another market.

would lose the desirable programs now presented on the AM station which they can receive satisfactorily only on FM. It is asserted (by CBS, Kaiser and others) that much (according to a CBS 1961 survey the great majority) of FM listening is to "duplicated" programming, and that the availability of this type of programming on FM has been an important factor in such development as has occurred so far in the medium.[9]

(d) The asserted illogical character of the rule—providing for a greater variety of program fare in the larger markets where there is often already a plethora of diverse programming available, and leaving untouched the situation in smaller places where there is less program choice for the listener.

23. As we have pointed out previously, the fundamental principle involved here is the wasteful and inefficient use of two frequencies to bring a single broadcast program to the same receiver location—a situation which is undesirable and which should not be permitted to continue unless there are substantial countervailing benefits. This waste and inefficiency is particularly significant when a demand arises for use of the frequencies, as it has now arisen in connection with FM in the larger markets. There are relatively few channels in the 125 cities involved which are neither occupied nor applied for, and in a number of instances competing applications are pending for the last channel or channels available in one of these communities.[10] In our judgment, the time has come to act to remove this inherent inefficiency to the extent we have provided in the rule, limited to cities of over 100,000 and 50% nonduplication, except where the benefits flowing from it are sufficient to warrant exemption on an individual basis.[11]

24. With respect to the economic and programming arguments mentioned, we stated in the Report and Order (paragraph 42) that it was recognized that individual licensees might suffer some short-term detriment; but we believed—and it is still our view—that there will be no net loss of FM service available to the public or substantial reduction in its quality. Insofar as they affect the public interest, as opposed to merely the private interest of the licensee, these are considerations which will be taken into account if presented in individual exemption requests. The same is true of the technical arguments mentioned, which may afford an appropriate basis for exemption in particular cases, depending on the facts presented. But as a general consideration, we were and are of the

[9] To quote Kaiser, to preclude the availability of "AM" programming on FM "amounts to rejection of the only technique which would ensure viability for the medium."

In its reply to the petitions, NAFMB asserts that the adoption of the nonduplication rule—like our earlier suggestion to the same effect in the overall FM allocation proceeding (Docket 14185)—has had a marked accelerating effect on the FM plans of advertisers, program producers and set manufacturers. Attached to its reply, and to its later statement concerning the NAB's request for postponement of the effective date of the rule, are trade press and newspaper stories to this effect.

[10] There are some 40 out of the 125 cities where channels are assigned and neither occupied nor applied for. One such community is Duluth, Minnesota, where there are six channels assigned and no FM stations or applications. In this and similar situations, in connection with exemption requests we would give consideration to permitting a smaller percentage of non-duplication, in order to give the medium the impetus in the area which appears to be needed.

[11] One of the arguments advanced by petitioners is that any non-duplication rule should not have been adopted in a proceeding concerned largely with other matters, but should be adopted only after a more searching inquiry. Under the circumstances this argument is without merit. Interested parties had ample notice of our proposal and opportunity to comment. Any more detailed consideration which is appropriate can be given in connection with requests for exemption in individual cases.

view that in the larger markets—where the demand for channels has reached the substantial point now existing, where FM has had its greatest development so far, and where the potential of economically viable separate programming is greatest—the time has come to put an end to highly extensive duplication where there is little or no warrant for it.[12]

*Educational FM stations in the noncommercial educational FM band*

25. The question has been asked as to whether Section 73.242, and its limitations on duplication by FM stations in cities of over 100,000 population, apply to noncommercial educational stations operating in the reserved portion of the FM band (Channels 201 to 220), which are under common ownership with AM stations in the same city. (There are only a few such situations.) The answer is that such operations are not covered. The rules concerning stations in this portion of the FM band are contained in Subpart C of Part 73 of the Rules (Section 73.501 et seq.). Except insofar as sections of Subpart B (commercial FM service) are incorporated into Subpart C by reference, they do not apply to noncommercial educational stations operating on Channels 201 to 220. Section 73.242 of Subpart B is not so incorporated, and therefore does not apply to stations in this part of the band. However, the rule does cover, if otherwise applicable, stations of a noncommercial educational character operating in the commercial portion of the FM band and thus under the provisions of Subpart B (Channels 221 through 300).

*Procedural matters*

26. In its "Petition to Stay Effective Date", etc., filed January 15, 1965, NAB asks: (1) that the effective date of the rules be postponed for six months, or till February 1, 1966; and (2) that the date for filing individual exemption requests be postponed until 3 months before the effective date of the rule. NAFMB opposes (1) but does not oppose (2). There are other similar requests for postponement.

27. With respect to the first request, in our view a six-months postponement of the effective date is not warranted. However, in view of the pendency of the above petitions until now, we believe that some extension is appropriate, and that licensees should have additional time to comply with the rule. Therefore we are postponing the effective date of the rules until October 15, 1965. As to the second request, we believe that three months before the effective date is too short a period in which to evaluate the requests and give the licensees time to adjust their operations if their requests are denied. However, in order to give licensees time to evaluate their situations in the light of this decision on reconsider-

[12] For example, there would appear to be little technical justification for complete or nearly complete duplication of programming where the AM station is a Class I–A clear channel station, operating interference-free day and night with 50 kilowatts power.

The foregoing discussion also explains the reason for applying the rule to the larger cities, even though there the program choice is generally greater than it is in smaller places not covered by the rule.

As mentioned, duplication is basically an inefficient practice, and at some point it may be appropriate to limit it more generally. But as a first step, we have provided only for a limitation in the larger cities, for the reasons mentioned.

ation, and if appropriate file exemption requests, we are postponing the date by which such requests must be filed until April 15, 1965. In specifying this exemption request procedure and date in the rule, we of course cannot preclude petitions for waiver of the rule which may be filed later, under the general provisions of Section 1.3 of our Rules concerning waiver. However, the specified procedure and date have been set up so that we may review these requests and give licensees ample notice of our decision thereon, well before the October 15 effective date. Petitions filed later, requesting waiver, may well not be acted upon before the effective date, and if not of course stations so petitioning will be subject to the rule until action on their petitions. Therefore licensees and permittees seeking exemption should file by April 15.

28. With respect to applications which have been recently granted, are now pending or may be filed in the near future, the following procedures will apply: (1) grantees seeking to be exempted from the rule should file petitions for exemption by the April 15 date specified, otherwise they will be expected to comply with the rule; (2) applicants with applications now pending should similarly file by that date; otherwise their grants will be on condition that they comply with the rule when they commence operation; (3) no application tendered henceforth will be accepted or considered unless either it proposes programming in compliance with the rule, or is accompanied by a request for exemption.

29. Authority for the amendments to §§ 73.37 and 73.242 of the Rules contained in the Appendix hereto is contained in Section 4(i) and 303 of the Communications Act of 1934, as amended.

30. In view of the foregoing, IT IS ORDERED, That:

(1) Effective April 19, 1965, Section 73.37 and 73.242 of the Commission's Rules ARE AMENDED as set forth in the Appendix hereto;

(2) The petitions for reconsideration filed in Docket No. 15084 by National Association of Broadcasters, Greater Indianapolis Broadcasting Company, Inc., Columbia Broadcasting System, Inc. Storer Broadcasting Company, Capital Cities Broadcasting Corporation, Interstate Broadcasting Company, Inc., Kaiser Industries Corporation, Newhouse Broadcasting Corporation and Mount Hood Radio and Television Broadcasting Corporation ARE DENIED;

(3) The petition for reconsideration filed in Docket No. 15084 by Paul E. Taft d/b as Taft Broadcasting Company, and the "Petition to Stay Effective Date of Rules Regarding Non-Duplication of Programs on Jointly Owned AM–FM Stations", filed January 15, 1965 by National Association of Broadcasters, ARE GRANTED, to the extent indicated hereinabove, and in all other respects ARE DENIED; and

(4) This proceeding (Docket No. 15084) IS TERMINATED.

Adopted March 10, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

NOTE: Rules changes herein will be covered by T.S. III(64)–7.

## APPENDIX

1. Section 73.37 is amended by designating the note following that section as Note 1, and adding new Notes 2 and 3, as follows:

§ 73.37 *Minimum separation between stations; prohibited overlap.*

* * * * * * *

NOTE 2: In the case of applications for changes (other than frequency) in the facilities of standard broadcast stations covered by this section, an application therefor will be accepted even though overlap of signal strength contours as mentioned in this section would occur with another station in an area where such overlap does not already exist, if: (1) the total area of overlap with that station would be reduced; (2) there would be no net increase in the area of overlap with any other station; and (3) there would be created no area of overlap with any station with which overlap does not now exist.

NOTE 3: The provisions of this section concerning prohibited overlap of signal strength contours will not apply where: (1) the area of such overlap lies entirely over sea water; or (2) the only overlap involved would be that caused to a foreign station, in which case the provisions of the North American Regional Broadcasting Agreement (NARBA) and the U.S./Mexican Agreement will apply. Where overlap would be received from a foreign station, the provisions of this section will apply.

2. In § 73.242, paragraph (a) is amended to read as follows:

§ 73.242 *Duplication of AM and FM programing.*

(a) After October 15, 1965, licensees of FM stations in cities of over 100,000 population (as listed in the latest US Census Reports) shall operate so as to devote no more than 50 percent of the average FM broadcast week to programs duplicated from an AM station owned by the same licensee in the same local area. For the purposes of this paragraph, duplication is defined to mean simultaneous broadcasting of a particular program over both the AM and FM station or the broadcast of a particular FM program within 24 hours before or after the identical program is broadcast over the AM station.

* * * * * * *

F.C.C. 65M–282

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| FLORIAN R. BURCZYNSKI, STANLEY J. JASINSKI AND ROGER K. LUND D.B.A. ULTRAVISION BROADCASTING CO., BUFFALO, N.Y. | Docket No. 15254<br>File No. BPCT–3200 |
| WEBR, INC., BUFFALO, N.Y. | Docket No. 15255<br>File No. BPCT–3211 |
| CLEVELAND TELECASTING CORP., CLEVELAND, OHIO | Docket No. 15249<br>File No. BPCT–3191 |
| THE SUPERIOR BROADCASTING CORP., CLEVELAND, OHIO | Docket No. 15250<br>File No. BPCT–3243 |
| INTEGRATED COMMUNICATION SYSTEMS, INC. OF MASSACHUSETTS, BOSTON, MASS. | Docket No. 15323<br>File No. BPCT–3167 |
| UNITED ARTISTS BROADCASTING, INC., BOSTON, MASS. | Docket No. 15324<br>File No. BPCT–3169 |
| For Construction Permits for New Television Broadcast Stations | |

### MEMORANDUM OPINION AND ORDER

BY A PANEL OF THE COMMISSION: COMMISSIONERS BARTLEY AND COX; COMMISSIONER LEE DISSENTING AND ISSUING A STATEMENT.

1. The three cases listed above relate to separate pending comparative proceedings for UHF television stations in Buffalo, New York, Cleveland, Ohio, and Boston, Massachusetts. Motions to enlarge the issues were filed by parties to the proceedings and the Review Board, because of the important policy issue concerning the applicants' projection of estimated revenues raised in each case, certified the matters to the Commission for determination. Pursuant to authority granted by the Commission, all parties filed comments concerning the certified questions. Upon consideration of the comments filed, and in view of the similarity of the problems presented in the three cases, the Commission directed that a consolidated oral argument be held before this panel of the Commission.[1] Oral argument was presented to the panel on September 21, 1964. The three cases will be considered together in this memorandum, and the pertinent facts with respect to each proceeding are set forth below.

[1] In addition to addressing themselves to the various motions, the parties were requested to express their views concerning a possible redefinition of the Commission's criteria for the establishment of basic financial qualifications along lines suggested by the Broadcast Bureau or, in the alternative, the desirability of requiring applicants to submit evidence of their estimated revenues.

*The Buffalo Proceeding*

2. This case involves the mutually exclusive applications for a UHF television station on Channel 29 at Buffalo, New York, filed by Ultravision Broadcasting Company, a partnership consisting of three partners, and WEBR, Inc., licensee of WEBR and WEBR–FM, in Buffalo. At present, three VHF commercial stations and one UHF non-commercial station are operating in this community. By Order, FCC 63–1191, released December 31, 1963, the applications were designated for comparative hearing to determine which applicant would better serve the public interest. With respect to Ultravision, a limited financial qualifications issue was added because of deficiencies in the bank letter submitted in support of its application.

3. In a motion to enlarge the issues, filed January 22, 1964, WEBR requested, insofar as pertinent here,[2] deletion of the limitation upon the inquiry into Ultravision's financial qualifications and the addition of the following issue:

To determine whether Ultravision Broadcasting Company's estimate of first year's operating revenues is reasonable and, if not, whether there is a reasonable assurance of effectuation of the program proposal contained in the Ultravision application.

*The Cleveland Proceeding*

4. Three applicants filed applications for a UHF station on Channel 65 at Cleveland, Ohio, as follows: Cleveland Telecasting Corporation; The Superior Broadcasting Corporation; and United Artists Broadcasting, Inc., a wholly-owned subsidiary of United Artists Corporation, a distributor of motion picture films. Three VHF television stations presently operate in Cleveland. By Order, FCC 63–1161, released December 23, 1963, the applications were designated for consolidated hearing on a number of issues, including the financial qualifications of Cleveland Telecasting and Superior Broadcasting because of certain specified deficiencies in their respective applications.

5. On January 16, 1964, United Artists filed two virtually identical petitions to enlarge the hearing issues as to both Cleveland Telecasting and Superior Broadcasting as follows (the names of the applicants being omitted):

(a) To determine whether the program proposals of... are feasible for a UHF television station without network affiliation in the Cleveland market and whether there is a reasonable prospect that the program proposals can be effectuated.

(b) To determine whether the operating deficit of... is likely to continue beyond the first year of operation and if so to determine the extent to which the funds available to... are sufficient to enable it to make a sustained effort to continue UHF operations.

6. Thereafter, United Artists requested leave to amend its application to specify Channel 31 at Lorain, Ohio. By Order, FCC 64M–275, released April 1, 1964, the Hearing Examiner granted the request and United Artists' application was thereupon re-

[2] Another requested issue went to matters pertaining to the Grade A and Grade B contours of the proposed station.

moved from hearing status and returned to the processing line. In view of the important public interest considerations raised by the motion of United Artists, we shall, on our own motion, consider the issues raised therein even though United Artists, the movant, has since withdrawn from the proceeding.

7. This case involves the mutually exclusive applications for a UHF television station on Channel 25 at Boston, Massachusetts, filed by Integrated Communications Systems, Inc. of Massachusetts, and by United Artists Broadcasting, Inc. Boston now has three VHF television stations and one VHF non-commercial educational station; construction permits for one UHF non-commercial educational station and one UHF commercial station [3]; and WIHS, a UHF station now on the air. By Order, FCC 64–96, released February 12, 1964, the Commission designated the applications for hearing. In addition to the standard comparative issues, and to other issues not relevant here, the Commission designated limited issues going to the financial qualifications of Integrated.[4]

8. United Artists filed a motion on March 2, 1964, requesting the addition of the following issue with respect to Integrated:[5]

> To determine whether the program proposals of the applicant are feasible for a UHF television station without network affiliation in the Boston market; whether there is a reasonable prospect that the program proposals can be effectuated; and, in light of evidence adduced with respect to the foregoing, whether the applicant is qualified to operate its station in the manner proposed in its application.

9. The main thrust of the arguments advanced by WEBR and United Artists in support of the requested issues is that the standards ordinarily applied in determining the financial qualifications of an applicant to construct and operate a broadcast facility are inadequate with respect to a UHF station which will be in competition with three existing VHF television stations and which will have no network affiliation. The Commission's Broadcast Bureau also asserts that the circumstances presented herein require a more substantial financial showing in order to provide assurance of television service on a continuing basis, but disagrees with the standard suggested by WEBR and United Artists. The Bureau would require UHF applicants to demonstrate an ability to meet all of their fixed operational costs, i.e., to amortize loans and for equipment payments, during the first year in addition to the usual showing. Ultravision, Cleveland Telecasting, Superior Broadcasting, and Integrated object to the addition of any issues which would tend to impose a higher standard in determining the financial qualifications of applicants for UHF stations.

10. A discussion of the statutory requirements and of past Commission policy in regard to finances will be helpful in placing our present problem in proper perspective. Under Sections 308(b) and 319(a) of the Communications Act, applicants for construction permits and licenses must demonstrate that they possess the financial qualifications to construct and operate the proposed

[3] The permit specified Cambridge as the principal city.
[4] Deficiencies were noted in the showing of Integrated concerning the ability of certain stockholders to meet their commitments to loan funds to the corporation.
[5] An issue was also requested with respect to Integrated's staff proposal.

broadcast facility. In *FCC* v. *Sanders Brothers*, 9 Pike & Fischer, R.R. 2008, 2011, the United States Supreme Court held that:

> An important element of the public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, inter alia, into an applicant's financial qualifications to operate the proposed station.
>
> * * * * * * *
>
> In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.
>
> * * * * * * *
>
> Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interferring electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

The policy applied by the Commission in determining the showing necessary to meet the minimum requirements for statutory qualifications has been dictated by the stage of development of the industry and by the economy of the times, and changes in policy have occurred when warranted by changed circumstances. Thus, during the period 1935 to 1939, applicants for licenses to operate standard broadcast stations were required to demonstrate by affirmative proof that sufficient advertising revenues would be forthcoming to support the proposed facility. *Siever, Bayless, and Steele*, 2 FCC 103, 105–106 (1935); *Carl C. Struble*, 2 FCC 115, 117 (1935); *Brownsville Broadcasting Company*, 2 FCC 336, 339–340 (1936); *Curtis Radiocasting Corporation*, 6 FCC 7, 10 (1938).

11. By the post-war period, however, the AM industry had been established as a financially lucrative medium of communications. As experience was acquired over the years in assessing of revenues after the station became operative, the Commission relaxed its requirement for evidentiary proof that adequate commercial support was available to maintain the proposed station. Instead, the Commission took the position that an applicant was financially qualified if it could show sufficient funds to complete construction and to operate without income for a reasonable period of time, generally three months. *Sanford A. Schafitz*, 24 FCC 363, 376, 14 Pike & Fischer, R.R. 852, 864b (1958); *Atlantic City Broadcasting Co.*, 9 Pike & Fischer, R.R. 647, 683–684 (1954). See also, *Voice of Cullman*, 6 Pike & Fischer, R.R. 164, 168–169 (1950). In *Southeastern Enterprises*, 22 FCC 605, 610, 13 Pike & Fischer, R.R. 139, 145 (1957), the Commission noted with respect to financial qualifications, that "there is a sufficient showing that the station can be constructed and its operation commenced, and that is all that we require. The concept of public interest is not so exacting that it demands a licensee capable of sustaining great losses for long periods and pledged to do so." See also, *Iredell Broadcasting Co., (WDBM)*, 23 FCC 79, 85–86, 13 Pike & Fischer, R.R. 996, 1003 (1957). As a general rule, the same standard has been applied to applications for FM and television facilities. *Cherokee Broadcasting Co.*, 25 FCC 92, 13 Pike & Fischer, R.R. 725, 747 (1958); *Radio Associates, Inc.*, 32 FCC 166, 172–173, 21

Pike & Fischer, R.R. 368, 370f (1962); *Louis Vander Plate,* FCC 64–883, released September 24, 1964.

12. Before us in these proceedings is a basic question as to the showing necessary on the part of a UHF station entering a market in competition with three existing VHF stations to establish its financial qualifications for constructing and continuing the operation which it proposes.

13. Over one hundred commercial UHF stations that were once on the air are now off the air. Nearly two hundred commercial UHF stations have been granted construction permits, but never went on the air. The obstacles which have beset the growth and development of UHF, particularly in competition with VHF stations, have been stated too frequently to require repetition here. *Expanded Use Of UHF Television Channels,* 21 Pike & Fischer, R.R. 1711 (1961); *Second Report on Deintermixture,* Docket No. 11532, 13 Pike & Fischer, R.R. 1571 (1956). In reviewing the television situation, the Commission determined that an adequate nationwide commercial and educational television system in the United States can be achieved only through utilization of all 82 channels, 12 VHF and 70 UHF, now allocated for television broadcasting. Congress enacted the all-channel receiver law [6] in furtherance of full utilization of all 82 channels. This law will unquestionably serve to foster and encourage the expanded use of UHF both because the operator, and the advertisers upon whom the operator must depend for the financial success of his station, can look forward to UHF receiver saturation in the service area; and because incentive has been provided to manufacturers to improve UHF transmitting and receiving equipment. *Deintermixture Cases,* FCC 62–953, 23 Pike & Fischer, R.R. 1645 (1962). However, we must also consider the fact that the all-channel receiver legislation will not provide an immediate panacea. While estimates vary as to the time which will elapse before the legislation has a substantial effect upon set conversion, it may be assumed that a period of several years will be required. During this period, we must seek to strike a balance between our desire, on the one hand, to stimulate the earliest possible development of the UHF medium, and the danger, on the other hand, that attainment of our alternate goal may be impaired if there should be any broad-scale repetition of the financial failures of the early UHF years. While we want those who acquire UHF permits to construct their stations without unreasonable delay, we are concerned that once on the air they continue to operate in a manner that serves the public interest—and without a likelihood that they will shortly seek a transfer of the permit or license to someone else.

14. In the cases here before us, the financial proposal of each applicant establishes that, after construction of the station, its continued operation will depend upon receipt of an estimated amount of advertising revenues, in order to off-set estimated operating costs. This is evident from our work sheets attached hereto [Exhibits A–G]. Thus, in the Boston case, of the $350,000

[6] Public Law 87–529, 76 Stat. 150–151, approved July 10, 1962.

actually committed by United Artists to the proposed station, $238,750.00 will be required to construct and to operate the station for an initial period of three months. Manifestly, therefore, additional funds will be required before the end of the first year of operation, based on its own estimate of a $250,000.00 operating cost for the first year. The same is true with respect to the other Boston applicant, Integrated; a Cleveland applicant, Cleveland Telecasting; and a Buffalo applicant, Ultravision. Although Superior Broadcasting (Cleveland) and WEBR (Buffalo) are in a somewhat better position since they have indicated a greater cash commitment, their proposals, dependent essentially upon borrowed funds, likewise contemplate the use of advertising revenues for continuing operations. Thus, in these three proceedings, immediate revenue is vitally necessary for continued operation.

15. The applicants dependence upon immediate revenue is also shown by further analysis of our worksheets (Exhibits A–G) annexed hereto. Based upon these worksheets, it is apparent that no applicant proposes to make substantial investments of equity capital, which is to be left in the enterprise, as distinguished from debt or borrowed capital which must be repaid.[7] These worksheets also show that the applicants have not made commitments to provide additional financing should it be required for a continuing operation of the station (supported by a showing of their capacity to do so). We therefore do not have before us applicants which have (a) substantial equity capital; or (b) stockholders who are committed to advance additional funds either by additional equity or debt contributions, should it be required for continued operation of the station; or (c) loan commitments from others (such as banking institutions, etc.) to provide such additional financing should it be required for continued operation.

16. It is of further significance to note that our examination of the applications discloses a wide divergence in the estimates of revenues during the first year of operation. Since the application form does not require the applicants to submit a detailed showing to support estimates, it cannot be determined from the information now before us whether these divergent estimates of revenues to be derived from the same market are realistic even assuming that differences in methods of proposed operation would, likewise, result in differences in revenues. Thus, with respect to Buffalo, WEBR estimates revenues of only $86,000 whereas Ultravision estimates $275,000.00. As to Boston, United Artists estimates revenues of $250,000.00 whereas Integrated estimates $150,000.00. For Cleveland, Superior Broadcasting estimates $200,000.00 whereas Cleveland Telecasting estimates $300,000.00 (and United Artists prior to withdrawal of its Cleveland application estimated $250,000.00—the same as its estimate for Boston). In a showing of financial qualifications, when an applicant relies upon stock subscriptions, we require evidentiary proof that the subscribers

[7] Equity capital is used here as "The amount invested in an enterprise-proprietorship, partnership, or corporation—by its owners; paid in capital." A Dictionary for Accountants, Second Edition, by Eric L. Kohler, Prentice-Hall, Inc., 1957. Debt capital, as used herein, refers to sums which have been advanced to the enterprise on a long-term basis by the owners, a bank, or others, giving rise to a debtor-creditor relationship between the enterprise and the lender of the funds.

in fact have adequate funds with which to meet their commitments; when an applicant relies upon a loan, we require evidentiary proof that the lender can and will make such loan; when an applicant relies upon credit for the purchase of equipment, to be paid on a monthly installment plan, we require evidentiary proof that the equipment manufacturer will extend such credit. When, as here, an applicant for a UHF station in a three-VHF market relies upon specified expected revenues for continued operation, it is equally important to require evidentiary proof that there is a reasonable likelihood of the applicant's obtaining that revenue.

17. We believe that a determination of which, if any, of these applicants' estimates as to anticipated revenue are realistic can be made only after a hearing in which all of the relevant matters are fully explored. The applicants will have an opportunity to develop and support the representations they have made with respect to their estimated revenues. Pertinent thereto are the expected rate of UHF set conversion, the potential of this medium for attracting advertising revenues in the light of newly developing circumstances, and the challenges which a new UHF facility in a three-VHF market will face. Through the adjudicatory process, the applicants' estimates may be tested and their weaknesses, if any, exposed. Information which withstands the test of cross-examination and which establishes reasonably dependable statistical probabilities could substantiate the applicants' representations as to expected revenue, and constitute a basis not only for the disposition of the cases before us but also for determining whether we should require all UHF applicants seeking facilities in major markets already served by three VHF stations affiliated with the respective networks, to make these types of showings.

18. We shall depend upon the applicants' ingenuity and expertise for evolvement of methods which should be utilized in ascertaining a sound basis for their estimate of revenues. These methods may well include inquiry into the expected rate of set conversion and the relationship of the level of UHF set ownership to station revenues. Since a network affiliation is not presently depended upon by any of the applicants, data would be helpful concerning the ratio of non-network to network viewing where both are available and the level of station revenues earned with non-network programming in competition with network programming. Information concerning possible rate schedules, the type of advertisers who would be attracted to a local UHF station without network affiliation, and the potential for revenues from such advertisers in the proposed service area would also tend to throw light on the issue. Applicants may, of course, choose other methods to ascertain the revenue potential of the service area, such as a canvass of advertisers. It must be emphasized, however, that the factors upon which an applicant relies in reaching a conclusion as to projected revenues should be disclosed on the record.

19. An important factor for consideration is the period for which projected revenues should be required. We are not satisfied that estimates limited to the first year of operation will suffice because of the transition period required for set conversion. In

our Report and Order in Docket No. 13864, where we had under consideration the adoption of rules with respect to the transfer of broadcast facilities, we noted that ". . . experience has demonstrated that time is needed to fully or substantially implement the proposals or to gain a better understanding of the program needs and desires of the community and to adjust programming to such needs and interests."[8] On the basis of our investigation in that rule making proceeding, we concluded that a uniform period should be fixed within which proposed transfers or assignments would be regarded as raising substantial questions of "undue interruption" and we were "persuaded that three years is an appropriate benchmark." We are likewise persuaded that during this interim period awaiting set saturation, estimates of annual revenues projected over a three-year period are essential in order to give the applicant an adequate basis for establishing the durability of its proposed operation. A three-year study will disclose expectable trends in set conversion and advertiser potential which are not likely to be determinable if the data relate only to the first year of operation. For the foregoing reasons, we conclude that estimated annual revenues should be projected over a three-year period.

20. Manifestly, a determination as to reasonable likelihood of a continuing operation must rest on a realistic estimate of construction costs and operating expenses, as well as of operating revenues. It is necessary, therefore, that each applicant disclose all factors which were considered in computing construction costs and operating expenses. Any substantial miscalculation or underestimation of costs for constructing and putting the proposed station into operation could reduce seriously the funds with which the applicant had expected to meet initial operating expenses, and, also, materially increase payments which the applicant must make during such period. The record should reflect in detail the amounts allocated for staffing, programming, fixed charges, and other expenses. With respect to programming, the evidence should establish a reasonable likelihood of effectuation with the funds allocated and available for this purpose. Elaborate plans for programming which far exceed an applicant's financial capability, or the cost of which would jeopardize its survival, add nothing to its comparative standing. The goal to be achieved is the commencement of service at the earliest possible time, followed by provision of a continuing service in the public interest. Only realistic estimates of anticipated revenues, operating expenses, and construction costs based on practical proposals, in the light of the obstacles which will be faced by the new stations, will establish whether an applicant has a reasonable likelihood of a continuing operation in the public interest.

21. Further exploration by each applicant into the areas which we have outlined may disclose the need to amend the applications submitted, and fairness requires that the parties be accorded an opportunity to do so. The applicants in these three proceedings will therefore be afforded an opportunity to submit revised esti-

[8] *Voluntary Assignments and Transfers of Control*, FCC 62-296, 23 Pike and Fischer, R.R. 1503, 1504.

mates of operating expenses during the first year of operation (or for a three-year period if deemed advisable) and revised estimates of anticipated revenues projected over a three-year period. In addition these applicants may, if they so desire, amend program proposals as to hours of broadcast, program content, or both. We also wish to make clear that no inference adverse to any of these applicants will be drawn from the fact that the amended estimates or program proposals differ from those originally submitted. The amendments must be filed within 60 days after the release of this Memorandum Opinion and Order.[9] An additional period of 30 days may be allowed in the discretion of the Hearing Examiner. In the period required by the applicants to make the necessary studies relative to the amendments, the hearings should proceed with respect to the other issues.

22. In order to keep at a minimum the expense of securing the additional information required herein, the applicants may submit a joint showing to the extent possible. Some information, of course, such as the rates to be charged advertisers and the estimated cost of programming, must be based on the independent research of each applicant. However, a considerable portion of such data—for example, the expected rate of set conversion, and the relationship of station viewing, both network and non-network, to station revenues—could be obtained through a joint survey by the applicants in each of the respective markets, viz., Buffalo, Boston, Cleveland.

23. Finally, we have carefully considered the argument advanced that any attempt to explore the basis for estimated revenues would result only in the production of a mass of meaningless information which would be speculative and conjectural. We disagree. If this were true, the applicants' present estimates of anticipated revenues would have to be considered meaningless also. In many types of proceedings, reliance is placed upon evidence concerning reasonable statistical probabilities and we perceive no reason why such evidence cannot be produced here. *Hall* v. *Federal Communications Commission,* 237 F. 2d 567, 99 U.C. App. D. C. 86. Where appropriate, financial, economic and other data which the Commission has will be made available to the applicants to assert them in preparation of certain types of joint showings concerning each market. The members of our staff in possession of such data are instructed to make the information available for the preparation of such joint showings.

24. For the reasons outlined above, we do not believe the precise issues requested by WEBR and United Artists will serve to provide the type of information we deem essential to a determination in these cases and their motions for enlargement of issues will be denied except to the extent they may be included in the action here taken. Similarly, the test suggested by the Broadcast Bureau is rejected because it would not accomplish our purpose. By the simple expedient of arranging for the deferment of installment payments or other fixed charges until the expiration of the first

[9] The limited authority to amend which we grant here does not modify our prior decisions in these cases denying requests for permission to amend in other respects.

year of operation, an applicant could meet such a test with a showing not much different from that presently submitted. And, moreover, there would be no information concerning the bases for estimated revenues and operating expenses which we believe to be vital to a determination of whether a continuing operation is likely under the circumstances of these cases (para. 19). On our own motion, we are designating additional issues as set forth below. The issues designated herein apply to all applicants in the three cases before us. The burden of proceeding with the introduction of evidence and of proof will be upon each applicant with respect to its own estimates. Any joint showings submitted shall be considered as the evidence of all parties participating therein.

Accordingly, IT IS ORDERED, This 11th day of March, 1965, That the issues in each of the three proceedings enumerated above ARE ENLARGED, by the addition of the following issues;

(a) To determine the basis of each applicant's (1) estimated construction costs, (2) estimated operating expenses for the first year of operation (or for a three-year period, if desired), and (3) estimated annual revenues projected over a three year period; and

(b) To determine, in light of the evidence adduced, which of the applicants, if any, has demonstrated a reasonable likelihood of construction and continuing operation of its proposed station in the public interest.

IT IS FURTHER ORDERED, That each of the parties to these proceedings IS GRANTED a period of 60 days from the date of release of this Memorandum Opinion and Order within which to amend its application to include estimates of anticipated annual revenues projected over a three-year period, and if deemed desirable, to revise its estimates of operating expenses during the first year of operation (or over a three-year period), and to revise its proposals as to hours of broadcast, program content, or both [10]; that the Hearing Examiner IS AUTHORIZED to allow an additional period of 30 days within which to make the foregoing amendments; and that in the period required by the applicants to make the necessary studies, the hearings should proceed with respect to the other issues.

IT IS FURTHER ORDERED, That the hearing examiners in these three cases ARE AUTHORIZED to schedule a joint type of initial pre-hearing conference for purposes of discussing the preparation of the required data.

IT IS FURTHER ORDERED, That the motions of WEBR, Inc. and United Artists Broadcasting, Inc., for enlargement of issues ARE DENIED except to the extent granted herein.[11]

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

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[10] See Footnote 9, supra.

[11] The petitions of WEBR, Inc., Cleveland Telecasting Corporation, and the Broadcast Bureau to correct transcript of consolidated oral argument are granted and the transcript is accordingly corrected.

## EXHIBIT A

### BUFFALO APPLICANT

*Burczynski, Jasinski, and Lund, d/b/a Ultravision Broadcasting Co.*
*(Docket No. 15254)*[1]

| | | |
|---|---|---|
| 1. | Total costs of construction | [2]$407,490.10 |
| 2. | Estimated costs of operation—1st year | 250,000.00 |
| 3. | Estimated revenues—1st year | 275,000.00 |
| 4. | Financial plan: | |
| | (A) Equity capital (committed to construction and operation of the proposed UHF station): Shares or contributions by stock holders or partners | [3]43,000.00 |
| | (B) Long-term debt capital: (Committed to construction and operation of the proposed UHF station): | |
| | Equipment deferred credit | 269,250.00 |
| | Loans by stockholders or partners | 60,000.00 |
| | Loans by banks or others | [4]200,000.00 |
| 5. | Cash required for construction and initial operation | [5]200,740.10 |
| 6. | Availability of additional equity or debt capital: | |
| | (A) Earned surplus of operating company | None |
| | (B) Loans by stockholders, loans by banks or others | [6]None |
| 7. | Hours of operation | [7]70:20 |
| 8. | Staffing proposal | 27 |
| 9. | Total commercial time (percentage) | 80.6 |
| | Total sustaining time (percentage) | 19.4 |
| 10. | Number of commercial spots | 415 |
| | Number of noncommercial spots | 135 |
| 11. | Percentage of live commercial | 16.2 |
| | Percentage of live sustaining | 11.2 |

[1] Burczynski and Jasinski each have a 45% interest, and Lund has a 10% interest.

[2] Transmitter and studio space to be leased.

[3] Originally, the applicant partnership consisted only of Burczynski and Jasinski, and the agreement between them provided that the former would supply the capital for the construction and initial operation of the station with any funds advanced after the first three months of operation to be considered a partnership liability. However, the application filed May 28, 1963, Section III of the form, listed only $10,000 cash as existing capital and no new capital. In an amended application filed September 10, 1963 (prior to designation for hearing) based on the new partnership agreement with Lund, existing capital is $8,000.00, and new capital $35,000.00 which represents Lund's commitment in addition to $2,000.00 he advanced in cash. Apparently, no reliance is being placed upon Burczynski for additional equity capital, although he has agreed to loan the partnership $60,000.00.

[4] A limited financial issue was designated by the Commission going to the sufficiency of the bank letter for a $150,000 loan. A new letter has since been supplied. In addition, Ultravision petitioned on June 9, 1964 for leave to amend its application to include a $50,000.00 loan from a private individual. The amendment was allowed by the Examiner (FCC 64M–582, released June 23, 1964) and the Review Board denied review (FCC 64R.433, corrected order released August 26, 1964).

[5] In the designation order, the Commission estimated that approximately $202,000 would be required.

[6] Although the partnership agreement refers to further loans from the partners, there is no commitment to make such loans.

[7] Monday through Friday, 1:00 p.m. to 11:20 p.m.; Saturday and Sunday, 2:00 p.m. to 11:20 p.m.

## EXHIBIT B

### BUFFALO APPLICANT

*WEBR, Inc. (Docket No. 15255)*

| | | |
|---|---|---|
| 1. | Total costs of construction | [1]$826,759.00 |
| 2. | Estimated costs of operation—1st year | 395,000.00 |
| 3. | Estimated revenues—1st year | 86,000.00 |
| 4. | Financial plan: | |
| | (A) Equity capital (committed to construction and operation of the proposed UHF station): Shares or contributions by stock holders or partners | [2]None |
| | (B) Long-term debt capital: (Committed to construction and operation of the proposed UHF station): | |
| | Equipment deferred credit | [3]451,000.00 |
| | Loans by stockholders or partners | None |
| | Loans by banks or others | [4]1,000,000.00 |
| 5. | Cash required for construction and initial operation | 474,509.00 |
| 6. | Availability of additional equity or debt capital: | |
| | (A) Earned surplus of operating company | [2]None |
| | (B) Loans by stockholders, loans by banks or others | None |
| 7. | Hours of operation | [5]81:36 |
| 8. | Staffing proposal | 26 |
| 9. | Total commercial time (percentage) | 50.1 |
| | Total sustaining time (percentage) | 49.9 |
| 10. | Number of commercial spots | 400 |
| | Number of noncommercial spots | 40 |
| 11. | Percentage of live commercial | 6.6 |
| | Percentage of live sustaining | 11.5 |

[1] Land on hand.

[2] Applicant is presently operating broadcast facilities in Buffalo. It has issued 3,000 shares of $75.00 par value stock ($225,000) and has a surplus of $178,744.56 of which $74,865.31 is shown on Section III of the application as cash on deposit in a bank. However, no part of the capital or surplus of WEBR, Inc. is actually committed to the proposed UHF operation.

[3] Equipment manufacturer estimates cost at $632,000 of which 75% would be deferred. This would amount to $474,000.00.

[4] Bank will make $1,500,000.00 available.

[5] Monday through Saturday, noon to 11:48 p.m.; Sunday, 1:00 p.m. to 11:48 p.m.

## EXHIBIT C

### CLEVELAND APPLICANT

*Cleveland Telecasting Corp. (Docket No. 15249)*[1]

| | | |
|---|---|---|
| 1. | Total costs of construction | [2]$610,000.00 |
| 2. | Estimated costs of operation—1st year | 498,000.00 |
| 3. | Estimated revenues—1st year | 300,000.00 |
| 4. | Financial plan: | |
| | (A) Equity capital (committed to construction and operation of the proposed UHF station): Shares or contributions by stock holders or partners | [3]479,000.00 |
| | (B) Long-term debt capital: (Committed to construction and operation of the proposed UHF station): | |
| | Equipment deferred credit | |
| | Loans by stockholders or partners | |
| | Loans by banks or others | |
| 5. | Cash required for construction and initial operation | [4]210,399.00 |
| 6. | Availability of additional equity or debt capital: | |
| | (A) Earned surplus of operating company | None |
| | (B) Loans by stockholders, loans by banks or others | None |
| 7. | Hours of operation | [5]65:10 |
| 8. | Staffing proposal | 26 |
| 9. | Total commercial time (percentage) | 79.41 |
| | Total sustaining time (percentage) | 20.59 |
| 10. | Number of commercial spots | 518 |
| | Number of noncommercial spots | 130 |
| 11. | Percentage of live commercial | 19.18 |
| | Percentage of live sustaining | 11.00 |

[1] On January 13, 1964, Cleveland Telecasting filed a petition for leave to amend its application which would have drastically altered the composition of the applicant, estimates, and proposed methods of financing. The petition was denied by the Examiner (FCC 64M–158, released February 25, 1964), the denial was upheld by the Review Board (FCC 64R–315, released June 10, 1964), and the Commission denied review (FCC 64–802, released September 4, 1964). Another petition for leave to amend, filed on September 25, 1964, was denied by the Examiner (FCC 64M–1046. released October 23, 1964), and an appeal is pending before the Review Board.

[2] Land and buildings to be leased. The applicant also proposes to lease all equipment and pay an annual rental (total equipment cost about $530,000.00 and rental about one-fifth per year. However, no lease agreement was filed with the application).

[3] The applicant has only $1,000 in cash, the remainder being in stock subscriptions. However, the financial ability of these stockholders to meet their stock commitments was not established.

[4] Based on figures contained in the Commission's designation order which does not include any initial payment for leasing of equipment.

[5] Monday through Friday, about 4:00 p.m. to midnight; Saturday, noon to midnight; Sunday, noon to midnight.

## EXHIBIT D

### CLEVELAND APPLICANT

*The Superior Broadcasting Corp. (Docket No. 15250)*

| | | |
|---|---|---|
| 1. | Total costs of construction | [1]$517,006.00 |
| 2. | Estimated costs of operation—1st year | [2]300,000.00 |
| 3. | Estimated revenues—1st year | 200,000.00 |
| 4. | Financial plan: | |
| | (A) Equity capital (committed to construction and operation of the proposed UHF station): Shares or contributions by stock holders or partners | 25,000.00 |
| | (B) Long-term debt capital: (Committed to construction and operation of the proposed UHF station): | |
| | Equipment deferred credit | [3]375,000.00 |
| | Loans by stockholders or partners | None |
| | Loans by banks or others | [4]750,000.00 |
| 5. | Cash required for construction and initial operation | [3]217,006.00 |
| 6. | Availability of additional equity or debt capital: | |
| | (A) Earned surplus of operating company | None |
| | (B) Loans by stockholders, loans by banks or others | None |
| 7. | Hours of operation | [5]72:30 |
| 8. | Staffing proposal | 26 |
| 9. | Total commercial time (percentage) | 47.4 |
| | Total sustaining time (percentage) | 52.6 |
| 10. | Number of commercial spots | 360 |
| | Number of noncommercial spots | 90 |
| 11. | Percentage of live commercial | 0.1 |
| | Percentage of live sustaining | 37.1 |

[1] In its designation order (FCC 63-1161), released December 23, 1963, the Commission questioned whether this figure includes freight, installation and other items.

[2] In the designation order, the Commission questioned whether this includes rental payments for land and buildings.

[3] The cash required figure is based on the applicant's estimate of the total cost of construction which includes land and building rental charges. The Commission stated in the designation order that $203,814.00 would be required if rental charges for land and buildings were included in the estimated cost of operation and $208,189.00 if they were not. The first figure was derived from an estimated equipment and construction cost of $494,256.00 less a 75% deferred credit of $370,692.00 leaving cash due of $123,564 plus 3 months operation at $75,000 plus $5,250.00 for miscellaneous items. The rental charges for buildings and land were not included in the cost of construction as computed by the Commission. The difference in the deferred credit item is due to the fact that the equipment supplier estimated the cost at $500,000.00.

[4] The Commission was not satisfied that the supporting bank letter constituted a commitment and designated a limited financial issue to clarify this point. A new letter from the bank was subsequently submitted.

[5] Monday through Friday, 12:55 p.m. to 11:00 p.m.; Saturday 11:00 a.m. to 11:00 p.m.; Sunday 12:55 p.m. to 11:00 p.m.

## EXHIBIT E

### CLEVELAND APPLICANT[1]

*United Artists Broadcasting, Inc. (Docket No. 15248)*

| | | |
|---|---|---|
| 1. | Total costs of construction | [2]$495,000.00 |
| 2. | Estimated costs of operation—1st year | 250,000.00 |
| 3. | Estimated revenues—1st year | 250,000.00 |
| 4. | Financial plan: | |
| | (A) Equity capital (committed to construction and operation of the proposed UHF station): Shares or contributions by stock holders or partners | None |
| | (B) Long-term debt capital: (Committed to construction and operation of the proposed UHF station): | |
| | Equipment deferred credit | 318,750.00 |
| | Loans by stockholders or partners | [3]350,000.00 |
| | Loans by banks or others | None |
| 5. | Cash required for construction and initial operation | 238,750.00 |
| 6. | Availability of additional equity or debt capital: | |
| | (A) Earned surplus of operating company | None |
| | (B) Loans by stockholders, loans by banks or others | None |
| 7. | Hours of operation | [4]36:50 |
| 8. | Staffing proposal | 21 |
| 9. | Total commercial time (percentage) | 77.4 |
| | Total sustaining time (percentage) | 22.6 |
| 10. | Number of commercial spots | 225 |
| | Number of noncommercial spots | 50 |
| 11. | Percentage of live commercial | 5.7 |
| | Percentage of live sustaining | 3.4 |

[1] Amended to specify Channel 31, Lorain, Ohio and returned to processing line April 1, 1964 (64M-275).
[2] Land and buildings to be leased.
[3] Advance from parent corporation "as capital or loans, as may be mutually agreed upon".
[4] From approximately 1:00 p.m. to 7:00 p.m. Monday through Friday and on Sunday.

## EXHIBIT F

### BOSTON APPLICANT

*Integrated Communication Systems, Inc. of Massachusetts* (*Docket No. 15323*)

| | | |
|---|---|---|
| 1. | Total costs of construction | $478,208.79 |
| 2. | Estimated costs of operation—1st year | 150,000.00 |
| 3. | Estimated revenues—1st year | 150,000.00 |
| 4. | Financial plan: | |
| | (A) Equity capital (committed to construction and operation of the proposed UHF station): Shares or contributions by stock holders or partners | [1]15,000.00 |
| | (B) Long-term debt capital: (Committed to construction and operation of the proposed UHF station): | |
| | Equipment deferred credit | 297,610.85 |
| | Loans by stockholders or partners | 319,000.00 |
| | Loans by banks or others | None |
| 5. | Cash required for construction and initial operation | 218,097.90 |
| 6. | Availability of additional equity or debt capital: | |
| | (A) Earned surplus of operating company | None |
| | (B) Loans by stockholders, loans by banks or others | None |
| 7. | Hours of operation | [2]45:30 |
| 8. | Staffing proposal | 13 |
| 9. | Total commercial time (percentage) | 70.3 |
| | Total sustaining time (percentage) | 29.7 |
| 10. | Number of commercial spots | 361 |
| | Number of noncommercial spots | 105 |
| 11. | Percentage of live commercial | 34.0 |
| | Percentage of live sustaining | 10.6 |

[1] In the Commission's designation order (FCC 64–96) released February 12, 1964, a limited financial qualifications issue was included concerning the ability of certain stockholders to meet their loan commitments. An amendment was allowed by the Examiner (64M–286 released April 6, 1964) which substituted stockholders and revised stock holdings, showed $10,000.00 in new capital, and reflected 2 additional loan commitments from stockholders totaling $100,000.00. The Board of Review affirmed (FCC 64R–364 released July 9, 1964) and the Commission denied review (FCC 64–803, released September 4, 1964). The figures set forth herein are therefore based on the amended application. Nevertheless, the limited financial qualifications issue remains in the hearing.

[2] Monday through Saturday, 4:45 p.m. to 11:15 p.m.; Sunday 4:45 p.m. to 11:15 p.m.

EXHIBIT G

BOSTON APPLICANT

*United Artists Broadcasting, Inc. (Docket No. 15324)*

| | | |
|---|---|---|
| 1. | Total costs of construction | [1]$495,000.00 |
| 2. | Estimated costs of operation—1st year | 250,000.00 |
| 3. | Estimated revenues—1st year | 250,000.00 |
| 4. | Financial plan: | |
| | (A) Equity capital (committed to construction and operation of the proposed UHF station): Shares or contributions by stock holders or partners | None |
| | (B) Long-term debt capital: (Committed to construction and operation of the proposed UHF station): | |
| | Equipment deferred credit | 318,750.00 |
| | Loans by stockholders or partners | [2]350,000.00 |
| | Loans by banks or others | None |
| 5. | Cash required for construction and initial operation | 238,750.00 |
| 6. | Availability of additional equity or debt capital: | |
| | (A) Earned surplus of operating company | None |
| | (B) Loans by stockholders, loans by banks or others | [2]None |
| 7. | Hours of operation | [3]40 |
| 8. | Staffing proposal | 21 |
| 9. | Total commercial time (percentage) | 77.5 |
| | Total sustaining time (percentage) | 22.5 |
| 10. | Number of commercial spots | 225 |
| | Number of noncommercial spots | 50 |
| 11. | Percentage of live commercial | 5.2 |
| | Percentage of live sustaining | 4.0 |

[1] Land and buildings to be leased.

[2] This figure represents an advance from the parent corporation "as capital or loans, as may be mutually agreed upon." Although United Artists Corporation, the parent corporation, has substantial financial resources, its commitment to the proposed UHF station is expressly limited to the amount stated.

[3] Monday through Friday, 11:00 a.m. to 6:00 p.m.; Saturday, 1:00 p.m. to 6:00 p.m. (no broadcasts on Sunday).

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

I would deny the motions to enlarge the issues in each of these proceedings, which motions, in effect, seek an enlargement of the scope of the Commission's inquiry regarding the financial capacity of the several applicants herein.

The main thrust of the additional issues that have been requested is couched in terms of program effectuation, the basic presumption in each instance appearing to be that, under the particular facts involved, certain applicants may not appear to have sufficient funds available to carry out their proposals. Since inquiry into this area falls within the ambit of the so-called Evansville issue, in *South* qualifications and is otherwise the best qualified to render service *Central Broadcasting Corp.*, 9 Pike & Fischer, R.R. 1035 (1953), ("To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated."), I would continue to rely upon our Hearing Examiners to add such an issue where appropriate.

Since mid-1957 the Commission has followed the policy that an applicant would be deemed to be financially qualified provided it showed sufficient funds to complete construction, and thereafter to operate the station for a minimum of three months without placing any reliance on revenue. *Iredell Broadcasting Co.*, 23 FCC 79, decided July 22, 1957. Indeed, as stated *In re Application of South-*

*eastern Enterprises*, 22 FCC 605, 610, decided March 20, 1957, what is required is a showing that *the station can be constructed and its operation commenced.* The concept of public interest is not so exacting that it demands a licensee capable of sustaining great losses for long periods of time. The fact that such a possibility *may* exist, dependent upon a variety of factors, some predictable and some unknown, does not mean that the applicant must on that account be considered financially unqualified. (See Iredell, *supra.*) Applicants for broadcast stations (AM, FM and TV) have, since the *Iredell* case, relied on our long-standing policy in order to establish their financial qualifications.

My fellow members on the Panel make it clear that they do not believe that the well-established test of financial qualifications is adequate where a UHF station seeks to enter a market occupied by three VHF stations. Thus, they would on their own motion enlarge the issues to require these applicants to make an affirmative showing that they not only have the financial ability to construct without delay and to operate the station for a reasonable time, but they would require such applicants to affirmatively demonstrate that adequate funds would be available to insure continued operation of the station over a period of at least three years. They say that "a determination as to reasonable likelihood of a continuing operation must rest on a realistic estimate of construction costs and operating expenses, *as well as of operating revenues.*" (Emphasis added.) It is to the implications of the foregoing, which I am confident has escaped the imagination of the parties in these proceedings, that I dissent.

Any requirement that estimated revenues be projected over a period of three years in order that a determination may be made as to a reasonable likelihood of *a continuing operation* of the proposed stations makes the statutory test of financial qualifications completely unrecognizable. Neither such a requirement nor such a determination is relevant or material to the test of whether an applicant for a new broadcast station is financially qualified to construct and operate the station in free and open competition with other stations for a reasonal period of time.

Future earnings may well determine whether or not a station will succeed financially to a point where it may effectuate its programs beyond a reasonable period, or whether the station will go broke; but this is not for the Commission to determine since this bears no relationship to the question of whether an applicant is or is not financially qualified. Where an applicant sought to rest its financial qualifications on future earnings, the Commission asserted "the fact" that it "has never found an applicant initially, financially qualified to construct a station on a basis of anticipated future earnings." *The Radio Station KFH Company, et. al.*, 11 RR 116b, 116d, decided March 14, 1956.

The Commission may, for some reason, have a right, or indeed, a responsibility to secure information on set conversions and prospective revenues of UHF stations on an across-the-board basis, but it has no right to begin with the applicants in these three markets under the guise that it needs such information in order to determine the financial qualifications of these applicants. I submit that the

Commission cannot justify receiving an education through the expensive processes of adjudication that would be imposed on the applicants in these particular markets.*

The production of the data that would now be required cannot be justified on the basis that it will aid in the consideration of other cases, since the data that would be secured from the proposed explorations can hardly be presumed to be susceptible of translation to other markets. Certainly, when an applicant appraises a given market for which he intends to apply for a new UHF television station, he then knows the types of programming the existing stations are providing and what his competition will be. Thus, it should be *his* judgment, *not ours*, as to when he will achieve adequate all-channel receiver saturation in the market so as to insure that the programs he intends to broadcast will attract viewers, advertisers, and satisfactory revenues.

An applicant, in any given situation, having surveyed the potential of a market, having weighed his own financial strength and his readiness to assume the risk, should be in a far better position than we to judge whether he can survive in the face of multifarious and imponderable adversity. We should not be occupied in testing such judgments (except when they are patently unreasonable) in adjudicatory proceedings where subjectivity often takes the place of objectivity and passion often displaces reason.

One of the principal differences between me and the other Panel members is how the public interest is best served. I do not believe that UHF television will succeed or fail depending on the care exercised by the Commission in second-guessing applicants' judgments as to their financial ability to survive the competition that they are more aware of than are the members of this Commission.

Although I share the concern of the majority that some new UHF stations may meet with failure unless they are sufficiently financed to get through an indeterminate receiver conversion period, I refuse to make UHF stations "second class" by setting up financial standards that would discriminate against applicants for such stations in markets having three VHF stations by adopting issues that would open the hearing records to testimony deficient in probative value and to conclusions impossible of reasonable proof.

The public interest is simply not concerned with the possibility that because of competition a new station may be forced to cease operation because of inadequate revenues. "The likelihood and even the certainty of some business failures is the price of competition. Congress in determining that the broadcast industry should be competitive has decided that price is not too high considering the benefits which flow therefrom." *The Voice of Cullman*, 6 RR 164, 169. "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public." *Sanders Bros.* at 309 U.S. 475.

The Commission presumably satisfied the requirements of Section 307(b) of the Act when it allocated television channels to these markets. All that remains is for the Commission to make a grant

* The expense of preparing and filing an application and prosecuting it through a comparative hearing is not to be lightly regarded.

to the applicant in each market that has met the test of statutory in the public interest, it being immaterial whether the station will operate at a profit, will break even, or go broke. "Congress intended to leave competition in the business of broadcasting where it found it" and to permit a licensee "to survive or succumb according to his ability to make his programs attractive to the public." *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470. Thus, it is not a function of this Commission to, in effect, guarantee to any business enterprise desiring to engage in the business of broadcasting greater security than it can obtain by its own competitive ability. To hold to the contrary would be to equate private interest with the public interest contrary to the recognized purpose of the Communications Act.

I feel compelled to say a few words on the majority's dissertation on equity capital vs. debt capital. The majority infers that equity capital is much to be preferred as a method of financing. This determination is made, so to speak, in a vacuum—devoid of facts. Financing, in the order of magnitude we are here concerned with, is not a matter to be treated in over-simplification. It can take many complex patterns. Assuming good faith and honesty on the part of applicants, the incentive to protect equity capital should be no greater than that of protecting debt capital thereby maintaining the good name and credit of the borrowers. Indeed, in certain circumstances as, for example, where there is substantial debt, it would appear that the judgment of the lenders of the debt capital would constitute an independent and significant reaffirmation of the wisdom of the undertaking, since bankers, traditionally, do not loan money for highly speculative undertakings where a high risk is compensated only by an opportunity to earn a legal rate of interest by way of return. In the circumstances here prevailing, I do not believe the Commission should make a determination that one method of financing is superior to any other. Each situation must rest on its own facts and careful appraisal. Thus, I believe the method of financing should best be left to each applicant.

F.C.C. 65R–89

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
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| FREDERICK B. LIVINGSTON AND THOMAS L. DAVIS D.B.A. CHICAGOLAND TV CO., CHICAGO, ILL. | Docket No. 15668<br>File No. BPCT–3116 |
| WARNER BROS. PICTURES, INC., CHICAGO, ILL. | Docket No. 15669<br>File No. BPCT–3271 |
| CHICAGO FEDERATION OF LABOR AND INDUSTRIAL UNION COUNCIL, CHICAGO, ILL. | Docket No. 15708<br>File No. BPCT–3439 |
| For Construction Permit for New Television Broadcast Station | |

## MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it for consideration a petition to enlarge issues, filed December 10, 1964, by Chicagoland TV Company (Chicagoland) seeking to add the following issues:[1]

(a) To determine whether Chicago Federation of Labor and Industrial Union Council is legally qualified to construct and operate a television station.

(b) To determine whether a grant of the application of the Chicago Federation of Labor and Industrial Union Council would be consistent with the provisions of Section 310(a) (4) of the Communications Act No. 1034, as amended.

(c) To determine whether the Chicago Federation of Labor and Industrial Union Council is financially qualified to construct and operate the proposed television station.

(d) To determine whether a grant of the application of the Chicago Federation of Labor and Industrial Union Council would be consistent with the provisions of Section 73.636 of the Commission's Rules.

2. Before discussing the merits of this petition the Board will consider the additional pleadings filed as a result of the Broadcast Bureau's comments.[2] On the last permissible day, January 7, 1965, the Federation filed its opposition pleading to Chicagoland's petition to enlarge issues. On the same day the Broadcast Bureau filed the comments alleging, among other things, new matter, not

[1] Pleadings before the Board include: (1) Petition to enlarge issues. filed December 10, 1964, by Chicagoland TV Company (Chicagoland); (2) Comments, filed January 7, 1965, by the Broadcast Bureau; (3) Opposition, filed January 7, 1965, by Chicago Federation of Labor and Industrial Union Council (Federation); (4) Reply, filed January 19, 1965, by Chicagoland; (5) Reply to (4), filed January 19, 1965, by the Federation; (6) Petition for ??????, file response to (5), filed January 27. 1965, by Chicagoland; (7) Response to (5), filed January 27, 1965, by Chicagoland; (8) Motion to strike (5), filed January 27, 1965, by Chicagoland; and (9) Opposition to motion to strike, filed February 8, 1965, by Federation.

[2] Items (5), (6), (7), (8) and (9) listed in Note 1. Under Section 1.21 of the Rules, the Broadcast Bureau is a party to every appropriate adjudicatory proceeding. By Memorandum Opinion and Order in *Musical Heights, Inc.*, FCC 58–1094, 17 RR 1101, the Commission held that comments filed by a party within the 10 day period for oppositions without Commission authorization or request did not contravene the limitations imposed by Section 1.45 of the Rules.

cited by Chicagoland in its petition, i.e., that the information on file with the Commission relative to the citizenship of Morris Bialis, a member of the Federation's Executive Board, was insufficient to prove that he is a United States citizen. The Federation filed a reply to the Bureau's comments on January 19, 1965, in which it pointed out that on October 28, 1964, it had filed an amendment to its application showing that Morris Bialis was naturalized May 4, 1923, in Superior Court, Cook County, Illinois, Certificate No. 279.2012. The Board will accept the Federation's reply to the extent that it answers the new matter raised by the Bureau. The remainder of this reply will be stricken as unauthorized by Section 1.45 of the Commission's Rules. A petition for leave to file a response to the Federation reply to Bureau's comments, and a response, were filed by Chicagoland on January 28, 1965. On the same date Chicagoland also filed a motion to strike the Federation's January 7th reply. As Chicagoland's response is not directed toward the new matter raised by the Bureau, the Board will deny Chicagoland's petition for leave to file a response and will not accept the response. In view of our disposition of the Federation's January 7th reply, Chicagoland's motion to strike, and the opposition thereto filed by the Federation, on February 8, 1965, will be dismissed as moot.

*Legal Qualifications Issue*

3. Chicagoland requests that an issue be added to determine whether the Federation possesses the requisite legal qualifications to be a licensee of the Commission. Petitioner contends that the Federation does not possess in its constitution authority to operate a television station. In addition, petitioner asserts, the Federation cannot fulfill both the objects and principles stated in its constitution and its obligation to serve the public interest as a licensee of the Commission. The latter assertion is based on the theory that as a licensee the Federation must fairly present viewpoints opposed to labor; events that may reflect discredit on the labor movements; and give unbiased coverage to the activities of management and government. Chicagoland further contends that the Federation's president lacked authority to file the application for Channel 38 because that action required the unanimous approval of the membership, which has not been demonstrated. Therefore, petitioner argues, the Federation's application is the result of an *ultra vires* act and consequently a nullity.

4. In opposition the Federation alleges that it and its predecessor have been licensees of the Commission continually since 1926; that its constitution contemplates the operation of WCFL and other stations; that its license has been consistently renewed by the Commission at the close of each license period; that the Executive Board of the Federation, which is empowered by the constitution to interpret the constitution, approved by the President's filing of this application on October 20, 1964; and that the decision to file an application for Channel 38, was approved by the delegate membership at a special meeting held on October 27, 1964.

5. The Review Board can find no support for petitioner's suggestion that the Federation would be unable to fulfill its own objectives and operate in the public interest if its application were granted. As noted in the Broadcast Bureau's comments, there has been no demonstration or allegation that the Federation's radio Station, WCFL, has failed to operate in the public interest in the 39 years of its existence and no indication that any individual union member has ever voiced dissatisfaction with its operation. In this respect it is noteworthy that the Commission renewed the license of WCFL on November 16, 1964. Nor can we find merit in petitioner's assertion that the Federation's constitution fails to grant the applicant legal capacity to own and operate a television station. Article IV, Section 3(D) of the Federation's constitution provides in part:

> The President and the Secretary-Treasurer shall be responsible for the filing of financial and other reports with the Federal Communications Commission in connection with WCFL and *such other stations as this organization may decide to operate.* (Italics added.)

The question, then, is whether the television station proposed by the Federation is encompassed by the terms "such other stations as [the Federation] may decide to operate." That "such other stations" includes television as well as radio (aural) stations is an interpretation of the constitution to be made in the first instance by the Executive Board of the Federation.[3] On October 20, 1964, the Executive Board approved the filing of the subject application. In the event any further procedural question remains as to the Federation's decision to operate a television station, we note that on October 27, 1964, at a special meeting, the delegate membership of the Federation voted unanimously to adopt the minutes of the Executive Board meeting of October 20, 1964. From the above, it is clear that no substantial question has been raised concerning the legal capacity of the Federation to operate a television station or the procedure followed by the Federation in filing the subject application.

*Citizenship Issue*

6. There is no Federation requirement that a member of a local union which is part of the Federation be a United States citizen; thus, Chicagoland asserts, an issue is necessary to determine if the Federation complies with Section 310(a)(4) of the Communications Act of 1934, as amended.[4] Petitioner contends that information on file with the Commission indicates only that the officers and members of the Executive Board are citizens, but makes no showing as to the nationality of the locals' delegates to the Federation or the membership composition of these local unions. The Broadcast Bureau, in supporting addition of this issue, states that the citizenship of one member of the Executive Board is question-

[3] See Article V, Section 6 of the constitution of the Federation.

[4] Section 310(a) of the Communications Act:
"The station license required hereby shall not be granted to or held by . . . (4) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country."

able.[5] Chicagoland requests that the Federation be required to demonstrate the United States citizenship of all the members of the local unions comprising it; the Bureau suggests that the Federation's showing must at least prove the citizenship of the local unions' delegates to the Federation.

7. The Federation, in opposition, states that each officer and member of the Executive Board is a United States citizen and that only local *unions* are members of the Federation (individual *members* of those unions are not). Therefore, the Federation claims, it should not be required to ascertain the nationality of "hundreds of thousands" of local union members. The Federation also argues that no citizenship issue should be added in the absence of a *prima facie* showing of "foreign influence" by the petitioner.

8. It is well settled that an unincorporated association must comply with the requirements of Section 310(a)(4). *Kansas City Broadcasting Co., Inc.*, 5 RR 1057 (1952). In its opposition pleading the Federation makes no attempt to demonstrate the percentage of U.S. citizenship among the members of the local unions comprising Federation or among the local union delegates to the Federation.[6] Due to the Federation's failure to properly demonstrate compliance with Section 310(a)(4) of the Communications Act, the Board will add a citizenship issue. Whether the Federation must show the citizenship of all members of the local unions, or, as it contends, only the local union delegates, is encompassed within the Section 310(a)(4) issue which is being added; the allegations and counter-allegations made by the parties do not permit a determination of this question on the basis of the pleadings before us.

*Financial Qualifications Issue*

9. The following facts are undisputed: (a) the Federation's approximate cash requirement for construction and three months operation on Channel 38, is $2,053,033; (b) the Federation has obtained a properly evidenced loan commitment from the Chicago National Bank in the sum of $1,250,000 addressed to William A. Lee, President; (c) the Federation has also arranged for deferred credit from the manufacturer for the purchase of equipment in the amount of $1,012,500; and (d) the Federation is presently involved in a legal contest with the Internal Revenue Service over whether it must pay taxes on profits of WCFL in the amount of $485,784.

10. Chicagoland asserts that the $1,250,000 loan should not be included in computing the Federation's financial ability as its constitution does not authorize the President or the Executive Board to borrow money for any business purposes. For the same reason petitioner contends that the $1,012,500 deferred credit is similarly not applicable for purposes of demonstrating the Fed-

[5] The question of the citizenship of this Executive Board member, Morris Bialis, is the new matter to which we referred in paragraph 2, *supra*. On the basis of the information contained in the Federation's October 28, 1964, amendment, no question as to his citizenship remains.

[6] In an unauthorized reply to the comments of the Broadcast Bureau, the Federation attempted to introduce the incomplete results of a citizenship survey taken among the local union delegates. See footnotes 1 and 2, *supra*.

eration's financial qualification. Chicagoland argues further that the Federation's balance sheet does not reflect a contingency fund for the possible $485,784 tax judgment. Petitioner contends that without the two sources of credit (Chicago National Bank and the equipment manufacturer) and with the possibility of a tax judgment, the Federation is not financially qualified to construct and operate a UHF television facility.

11. The Federation, in opposition, claims that it proposes to use funds in a manner provided for by its constitution, namely, the operation of additional broadcast facilities. The Federation asserts that the Executive Board, which is empowered to interpret the constitution, and the membership have approved the filing of the Federation's application for Channel 38 and the incidents thereto, including the obtainment of credit from Chicago National Bank and the equipment manufacturer. Further assertions are made that the Federation is a legal entity with capacity to sue and be sued and therefore has legal capacity to borrow money and enter into a deferred credit agreement. Moreover, the Federation contends *arguendo* that if there has been a breach of fiduciary duty on the part of the Federation's officers, the proper redress is through the Secretary of Labor under the National Labor Relations Act and not through a petition to enlarge issues. The Federation also states that it has net current assets of over $1 million in addition to any loan commitments and that if a tax judgment is obtained against the Federation there are sufficient assets reflected in the balance sheet attached to its application to satisfy the judgment without impairing the financial ability of the Federation to construct and operate the proposed facility.

12. Chicagoland's request for this issue will be denied as no showing has been made which would prompt the Board to question the financial qualifications of the Federation. The notation on the Federation's balance sheet showing the existence of the contingent liability to the IRS is fully in accord with accepted accounting procedures. In addition, the properly evidenced bank loan and deferred credit agreement adequately demonstrate that the Federation has ample funds to effectuate its proposal. In considering the addition of a financial qualifications issue the Board seeks to determine whether there is assurance that adequate funds are available to the applicant. In the absence of evidence indicating that the Chicago National Bank or the equipment manufacturer questions the Federation's capacity to incur debt and as these entities appear to be willing to extend credit, the Board will not question the Federation's financial qualifications. See *Tri-Cities Broadcasting Co.*, FCC 65R–48, released February 4, 1965; *Springfield Television Broadcasting Corporation*, FCC 64R–243, 2 RR 2d 843; and *Massillon Broadcasting Co., Inc.*, FCC 61–1164, 22 RR 218. The Federation's credit arrangements, together with its net current assets, are sufficient to meet its construction costs and initial operating expenses. Finally, we can find no merit in the argument that the Federation's officers and its Executive Board cannot incur a debt in the absence of specific constitutional authority. We have already concluded that the officers and Execu-

tive Board were authorized by the delegate membership to file the subject application. That authority would be meaningless in the absence of concurrent authority to take such actions as are necessary to the successful prosecution of the application, including obtaining financial backing. The petitioner does not cite, nor are we aware of any law which prohibits an unincorporated association, such as the Federation, from incurring a debt for the purpose of implementing a declared objective of the association.

*Multiple Interest and Control Issue*

13. Chicagoland contends that the Federation's application violates the intent of Section 73.636(a)(2) of the Commission's Rules. Petitioner states that one officer and two members of the Executive Board of the Federation are members of local unions which "are *or could be* representative of many of the employees of competing television and radio stations in the city of Chicago" (emphasis added); and thus the local unions constituting the Federation have a direct interest in the operation of and an indirect control over competing stations. Such control must be imputed to the Federation, argues the petitioner. Chicagoland further asserts that in the past labor unions have claimed a direct interest in the operation of broadcast stations to justify their intervention in opposition to applications for transfer of control or assignment which affect their right to represent station employees. Therefore, petitioner claims, the Federation should be held to have a direct interest in competing stations for purposes of Section 73.636.[7] As authority for its request Chicagoland cites the Commission letter to *Shenandoah Life Insurance Co.*, 19 RR 1 (1959) and the Commission's Memorandum Opinion and Order in *B. J. Parrish*, FCC 58–650, 17 RR 482 (1958).

14. In opposing addition of a concentration of control issue the Federation states that as licensee of WCFL it has never been accused of using its position to the detriment of competing stations; it is not the representative of any group of employees and has no authority to call a strike or slowdown or to request disclosure of any information by the employees of a competing station; and the petitioner has also failed to allege that any party to the Federation's application has an interest in or is an officer or director of any other television station. The Broadcast Bureal also makes the last point. The Federation contends that no factual showing has been made which warrants the addition of an issue. In recommending the denial of this issue the Bureau states that petitioner has filed no affidavit supporting its request, as required by Section 1.229 of the Commission's Rules.

15. Chicagoland alludes to the "power" of the Federation to inflict harm on competing television stations through its influence on the individual members of local unions which constitute the

[7] In its reply, Chicagoland claims that it has recently been the victim of the "Federation's power" during its unsuccessful attempt to lease a superior transmitter site. Section 1.45(b) of the Commission's Rules limits replies to "matters raised in the oppositions. . . ." Therefore, this new matter alleged in Chicagoland's reply will be disregarded. This same allegation was subsequently made by Chicagoland in a second petition to enlarge, filed on January 19, 1965, which will be considered by the Board in due course.

Federation, but has offered neither affidavits nor concrete factual allegations to support this charge. Chicagoland's contention that representative unions are permitted to intervene in transfer of control and assignment proceedings and that the Federation therefore exercises direct and/or indirect control over competing stations in contravention of Section 73.636 of the Rules is concluded to be without merit. Under Section 1.223 of the Rules, any person who has a sufficient interest in the proceeding and will assist the Commission in the determination of the issues is permitted to intervene as a party and file pleadings. The intervention to which Chicagoland has attempted to analogize the present circumstance is far different from the "control" prohibited by Section 73.636 of the Rules.[8] Chicagoland has advanced a novel theory, but has failed to present any allegations of fact upon which the Board can add an issue.

Accordingly, IT IS ORDERED, This 12th day of March, 1965, That the petition to enlarge issues, filed December 10, 1964, by Chicagoland TV Company IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and that the issues in this proceeding ARE ENLARGED by the addition of the following:

> To determine whether the grant of the application of the Chicago Federation of Labor and Industrial Union Council, would be consistent with the provisions of Section 310(a) (4) of the Communications Act of 1934, as amended; and

IT IS FURTHER ORDERED, That the reply to the Bureau's comments, filed January 19, 1965, by Chicago Federation of Labor and Industrial Union Council IS STRICKEN, except to the extent reflected in this opinion; and

IT IS FURTHER ORDERED, That the petition for leave to file a response to the reply to the comments of the Broadcast Bureau, filed by Chicagoland TV Company, on January 27, 1965; the motion to strike the reply to the comments of the Broadcast Bureau, filed by Chicagoland TV Company, on January 27, 1965; and the opposition to the motion to strike the reply to the comments of the Broadcast Bureau, filed by the Chicago Federation of Labor and Industrial Union Council, on February 8, 1965, ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[8] The cases urged by Chicagoland as supporting the addition of this issue are not in point. In *Shenandoah Life Insurance Co., supra,* the Commission refused to grant a waiver of the multiple ownership rules to approve one individual serving as a director of a bank, which in its capacity as a trustee controlled broadcast facilities competitive with other broadcast facilities controlled by a second corporation in which the same individual was a director. In *B. J. Parrish, supra,* the sales manager of one station was not permitted to acquire an equitable interest in another station which served substantially the same area.

F.C.C. 65M–303

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of AMERICAN TELEPHONE & TELEGRAPH Co. Charges, Practices, Classifications, and Regulations for and in Connection With Teletypewriter Exchange Service. | Docket No. 15011 |

ORDER

The Hearing Examiner having for consideration a petition to intervene filed by Western Union International (WUI) on February 26, 1965;

IT APPEARING, that no opposition to the subject petition has been filed within the time provided by the Commission's Rules;

IT IS ORDERED, this 15th day of March, 1965, that the subject petition IS GRANTED, and that Western Union International IS MADE a party intervenor in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

CHESTER F. NAUMOWICZ, Jr., *Hearing Examiner.*

F.C.C. 65M–338

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>RADIO 13, INC.<br>For Renewal of License of Station<br>WHZN, Hazleton, Pa. | Docket No. 15684<br>File No. BR–4064 |

### MEMORANDUM OPINION AND ORDER

BY THOMAS H. DONAHUE, HEARING EXAMINER:

1. Here under consideration is a Motion to Terminate Proceeding as Moot filed by Radio 13, Inc. on February 10, 1965. Salient facts relating to that motion are outlined below.

2. On November 2, 1964, the Commission issued an order (FCC 64–997) designating the captioned application for hearing on a number of issues. Among other things, the order directed inquiry into whether Radio 13 had: misrepresented facts to the Commission; violated the Commission's Rules and the provisions of the Communications Act of 1934, as amended, in rebroadcasting programs of other stations; violated provisions of the rules dealing with operator and logging requirements; sought to deceive the Commission through the manner in which Station WHZN's logs were maintained; and controlled and supervised Station WHZN in a manner consistent with licensee responsibility.

3. On November 23, 1964, a prehearing conference was held. At that conference counsel for Radio 13 announced that his client intended to concurrently file a petition for reconsideration and an application to assign the license of Radio 13. He continued in the following vein:—The station had not been making money. Its sale would not reflect a profit and would probably reflect a loss. It was doubtful if the station could stand the expense of a hearing. It was his understanding that an agreement for sale of the station had been reached but that contracts had not as yet been drafted. A continuance of hearing was requested in order to permit preparation of the petition for reconsideration, preparation of the application for assignment, and action upon both by the Commission. Hearing was continued from January 18, 1965 to February 18, 1965.

4. On December 9, 1964, a petition for reconsideration was filed by Radio 13. That petition asserted the following:– Radio 13 is wholly owned by Lewis Adelman. Adelman's financial situation is such as to preclude his going through hearing. He has made diligent effort to find a purchaser for the station. A purchaser has been found. The total purchase price for the real estate and all

other assets is $75,000. This amount represents a very substantial financial loss for Adelman.

5. On December 22, 1964, the Broadcast Bureau filed an opposition to Radio 13's petition. In that pleading the Bureau pointed out: that the petition does not address itself to the issues; that the allegations made, in the main, relate to future not past events; that the issues direct explanation into Radio 13's character qualification to be a licensee of the Commission and it appears that Radio 13 does not want that subject explored; and that any "continuity of service" problem (if there is one) is not so serious as to require consideration of an application for assignment.

6. On January 22, 1965, the Commission released a Memorandum Opinion and Order in this matter (4 R.R. 2d 322). In that document the Commission denied Radio 13's petition. The Commission, citing *NBC, Inc.*, 21 R.R. 524, 527, stated "there is 'nothing to assign unless and until the Commission renews' the license of the station." Citing the Court in *Jefferson Radio Co., Inc.* v. *FCC*, 2 R.R. 2d 2090, 2092, the Commission continued: " 'It is the recognized policy of the Commission that assignment of broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited the authorization.' " "Here", said the Commission, "such a determination can only be made after an evidentiary hearing." Citing itself in *Harry Wallerstein, Receiver, Television Company of America, Inc.*, FCC 63–625, released July 5, 1963, the Commission went on to say: " 'The instant petition, assuming *arguendo* the allegations to be true, resolves none of the questions raised by the issues. Moreover, the petition, in effect, requests the Commission to ignore the past events and consider only the future of KSHO–TV. This the Commission cannot do. The designation order raises a number of questions concerning serious violations of the Communications Act of 1934, as amended, and the Commission's Rules and Regulations. Resolution of these questions requires a full evidentiary proceeding.' " Concluded the Commission, in the Memorandum Opinion and Order here under discussion, ruling on the Radio 13 petition must be identical with rulings made in the cases cited. In order to obtain reconsideration, questions raised by the hearing issues must be substantially satisfied.

7. On January 14, 1965, the Commission issued an Order *In re the Applications of Collins Corporation of Georgia, et al.* (FCC 65–31). The facilities involved (1310 kc/s, 5 kw power, daytime only, Kingstree, South Carolina) were those vacated or being vacated by E. G. Robinson, Jr., tra Palmetto Broadcasting Co. Robinson had been charged with, among other things, misrepresentation to the Commission. Following hearing, the Commission issued a decision denying his application for renewal of license (*Palmetto Broadcasting Co. (WDKD)*, 23 R.R. 483). Robinson unsuccessfully appealed the Commission's decision to the Circuit Court of Appeals for the District of Columbia and also without success sought review with the United States Supreme Court (334 F. 2d 534, rehearing denied at 537; cert. den. 10–12–64, 379 U.S. 843). In the order here under discussion the Commission found

Santee's proposed payment of $3,032.24 to Collins to be reimbursement for legitimate and prudent expenses incurred in the prosecution of the Collins application. It found Santee legally, technically, financially, and otherwise qualified to "construct and operate as proposed" and found that grant to that applicant would serve the public interest.

8. A check of the Santee application file (BP–16419) shows the corporation to be composed of 10 stockholders, three of whom testified on behalf of Robinson at the hearing on his renewal application. The file also shows that Santee takes over the physical facilities and real property of Robinson's station, WDKD, and in exchange pays Robinson $119,311.33. This latter figure was arrived at on the basis of an appraisal made by a station broker, naming $119,311.33 as the value of the fixed assets of Station WDKD. Personal inspection and analysis of replacement value of assets formed the basis for the broker's figure.[1]

9. On January 29, 1965, the Examiner called a further prehearing conference in the instant matter. At that conference he noted the action of the Commission on the Santee application and the method of evaluation employed in establishing the amount of money Santee was to pay Robinson for the WDKD facilities. Expressing some surprise that such a standard was approved, in light of the language of Section 301 of the Communications Act of 1934, he suggested that if the then imminent hearing on Radio 13's application for renewal was merely a kind of necessary formality to be disposed of prior to Radio 13's selling its facilities for whatever it could realize from the sale, perhaps hearing could be expedited and its removal to Hazleton, Pennsylvania, as then contemplated, could be avoided.

10. Here counsel for Radio 13 asked leave for Lewis Adelman, Radio 13's sole owner, to make a statement for the record. His statement is here set forth:

> This is probably the last opportunity I will have to say anything. In order that the record be entirely clear I wish to make the following statement concerning the action that this organization, referring to, I presume, the Federal Communications Commission, has taken against me.
>
> My position concerning the charge is nowhere apparent in the record because after having spent my entire fortune in the building and operation of this radio station for over three years in a poverty stricken area and providing a service to the community never equalled by WAZL in its 30 years of existence, as evidenced by ratings showing a three to one superiority by my station in its first year of operation, it is unfortunate that I have no funds to defend myself.
>
> That radio station represents over eight years of effort. I brought to this community my entire experience as a university instructor in radio broadcasting for many years and 12 years as Chief of Operations of the Armed Forces Radio Stations in Europe, Africa, and the Middle East.
>
> I created and enforced rigid regulations for over 100 radio stations and received the highest civilian award for this performance. There are people

[1] Employment of the "replacement value of assets" standard for assessing station value permits inclusion of such items as the following, which are taken from the broker's breakdown of station value which is attached to the Santee application:

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| 1,235 | 78 r.p.m. records | $1,235.00 |
| 1,445 | 45 r.p.m. records | 722.50 |
| 8,400 | 78 r.p.m. records | 8,400.00 |
| 743 | long playing albums | 745.00 |
| 26,895 | 45 r.p.m. records | 13,447.50 |

who will tell you that I am second to none in the art of public service broadcasting. I put all of this to bear in Hazleton.

. . . "Afterward, I built and operated commercial stations in Richmond, Virginia, and Herkimer, New York, with excellent effect and never a blemish on my record.

In October 1961 the Hazleton station went on the air. I found after one year that I could not sustain myself from its income and had to find other means for making a living which, for a 46-year-old person, is an overwhelming problem.

I wish the record to reflect that it is my intense desire to contest the charges contained in the Hearing Order and to demonstrate that they are essentially groundless and that I am eminently qualified to continue to be the licensee of WHZN. However, I have literally given everything I had to this community and it is only because of my present financial inability to prosecute this hearing that I must, with the deepest regret, request that the Commission accept the license of Radio 13, Inc., for reallocation of its frequency to someone who will serve the community at least as well as I have tried to do, and, hopefully, with better financial results.

My attorney is prepared to discuss the precise steps by which this can be accomplished most efficiently for all concerned." (Tr. 17–19)

11. Counsel for Radio 13 then stated that it was apparent that Radio 13 would not be present at the contemplated hearing. In lawyer's language he said Radio 13's plea was one of *nolo contendere*. Radio 13, he continued, would, during the forthcoming week, surrender its license and ask that its call letters be deleted. In response to the Examiner's comments concerning the acquisition of WDKD, Kingstree, by Santee, he said he was well aware of that disposition and Mr. Adelman was also aware of it. His firm was counsel for Santee as well as for Radio 13.

12. At this point counsel for the Bureau suggested alternative methods of bringing to a close the proceeding. The first alternative contemplated surrender of the license and issuance of an order terminating the proceeding. The second alternative contemplated holding the applicant in default on the basis of his expressed intent not to participate in hearing and proceed forthwith to deny the application. Strong objection to the latter alternative was voiced by counsel for Radio 13.

13. Hearing was continued indefinitely (FCC 65M–190). A letter from Radio 13's counsel to the Secretary of the Commission covered surrender of Radio 13's instruments of authorization for Station WHZN. On February 23, 1965, the Commission's Broadcast Bureau filed comments on the motion here under discussion. Pointing out that the surrender effected by Radio 13 complies with the Commission's Rules, the Bureau stated: "Since Radio has surrendered its instruments of authorization and since no factual resolution of the issues is required, Radio's application can be dismissed, and the proceeding terminated."

14. It is apparent that Bureau and Radio 13 disagree on how this proceeding should end. Radio 13 wants its retreat from the picture accompanied by extraordinary relief. As its counsel stated, it wants its surrender of license, in the face of the hearing issues, to be viewed as response akin to a plea of *nolo contendere* in a criminal proceeding. The dictionary defines that plea thus:

*NOLO CONTENDERE* . . . I will not contest it. The name of a plea in a criminal action, having the same legal effect as a plea of guilty, so far as re-

gards all proceedings on the indictment, and on which the defendant may be sentenced . . . Like a demurrer this plea admits, for the purposes of this case, all the facts which are well pleaded, *but is not to be used as an admission elsewhere.*" (Black's Law Dictionary, 3rd Edition, at p. 1246.) (Italics supplied.)

The Bureau, on the other hand, wants extraordinary relief of a different sort. Although the Commission's Rules only contemplate dismissals "with prejudice" or "without prejudice", Bureau urges that Radio 13's application be dismissed without qualification.

15. The Examiner finds himself catapulted onto the woolsack and asked to dispense equitable relief. Functioning in this role his views are these: The Commission has found that the public interest will be served by permitting a malefactor licensee, identified as such following hearing and judicial review, to designate a successor and to sell to that successor Class III, daytime-only facilities in Kingstree, South Carolina for $119,000, including nearly $25,000 for old phonograph records. This being the case, considerations of sympathy apart, should not one who has been charged as a malefactor and is willing to enter a limited plea of guilty and voluntarily surrender his station authorization, thereby saving the government the time, effort and expense of hearing, be permitted without let or hindrance to designate his successor and dispose of his Class III, daytime-only facilities in Hazleton, Pennsylvania for whatever he can get for them? Considerations of fairness seem to point to affirmative answer. Since in the judgment of his counsel to write finis to this proceeding in the manner advocated by the pleading at issue would aid in that behalf it shall be done.

Accordingly, IT IS ORDERED, this 18th day of March 1965, that the Motion to Terminate Proceeding as Moot filed by Radio 13, Inc. on February 10, 1965, is GRANTED, this hearing record is CLOSED, and the above-captioned proceedings are TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,

THOMAS H. DONAHUE, *Hearing Examiner.*

BEN F. WAPLE, *Secretary.*

F.C.C. 65–210

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| JAMES B. CHILDRESS, BURNSVILLE, N.C. | Docket No. 15883 |
| Requests: 1540 kc., 1 kw., Day, Class II | File No. BP–15374 |
| JAMES B. CHILDRESS, THEATRICE C. CHILDRESS AND JAMES ARDELL SINK D.B.A. DENTON RADIO CO., DENTON, N.C. | Docket No. 15884 File No. BP–15510 |
| Requests: 710 kc., 10 kw., DA, Day, Class II | |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND LOEVINGER DISSENTING.

1. The Commission has before it for consideration (a) the above-captioned and described applications; (b) the joint "Petition to Deny", filed on April 15, 1963 by Davidson County Broadcasting Company, licensee of Station WBUY–AM–FM, Lexington, North Carolina, and Thomasville Broadcasting Company, licensee of Stations WTNC–AM–FM, Thomasville, North Carolina (hereinafter both referred to as Petitioners) directed against a grant of the above-captioned application of Denton Radio Company (BP–15510); (c) the "Opposition to Petition to Deny", filed on April 30, 1963 by the Denton Radio Company; (d) the "Reply to Opposition to Petition to Deny", filed on May 10, 1963 by the petitioners; and (e) the letter, filed on October 13, 1964, by the petitioners.

2. By a letter dated August 13, 1964, the Commission afforded the petitioners an opportunity to amend their petition to deny with respect to the *Carroll* [1] issue in accordance with the *Missouri-Illinois Broadcasting Co.* case, 3 RR 2d 232 (1964). The petitioners, in a letter filed on October 3, 1964, indicated that they did not intend to amend their petition and requested the Commission to disregard the allegations pertaining to the *Carroll* issue. Accordingly, the Commission will disregard paragraphs 20–23 of the petition and consider the remaining paragraphs of the petition. The petitioners request that the above-captioned application of Denton Radio Company (BP–15510) be designated for hearing on the following issues, to determine: (a) the efforts made by the applicant to ascertain the programming needs and interests of the area to be served and how the applicant proposes to meet such needs and interests (*Suburban* issue [2]); (b) whether the proposed station is, in fact, intended to

[1] *Carroll Broadcasting Co.* v. *F.C.C.* 258 F.2d 440, 17 RR 2066 (1958).
[2] *Henry et al, (Suburban Broadcasting) v. F.C.C.*, 302 F.2d 191, 23 RR 2016 (1962).

be a Denton station; (c) whether the applicant is financially qualified to construct and operate as proposed; (d) whether a grant of the application would result in a concentration of control of standard broadcasting in a manner inconsistent with the public interest; (e) whether or not James B. Childress has trafficked in licenses or abused Commission processes and whether he possesses the necessary character qualifications to be a broadcast licensee; and (f) whether or not the applicant gave timely public notice of the filing of its application as required by Section 1.580 of the Commission's Rules.

3. The petitioners allege standing as "parties in interest" in this proceeding on the grounds that a grant of the Denton application (BP–15510) would result in the diversion of advertising revenues from Stations WBUY–AM–FM, Lexington, North Carolina and Stations WTNC–AM–FM, Thomasville, North Carolina and that the proposed station would have an adverse economic impact on each of these stations. The city of Denton is located approximately 18 miles from both Lexington and Thomasville. The proposed station would provide a signal of at least 25 mv/m over the city of Lexington and a signal of at least 5 mv/m over the city of Thomasville. In view of the foregoing, it appears that the proposed station will compete with the petitioners' stations for listening audience and revenues. The Commission is of the opinion that the petitioners are "parties in interest" within the meaning of Section 309(d)(1) of the Communications Act of 1934, as amended, and Section 1.580(i) of the Commission's Rules. *F.C.C.* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 9 RR 2008 (1940). However, the petitioners standing is limited to matters concerning the Denton proposal (BP–15510).

4. The petitioners request that a *Suburban* issue be specified on the grounds that the applicant (BP–15510) has not ascertained the real program needs and interests of the community proposed to be served. Denton has a population of under 1000. Yet, the petitioners have submitted affidavits from the Mayor and his two predecessors in that office, the principal of the Denton public schools, a member of the County Board of Commissioners residing in Denton, and a member of the Town Board of Commissioners, all stating that at no time were they contacted by the applicant with respect to proposed programs for the community. Petitioners further assert that the proposed programming for Denton is substantially identical to the programming proposed in five applications filed by James B. Childress for communities located in three separate states, as well as substantially identical to that proposed in the pending Burnsville application. None of the partners of the applicant are now, or ever were, residents of Denton. The applicant's contention is that the broad experience of the partners in North Carolina broadcasting has sufficiently familiarized them with the programming requirements of small communities similar to Denton so that they are now capable of formulating a flexible and appropriate programming proposal without specifically consulting community leaders and residents. The applicant does allege that he has several times in the past ten years visited Denton, listened

to the radio stations serving Davidson County, talked with radio station employees in the area, and consulted with relatives residing in the surrounding communities about general programming needs. The *Peace River Broadcasting Corp.* 23 RR 1218 (1962) decision is cited by the applicant in support of the contention that it has adequately complied with the *Suburban* rule. That case is distinguishable on its facts, and conclusion of the Commission was arrived at only after a hearing on the issue had been held. The programming proposed in the Denton application is substantially similar to that proposed in the Burnsville application. The Burnsville applicant does not indicate that it has taken any definite steps to ascertain the particular programming needs and desires of the community. On the basis of the information submitted, and in view of the substantially similar programming proposals noted above, the Commission is of the opinion that a substantial question exists as to whether sufficient efforts have been made to ascertain the programming needs and interests of Denton and Burnsville. Therefore, the requested *Suburban* issue will be specified as to the Denton proposal and the Commission will, on its own motion, specify the *Suburban* issue as to the Burnsville proposal. *Don L. Huber* 22 RR 954 (1962); *Lindsay Broadcasting Company* 22 RR 805 (1961); *Chapman Radio and Television Company* FCC 65–127 (released February 19, 1965).

5. The petitioners request that the application (BP–15510) be designated for hearing to determine whether a grant of the application would result in a concentration of control of standard broadcasting in a manner inconsistent with the public interest. James B. Childress, the individual applicant in the above application, File No. BP–15374, also owns a 51 percent interest in the above application, File No. BP–15510. Childress presently has the following standard broadcast interests in the State of North Carolina: (1) WKJK, Granite Falls—100%; (2) WMSJ, Sylva—100%; (3) WKSK, West Jefferson—51%; and (4) WKRK, Murphy—minority interest. He also has a minority interest in (5) Station WLAF, Lafollette, Tennessee. These existing stations and the proposed Denton station are all located within 120 miles of the Burnsville proposal. There is no violation of Section 73.35(a) of the Commission's Rules since a grant of the above applications will not result in any overlap of the 1 mv/m contours of the existing and proposed stations. However, the Commission has considered the contentions of the petitioner and applicant and is of the view that a substantial and material question exists as to whether a grant of either or both of the above applications would result in a concentration of control of standard broadcasting contrary to the public interest in violation of Section 73.35(b) of the Commission's Rules. Accordingly, the requested issue will be specified as to the Denton proposal and the Commission, on its own motion, will specify the issue as to the Burnsville proposal.

6. Petitioners challenge the character qualifications of James B. Childress on the basis of alleged "trafficking" in broadcast stations and applications. "Trafficking involves, among other things, intention, the element of time, and price." *Atlantic Coast Broadcasting Corporation of Charlestown* 22 RR 1045, 1051 (1962). The

Commission considers both past and proposed transactions in order to discern a pattern of conduct indicating acquisition of station ownership for the purpose of profitable resale rather than for operation. *Franklin Broadcasting Company* 22 RR 880 (1962). *Versluis Radio and Television, Inc.* 9 RR 1123, 1141 (1954). Mr. Childress has retained his original 25 percent in Station WMSJ, Sylva, North Carolina, and increased his interest in this station to 100 percent in August, 1962. He has retained control over Station WKSK, West Jefferson, North Carolina since August 1959. In July 1962 Mr. Childress acquired by assignment the construction permit for Station WKJK, Granite Falls, North Carolina and has been operating the station since that time. The Commission approved, in July 1962, the assignment of the construction permit for Station WKMK in Blountstown, Florida and approved, in December 1962. the sale of Childress stock in WLAF, LaFollette, Tennessee. In April 1963, the Commission approved a sale of 75 shares of stock in Childress Broadcasting Service, Inc., the corporate licensee of Station WKRK, Murphy, North Carolina, by Mr. Childress to Paul Ridenour, his station manager, for $45,000. Mr. Childress had owned WKRK for five years and still retains a small interest in the corporation. A review of the past transactions by Mr. Childress does not at this time indicate a pattern of trafficking. Therefore, the request for its specification as an issue will be denied.

7. The petitioners claim that the Denton Radio Company is not financially qualified to construct and operate as proposed. Subsequent to the petitioner's claim, the applicant, on August 9, 1963, amended the financial portion of its application. The Commission has considered the financial aspects of both the Denton proposal, as amended, and the Burnsville proposal. Funds of approximately $55,180 will be needed to construct both stations and to operate them for a reasonable time without any revenues. To meet these costs the applicants show cash of $4,500, a bank loan commitment for $50,000, and real property appraised at $50,000 for immediate sale. The applicants have demonstrated to the satisfaction of the Commission that they have sufficient funds available for the construction and initial operation of each station. Accordingly, the request for a financial issue will be denied.

8. Petitioners request that an issue be specified to determine whether the proposed station is, in fact, intended to be a Denton station. They assert that the proposed transmitter and studio site are located closer to Lexington and Thomasville than Denton. Furthermore, they claim that the proposed station will place a signal of 25 mv/m or better over all of Lexington and a 5 mv/m signal over all of Thomasville. The applicant's proposal does provide adequate coverage to the town designated. The fact that the proposal also places a strong signal over Lexington and Thomasville in no way violates the Commission's Rules. The Commission finds that the requested issue is not warranted on the facts of this case.

9. Petitioners further request an issue to determine whether Denton Radio Company has met the requirements governing the publication of the notice of the filing of its application. Section 1.580(c)(1) of the Commission's Rules provides that, where it is appropriate to publish notice of the filing of an application in a

weekly newspaper, such notice shall be published once a week for three weeks immediately following the tendering of the application. The Denton Radio Company's application was tendered for filing on April 16, 1962, and the notice was published in the Davidson Record, a weekly publication in Denton, on May 31, June 7 and June 14, 1962. However, the Commission finds that the notice given was adequate to apprise the public of the filing of the application. The Commission does not regard this delay as a serious matter and finds that the publication of the required notice was in substantial compliance with the Rules. Therefore, the Commission will waive the strict requirements of Section 1.580(c)(1), and the requested issue will not be specified.

10. There remains no other material or substantial questions of fact presented by the petitioners in their petition to deny which would warrant the specification of issues in this proceeding. Accordingly, the petition to deny will be granted to the extent indicated above and denied in all other respects.

11. Except as indicated by the issues specified below, each of the above-captioned applicants is legally, technically, financially and otherwise qualified to construct and operate as proposed. The Commission is unable to make the statutory finding that a grant of the above-captioned applications would serve the public interest, convenience and necessity and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below.

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

1. To determine whether a grant of either or both of the above-captioned applications would be in contravention of Section 73.35(b) of the Commission's Rules with respect to concentration of control.

2. To determine the efforts made by James B. Childress (BP–15374) to ascertain the programming needs and interests of the area to be served and the manner in which applicant proposes to meet such needs and interests.

3. To determine the efforts made by Denton Radio Company (BP–15510) to ascertain the programming needs and interests of the area to be served and the manner in which applicant proposes to meet such needs and interests.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues whether either or both of the applications should be granted.

IT IS FURTHER ORDERED, That, with respect to the application of the Denton Radio Company, the strict requirements of Section 1.580(c)(1) ARE HEREBY WAIVED.

IT IS FURTHER ORDERED, That the participation of Davidson County Broadcasting Co. and Thomasville Broadcasting Company in the proceeding ordered herein shall be limited to the issues affecting the application of Denton Radio Company (BP–15510).

IT IS FURTHER ORDERED, That, the Petition to Deny, filed

by Davidson County Broadcasting Co. and Thomasville Broadcasting Company IS GRANTED to the extent indicated above and IS DENIED in all other respects.

IT IS FURTHER ORDERED, That, in the event of a grant of the Denton Radio Company application, the construction permit shall contain the following condition:

> Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

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

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

Adopted March 17, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65M–343

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>FREDERICK B. LIVINGSTON AND THOMAS L. DAVIS D.B.A. CHICAGOLAND TV CO., CHICAGO, ILL. | Docket No. 15668<br>File No. BPCT–3116 |
| CHICAGO FEDERATION OF LABOR AND INDUSTRIAL UNION COUNCIL, CHICAGO, ILL.<br>For Construction Permit for New Television Broadcast Station (Channel 38) | Docket No. 15708<br>File No. BPCT–3439 |

### MEMORANDUM OPINION AND ORDER

BY CHESTER F. NAUMOWICZ, JR., HEARING EXAMINER:

1. The Hearing Examiner has for consideration: (1) a Petition for Reconsideration of Examiner's Adverse Ruling filed by Chicagoland TV Company on March 16, 1965,[1] together with a reply thereto filed by the Broadcast Bureau on March 19, 1965;[2] and (2) a letter of March 17, 1965 to the Examiner from counsel for Chicago Federation of Labor and Industrial Union Council containing a summary of authorities, in support of the admissibility of Federation Exhibits 32, 33, 34 and 34A.[3]

2. Chicagoland seeks reconsideration of the Examiner's ruling rejecting its Exhibit No. 17, a 95 page document directed to the past performance of Station WAAF in which one of the Chicagoland partners had a management—but not an ownership—interest. Federation urges the admission of its Exhibits 32, 33, 34 and 34A, which in 57 pages deal with contacts made by Federation principals with local civic leaders and residents after the final submission of the Federation programming proposal.

3. Each party cites Commission decisions which, it contends, constitute precedent for the admission of exhibits of the type it has offered. However, none of the cited authorities contains a direct ruling on the question of admissibility. In each instance the Commission was not ruling on a challenge to the admissibility of the evidence, but was stating the purpose for which it would consider evidence already received into the record, without opposition so far as can be gleaned from the decisions themselves. While

[1] On March 15, 1965, the Hearing Examiner gave oral consent for the filing of a petition for reconsideration.

[2] Counsel for Federation orally advised the Hearing Examiner that his client would rest on the objections to the subject exhibit expressed on the record when the exhibit was originally offered and rejected.

[3] The Exhibits were offered into evidence during a hearing session of March 12, 1965, but ruling thereon was reserved pending filing of the subject table of authorities.

consideration of inadmissible evidence received without objection is appropriate, *Diaz* v. *United States*, 223 US 442, the utilization of such evidence is not to be construed as an implied ruling that it should be received over objection.

4. Thus, the parties have cited no direct precedent controlling the disposition of the subject pleadings. The Examiner must be guided by the usual considerations of whether the proffered evidence is inherently credible and whether it tends to prove facts significantly pertinent to the resolution of the designated issues: that is, competence, relevance and materiality. In this instance, all of the subject exhibits fail for lack of materiality.

5. Chicagoland Exhibit No. 17 details the past performance of Station WAAF in which one of the Chicagoland partners, Mr. Davis, held a substantial management—but no ownership—interest. Petitioner cites instances where the Commission has considered such broadcast records on the ground that they tend to demonstrate the "experience" of the non-owning manager, and suggests that such is especially pertinent in this instance because WAAF, under Mr. Davis, has offered precisely the sort of minority oriented programming now proposed by Chicagoland. However, scrutiny of the precedents does not suggest that evidence of the sort here involved has been of substantial assistance to the Commission in resolving issues comparable to those designated in this proceeding, nor is there any indication that an individual's broadcast experience might not better be proven by direct evidence on the matter. If Mr. Davis has, in fact, gleaned experience from his management of Station WAAF which would qualify him uniquely for the operation of Chicagoland's proposed station, it would be far more meaningful for him to delineate that experience and relate it to the problems he anticipates for his instant proposal. Absent some threshold showing as to how voluminous evidence concerning the WAAF programming would assist significantly in evaluating Mr. Davis' experience, the proffered exhibit will be rejected as immaterial.

6. Similar reasoning is applicable to the subject Federation exhibits. The principal value of community surveys is to secure opinions as to how the station's programming can best serve the community. Patently, surveys conducted subsequent to the submission of an applicant's most recent programming proposal cannot have affected such proposal. While such surveys may tend to show the applicants continuing interest in the suitability of its program proposal, some threshold showing to establish that such proof would materially assist in the disposition of the designated issues should first be laid. No such foundation having been offered, Federation Exhibits 32, 33, 34 and 34A will be rejected as immaterial.

7. Nor is the admission of the subject exhibits required by the fact that a portion of Chicagoland Exhibit 13, which has been received in evidence, is related to community contacts made subsequent to the submission of Chicagoland's final program proposal. This aspect of Exhibit 13 was not directed to the Examiner's attention at the time the exhibit was offered into evidence, nor has

Federation made any attempt to secure deletion of all or part of the exhibit on that ground. Thus, although Federation is undoubtedly entitled to expect uniformity of rulings with respect to the similar exhibits of the contending parties, its failure to object to the offending portion of the Chicagoland exhibit has, thus far, deprived the Examiner of the opportunity of ruling on that aspect of the exhibit. A party does not acquire a vested right in the admissibility of otherwise unacceptable evidence by remaining silent when its opponent offers similar evidence. The remedy protecting against disparity of treatment in such circumstances lies in the motion to strike. Particularly is this so in administrative proceedings where there is no jury to have been inflamed by exposure to improper evidence.

8. In excluding the subject exhibits, the Hearing Examiner, as hereinbefore indicated, is not unaware of instances where similar exhibits have been received into the records of proceedings before this Commission. However, the Hearing Examiner is also not unaware of the burden imposed both upon parties and upon adjudicatory authorities by protracted hearings and lengthy records. The rejected exhibits are substantial in size. If they were to be received, cross-examination thereon would be in order, and, if cross-examination is to be a meaningful right rather than an empty form, it may be long. Thus, should the Examiner follow the time-honored administrative practice of letting in dubious evidence "for what it is worth," he would not only be expanding the record by the 150 odd pages of exhibit material, but possibly by many pages of cross-examination transcript. Such an expansion of the record, with the attendant burden on all concerned, in favor of evidence which, if true, is unlikely to greatly help any party, or which, if proven false, is unlikely to greatly harm that party, is an unreasonable imposition on the administrative process.

9. This is not to say that any party should be restricted from offering evidence on aspects of its proposal which are less than crucial, or should be limited from pressing a claim as to a novel or unique point of preference. Such matters are not involved in this decision, which is limited to the rejection on grounds of immateriality of evidence which does not tend to directly prove any matter at issue, and the specific evidentiary value of which as indirect proof has not been demonstrated.

10. Nor should the applicants be deprived of a reasonable opportunity to acquaint the Commission with such facts as they believe will materially advance their cause. If the rejected exhibits are seasonably reformed to present only material facts, it would not be inappropriate for the parties to seek modification of the present hearing schedule to permit the introduction of such exhibits into the record.

Accordingly, IT IS ORDERED, this 22nd day of March, 1965, that the Petition for Reconsideration filed by Chicagoland TV Company on March 16, 1965, IS DENIED.

IT IS FURTHER ORDERED, that Exhibits 32, 33, 34 and 34A of Chicago Federation of Labor and Industrial Union Council offered into evidence during a hearing session on March 12, 1965,

**ARE REJECTED.**

FEDERAL COMMUNICATIONS COMMISSION,
CHESTER F. NAUMOWICZ, JR. *Hearing Examiner.*
BEN F. WAPLE, *Secretary.*

F.C.C. 65–227

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS WITH RESPECT TO COMPETITION AND RESPONSIBILITY IN NETWORK TELEVISION BROADCASTING | Docket No. 12782 |

## NOTICE OF PROPOSED RULEMAKING

BY THE COMMISSION: COMMISSIONER HYDE DISSENTING AND ISSUING A STATEMENT; COMMISSIONER LEE DISSENTING; COMMISSIONER LOEVINGER CONCURRING AND ISSUING A STATEMENT.

1. Notice is hereby given of proposed rule-making in the above entitled matter.

2. This proposal results from the Commission's Program Inquiry (Docket No. 12782)—an exhaustive and continuing examination, begun in February 1959,[1] of the policies, practices and operations of various components of the television industry. Particular attention has been paid to the economics of network [2] television program procurement and production and their effect upon the public interest in television program service.

[1] See Order for Investigatory Proceeding, Docket No. 12782, FCC 59–166, February 26, 1959 (printed at pp. 133–135, House Report No. 281, 88th Congress, 1st Session, May 8, 1963). Among other things the Commission's staff was directed to obtain information and data to enable the Commission to determine whether and the extent to which production of programs and acquisition of financial and proprietary interests and subsidiary rights in independently produced programs by network corporations in television are necessary to maintain a commercially viable and economically sound national television structure, or whether such practices tend unduly to restrict competition in television program production, procurement and choice in a manner inconsistent with the public interest. Also, the Commission sought to determine whether program production and procurement practices of network corporations unduly impair or impede the exercise by television licensees of their responsibility as "trustees" to provide community broadcast service. Additionally, the Commission sought to determine the extent to which program choices by network corporations are influenced by their acquisition of financial and proprietary interests and subsidiary rights in such programs. From May 1959, to March 1962, public investigatory proceedings were held in New York, Los Angeles and Washington, D.C., during which testimony was taken from many representatives of advertising agencies and national advertisers, a large number of producers of television programs (both live and film), directors, actors, talent agents, trade guild officials, university professors and others from the academic world, women's organizations, representatives of churches and other religious groups, journalists, other representatives of the public and public groups, the National Association of Broadcasters and the principal managers of the three national television network corporations. The record to date consists of 11,062 pages of transcript in 70 volumes, in addition to 462 exhibits; 246 witnesses testified (a few submitted statements), representing 197 companies, groups or organizations.

[2] Generally speaking, a television "network" is composed of a large number of independent licensees who, by contract, derive a substantial part of their programming from a central source—the network corporation. The network corporation, in turn, directly or indirectly, procures programs, arranges for sponsorship and offers a continuous, coordinated program schedule to its affiliates. It compensates the stations for carrying a program and acts as a "sales agent" for stations to create a national advertising market. Under its affiliation contract (as provided by the Commission's Chain Broadcasting Regulations), under certain circumstances the affiliate has the right to reject the program. The network corporation and its affiliates are interconnected through facilities provided by the American Telephone and Telegraph Company, which charges for the use of such facilities as a common carrier on the basis of tariffs filed with the Federal Communications Commission. Hence, in this notice, for the purpose of clarity we will use the term "network corporation" to differentiate the "central source" from the composite "network."

3. Staff reports, based on the record of the Inquiry, have been submitted to the Commission, together with conclusions and suggestions for Commission action.[3] Among other things the staff concluded that policies and practices presently pursued by network corporations tend unduly to restrict competition—both economic and creative—in the production and procurement of programs for television exhibition; that entry into network television program markets for independent program producers is substantially impeded; and that network corporations control the source of supply of television programs and dominate competition in both the network and syndication program markets. The staff suggested that the Commission, through the exercise of its rule-making authority, seek to reduce these existing competitive imbalances and to encourage and maintain increased competition in television program production and procurement.[4]

## I. *Purpose and Objective of the Proposed Rule*

4. While networks have long been a part of the American system of broadcasting, their existence and contributions need not be at the expense of genuine and healthy competition. The information and data before the Commission appear to establish that network corporations, with the acquiescence of their affiliates, have adopted and pursued practices in television program procurement and production through which they have progressively achieved virtual domination of television program markets. The result is that the three national network corporations not only in large measure determine what the American people may see and hear during the hours when most Americans view television but also would appear to have unnecessarily and unduly foreclosed access to other sources of programs. The purpose of the rule proposed herein is to foster free competition in television program markets. Specifically, the proposed rule is designed (a) to provide opportunity for entry of more competitive elements into the market for television programs for network exhibition and (b) to encourage the growth of alternate sources of television programs for both network and non-network exhibition.

5. Our purpose is to reach those practices which materially impair the ability of licensees to operate in the public interest.[5]

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[3] Part I of the Second Interim Report, "Television Network Program Procurement," submitted to the Commission by the Chief of the Office of Network Study on November 28, 1962. That Report, together with a prior Interim Report, "Responsibility for Broadcast Matter," submitted to the Commission on June 16, 1960 (which served as the basis for the Commission's Statement of Policy: see note 9, page 5, *post*) have been made public and are contained, together with a number of relevant documents, in the Report of the Committee on Interstate and Foreign Commerce, 88th Congress, 1st Session, House Report No. 281, ordered to be printed on May 8, 1963 (cited hereinafter as H. Rpt. No. 281).

[4] H. Rpt. No. 281, pp. 97–108, 115–116.

[5] The Commission, in considering restraint on competition in network radio, concluded in its Chain Broadcasting Report (Commission Order No. 37, Docket No. 5060, May 1941, pp. 88–89):

"We have been at pains to limit our regulations to the proven requirements of the situation, and especially to ensuring the maintenance of a competitive market. Radio broadcasting is a competitive industry. *The Congress has so declared it in the Communications Act of 1934, and has required the fullest measure of competition possible within physical limitations.* If the industry cannot go forward on a competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensable to the industry, then we must frankly concede that broadcasting is not properly a competitive industry. If this be the case, we recommend that the Congress should amend the Communications Act to authorize and direct regulations to protect listeners, advertisers, and consumers. We believe, however, that competition, given a fair test, will best protect the public interest. That is the American system." (Emphasis supplied.)

As the Commission has pointed out, commercial activities of licensees, whether done singly or in combination as networks, which do in fact operate against the public interest in a free, competitive broadcast structure, may not be insulated from corrective action by the Commission merely by the declaration that they are "business practices."[6] Where the public interest so requires, the Commission is empowered to consider the complex economic factors which have brought about the situation and to use its full statutory authority, if necessary, to eliminate practices of network corporations or licensees found unduly to restrict competition and to limit sources of television programming.[7]

## II. *Present Network Practices in Program Production and Procurement*

6. The network process plays an important role in providing programs supported by advertisers, for many stations throughout the country. National advertisers frequently may seek to reach different audiences.[8] Therefore, it is important to encourage open access to network time by independent program producers serving advertisers, to the end that program diversity may be encouraged. To the extent that access is narrowed, diversity may also be diminished.

7. Licensees bear the sole legal responsibility to provide television service designed to serve the needs and interests of their communities.[9] In addition a licensee assumes the duty to bring his

[6] As the Commission said in its Report on Chain Broadcasting (p. 84):
"... Licensees cannot escape the consequences of their acts or shirk their duty of properly serving the public by the simple device of describing their operating activities as business practices."

[7] In *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190, 198–199 (1943), the Supreme Court of the United States quoted with approval the Commission's statement in its Report on Chain Broadcasting setting forth its *duty with* regard to network *practices and policies*:
"'... the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated.' (Report, p. 4)
"'... A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, *by closing the door of opportunity in the network field*, adversely affect the program structure of the entire industry.' (Report, pp. 52, 57)" (Emphasis supplied.)
The Commission has said (In the Matter of Editorializing by Broadcast Licensees, Docket No. 8516, 13 FCC 1346, June 1, 1949, p. 12):
"... The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees."
In this connection the Commission adopted the test laid down by the Supreme Court (*Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)), quoting in the Editorializing Report, p. 12.:
"... It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.... That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."

[8] James Aubrey, CBS, TR. 8173; Oliver Treyz, ABC, TR 9369; Robert Sarnoff, NBC, TR 8716. In general, see Interim Report, "Responsibility for Broadcast Matter," H. Rpt. No. 281, pp. 362–382. For detailed description of the methods used by advertising agencies in adapting programming to economic, cultural and demographic groups or audiences in the interest of "efficient" advertising, see testimony of C. Terrence Clyne, McCann Erickson (TR. 416 *et seq.*), Robert L. Foreman, BBD&O (TR. 552–613) and Thomas J. McDermott, Benton & Bowles, Inc. (TR. 918–927). For a detailed description of network practices in the same area see testimony of Hugh M. Beville, Vice President for Planning and Research, NBC, TR. 8905–8946 and 8953.

[9] See Report and Statement of Policy re: Commission En Banc Programming Inquiry, FCC 60–970, Mimeo No. 91874, July 29, 1960, reprinted in H. Rpt. No. 281, pp. 157–172.

. . . positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide [an] acceptable program schedule . . . in the public interest in his community.[10]

But under the present circumstances in network television licensees have little or no opportunity to perform these essential parts of their duty as trustees for the public. The ability of licensees to obtain programs necessary to serve the needs and interests of their communities depends in large measure on the schedules offered them by the network corporations.[11] As a practical matter licensees must place practical reliance on network corporations to choose, edit and supervise the network programs which they broadcast to local audiences.[12]

Under these circumstances network corporations regularly assume responsibilities and perform functions in the television program process which directly affect the public interest in community service and which may either promote or retard the "larger and more effective use" of television channels.[13]

8. The bulk of television station programming [14] comes from three sources: (a) the three network corporations, via some form of interconnection; (b) "syndication," which can be defined for present purposes as the distribution of programs originally produced for television, often on a station-to-station basis (but sometimes to groups of stations), as programming for non-network regional or local use and (c) theatrical film originally produced for and exhibited in motion picture theatres. Each of the three network corporations offers an evening schedule, approximately

[10] *Ibid.*, H. Rpt. No. 281, p. 167.

[11] *Ibid.*, p. 168 and pp. 225–230 and 382–384.

[12] *Ibid.* Also see Policy Statement, H. Rpt. No. 281, p. 168, where the Commission concluded: "Although the individual station licensee continues to bear legal responsibility for all matter broadcast over his facilities, the structure of broadcasting as developed in practical operation, is such—especially in television—that, in reality, the station licensee has little part in the creation, production, selection, and control of network program offerings. Licensees place 'practical reliance' on networks for the selection and supervision of network programs which, of course, are the principal broadcast fare of the vast majority of television stations throughout the country." The Attorney General of the United States and the Special Subcommittee on Legislative Oversight of the House of Representatives have also expressed similar conclusions. See Report of Attorney General to the President, December 30, 1959, p. 25 and Interim Report, Special Subcommittee on Legislative Oversight, Washington, D.C., 1960, p. 38.

[13] *Ibid.* See also H. Rpt. No. 281, pp. 382–384 and p. 365.

[14] On an average, local-live programming in television accounts for about 13% of overall broadcast time. In prime time (6–11 p.m.) that percentage is considerably smaller. Between 7 and 11 p.m. the amount of local-live programming is negligible. The following figures, based on an ARB study on network clearances in prime time (percent of network programs carried by affiliates), were reported in *Television Age*, June 8, 1964, p. 31, under the comment that "*the ending of option time had only the slightest effect* on the number of network hours carried by affiliates":

"*Network clearance in prime time*
"% of network programs carried by affiliates

| | "ABC | CBS | NBC |
|---|---|---|---|
| 3 VHF station markets | | | |
| March, 1963 | 96.0 | 95.5 | 96.3 |
| March, 1964 | 94.5 | 94.2 | 93.8 |
| 4 or more VHF station markets | | | |
| March, 1963 | 98.0 | 96.8 | 98.0 |
| March, 1964 | 97.4 | 97.6 | 98.5 |

"Source: ARB, March 1963, March 1964."

A large part of station revenues is derived from sale of advertising "spots" in non-network programs. As will be seen below, currently almost all programming offered for non-network exhibition consists of film series previously shown on networks rather than programs or series originally produced for syndication. Apparently there has been some recent increase in local production of public affairs programs, some of which are available in the syndication market, but new production of "quality" film entertainment appropriate for prime time for non-network distribution has virtually disappeared. See par. 20, *post.*

four hours in duration, the largest part of which is composed of television films.

9. Normally, television network time is sold only to advertisers.[15] The total potential market available to independent producers of programs for *network* exhibition is restricted to network corporations and network advertisers.[16]

Formerly, many network television programs were developed and brought to the market in "pilot" form by independent producers at their own account and risk. A reasonably broad market was then available to such producers.[17] It was composed of a large number of sponsors and potential sponsors of network programming in addition to the three network corporations. The first-run exhibition rights to many such programs were sold by independent producers directly to sponsors and, subject to network approval as to scheduling, suitability, good taste, decency, etc., were exhibited as network offerings. Sponsors chose programs in accordance with their diverse needs from a program market provided by independent producers.[18] Up until six or seven years ago, a third to a half of network evening schedules consisted of such independent programs.

10. Direct sale to sponsors had economic advantages for independent producers. Sponsors only occasionally acquired or shared in syndication, foreign sales or other subsidiary rights.[19] These rights usually were retained by independent producers and constituted valuable commercial assets which contributed to their economic stability and viability.[20] The importance of the retention of these rights to the financial stability of independent producers is supported by the testimony of producers that in many, if not most, instances they do not recover their initial production costs from the network run of a program series but must look to syndication

[15] See extensive testimony on this point by Robert Sarnoff of NBC in the "Television Inquiry," Hearings before the U.S. Senate Committee on Interstate and Foreign Commerce, March-July 1956, Part IV, "Network Practices," pp. 2435, 2452–2455.

[16] See testimony of James Aubrey, President of the CBS Television Network, TR. 8142: ". . . the market place for the sale by . . . packagers of programs for network exhibition is either with a network or with an advertiser."

[17] For example, for the week of April 15–21, 1956, between the hours of 6–11 p.m., on CBS 23 out of 49 programs (or 46.9%) were programs in which the network had no financial or proprietary interest, and on NBC for the same period 23 out of 41 programs (or 56.1%) were programs in which the network had no financial or proprietary interest. Hours represented by these programs follow: On CBS 12 out of 27¾ hours (or 43.2%); and on NBC 13 3/5 out of 25½ hours (or 53.3%). These figures were compiled from network responses to FCC Network Questionnaire No. 2 of April 20, 1956. Also see the following CBS submission in the "Television Inquiry," Hearings before the U.S. Senate Committee on Interstate and Foreign Commerce, March-July 1956, Part IV, "Network Practices," p. 1792, providing information regarding source of programs broadcast 6 p.m. to 11 p.m. Monday through Saturday and 5 p.m. to 11 p.m. on Sunday during a week in April:

| | April 1954 | | April 1956 | |
|---|---|---|---|---|
| | Hours | Percent | Hours | Percent |
| Produced by outside sources | 9½ | 38.0 | 16 | 57.7 |
| Produced by outside sources and CBS Television | 2½ | 10.0 | 2½ | 9.0 |
| Produced by CBS Television | 13 | 52.0 | 9¼ | 33.3 |
| Total | 25 | 100.0 | 27¾ | 100.0 |

[18] TR. 469–470 and 522 (Clyne, McCann Erickson); TR. 565–571 (Foreman, BBD&O); TR. 772–773 (Seymour, J. Walter Thompson); TR. 828–830 (Levathes, Young and Rubicam). See also testimony of Mort Werner, Vice President NBC Television Network Programs and head of the NBC Television Network Program Department (TR. 9025). For testimony bearing on this subject see generally volumes 36–43 of the Program Inquiry transcript.

[19] TR. 476–478 (Clyne, McCann Erickson) and TR. 4259 (Richard Powell and Thomas J. McDermott, Four Star Productions).

[20] TR. 474–475 (Clyne, McCann Erickson).

and foreign sales to "make them whole" and to show a profit.[21]

11. In recent years (since about 1957–1958) the market in which an independent producer must sell his product has progressively contracted. The percentage of independently provided programs in the schedules of all three national television networks has declined sharply.[22] Such programs, in effect, have been crowded out of network schedules by programs—in many cases hour length film series —supplied by outside producers but procured and controlled (both creatively and economically) by network corporations. In procuring these programs network corporations almost invariably acquire the exclusive right to first-run network exhibition directly from the producer and schedule the program series in choice evening time. Often the network corporations "buy" the program series and "slot" it in the schedule before sponsorship has been obtained and, hence, assume the economic risk of selling advertising positions in the program—usually to several different sponsors.[23]

12. In addition to control of such programs through the first-run license, network corporations—usually as *a quid pro quo* for initial financing but sometimes as compensation for assumption of the risk of sale to advertisers—in the initial bargaining with producers seek and frequently obtain separately or in combination the right to share (often 50%) in the profits, if any, from the network run; the right to share in profits from subsequent network runs; the right to distribute the programs or series in domestic syndication and in foreign markets; the right to share (usually 50% for a term of years or in perpetuity) in the profits from domestic and foreign syndication sales; exploitation rights and share of profits in merchandising; and the right to share in other non-broadcast interests (e.g., motion pictures, books, magazine stories and articles, phonograph records and plays derived from the programs). Also, these arrangements usually accord network corporations the right to participate in the creative process to the extent necessary to assure themselves and mass advertisers that the program or series will initially be designed to attract large circulation and that subsequent episodes of a series will adhere to the "formula" originally designed.[24]

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[21] TR. 4254–4256 (Powell and McDermott, Four Star Productions) and TR. 4518 (Desi Arnaz, Desilu Productions). For a more recent statement see *Television Age*, January 18, 1965, p. 22.

[22] See Appendix B of this notice. Also see testimony by James Aubrey of CBS, TR. 8142–8144.

[23] In some cases the *quid pro quo* to justify the grant to network corporations of distribution and profit-sharing rights is simply the assumption of the risk of sale to advertisers. Because of the seller's market in network advertising, the network "risk" in many cases is slight, if not miniscule. Some indication of the extent of the "risk" can perhaps be inferred from a statement by Dr. Frank Stanton, President of CBS, Inc., as quoted in the trade press. "If the Surgeon General's report on smoking leads to decline in cigarette advertising, CBS will be able to more than offset such losses by acquisition of new advertising business." Broadcasting, January 20, 1964, p. 9.

[24] By and large episodes of television series are produced on the basis of "formulas"—approved in advance by the network corporation and often its mass advertisers—which "set" the characters, "freeze" theme and action and limit subject matter to "tested" commercial patterns. See testimony, among others, of writers Erik Barnouw (TR 5332 and 5357) and David Davidson (TR. 5388 and 5392–5393), producer Herbert Brodkin (TR. 6488), Ernest Kinoy, President, Writers Guild of America, East Inc. (TR. 5434–5445) and William T. Orr, Vice President of Warner Brothers Pictures, Inc. and Executive Producer, Television Division (TR. 3934-3939).

As CBS has recently stated (1963 Annual Report to Stockholders, p. 12):

"[*The*] *ability to produce a program schedule which year after year commands the largest audiences in broadcasting is founded on* a steadfast commitment to two fundamental programming principles. The first is to obtain the talents of those writers, producers, directors and performers whose outstanding abilities and dedication permit no compromise with anything less than their best efforts at all times. The second is *the continuing participation of the Network's programming officials at every stage of the creative process from the initial script to the final broadcast.*

*Continued on next page*

13. A breakdown [25] of the evening program schedules of all three networks (on the basis of information supplied by ABC, CBS, and NBC) for a week in November of each season, 1957 through 1964, indicates the trend toward centralization of economic control of television program production, procurement and choice in the hands of the three television network corporations. In accordance with established policies, network corporations produce and own virtually all news and public affairs programs included in network schedules. However, they are the sole producers of only a small part of entertainment programming. The overall percentage of network schedules produced by networks has declined in recent years. The large shift has been to the so-called "co-production" type of arrangement.[26] The figures show a big increase in these network-financed, "independently" produced programs—the so-called joint-venture programs—network corporations almost invariably acquire the first-run right in addition to some rights to share in the profits from the network run and the right to distribute and/or share in the profits from domestic syndication of overseas sales and other valuable subsidiary rights. Coincidentally, there has been a very sharp decline on all three networks in the number of programs independently produced and licensed to advertisers.

14. Appendix B hereto contains detailed breakdowns of the sources of network programs and network corporations' interests in them for programs broadcast 6-11 p.m. during a week in November each year 1957–1964. The tables below summarizes the sources of all evening (6–11 p.m.) programs carried on each of the three networks during a representative week in 1957 and 1964. The figures are shown as percentages of total network evening program hours.

| | 3 Networks combined | | ABC | | CBS | | NBC | |
|---|---|---|---|---|---|---|---|---|
| | 1957 | 1964 | 1957 | 1964 | 1957 | 1964 | 1957 | 1964 |
| (1) Network produced ..... | 28.7 | 22.4 | 19.7 | 22.2 | 43.9 | 30.1 | 21.4 | 15.1 |
| (2) Network participation (produced by others and licensed to network corporations) ... | 38.5 | 70.7 | 51.7 | 75.9 | 24.3 | 61.9 | 40.8 | 74.3 |
| (1) and (2) combined ..... | 67.2 | 93.1 | 71.4 | 98.1 | 68.2 | 92.0 | 62.2 | 89.4 |
| (3) Independently provided ... | 32.8 | 6.9 | 28.6 | 1.9 | 31.8 | 8.0 | 37.8 | 10.6 |

Similar data are shown below for entertainment programs only:

| | 3 Networks combined | | ABC | | CBS | | NBC | |
|---|---|---|---|---|---|---|---|---|
| | 1957 | 1964 | 1957 | 1964 | 1957 | 1964 | 1957 | 1964 |
| (1) Network produced ..... | 21.2 | 9.5 | 5.4 | 8.7 | 38.8 | 16.1 | 15.2 | 4.0 |
| (2) Network participation (produced by others and licensed to network corporations )... | 43.2 | 82.5 | 62.2 | 89.1 | 26.5 | 74.3 | 45.6 | 84.0 |
| (1) and (2) combined ..... | 64.4 | 92.0 | 67.6 | 97.8 | 65.3 | 90.4 | 60.8 | 88.0 |
| (3) Independently provided ... | 35.6 | 8.0 | 32.4 | 2.2 | 34.7 | 9.6 | 39.2 | 12.0 |

*Continued from preceeding page*

This applies not only to the occasional special program, but to the day-to-day production of continuing program series.

"By adhering to these principles the CBS Television Network commanded the largest nighttime audiences in network television throughout the year, averaging eight of the top ten programs and 23 of the top 40." (Emphasis supplied.)

[25] See Appendix B of this notice.

[26] For the week of April 17–23, 1955, between 6 and 11 p.m., on NBC 28 programs out of 43 or 65.1% were programs produced by persons other than — in which NBC did not have any financial or proprietary interest. On CBS in the same period 18 out of 47 or 38.3% were programs produced by stations other than CBS in which CBS did not have any financial or proprietary interest. Docket No. 12782, Exhibit No. 83 (NBC), Exhibit No. 58 (CBS).

15. Whereas in 1957 independents provided approximately one-third of the evening network schedules, their share in 1964 had declined to less than 10 percent. Conversely, programs produced by or in conjunction with network corporations now occupy more than 90 percent of the weekly evening hours on the three network corporations combined. The ratios of network-controlled program fare as among the individual networks range from 88.0% to 97.8% for entertainment programming and 89.4% to 98.1% for entertainment and other programming.

16. The inability of independent entrepreneurs successfully to compete in the so-called network television program market except upon terms dictated by network corporations seems obvious from the above figures. The ability of network corporations thus to dictate the terms of entry to the network television program market is a function of their control of broadcast time on large combinations of local television facilities permitted by the commercial convenience and willing acquiescence of television licensees.

17. Testimony before the Commission indicates that the increase in financial and proprietary control of the production, procurement and scheduling process by network corporations has been accompanied by an increase in bulk circulation programs attractive to mass advertisers. The testimony before us is in conflict as to whether the increased control has been used in order to maintain bulk circulation,[27] or whether it has been due to the increased productions costs of "quality" network programs,[28] or to the evolution of more sophisticated marketing techniques and advertising practices.[29]

18. The results of the evolution of program practices above described as they affect procurement of *network* programs have been

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[27] See TR. 8140–1843 (Aubrey, CBS); TR. 9043–9056 (James A. Stabile, Vice President and Associate General Attorney, NBC) and TR. 8884–8888 (Walter D. Scott, Executive Vice President in Charge of NBC Television Network) and TR. 9358–9359 and TR. 9370–9375 (Treyz, ABC). The commercial fruits of the circulation-rating-time rate formula is indicated by the following: A study by Interpublic Group of Companies, Inc. reported in *Television Magazine*, May 1964, p. 83 noted: "Network TV [from 1958 to 1963] showed a hefty 25% gain in basic rates, but its C-P-M [cost-per-thousand] rise was a modest 3%, the smallest among all national media measured." A circulation increase of 21% explains the low C-P-M change. The commercial benefit to "acquiescing" affiliates is perhaps indicated by an overall 35% increase in spot television "basic rates" during the same period. Analysis by the staff shows a 19% increase in network rates (network owned-and-operated stations and affiliates) in 57 three-station markets between 1958 and 1962:

The network program process is described in detail in the record of the Program Inquiry. See testimony of Walter Scott, Exec. Vice Pres., in Charge of NBC Television Network, TR. 8857–8903; James Aubrey of CBS, TR. 8119–8222 and Oliver Treyz of ABC, TR. 9354–9385. See also testimony of various producers in Vols. 36–43. The "slide rule" approach to network scheduling is well illustrated by the recent, highly publicized changes in both programs and program sequence by CBS following its "loss" of nighttime circulation "leadership" as indicated by the Neilsen "ratings." See *New York Times*, Thursday, December 10, 1964, Monday, December 14, 1964, and Wednesday, December 16, 1964; also *Broadcasting*, December 14, 1964, p. 25.

[28] H. Rpt. No. 281, p. 65; TR. 8884–8885 (Scott, NBC); TR. 8140–8144 (Aubrey, CBS); TR. 9371–9372 (Treyz, ABC).
See TR. 8144 (Aubrey, CBS):

"The huge financial risk connected with hour-length programming has made the network the natural supplier . . . [High costs and multiple sponsorship have] resulted in and will continue to result in a substantial portion of programs being produced by or licensed to the network."
Aubrey pointed out that in 1959 29% of CBS' evening schedule was sponsored by single sponsors; in 1961 that figure had fallen to 14.5%. (TR. 8143)

[29] H. Rpt. No. 281, p. 67—TR. 8888 (Scott, NBC):

". . . a number of advertisers have found that they can obtain increased efficiency by dispersing their commercial announcements over many different programs, with short-term cancellation rights. Now more than 50 percent of the schedule between the hours of 7:30 to 11 p.m. is sold on a participation basis, with the advertisers buying one-minute positions in several programs, and their orders often cancellable in cycles of 13 weeks or fewer. This has enormously increased the network's risk, for we must maintain a program structure through which advertisers circulate; and only the more successful of these programs [in terms of ratings] will enjoy full sponsorship at program charges that recover program costs."

(a) to concentrate economic, proprietary and creative control of program production and procurement in network corporations; (b) to concentrate residual rights to television programs in network corporations; and (c) progressively to limit the market available to independent producers of network programs for all practical purposes to the three network corporations and, hence, to restrict the profitability of the operations of independent program producers. The total effect of this condition has been a marked tendency to centralize control of what the American public may see and hear through television in network corporations and thus to hamper the competitive development of "diverse and antagonistic" sources for television program service.[30] This is almost the exact reverse of that "condition of competition" within the framework of service in the public interest intended as the principal criterion of choice of program fare under the American system of broadcasting.[31]

### *III. The Domestic Syndication and Foreign Television Program Markets*

19. In addition to offering network schedules to affiliates, the three television network corporations engage in domestic syndication (both to their own affiliates and to other stations) and in foreign sales of television programs as regular parts of their business. During approximately the same span of time when network corporations devised and perfected program production and procurement practices through which they progressively acquired economic and creative control of all but a small portion of their evening schedules, they expanded their activities in the sale of filmed programs and series in domestic syndication and foreign markets.[32]

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[30] The constriction of the network program market may perhaps best be measured in terms of the available product in "pilot" form. There are no "official" figures as to the number of "pilots" offered each year. However, the following information gives some idea of the trend. An advertising agency executive testified that for the *1959–60* television season, *between 225 and 250* "completed" pilot films were offered in the network television program market. About 90% were "new investments," which means that "someone had an idea, had gone to the script form, had gotten financing." The other 10% were "pictures that had been on the air in the past season as episodes in another series," and had "succeeded"—the socalled "spin-offs" from current series. (TR. 431–433) Other agency executives agreed that these figures were approximately correct. (TR. 572, 651; TR. 913)

On December 23, 1964, *The New York Times* reported that "new television shows for next season will be selected from among *76 pilot films*. . . ." NBC has "24 shows in production," ABC has 22 and CBS has 18. "There are 12 others being financed by sponsors, which have not yet chosen a network." So that, according to the *Times* all but 12 of 76 shows offered in the network program market for the 1965–66 season are either network-produced or financed. Another very recent estimate by a leading advertising agency indicates a total of 100 pilots in the market for the 1965–66 season. Of these 30–35 are said to be so-called "free-balls," *i.e.*, pilots produced and financed solely by advertisers or independent producers. The balance are network-produced or financed. A previous estimate from the same source indicated that for the 1964–65 season about 75 or 80 pilots were made, the vast majority of which were network-financed.

[31] The testimony of Frank Stanton, President of CBS, on improved use of the spectrum is perhaps equally relevant to the network television programming process. He said (TR. 8009):

"If we really believe that over the long haul improvement and progress in a democracy are attained through competition for the attention and approval of a people free to make up its own mind, then we must put our major trust in improving the conditions of competition."

[32] There are no published figures which authoritatively describe the dollar dimensions of domestic syndication and foreign sales of television programs or the extent of the participation in these markets by network corporations. However, limited figures (which concededly do not disclose the whole picture) were obtained from the three television network corporations on their revenues and profits derived from domestic syndication and foreign sales of programs which originally appeared in their network evening schedules from October 1957 through December 1961. These figures indicate that during the four year period, 1958 through 1961, there was only a small increase (less than 5%) in net revenues from domestic distribution fees. However, there was a much greater percentage of increase (approximatly 65-fold) in net income from foreign distribution fees and approximately a 250% increase in gross foreign distribution fees. Share of profits received or retained from domestic and foreign non-network distribution rose by 81.5%. Total gross revenues from domestic syndication and foreign sales increased 54.5% between 1958 and

*Continued on next page*

Formerly, the domestic syndication market was looked to by television station licensees as the principal alternate source for television programs. Under modern program procurement practices, production and procurement of programs for network exhibition and for syndication have become directly related activities. In large measure they involve the same persons and the same programs. Syndication of programs produced for television has become a by-product of network program production and procurement.

20. As stated earlier, in the initial process of program procurement for network exhibition, network corporations often acquire the right to distribute the program or program series in syndication after the network run.[33] This right is then assigned to the syndication division or arm of the network and is commercially exploited in station-to-station sale for nonnetwork exhibition. The result is that a large part of the total of programs available for syndication stems from the same transaction as do network programs and simply involves a subsequent use of a program which is designed for network broadcast. Syndication as an alternate source of station program service has thereby been substantially constricted.[34]

21. Most of the popular entertainment series in network schedules at present are produced on film. These include almost all the program series in which the network corporations acquire first-run and subsidiary rights. Indeed, over the past six or eight television seasons, filmed programs (with some increase in taped programs) have become the rule rather than the exception in

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*Continued from preceeding page*

1961, net revenues increased 126.1%. These figures are based on only those regularly scheduled program series produced by others and licensed to the network corporations which were broadcast between 6 and 11 p.m. during the period from October 1957 to the end of December 1961 and in which the network corporations obtained distribution or profit-sharing rights in domestic or foreign syndication or any combination of such rights. Based on these filings, total revenues from domestic and foreign syndication activities accounted for less than one per cent of the combined revenues from the sale of time, talent and program material to advertisers. Some indication of the inadequacy of these figures to show more than a trend can, perhaps, be gleaned from a comparison of the CBS filing with its Annual Report to Stockholders. The filing listed only 21 series, while the Annual Report for 1963 states that "CBS Films Inc. distributes more than 80 program series in 70 countries, at a rate of more than 2900 half hours weekly." (p. 19) Apparently this is in addition to domestic distribution. Some further indication of increases in network foreign distribution is indicated by the following statement from *Television Digest*, April 1, 1963, p. 6:

"NBC's foreign TV business was 61% greater than 1961 last year, and 1963's sales are at a higher rate, NBC International announced last week after N.Y. & Hollywood meetings of its field staff representatives. NBI now supplies TV programming to 110 stations in 60 countries, and has financial or management commitments with stations or networks in 15 areas of the globe. . . ."

[33] In 1957 network corporations acquired some domestic or foreign syndication interest in only 11 hours of film programming licensed to them for first-run network exhibition by independent producers or packagers. That figure rose to 38 hours in 1961 and receded to 34 hours in 1964. In terms of percentages the figures are 60.6% in 1957; 90.0% in 1960; 84.0% in 1961 and 74.6% in 1964. (See Appendix B of this notice, Table 7-C.)

[34] The following table has been prepared from various trade press sources. While the figures may not be exact, they are doubtless of sufficient accuracy to establish the marked trend toward the virtual extinction of the first-run, prime-time syndication market.

*Number of mass-appeal, U.S. produced series released annually by major suppliers to the first-run syndication market, 1956–64*

| | *Series* |
|---|---|
| 1956 | 29 |
| 1957 | 20 |
| 1958 | 16 |
| 1959 | 15 |
| 1960 | 10 |
| 1961 | 7 |
| 1962 | 3 |
| 1963 | 3 |
| 1964 | 1 |

nighttime network television.[35] One marked advantage of film is that it is most readily adaptable to subsequent commercial exploitation—particularly in domestic syndication and foreign distribution. As a result of the massive shift to film and the procurement and production practices of network corporations, the great bulk of the programming available for syndication not only from network syndication divisions but from all other distributors at present consists of "off-network" product. The first-run syndication market appears to have virtually disappeared.[36]

22. At present domestic syndication and foreign sales appear to account for only a small part of the revenues and profits of network corporations. Network corporations claim that the acquisition of rights to subsequent distribution of programs is merely an ancillary economic activity to minimize the "enormous risks" they run in procurement and financing of programs for their schedules.[37] However, it also appears that the potential expansion of both domestic and foreign markets for American television programs is great. The overseas market is expanding rapidly. With the expected increase in the number of American television stations in the UHF band, there will in all probability be a large increase in the domestic market for television programs. Under present program practices of network corporations, the staple to serve these markets will continue to be "off-network" film series. Unless more competitive opportunity is provided for independent television program producers, it seems inevitable that network corporations will expand their control of these markets.[38]

23. Under present conditions independent producers who wish to exhibit their product first on a network and then to offer it in the domestic syndication or foreign markets are subject to an extreme handicap. They must bargain for the network exposure necessary to establish the subsequent value of their program properties with the network corporations who are among their principal competitors in domestic and foreign distribution. In this bargaining process independent producers often grant to their competitors—the network corporations—large shares in the subsidiary rights in the programs which are their stock-in-trade in domestic and foreign markets. Also, independent producers who attempt to sell their programs for original exhibition through the domestic syndication market must compete with "off-network"

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[35] Walter D. Scott, Executive Vice President in Charge of the NBC Television Network, testified that on NBC "16½ hours of evening programming was produced on film last year [1961] as compared to only 6½ hours five years ago." (TR. 8886)

[36] See note 33, *ante*.

[37] See TR. 9370–9375 (Treyz, ABC); TR. 8140–8142 (Aubrey, CBS) and CBS Exhibit No. 30, FCC Docket No. 12782, p. 2; and TR. 9033–9056 (James A. Stabile, Vice President and Associate General Attorney, NBC). On the subject of the "risks" undertaken by network corporations in the programming process, it should perhaps be pointed out that between 1961 and 1963 network net income more than doubled. In 1961 broadcast income (before federal tax) of the three network corporations was $24.7 million; in 1963 it was $56.4 million. Source: FCC compilations. (These figures do not include income of network owned-and-operated stations. They are for television network operations only.)

[38] The syndication market should also provide a principal alternate source of television programs competitive with network offerings and should be composed, as far as is economically feasible, of a stock of programs derived from competitive diverse and antagonistic sources. At present most film program series available for syndication (with the exception of some "fringe" time offerings) are "off-network" filmed series which originally were shepherded through the progression from idea, to script. to pilot and then to network exhibition by the network corporations. Hence, under present conditions the choice afforded television station licensees is among programs chosen by the three national network corporations for network exhibition in the current or in past seasons.

programs which are owned or controlled by network corporations. Similarly, an entrepreneur who attempts to compete in foreign markets finds his source of supply of the programs which constitute his stock-in-trade controlled and limited in large measure by his principal competitors—the network corporations.

## IV. *Summary and Conclusions*

24. At the present time there is an undue concentration of control in the three network corporations over television programs available to the public. The power accruing to network corporations through formulation of network schedules and distribution of programs to affiliates is obvious. To this control over access to the public, network corporations have added an increasing economic and creative control over the programs themselves. As we have shown above, between 1957 and 1964 the percentage of program hours in nighttime schedules in which the network corporations have no proprietary interests decreased from approximately one-third to only 6.9%. This concentration of control of the production and scheduling of programs and proprietary control of the programs themselves would appear adversely to affect the public interest in several ways.

25. First of all, it is not desirable for so few entities to have such a degree of power with respect to what the American public may see and hear over so many television stations. A diversification of economic interest and power in this area is a cardinal principle of the public interest standard of the Communications Act. Furthermore, this intense concentration of power decreases the competitive opportunity for independent program producers. Under present practices they must, in practical effect, deal with the three network corporations on their terms or give up hope of producing programs for exhibition on television networks. Further development of television service, with particular regard to additional UHF stations which we expect to come into operation, will require a vigorous independent syndication industry. Formerly, that industry showed healthy promise. But coincident with development of present program procurement practices by network corporations, new product for syndication has shown a steady decline.

Finally, the concentration of power presently vested in network corporations puts them in a position where they have a clear conflict of interest, since they choose programs for distribution to their affiliates from groups of programs in most of which they have acquired or have been offered financial interest. While it has been contended that this interest is not a substantial factor in program choice, it must be recognized that financial participation by network corporations in any proposed program may well be the decisive factor in its selection for network exhibition. This may be especially true where the proposed programs are similar in theme and format and their popular appeal cannot be correctly evaluated except by network exhibition.

26. We propose to encourage and increase competitive forces—both creative and economic—in television program production and

procurement through limitations on the capacity of network corporations to confine network schedules to programs in which they have financial and proprietary interests and through divorcement of networks from domestic syndication and, to some extent, foreign distribution. The proposed rule is directed toward a strengthening of independent program production. It should increase the opportunity of the independent producer for access to the networks, and the opportunity for the development of new ideas in program production. Furthermore, it is our hope that the proposed rule would reduce the possibility that independent producers may be forced to give up rights in their programs in order to obtain access to network time. A further benefit from the strengthening and development of independent program producers may well be the development of new program sources available for additional UHF television stations. Additional UHF stations might in turn provide a basis for a fourth network. Since the proposed rule defines chain broadcasting as the distribution of programs to a substantial number of stations during a substantial period of the day (and we specifically seek comments on the precise terms of this definition), and since, in addition, the rule would not affect any person distributing less than 14 hours a week between 6 and 11 PM of programming he controlled, the restrictions in the rule clearly would not impede the development of any proposed additional networks.

27. While it has been claimed that network corporations require the type of control they now possess to assure their continued viable operation as advertising media and to minimize the economic risks they undertake in program production and procurement, we do not believe that the proposed rule will have a material adverse effect on either function or network corporations. They will still be able to make ultimate decisions as to which programs they will choose for their network schedules, and they may enforce appropriate standards which programs offered them shall meet. Furthermore, their risk will be diminished to the extent that the financing of program production is taken over by other sources of risk money. There appears to be no warrant for any assumption that other sources of programs and financing will not be adequate.

28. To be more specific, the proposed rule (Appendix A) is designed to alleviate the non-competitive conditions in television program production described herein. This is sought to be accomplished by (1) eliminating network corporations from the syndication business within the United States and from the sale, licensing and distribution of independently produced television programs in foreign markets; (2) prohibiting network corporations from acquiring distribution or profit-sharing rights in syndication and foreign sales of independently produced television programs; and (3) limiting economic and proprietary control by network corporations of the programs included in their schedules in desirable evening network time. The proposed rule, however, would preserve the right of network corporations to sell or otherwise dispose of syndication, overseas and other subsidiary rights in programs produced by them or by persons controlling, con-

trolled by, or under common control with them and to distribute programs of which they are the sole producers in foreign markets.

(a) *Restriction on networks in domestic syndication and foreign markets*

29. In particular, the first part of the proposed rule would: (1) prohibit network corporations from engaging in syndication in the United States or distributing independent programs for exhibition outside the United States; (2) prohibit network corporations from acquiring syndication and foreign sales rights in programs produced by other persons and licensed directly to the network corporations for exhibition; (3) prohibit network corporations from acquiring rights to share in the profits from syndication and foreign sales of such programs; and (4) require network corporations to divest themselves of distribution and profit-sharing rights in domestic syndication and overseas sales of which they are presently possessed. The net effect of this part of the proposed rule would be completely to eliminate network corporations from syndication and foreign sales of programs produced by "independents." It would not, however, prohibit them from selling to other distributors domestic syndication rights in programs solely produced by network corporations or persons controlling, controlled by, or under common control with them or from selling and distributing such programs in foreign markets. The proposed rule, as mentioned above, would eliminate network corporations from all syndication within the United States, including syndication of programs wholly produced by them. Domestic syndication to the network's own affiliates raises questions of conflict of interest and possible undue advantage over other syndicators.

(b) *Encouragement of competition in network program procurement*

30. The second part of the proposed rule seeks to broaden the market from which network programs are procured. There is little likelihood that an adequately expanded independent program industry will develop if present practices of network corporations in program procurement are permitted to continue. These practices permit network corporations virtually to control the source of supply of programs both for network exhibition and for sale in the domestic syndication and foreign markets through bargaining with independent producers at the inception of the production process. This is made possible by the practical ability of network corporations greatly to influence, if not to dictate, the terms and conditions of access to the most desirable broadcast time on their affiliates throughout the country—the sum of which, of course, includes all but a small fraction of existing television stations. This part of the rule is designed to correct this competitive imbalance and to place independent producers and network sponsors in a position to bargain on something approaching an even basis with network corporations in the program production process. At the same time the rule would permit sufficient latitude to enable network corporations to engage in and finance production of pro-

grams to the extent necessary to preserve their effectiveness and economic viability as national advertising media.

31. To achieve these ends the rule sets a limit beyond which undue concentration and lessening of competition are deemed to exist. The rule will prohibit a network corporation from offering a weekly evening program schedule in which more than 50% of the time or a total of fourteen hours per week, whichever is greater, is occupied by programs (exclusive of newscasts, news interviews, special news programs, on-the-spot coverage of news events and sustaining programs) either produced by the network corporation or in which it has acquired the first-run license directly from an independent producer. The rule, however, permits network corporations to acquire exclusive exhibition rights to particular programs for not longer than a year at a time from other persons as part of the arrangements for broadcast time. The net result of the rule would be to make prime time available each evening in network television schedules for the exhibition of programs in which the network corporations could have no financial or proprietary interests. Independent program producers serving sponsors would be enabled to compete for network time and, with approval of network corporations, to exhibit programs of their choice. Assuming the operation of the normal laws of competition, this would in turn re-establish and broaden the market to which an independent program producer could take his wares and, hence, foster and encourage competition among such producers. In this way the end product—the network schedules—will tend more nearly to reflect the program judgments not only of the network corporations but also of a large number of competitive and competent elements who wish to speak to the American people through television.

32. We also wish to make clear that under the proposal an independent producer or other persons or groups could give the network the exclusive one-year exhibition right in connection with an agreement whereby the producer or other person acquires time and facilities for the presentation of that particular program over the network. The producer, in turn, could obtain an advertiser or advertisers for the program (and in all likelihood would have done so at the inception of the agreement). We do not believe that such an arrangement would be inconsistent with the public interest, since the network would be fully in control as to whether the program should be presented (and the time of presentation),[39] and would of course have the responsibility to clear all advertisers and advertising continuity. We recognize that while the above practice is possible today, it has not occurred. But that does not mean that it is infeasible or that it is not a possible alternative which could be employed in the event the proposed 50% rule were adopted in order to restore competitive conditions. And, indeed, there may be other arrangements or alternatives, or combinations thereof, which could be pursued, consistent with the above objective. In short, the purpose of this Notice is to explore the feasibility of such alternatives and their possible contribution to "the larger and more ef-

[39] The network would also retain the right to take all steps to insure that the programming is consistent with its standards, including the right to reject objectionable material.

fective use of radio in the public interest", in this important area.

33. Newscasts, news interviews, special news programs, on-the-spot coverage of news events and sustaining programs are exempted because of the intimate association of these types of programs with the network's journalistic and editorial responsibility. Such programs are normally produced and controlled by the network corporations as part of their responsibility as licensees, and special staffs are maintained for that purpose. There is a question whether public affairs documentaries should also be exempted from the 50% requirement. Public affairs documentaries are closely related to the news activities of the networks. The networks thus maintain staffs for this type of program, assume a high degree of responsibility for such programming and must maintain adequate supervision or control. Furthermore, their presentation should be encouraged as serving "the larger and more effective use of radio in the public interest" (§ 303(g)). See *Report on Editorializing*, 13 F.C.C. 1246. On the other hand, other competent producers are available to produce such documentaries and to bring the benefits of fresh viewpoints to choice of subject and manner of presentation. Because they permit more time for preparation, documentaries are also susceptible of independent production in a way that news programs may not be and do not appear to require network production for adequate maintenance of the network's editorial responsibilities. While documentaries are not now included in the exemption in the attached proposed rule, we specifically requirest comments on whether or not it is desirable to exempt public affairs documentaries from the 50% requirement. Further, in the event such an exemption is afforded, it appears undesirable for such an exemption to be construed as approval of a policy of complete exclusion of independently produced documentaries. Such a policy, which does not appear to be requisite for adequate network control, excludes alternate sources of programs in a significant area. Therefore, we also seek comments on the question of whether a network policy of exclusive production of public affairs documentaries is in the public interest.

34. In devising this part of the proposed rule we have taken cognizance of the extensive testimony in the Program Inquiry which indicates that control and financing of independently produced programs by network corporations are necessary in order to enable each network corporation to assure itself that it can present a program schedule under all circumstances which is designed to meet the needs of advertisers, its affiliates and the public. As stated above, however, upon the basis of the present evidence we do not believe that formulation of a program schedule for the evening hours requires continuation of the present practices of network corporations. While the number of programs involving multiple sponsorship has increased substantially in recent years, there would seem to be no reason why such programs could not be continued, if network corporations so desire, under the proposed rule. There appears to be no reason why sponsorship of such programs could not be arranged without *financial* interests of network corporations playing a role. The network corporations can also continue

to cooperate with other program sources in securing desirable programs. It has not been shown that this country's non-network financial and artistic resources are not adequate to play an expanded role in nighttime television. And, of course, to insure stability, the network corporations will be permitted to continue to acquire first-run rights with respect to 50% of the evening schedule.

35. Strict adherence to the principle of free competition would perhaps suggest the total elimination of network corporations from production and financial and proprietary control of television programming. However, the record of the Program Inquiry and our general knowledge of the situation as it currently exists in network television leads us to the view that the public interest in a nationwide television structure sustained by network program service would not be furthered by eliminating network corporations entirely from the program production and procurement process. We are persuaded that, in order reasonably to insure the quantity and quality of television programming necessary to maintain adequate community service, network corporations should be permitted to engage to a substantial but limited degree in program production, procurement and financing. On the other hand, it is our tentative view that to permit continuing dominance by network corporations of the television program production and procurement processes as disclosed by the record of our Inquiry not only would injure the public interest in a competitive national television structure but also would act as a stricture on the "larger and more effective" use of television channels in the public interest. The question then becomes one of striking a reasonable balance which will preserve the public interest in an economically viable national commercial network structure and which at the same time will preserve the equally imperative public interest in the creation and maintenance of the largest feasible number of competitive sources for television programming. We believe that the rule as proposed will bring about such a reasonable balance.

(c) *Responsibility for program choice and scheduling*

36. It should be emphasized that the proposed rule does not transfer program responsibility or schedule control from network corporations to sponsors. The principal function of the proposed rule is to promote diversity of sources of network programs and thus to broaden the base from which such programs may be selected by network corporations for their schedules. Increased opportunity for independent producers to enter the network television program market through curtailment of economic dominance of the program process by network corporations may reasonably be expected to foster the development of multiple viable independent sources for television programming. The history of the industry indicates that reasonable opportunity for network exhibition of independently produced programs encourages the development of independent program sources. In network television neither advertisers nor advertising agencies have directly engaged to any great extent in program production. It is not

anticipated that any considerable portion of television programming under the competitive conditions sought to be fostered by the proposed rule would be produced directly by sponsors. Rather, it is indicated that, released from network control, independent entrepreneurs would expand their activities or new entrepreneus would enter the field and offer their wares as a staple of an expanded program market.

37. Under the rule as proposed, network corporations would retain their responsibility to enforce their program standards and to construct their schedules to conform to their needs. Nothing in the proposed rule is intended or should be construed to limit or modify the overall program responsibility of licensees for all matter broadcast through their facilities. This, of course, includes the responsibility of licensees, including network corporations as station licensees, to devote a reasonable proportion of their broadcast time to news and public affairs programs

38. It is contemplated that by subsequent orders network television licensees would be requited to file certain information and data with the Commission in aid of the administration of the proposed rule.

39. Authority for the adoption of the rule proposed herein as set forth in the attached Appendix is contained in Sections 4(i); 301; 303(b), (f), (g), (i) and (j); 307(d); 308(b); 309(a); 310; 312; 313 and 314 of the Communications Act.

40. The proposed rule is couched directly in terms of chain broadcasting (i.e., ". . . stations engaged in chain broadcasting"—see Section 303(i) of the Communications Act). However, the rule could be drawn, as are our present network regulations, in terms directed to the individual licensee. Parties may comment on the appropriate form of any rule adopted.

41. It is hoped that the Commission will be given the benefit of all available relevant data and the comments, opinions and advice not only of the network corporations, licensees, advertisers, program producers and others in the industry, but also of public groups and interested members of the public. We stress that parties are free to suggest alternative courses of action or a combination of some aspects of the foregoing proposals with different proposals. In short, at the time of final decision the Commission would hope to have before it the broadest possible range of data and alternate courses of action in order to insure that any final action taken in this vitally important area would best promote the public interest in the "larger and more effective use" of television.

42. Comments by interested parties shall be filed no later than June 21, 1965, and replies to such comments no later than July 21, 1965. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, including matter contained in the record in Docket 12782, in addition to the specific comments invited by this notice. In accordance with the provisions of Section 1.415 of the Commission's rules and regulations, an original and 14 copies of all

statements, briefs or comments shall be furnished the Commission.

Adopted March 19, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

## APPENDIX A

### PROPOSED RULE

§ 73.659 *Network television program practices.*

(a) As used in this section the term network television licensee" means a television station licensee (or any person controlling, controlled by or under common control with such licensee) which engages in chain broadcasting. For the purposes of this section, chain broadcasting means the furnishing of programs to a substantial number of television broadcast stations on a daily basis for a substantial number of hours per day.

(b) Except as permitted in subsection (c) hereof no network television licensee shall:

(1) sell, license or distribute television programs to other television station licensees within the United States for non-network television exhibition, or otherwise engage in the business commonly known as "syndication" within the United States; or sell, license or distribute television programs for exhibition outside the United States; or have any option or right to share in revenues or profits in connection with such sale, licensing or distribution;

(2) with respect to any television program produced either wholly or partly by a person other than such network television licensee, acquire any financial or proprietary right or interest in the program or distribution thereof except the license or other exclusive right to network exhibition within the United States and on whatever foreign stations are regularly included within the network;

(3) after [18 months after the effective date of the rule] retain any right or interest the acquisition of which would be prohibited by this section.

(c) Nothing in this section shall prohibit a network television licensee from selling or distributing programs of which such network televison licensee is the sole producer for television exhibition outside the United States, or selling or otherwise disposing of program rights not acquired from another person including the right to distribute programs for non-network exhibition (as in syndication) within the United States, but such network television licensee shall not itself engage in such distribution within the United States or retain the right to share the revenues or profits therefrom.

(d) No network television licensee shall subsequent to [18 months after the effective date of the rule] offer to other television licensees a television network schedule between the hours of 6:00 PM and 11:00 PM, New York time, in any calendar week, in which schedule more than 50% of the time to the nearest half hour or a total equal to fourteen hours per week, whichever is greater is occupied by programs (exclusive of newscasts, news interviews, special news programs, on-the-spot coverage of news events and sustaining programs) of which the network television licensee was the producer or co-producer or in which it has acquired from another person the license, option or other exclusive right to network exhibition. *Provided however,* That nothing herein shall prohibit a network television licensee from agreeing with another person or persons as part of a contract or arrangement for network time and facilities that the particular program or series involved will be broadcast exclusively on the network during the term of such contract or arrangement or for a shorter period. However, no such contract or arrangement may be for a term greater than one year with the option or other right to renew the arrangement for periods not to exceed one year. *Note*: In computing time devoted to network-produced or licensed programs for the purpose of this subparagraph, the entire time segment within which the program is presented shall be counted (hour, half hour, etc.), even though the actual length of the program is less because of commercial announcements or other matter.

## APPENDIX B

(To Notice of Proposed Rule-Making in Docket No. 12782)

STATISTICAL TABLES RE: (1) NETWORK PROGRAM SOURCES; (2) NETWORK INTEREST IN PROGRAMS—1957–64

*General Note*

The tabulations are based upon November network program schedules, exclusive of special and one-time-only programs. Program series appearing alternately in a time period are counted as separate programs in the tabulations on number of programs, and the program time is divided between them in the tabulation on hours of programming. The same daily newscast is given full time credit but is counted as only one program for the week. Repeat feeds of a newscast are excluded in these tabulations.

Tables 1–4 show network programs by source of supply, namely, the network, the packager and the advertiser. These tables should not be taken to imply that the network's creative function is limited only to network produced programs. As discussed in various portions of the report on Television Network Program Procurement[1], particularly pages 65 to 87, the network may play a creative function in varying degrees in programs supplied to the network by the packager of advertiser.

Interest acquired by the network in programs licensed to it by packagers is shown in Tables 5–7. Categories of types of network interest in programs licensed by packagers shown in Tables 5–7 are mutually exclusive, and, consequently, each program appears in only one of the interest categories. "Other interest" of the network in programs licensed by packagers includes any network interest other than an interest in syndication or only the first run right for the given year. Examples of "other interest" are merchandising rights, rerun rights and sharing in revenue from the sale of the program by the network to the advertiser at an amount in excess of the program cost to the network. The network interest in a program licensed by the packager to the syndication subsidiary of the network and supplied by the latter to the network for network showing is based upon the combined rights of the syndication subsidiary and the network. Programs produced by known wholly-owned subsidiaries of networks are treated as network programs.

Some revisions have been made in the statistics previously published in Part I of the Second Interim Report Television Network Program Procurement."

SOURCES OF DATA

*American Broadcasting Company*
Record of Television Programming Inquiry, Docket No. 12782:
- Exhibits numbered 89, 90, 95 and supplemental charts entitled "ABC-TV Network Schedule" Fall 1959 and 1960; Nov. 1962, 1963 and 1964.
- Testimony of Oliver Treyz, February 4, 1962, Vol. 61, TR. 9362 and 9417.
- Chart of "ABC Rights in Programs Licensed It, Regularly Scheduled Series, 6-11 p.m., for a Composite Week Based on November, 1957-1964."

Correspondence with network.
Sponsor Magazine, October 31, 1959, pp. 40-41; November 21, 1959, pp. 44-45; November 21, 1960, pp. 46-47.
Television Magazine, October 1961, pp. 30-31.
Broadcasting Magazine, October 2, 1961, pp. 83-85.

*Columbia Broadcasting System:*
Record of Television Programming Inquiry, Docket No. 12782:
- Exhibits numbered 32, 33, 33-A, 38, 40 and CBS Ex. No. 22.
- CBS-TV Network Program Schedules, Nov. 1962, 1963 and 1964. Hearings, Vol. 25, TR. 4478-4484 and Vol. 53, TR. 8198-8222.
- Chart of "CBS Rights in Programs Licensed to It, Regularly Scheduled Series, 6-11 p.m., for Composite Week Based on November, 1957-1964." (CBS Ex. 4 and 4-A)

Correspondence with network.
Sponsor Magazine, October 31, 1959, pp. 40-41; November 21, 1959, pp. 44-45; November 21, 1960, pp. 46-47.
Television Magazine, October 1961, pp. 30-31.

*National Broadcasting Company:*
Record of Television Programming Inquiry, Docket No. 12782:
- Exhibits numbered 72, 73, 74 and 75. NBC-TV Network Program Schedules, Nov. 1962, 1963 and 1964.
- Hearings, Vol. 58. TR. 9041 (Ex. A) and TR. 9027-9035.
- Chart of "NBC Rights in Programs Licensed It, Regularly Scheduled Series, 6-11 p.m., for Composite Week based on November, 1957-1964." (NBC Ex. 28)

Correspondence with network.
Sponsor Magazine, October 31, 1959, pp. 40-41 and November 21, 1959, pp. 44-45.

[1] H. R. No. 281, 88th Congress, 1st Session. Or see pages 87 to 133, Part I of Second Interim Report by the Office of Network Study, Docket No. 12782, Mimeo No. 28284.

## Number of Programs for a Week by Source of Supply, 1957–64

Table 1–A.—*All network programs (entertainment and other) 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | | | | Number of programs* | | | | |
| Network produced | 31 | 34 | 25 | 22 | 23 | 24⅔ | 22⅓ | 20½ |
| Produced by packager and licensed to network | 51 | 54 | 66½ | 71 | 73½ | 68⅓ | 661/6 | 74 |
| Advertiser | 48 | 37 | 32½ | 23 | 17½ | 15 | 13½ | 9½ |
| Total | 130 | 125 | 124 | 116 | 114 | 108 | 102 | 104 |
| | | | | Percent of number of programs | | | | |
| Network produced | 23.9 | 27.2 | 20.2 | 19.0 | 20.2 | 22.8 | 21.9 | 19.7 |
| Produced by packager and licensed to network | 39.2 | 43.2 | 53.6 | 61.2 | 64.5 | 63.3 | 64.9 | 71.2 |
| Advertiser | 36.9 | 29.6 | 26.2 | 19.8 | 15.3 | 13.9 | 13.2 | 9.1 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

Note:—See "General Note" preceding tabulations.

Table 1–B.—*ABC network programs (entertainment and other) 6–11p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | | | | Number of programs | | | | |
| Network produced | 6 | 7 | 2 | 2 | 3 | 8 | 8 | 7 |
| Produced by packager and licensed to network | 22 | 23 | 33 | 32 | 33 | 27 | 23 | 27 |
| Advertiser | 12 | 7 | 3 | 4 | 2 | 2 | 3 | 1 |
| Total | 40 | 37 | 38 | 38 | 38 | 37 | 34 | 35 |
| | | | | Percent of number of programs | | | | |
| Network produced | 15.0 | 18.9 | 5.3 | 5.3 | 7.9 | 21.6 | 23.5 | 20.0 |
| Produced by packager and licensed to network | 55.0 | 62.2 | 86.8 | 84.2 | 86.8 | 73.0 | 67.7 | 77.1 |
| Advertiser | 30.0 | 18.9 | 7.9 | 10.5 | 5.3 | 5.4 | 8.8 | 2.9 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

Note:—See "General Note" preceding tabulations.

Table 1–C.—*CBS network programs (entertainment and other) 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | | | | Number of programs* | | | | |
| Network produced | 16 | 18 | 14 | 11 | 10 | 10 | 10 | 9½ |
| Produced by packager and licensed to network | 12 | 10 | 11½ | 17 | 19½ | 20 | 22½ | 25 |
| Advertiser | 17 | 17 | 20½ | 14 | 11½ | 9 | 5½ | 4½ |
| Total | 45 | 45 | 46 | 42 | 41 | 39 | 38 | 39 |
| | | | | Percent of number of programs | | | | |
| Network produced | 35.6 | 40.0 | 30.4 | 26.2 | 24.4 | 25.6 | 26.3 | 24.4 |
| Produced by packager and licensed to network | 26.6 | 22.2 | 25.0 | 40.5 | 47.6 | 51.3 | 59.2 | 64.1 |
| Advertiser | 37.8 | 37.8 | 44.6 | 33.3 | 28.0 | 23.1 | 14.5 | 11.5 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

Note:—See "General Note" preceding tabulations.

TABLE 1–D.—*NBC network programs (entertainment and other) 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs* | | | | | | | |
| Network produced | 9 | 9 | 9 | 9 | 10 | 6⅔ | 4⅓ | 4 |
| Produced by packager and licensed to network | 17 | 21 | 22 | 22 | 21 | 21⅓ | 20⅔ | 22 |
| Advertiser | 19 | 13 | 9 | 5 | 4 | 4 | 5 | 4 |
| Total | 45 | 43 | 40 | 36 | 35 | 32 | 30 | 30 |
| | Percent of number of programs | | | | | | | |
| Network produced | 20.0 | 20.9 | 22.5 | 25.0 | 28.6 | 20.8 | 14.4 | 13.3 |
| Produced by packager and licensed to network | 37.8 | 48.8 | 55.0 | 61.1 | 60.0 | 66.7 | 68.9 | 73.4 |
| Advertiser | 42.2 | 30.3 | 22.5 | 13.9 | 11.4 | 12.5 | 16.7 | 13.3 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

NOTE:—See "General Note" preceding tabulations.

## HOURS OF PROGRAMING FOR A WEEK BY SOURCE OF SUPPLY, 1957–64

TABLE 2–A.—*All network programs (entertainment and other) 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing | | | | | | | |
| Network produced | 22⅝ | 23½ | 17¾ | 16¾ | 16¾ | 17⅝ | 19⅘ | 18⅔ |
| Produced by packager and licensed to network | 29⅔ | 32½ | 43¼ | 49¼ | 55¾ | 55½ | 56⅘ | 58⅝ |
| Advertiser | 25¼ | 20¼ | 18¼ | 12¾ | 9½ | 8½ | 7½ | 5¾ |
| Total | 77 | 76¼ | 79¼ | 77¾ | 82 | 81½ | 83 | 83¼ |
| | Percent of hours of programing | | | | | | | |
| Network produced | 28.7 | 30.8 | 22.4 | 20.3 | 20.4 | 21.0 | 23.4 | 22.4 |
| Produced by packager and licensed to network | 38.5 | 42.6 | 54.6 | 63.3 | 68.0 | 68.6 | 67.6 | 70.7 |
| Advertiser | 32.8 | 26.6 | 23.0 | 16.4 | 11.6 | 10.4 | 9.0 | 6.9 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations.

TABLE 2–B.—*ABC network programs (entertainment and other) 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing | | | | | | | |
| Network produced | 4⅝ | 5¾ | 2¼ | 1¾ | 2¼ | 5 | 6 | 6 |
| Produced by packager and licensed to network | 12½ | 14 | 22 | 22¾ | 24¼ | 21½ | 19½ | 20½ |
| Advertiser | 7 | 4½ | 2 | 2¼ | 1¼ | 1¼ | 1¼ | ⅓ |
| Total | 24½ | 24¼ | 26¼ | 26¾ | 27¾ | 27¾ | 26¾ | 27 |
| | Percent of hours of programing | | | | | | | |
| Network produced | 19.7 | 23.7 | 8.6 | 6.5 | 8.1 | 18.0 | 22.4 | 22.2 |
| Produced by packager and licensed to network | 51.7 | 57.7 | 83.8 | 85.1 | 87.4 | 77.5 | 72.9 | 75.9 |
| Advertiser | 28.6 | 18.6 | 7.6 | 8.4 | 4.5 | 4.5 | 4.7 | 1.9 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations.

TABLE 2–C.—*CBS network programs (entertainment and other) 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing | | | | | | | |
| Network produced | 11¾ | 11¾ | 9½ | 7¼ | 7¾ | 7¾ | 9 | 8½ |
| Produced by packager and licensed to network | 6½ | 6 | 6¾ | 11½ | 13¼ | 14½ | 16¾ | 17⅓ |
| Advertiser | 8½ | 9 | 11 | 7½ | 6¼ | 5 | 2¾ | 2¼ |
| Total | 26¾ | 26¾ | 27¼ | 26¼ | 27¼ | 27¼ | 28½ | 28 |
| | Percent of hours of programing | | | | | | | |
| Network produced | 43.9 | 43.9 | 34.8 | 27.6 | 28.5 | 28.5 | 31.6 | 30.1 |
| Produced by packager and licensed to network | 24.3 | 22.4 | 24.8 | 43.8 | 48.6 | 53.2 | 58.8 | 61.9 |
| Advertiser | 31.8 | 33.7 | 40.4 | 28.6 | 22.9 | 18.3 | 9.6 | 8.0 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations.

TABLE 2–D.—*NBC network programs (entertainment and other) 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing | | | | | | | |
| Network produced | 5½ | 6 | 6 | 6¾ | 6¾ | 4⅕ | 4 3/17 | 4¼ |
| Produced by packager and licensed to network | 10½ | 12½ | 14½ | 15 | 18¼ | 19⅞ | 19⅞ | 21 |
| Advertiser | 9¾ | 6¾ | 5¼ | 3 | 2 | 2¼ | 3½ | 3 |
| Total | 25¾ | 25¼ | 25¾ | 24¾ | 27 | 26½ | 27¾ | 28¼ |
| | Percent of hours of programing | | | | | | | |
| Network produced | 21.4 | 23.8 | 23.3 | 27.3 | 25.0 | 16.4 | 15.9 | 15.1 |
| Produced by packager and licensed to network | 40.8 | 49.5 | 56.3 | 60.6 | 67.6 | 75.1 | 71.5 | 74.3 |
| Advertiser | 37.8 | 26.7 | 20.4 | 12.1 | 7.4 | 8.5 | 12.6 | 10.6 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations.

## NUMBER OF PROGRAMS FOR A WEEK BY SOURCE OF SUPPLY, 1957–64

TABLE 3–A.—*All network entertainment programs, 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs* | | | | | | | |
| Network produced | 21 | 24 | 15 | 13 | 11 | 9⅗ | 9⅕ | 8½ |
| Produced by packager and licensed to network | 48 | 54 | 66½ | 68 | 71½ | 67⅓ | 66⅞ | 74 |
| Advertiser | 45 | 35 | 30½ | 21 | 16½ | 14 | 12½ | 9½ |
| Total | 114 | 113 | 112 | 102 | 99 | 91 | 88 | 92 |
| | Percent of number of programs | | | | | | | |
| Network produced | 18.4 | 21.2 | 13.4 | 12.7 | 11.1 | 10.6 | 10.6 | 9.3 |
| Produced by packager and licensed to network | 42.1 | 47.8 | 59.4 | 66.7 | 72.2 | 74.0 | 75.2 | 80.4 |
| Advertiser | 39.5 | 31.0 | 27.2 | 20.6 | 16.7 | 15.4 | 14.2 | 10.3 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

NOTE:—See "General Note" preceding tabulations. Sports programs are not included in the category, "entertainment programs."

TABLE 3–B.—*ABC network entertainment programs, 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs | | | | | | | |
| Network produced | 2 | 4 | .. | 1 | 1 | 2 | 2 | 3 |
| Produced by packager and licensed to network | 19 | 23 | 33 | 29 | 31 | 26 | 23 | 27 |
| Advertiser | 10 | 6 | 2 | 3 | 1 | 1 | 2 | 1 |
| Total | 31 | 33 | 35 | 33 | 33 | 29 | 27 | 31 |
| | Percent of number of programs | | | | | | | |
| Network produced | 6.5 | 12.1 | .... | 3.0 | 3.0 | 6.9 | 7.4 | 9.7 |
| Produced by packager and licensed to network | 61.3 | 69.7 | 94.3 | 87.9 | 94.0 | 89.7 | 85.2 | 87.1 |
| Advertiser | 32.2 | 18.2 | 5.7 | 9.1 | 3.0 | 3.4 | 7.4 | 3.2 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations. Sports programs are not included in the category, "entertainment programs."

TABLE 3–C.—*CBS network entertainment programs, 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs* | | | | | | | |
| Network produced | 13 | 15 | 10 | 6 | 6 | 6 | 6 | 4½ |
| Produced by packager and licensed to network | 12 | 10 | 11½ | 17 | 19½ | 20 | 22½ | 25 |
| Advertiser | 17 | 17 | 20½ | 14 | 11½ | 9 | 5½ | 4½ |
| Total | 42 | 42 | 42 | 37 | 37 | 35 | 34 | 34 |
| | Percent of number of programs | | | | | | | |
| Network produced | 30.9 | 35.7 | 23.8 | 16.2 | 16.2 | 17.1 | 17.6 | 13.2 |
| Produced by packager and licensed to network | 28.6 | 23.8 | 27.4 | 46.0 | 52.7 | 57.2 | 66.2 | 73.6 |
| Advertiser | 40.5 | 40.5 | 48.8 | 37.8 | 31.1 | 25.7 | 16.2 | 13.2 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

NOTE:—See "General Note" preceding tabulations. Sports programs are not included in the category, "entertainment programs."

TABLE 3–D.—*NBC network entertainment programs, 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs* | | | | | | | |
| Network produced | 6 | 5 | 5 | 6 | 4 | 1⅔ | 1⅓ | 1 |
| Produced by packager and licensed to network | 17 | 21 | 22 | 22 | 21 | 21⅓ | 20⅔ | 22 |
| Advertiser | 18 | 12 | 8 | 4 | 4 | 4 | 5 | 4 |
| Total | 41 | 38 | 35 | 32 | 29 | 27 | 27 | 27 |
| | Percent of number of programs | | | | | | | |
| Network produced | 14.6 | 13.1 | 14.3 | 18.7 | 13.8 | 6.2 | 4.9 | 3.7 |
| Produced by packager and licensed to network | 41.5 | 55.3 | 62.9 | 68.8 | 72.4 | 79.0 | 76.6 | 81.5 |
| Advertiser | 43.9 | 31.6 | 22.8 | 12.5 | 13.8 | 14.8 | 18.5 | 14.8 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

NOTE:—See "General Note" preceding tabulations. Sports programs are not included in the category, "entertainment programs."

## HOURS OF PROGRAMING FOR A WEEK BY SOURCE OF SUPPLY, 1957–64

TABLE 4–A.—*All network entertainment programs, 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing | | | | | | | |
| Network produced | 14 | 15½ | 10¼ | 9 | 8½ | 7⅓ | 8⅔ | 6¾ |
| Produced by packager and licensed to network | 28½ | 32½ | 43¼ | 48 | 55 | 55 5/12 | 56 7/12 | 58⅞ |
| Advertiser | 23½ | 19 | 17 | 11½ | 8¾ | 7¾ | 6¾ | 5¾ |
| Total | 66 | 67 | 70½ | 68½ | 72¼ | 70½ | 71½ | 71⅓ |
| | Percent of hours of programing | | | | | | | |
| Network produced | 21.2 | 23.1 | 14.5 | 13.1 | 11.8 | 10.4 | 12.1 | 9.5 |
| Produced by packager and licensed to network | 43.2 | 48.5 | 61.4 | 70.1 | 76.1 | 78.6 | 78.4 | 82.5 |
| Advertiser | 35.6 | 28.4 | 24.1 | 16.8 | 12.1 | 11.0 | 9.5 | 8.0 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations. Sports programs are not included in the category, "entertainment programs."

TABLE 4–B.—*ABC network entertainment programs, 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing | | | | | | | |
| Network produced | 1 | 2½ | .. | ½ | ½ | 1½ | 2½ | 2 |
| Produced by packager and licensed to network | 11½ | 14 | 22 | 21½ | 23½ | 21 | 19½ | 20½ |
| Advertiser | 6 | 4 | 1½ | 1½ | ½ | ½ | ½ | ½ |
| Total | 18½ | 20½ | 23½ | 23½ | 24½ | 23 | 22½ | 23 |
| | Percent of hours of programing | | | | | | | |
| Network produced | 5.4 | 12.2 | .... | 2.1 | 2.0 | 6.5 | 11.1 | 8.7 |
| Produced by packager and licensed to network | 62.2 | 68.3 | 93.6 | 91.5 | 96.0 | 91.3 | 86.7 | 89.1 |
| Advertiser | 32.4 | 19.5 | 6.4 | 6.4 | 2.0 | 2.2 | 2.2 | 2.2 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations. Sports programs are not included in the category, "entertainment programs."

TABLE 4–C.—*CBS network entertainment programs, 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing | | | | | | | |
| Network produced | 9½ | 9½ | 6¾ | 4 | 4½ | 4½ | 5 | 3¾ |
| Produced by packager and licensed to network | 6½ | 6 | 6¾ | 11½ | 13¼ | 14½ | 16¾ | 17⅓ |
| Advertiser | 8½ | 9 | 11 | 7½ | 6¼ | 5 | 2¾ | 2¾ |
| Total | 24½ | 24½ | 24½ | 23 | 24 | 24 | 24½ | 23⅓ |
| | Percent of hours of programing | | | | | | | |
| Network produced | 38.8 | 38.8 | 27.6 | 17.4 | 18.8 | 18.8 | 20.4 | 16.1 |
| Produced by packager and licensed to network | 26.5 | 24.5 | 27.6 | 50.0 | 55.2 | 60.4 | 68.4 | 74.3 |
| Advertiser | 34.7 | 36.7 | 44.8 | 32.6 | 26.0 | 20.8 | 11.2 | 9.6 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations. Sports programs are not included in the category, "entertainment programs."

TABLE 4–D.—*NBC network entertainment programs, 6–11 p.m.*

| Source of supply | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing | | | | | | | |
| Network produced | 3½ | 3½ | 3½ | 4½ | 3½ | 1⅓ | 1⅛ | 1 |
| Produced by packager and licensed to network | 10½ | 12½ | 14½ | 15 | 18¼ | 19⅓ | 19⅞ | 21 |
| Advertiser | 9 | 6 | 4½ | 2½ | 2 | 2¼ | 3½ | 3 |
| Total | 23 | 22 | 22½ | 22 | 23¾ | 23½ | 24½ | 25 |
| | Percent of hours of programing | | | | | | | |
| Network produced | 15.2 | 15.9 | 15.6 | 20.4 | 14.7 | 5.7 | 4.8 | 4.0 |
| Produced by packager and licensed to network | 45.6 | 56.8 | 64.4 | 68.2 | 76.9 | 84.7 | 80.9 | 84.0 |
| Advertiser | 39.2 | 27.3 | 20.0 | 11.4 | 8.4 | 9.6 | 14.3 | 12.0 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations. Sports programs are not included in the category, "entertainment programs."

## LICENSED BY PACKAGERS TO NETWORKS: BY TYPE OF NETWORK INTEREST IN NUMBER OF SUCH PROGRAMS, 1957–64

TABLE 5–A.—*All network programs (entertainment and other) for a week, 6–11 p.m.*

| Type of network interest in programs | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs licensed by packagers to networks* | | | | | | | |
| Some interest in syndication and may have other interest | 22 | 28 | 45 | 56 | 54 | 46⅓ | 41⅔ | 56 |
| Other interest (excluding syndication interest) | 27 | 25 | 20½ | 14 | 19½ | 20½ | 23 | 15 |
| First run right only for given year | 2 | 1 | 1 | 1 | ... | 1½ | 1½ | 3 |
| Total | 51 | 54 | 66½ | 71 | 73½ | 68⅓ | 66⅔ | 74 |
| | Percent of number of programs licensed by packagers to networks | | | | | | | |
| Some interest in syndication and may have other interest | 43.1 | 51.9 | 67.7 | 78.9 | 73.5 | 67.8 | 63.0 | 75.7 |
| Other interest (excluding syndication interest) | 53.0 | 46.3 | 30.8 | 19.7 | 26.5 | 30.0 | 34.7 | 20.3 |
| First run right only for given year | 3.9 | 1.8 | 1.5 | 1.4 | ... | 2.2 | 2.3 | 4.0 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

NOTE:—See "General Note" preceding tabulations.

TABLE 5–B.—*ABC network programs (entertainment and other) for a week, 6–11 p.m.*

| Type of network interest in programs | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs licensed by packagers to network | | | | | | | |
| Some interest in syndication and may have other interest | 7 | 10 | 23 | 25 | 27 | 21 | 16 | 22 |
| Other interest (excluding syndication interest) | 14 | 12 | 9 | 6 | 6 | 6 | 7 | 4 |
| First run right only for given year | 1 | 1 | 1 | 1 | .. | .. | .. | 1 |
| Total | 22 | 23 | 33 | 32 | 33 | 27 | 23 | 27 |
| | Percent of number of programs licensed by packagers to network | | | | | | | |
| Some interest in syndication and may have other interest | 31.8 | 43.5 | 69.7 | 78.1 | 81.8 | 77.8 | 69.6 | 81.5 |
| Other interest (excluding syndication interest) | 63.7 | 52.2 | 27.3 | 18.8 | 18.2 | 22.2 | 30.4 | 14.8 |
| First run right only for given year | 4.5 | 4.3 | 3.0 | 3.1 | .... | .... | .... | 3.7 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations.

TABLE 5–C.—*CBS network programs (entertainment and other) for a week, 6–11 p.m.*

| Type of network interest in programs | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs licensed by packagers to network* | | | | | | | |
| Some interest in syndication and may have other interest | 4 | 4 | 6 | 14 | 13 | 11 | 12 | 19 |
| Other interest (excluding syndication interest) | 8 | 6 | 5½ | 3 | 6½ | 7½ | 9 | 4 |
| First run right only for given year | .. | .. | .. | .. | .. | 1½ | 1½ | 2 |
| Total | 12 | 10 | 11½ | 17 | 19½ | 20 | 22½ | 25 |
| | Percent of number of programs licensed by packagers to network | | | | | | | |
| Some interest in syndication and may have other interest | 33.3 | 40.0 | 52.2 | 82.3 | 66.6 | 55.0 | 53.3 | 76.0 |
| Other interest (excluding syndication interest) | 66.7 | 60.0 | 47.8 | 17.7 | 33.4 | 37.5 | 40.0 | 16.0 |
| First run right only for given year | .... | .... | .... | .... | .... | 7.5 | 6.7 | 8.0 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

NOTE:—See "General Note" preceding tabulations.

TABLE 5–D.—*NBC network programs (entertainment and other) for a week, 6–11 p.m.*

| Type of network interest in programs | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs licensed by packagers to network* | | | | | | | |
| Some interest in syndication and may have other interest | 11 | 14 | 16 | 17 | 14 | 14⅓ | 13⅔ | 15 |
| Other interest (excluding syndication interest) | 5 | 7 | 6 | 5 | 7 | 7 | 7 | 7 |
| First run right only for given year | 1 | .. | .. | .. | .. | .. | .. | .. |
| Total | 17 | 21 | 22 | 22 | 21 | 21⅓ | 20⅔ | 22 |
| | Percent of number of programs licensed by packagers to network | | | | | | | |
| Some interest in syndication and may have other interest | 64.7 | 66.7 | 72.8 | 77.3 | 66.7 | 67.2 | 66.1 | 68.2 |
| Other interest (excluding syndication interest) | 29.4 | 33.3 | 27.2 | 22.7 | 33.3 | 32.8 | 33.9 | 31.8 |
| First run right only for given year | 5.9 | .... | .... | .... | .... | .... | .... | .... |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

NOTE:—See "General Note" preceding tabulations.

## LICENSED BY PACKAGERS TO NETWORKS: BY TYPE OF NETWORK INTEREST IN HOURS OF PROGRAMING REPRESENTED BY SUCH PROGRAMS, 1957–64

TABLE 6–A.—*All network programs (entertainment and other) for a week, 6–11 p.m.*

| Type of network interest in programs | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing licensed by packagers to networks | | | | | | | |
| Some interest in syndication and may have other interest | 13½ | 17 | 30 | 40 | 42¼ | 37⅜ | 35⅛ | 42½ |
| Other interest (excluding syndication interest) | 14⅔ | 14½ | 12¼ | 8¼ | 13½ | 17½ | 20 | 14⅛ |
| First run right only for given year | 1½ | 1 | 1 | 1 | .. | ¾ | ¾ | 2 |
| Total | 29⅔ | 32½ | 43¼ | 49¼ | 55¾ | 55⅛ | 56½ | 58⅝ |
| | Percent of hours of programing licensed by packagers to networks | | | | | | | |
| Some interest in syndication and may have other interest | 45.5 | 52.3 | 69.4 | 81.2 | 75.8 | 67.4 | 63.0 | 72.2 |
| Other interest (excluding syndication interest) | 49.4 | 44.6 | 28.3 | 16.8 | 24.2 | 31.3 | 35.7 | 24.4 |
| First run right only for given year | 5.1 | 3.1 | 2.3 | 2.0 | .... | 1.3 | 1.3 | 3.4 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations.

TABLE 6–B.—*ABC network programs (entertainment and other) for a week, 6–11 p.m.*

| Type of network interest in programs | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing licensed by packagers to network | | | | | | | |
| Some interest in syndication and may have other interest | 4 | 6 | 15½ | 18½ | 21 | 16½ | 15 | 16 |
| Other interest (excluding syndication interest) | 7⅔ | 7 | 5½ | 3¼ | 3¼ | 5 | 4½ | 3½ |
| First run right only for given year | 1 | 1 | 1 | 1 | .. | .. | .. | 1 |
| Total | 12⅔ | 14 | 22 | 22¾ | 24¼ | 21½ | 19½ | 20½ |
| | Percent of hours of programing licensed by packagers to network | | | | | | | |
| Some interest in syndication and may have other interest | 31.6 | 42.9 | 70.5 | 81.3 | 86.6 | 76.7 | 76.9 | 78.0 |
| Other interest (excluding syndication interest) | 60.5 | 50.0 | 25.0 | 14.8 | 13.4 | 23.3 | 23.1 | 17.1 |
| First run right only for given year | 7.9 | 7.1 | 4.5 | 4.4 | .... | .... | .... | 4.9 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations.

TABLE 6–C.—*CBS network programs (entertainment and other) for a week, 6–11 p.m.*

| Type of network interest in programs | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing licensed by packagers to network | | | | | | | |
| Some interest in syndication and may have other interest | 2 | 2 | 3 | 9 | 9 | 8 | 8½ | 14 |
| Other interest (excluding syndication interest) | 4½ | 4 | 3¾ | 2½ | 4¼ | 5¾ | 7½ | 2⅓ |
| First run right only for given year | .. | .. | .. | .. | .. | ¾ | ¾ | 1 |
| Total | 6½ | 6 | 6¾ | 11½ | 13¼ | 14½ | 16¾ | 17⅓ |
| | Percent of hours of programing licensed by packagers to networks | | | | | | | |
| Some interest in syndication and may have other interest | 30.7 | 33.4 | 44.4 | 78.2 | 67.9 | 55.2 | 50.7 | 80.8 |
| Other interest (excluding syndication interest) | 69.3 | 66.6 | 55.6 | 21.8 | 32.1 | 39.7 | 44.8 | 13.5 |
| First run right only for given year | .... | .... | .... | .... | .... | 5.1 | 4.5 | 5.7 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations.

TABLE 6–D.—*NBC network programs (entertainment and other) for a week, 6–11 p.m.*

| Type of network interest in programs | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Hours of programing licensed by packagers to network | | | | | | | |
| Some interest in syndication and may have other interest | 7½ | 9 | 11½ | 12½ | 12¼ | 13⅛ | 11⅞ | 12½ |
| Other interest (excluding syndication interest) | 2½ | 3½ | 3 | 2½ | 6 | 6¾ | 8 | 8½ |
| First run right only for given year | ½ | .. | .. | .. | .. | .. | .. | .. |
| Total | 10½ | 12½ | 14½ | 15 | 18¼ | 19⅛ | 19⅞ | 21 |
| | Percent of hours of programing licensed by packagers to network | | | | | | | |
| Some interest in syndication and may have other interest | 71.4 | 72.0 | 79.4 | 83.3 | 67.1 | 66.1 | 59.7 | 59.5 |
| Other interest (excluding syndication interest) | 23.8 | 28.0 | 20.6 | 16.7 | 32.9 | 33.9 | 40.3 | 40.5 |
| First run right only for given year | 4.8 | .... | .... | .... | .... | .... | .... | .... |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

NOTE:—See "General Note" preceding tabulations.

## LICENSED BY PACKAGERS TO NETWORKS: BY TYPE OF NETWORK INTEREST IN NUMBER OF SUCH PROGRAMS, 1957–64

TABLE 7–A.—*All film network programs (entertainment and other) for a week, 6–11 p.m.*

| Type of network interest in programs | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs licensed by packagers to networks* | | | | | | | |
| Some domestic and foreign syndication interest and may have other interest | 16 | 22 | 39 | 50 | 47 | 39 | 33⅔ | 45 |
| Some domestic or foreign syndication interest, but not both, and may have other interest | 3 | 1 | .. | 1 | 1 | 1 | 1 | .. |
| Other interest (excluding syndication interest) | 11 | 10 | 7½ | 6 | 10½ | 11½ | 11 | 11 |
| First run right only in given year | 2 | 1 | 1 | 1 | .. | 1½ | 1½ | 1½ |
| Total | 32 | 34 | 47½ | 58 | 58½ | 53 | 47⅔ | 57½ |
| | Percent of number of programs licensed by packagers to networks | | | | | | | |
| Some domestic and foreign syndication interest and may have other interest | 50.0 | 64.7 | 82.1 | 86.2 | 80.4 | 73.6 | 71.4 | 78.3 |
| Some domestic or foreign syndication interest, but not both, and may have other interest | 9.4 | 2.9 | .... | 1.7 | 1.7 | 1.9 | 2.1 | .... |
| Other interest (excluding syndication interest) | 34.4 | 29.4 | 15.8 | 10.4 | 17.9 | 21.7 | 23.3 | 19.1 |
| First run right only in given year | 6.2 | 3.0 | 2.1 | 1.7 | .... | 2.8 | 3.2 | 2.6 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

NOTE:—See "General Note" preceding tabulations.

TABLE 7–B.—*All live and tape network programs (entertainment and other) for a week, 6–11 p.m.*

| Type of network interest in programs | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|---|---|---|
| | Number of programs licensed by packagers to networks* | | | | | | | |
| Some domestic and foreign syndication interest and may have other interest | .. | 2 | 3 | 4 | 4 | 6⅓ | 7 | 10 |
| Some domestic or foreign syndication interest, but not both, and may have other interest | 3 | 3 | 3 | 1 | 2 | .. | .. | 1 |
| Other interest (excluding syndication interest) | 16 | 15 | 13 | 8 | 9 | 9 | 12 | 4 |
| First run right only in given year | .. | .. | .. | .. | .. | .. | .. | 1½ |
| Total | 19 | 20 | 19 | 13 | 15 | 15⅓ | 19 | 16½ |
| | Percent of number of programs licensed by packagers to network | | | | | | | |
| Some domestic and foreign syndication interest and may have other interest | .... | 10.0 | 15.8 | 30.7 | 26.7 | 41.3 | 36.8 | 60.6 |
| Some domestic or foreign syndication interest, but not both, and may have other interest | 15.8 | 15.0 | 15.8 | 7.7 | 13.3 | .... | .... | 6.1 |
| Other interest (excluding syndication interest) | 84.2 | 75.0 | 68.4 | 61.6 | 60.0 | 58.7 | 63.2 | 24.2 |
| First run right only in given year | .... | .... | .... | .... | .... | .... | .... | 9.1 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

*Fractions reflect those programs supplied in specified proportions by networks, packagers, or advertisers.

NOTE:—See "General Note" preceding tabulations.

## DISSENTING STATEMENT OF COMMISSIONER ROSEL H. HYDE

I dissent to the issuance of the proposed rules relating to network television program practices. The projected rules are subject, of course, to further consideration in the light of comment which may be submitted pursuant to the notice of rule making. However, I do not believe that even proposed rules of such far-reaching implications should be promulgated on the basis of the study which has been made. There is no dearth of assumptions, opinion and argument on the matter, but there is a paucity of definitive information, and no real analysis regarding the economic factors in present program practices. Also, as appears from the concurrent reply to Senator Hartke's questions, the possible impact of economic factors on program practices under the proposed rules is practically conceded to be a matter of speculation.

I feel that inadequate study has been made as to the desirability of proposing to adopt a change in basic policy which would restrict the creative efforts of networks and tend to make them mere exhibitors. It would seem appropriate to me for the Commission to give more consideration as to where and how program responsibility would be exercised under the proposed rules before projecting such rules.

## CONCURRING OPINION OF COMMISSIONER LOEVINGER

I concur in the publication of the proposed rule for the purpose of securing comment on, facts relating to, and public discussion of, the proposal and the problem to which it relates. However, I deem the matter of sufficient importance to justify a separate statement of my own views which are not completely identical with those of my colleagues.

It seems to me that the public interest in the field of broadcasting is best served by a system in which government control of, or influence over, the program content is at an absolute minimum,

and the programs broadcast are determined by the desires primarily of the public and secondarily of the licensee. This requires that there be a diversity of program sources for the right of choice to be effective.

With a diversity of program sources and a free choice among them available to the public, I am not concerned, and I do not believe that this Commission should be concerned, whether program production is financed by advertisers, by licensees or by independent production companies. In those circumstances I am not concerned, and I do not believe that this Commission should be concerned, whether the programs meet my own standards of taste and quality. This, of course, has nothing to do with the Commission's right to prohibit legally objectionable programs. See Loevinger, The Role of Law in Broadcasting, 8 Journal of Broadcasting 113 (1964).

The inferences to be drawn from the Commission's prior hearings and investigations into the matter of program sources suggest that the diversity of sources which a system of free broadcasting rests upon, has been restricted in recent years. The facts referred to in the Commission's Notice, and to be found in the records before the Commission, indicate that formerly there were a significant number of independent program production companies offering products to networks, to advertisers, and to television stations. By the end of the 1950's the networks had either acquired substantial proprietary interests in the great bulk of network shows or selected the great bulk of network shows from those in which they had proprietary interests. Regardless of how this came about, the result was that the market for independent program production was very substantially constricted, and that most of the independent program producers were reduced to the status of satellites of the networks.

This situation seems to me to present an issue that deserves public consideration and discussion. This is what is sought by the Notice of Proposed Rulemaking.

In voting for the Notice of Proposed Rulemaking I do not indicate any fixed conclusion as to what the facts are, as to whether the facts present a problem requiring Commission action, or as to what action is appropriate if there is a serious problem. I would welcome representations and discussion on all of these aspects of the matter. In particular, questions which seem to me to merit the most widespread public consideration and discussion are these:

(1) Is it desirable for the great preponderance of television shows available to the public to be produced, owned or controlled by three network corporations?

(2) Are there independent production companies able and willing to produce programs of network quality without network assistance or participation if there is a market for such programs?

(3) If there are such persons or enterprises, would it be desirable to separate the production of television programs from the control of exhibition altogether under the rule of United States v. Paramount Pictures, 334 US 131? If not, why not?

(4) If the complete separation of production and exhibition is

not deemed appropriate, is the proposed rule attached to the Commission Notice the best approach to the problem?

(5) Would adoption of a rule prohibiting network syndication and acquisition of proprietary rights other than exhibition rights in programs produced by others suffice to promote diversity of program sources?

(6) If the proposed rule, or some similar rule, is deemed desirable, should its application be limited to networks serving more than some specified number (such as 50) affiliated stations, in order to offer encouragement to the development of new networks?

(7) Is the principle of licensee responsibility consistent with network control, and is network control consistent with independent production? If these principles or objectives are not wholly consistent, which should the FCC prefer or emphasize?

(8) If the proposed rule, or some similar rule, is deemed substantively desirable, is the jurisdictional basis of the proposed rule legally sound? If not, is there any legally sound jurisdictional basis for FCC promulgation of a substantive limitation of this kind under present statutes?

(9) If the Commission concludes that some action is appropriate to encourage a greater diversity of program sources, is there any course of action which would be more effective than, or otherwise preferable to, the proposed rule?

In voting for the Notice and the publication of the proposed rule I indicate no more than that I consider the foregoing questions to be relevant and material to the Commission's function and to be worthy of investigation and widespread discussion. I think it preferable that these questions be frankly confronted and openly discussed, rather than avoided or covertly or privately considered. I hope that the Commission will receive specific and useful answers to these difficult questions.

F.C.C. 65R–103

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of KFOX, INC., (KFOX), PASADENA, CALIF., ET AL. For Construction Permits | Dockets Nos. 15751 through 15766 File No. BP–16149 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Pasadena Broadcasting Company (Pasadena Broadcasting) requests enlargement of issues with respect to the application of Western Broadcasting Corporation (Western).[1] The requested issue reads as follows:

To determine whether the maximum expected operating values specified for the directional antenna pattern of Western Broadcasting Corporation are those which can reasonably be expected to be achieved for the directional antenna array and power proposed.

2. Pasadena Broadcasting states that (1) the purpose of a maximum expected operating value (MEOV) is to allow some safety factor in the design of a directional antenna system so as to assure protection to other stations by providing for unknown variables, (2) an MEOV should not be used in an arbitrary manner to prevent allocation problems, (3) an MEOV used for a directional antenna pattern must bear a direct mathematical relationship to the pattern to which it is applied, and (4) notes that Western's amended proposal does not show symmetrical MEOV's about the line of towers. Contending that Western's MEOV's are unrealistic, petitioner states that a comparison of Western's calculated field and MEOV values for certain vertical angles on certain azimuths show a large variation in the percentage increase in MEOV over calculated field values, and that there is no reason for MEOV's to vary in this manner unless serious distortion is expected or unless the designer of the directional array anticipates the fact that the calculated pattern cannot be achieved or is unreasonable. Pasadena Broadcasting contends that Western itself admits, in effect, that its MEOV's bear no relationship to its proposed pattern.

3. Western's consulting engineer asserts that Pasadena's statements (1) and (2) above are incompatible. Agreeing that maxi-

[1] The Review Board has before it (a) petition of Pasadena Broadcasting Company to enlarge issues with respect to application of Western Broadcasting Corporation, filed January 21, 1965; (b) Broadcast Bureau's opposition, filed February 12, 1965; (c) opposition of Western Broadcasting Corporation, filed February 15, 1965; and (d) correction, filed by Western Broadcasting Corporation on February 18, 1965.

mum expected operating values are for the purpose of allowing some safety factor (tolerance) in the adjustment of arrays, Western states that the MEOV's do not have to be symmetrical with respect to the theoretical pattern of the array; that there are cases where Pasadena's engineer has applied MEOV's to directional patterns which neither follow a constant ratio to the calculated values or bear a direct mathematical relationship to the theoretical pattern. Noting that the Commission has designated an issue to determine whether Western can adjust and maintain its directional array within the MEOV's specified, but has not questioned the MEOV values selected by Western's consultant which in his judgment would protect other stations and yet permit adjustment of the array within the specified limits, the Broadcast Bureau reiterates that the MEOV is a safety factor based on good engineering judgment. It is the Bureau's opinion that some statements by petitioner support arguments against petitioner's contentions. Thus, petitioner's engineer recognizes at page 1 of his engineering statement that the MEOV is a safety factor intended to allow for variables (such as reradiation or reflections from extraneous objects, different attenuation factors for tall towers, etc.) not covered in the mathematical expression for a directional array. Petitioner did not reply to the oppositions.

4. As to petitioner's first statement listed above, the parties agree that the purpose of an MEOV is to allow some safety factor in pattern design by providing for the variables not covered in the mathematical expression for the array. This is so because in practice various factors (such as terrain, reradiation or reflection from objects external to the array, characteristics of the array) can prevent adjustment of an array to precisely the calculated theoretical values. Therefore, based on his judgment and experience, the designing engineer, considering such factors, specifies MEOV's as the maximum values within which he expects to adjust the array. While petitioner's statement that an MEOV should not be used in an arbitrary manner to prevent allocation problems is valid, petitioner fails to specifically relate this statement to Western's MEOV's. Petitioner's major contention is that an MEOV must bear "a direct mathematical relationship to the pattern to which it is applied"; that Western's MEOV's do not bear such a relationship; and that, therefore, Western's MEOV's are unrealistic. In support of this contention, petitioner cites certain calculated (theoretical) values of radiation and maximum expected operating values of radiation proposed by Western at azimuths where the calculated value varies from a maximum of 5 millivolts per meter (mv/m) to a minimum of 0.03 mv/m, and the MEOV's vary from a maximum of 23.6 mv/m to a minimum of 13.8 mv/m. The azimuths chosen by petitioner are where the minimum values of radiation for the array occur. Since it is not possible to adjust an array to obtain extremely low calculated values, it is to be expected that the percentage of departure of the MEOV from the calculated value would be large. Thus, the fact that at the azimuth of 60 degrees true and a vertical angle of 20 degrees the ratio of Western's MEOV to petitioner's calculated

field is 470, does not, of itself, establish that Western's engineering judgment in establishing the MEOV's is in error. For here, where petitioner's calculated field is a fraction of a millivolt per meter (0.03 mv/m) it would be expected that the percentage of departure of the MEOV from the calculated value would be large because of the small calculated value and because the effects of departures of operating conditions from assumed theoretical conditions would be most noticeable in the null area which exists at this azimuth.[2] Nor has petitioner established that Western's exercise of its engineering judgment in proposing non-symmetrical MEOV's is in error. In view of the foregoing, and of other protective factors, including the fact that under Issue 8 herein Western must establish that it will be able to adjust and maintain its directional antenna system, petitioner has failed to allege facts sufficient to warrant addition of the requested issue.

Accordingly, IT IS ORDERED, This 22nd day of March, 1965, That the petition of Pasadena Broadcasting Company to enlarge issues with respect to application of Western Broadcasting Corporation, filed January 21, 1965, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] *Edina Corp.*, FCC 62R-94, 24 RR 436 (1962).

F.C.C. 65–216

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Application of SELMA TELEVISION, INC. (WSLA–TV), SELMA, ALA. For Construction Permit | Docket No. 15888 File No. BPCT–2827 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND BARTLEY DISSENTING; COMMISSIONER COX CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the above-captioned application of Selma Television, Inc., permittee of Television Broadcast Station WSLA–TV, Channel 8, Selma, Alabama, and various pleadings filed in connection therewith [1]. The applicant (hereinafter sometimes referred to as "WSLA") is authorized to operate from a site 4 miles southwest of Selma, Alabama (approximately 46 miles west of Montgomery, Alabama) with effective radiated visual power of 2.51 kw and antenna height above average terrain of 360 feet. By its application, applicant seeks authority to change the site of its transmitter to a point near West Blocton, Alabama, 35 miles southwest of Birmingham, 68 miles northwest of Montgomery, and 45 miles generally north from its present site, increase effective radiated visual power to 316 kw, increase antenna height above average terrain to 2,000 feet, and make other changes in the facilities of Station WSLA–TV. Applicant originally filed its application on November 4, 1960, requesting authority to move its transmitter to a point near Gordonsville, Alabama, 27.5 miles southeast of Selma, 26 miles southwest of Montgomery, and 30 miles generally southeast from its present site, increase effective radiated visual power to 316 kw and increase antenna height above average terrain to 1,393 feet. The Gordonsville site would have been the southern-most point of a triangle with Selma and Montgomery as the other points. That proposal was opposed by the two Montgomery, Alabama, UHF television stations, Stations WCOV–TV, Channel 20, and WCCB–TV, Channel 32 [2]. Thereafter, the applicant, on February 11, 1964, amended its application to specify substantially different facilities. Because of the character of the amendment which presented, in substance, a new and substantially different application, all of the interested parties filed new pleadings directed to the application as amended. Subsequently, on October 23, 1964, the applicant again amended its application, submitting alternative

[1] The numerous pleadings filed in this matter are listed in the Appendix attached hereto.
[2] See Appendix, Footnote 2.

proposals for directional and non-directional operations. The applicant stated that it preferred the non-directional proposal, but that it was submitting the alternative directional proposal in order to eliminate incursion of its proposed Grade B contour into Montgomery, Alabama, and thus obviate opposition from the Montgomery UHF stations. The alternative proposals involve no change in site, antenna height, or power (except in certain directions due to the directional proposal) from that specified in the amendment of February 11, 1964. Consequently, except to the extent that pleadings filed prior to February 11, 1964, may have been incorporated by reference into subsequent pleadings and are still applicable, they are moot and need not be considered in reaching our decision [3].

2. In order to place our decision herein in proper perspective, we think that a brief resume of the general situation in the central Alabama area with respect to television broadcast service may be appropriate. Channels 8 and 58 are the only television broadcast channels allocated to Selma, Alabama, and the applicant is the only television station authorized and operating in Selma. The applicant proposes a network affiliation with ABC or CBS, but at the present time it does not have a network affiliation. Station WSLA–TV does, however, broadcast ABC network programming when the station is specifically requested by network advertisers (so-called "bonus"). Montgomery, Alabama, is an intermixed market, with three operating UHF television stations and one operating VHF television station: Station WAIQ, Channel *26 (noncommercial educational); Station WCOV–TV (CBS), Channel 20; Station WKAB–TV (ABC), Channel 32; and Station WSFA–TV (NBC), Channel 12. There are four television broadcast stations authorized in Birmingham, Alabama: Station WAPI–TV (CBS and NBC), Channel 13; Station WBRC–TV (ABC and CBS), Channel 6; Station WBIQ, Channel *10 (noncommercial educational); and Station WBMG, Channel 42, which has not yet been constructed.[4] Additionally, there are two applicants presently in comparative hearing in Docket Nos. 15460–15461 for a construction permit for a new television station to operate on Channel 54, which is allocated to Bessemer, Alabama, but one of the applicants has specified Homewood, Alabama, as its principal community to be served and the other has specified Fairfield, Alabama. Both of these proposed principal communities are suburbs of Birmingham and a grant of either may be expected to result in the delivery of a principal city signal over Birmingham. There are two commercial channels allocated to Tuscaloosa, Alabama (Channels 45 and 51), and there is an uncontested application pending for one of them with a promise of an application to be filed shortly for the other. Finally, two applications for a construction permit for a new television station to operate on Channel 70, the only television channel allocated to Anniston, Alabama

[3] See Footnote 2 of the Memorandum Opinion and Order in *Springfield Telecasting Co.*, FCC 64–387, released May 4, 1964, Docket Nos. 15449–15450.

[4] WBMG has an application (BMPCT–6044) pending for modification of its construction permit to make certain changes in its authorized facilities. A grant of the application would result in a substantial expansion of WBMG's predicted Grade B contour.

were designated for comparative hearing by the Commission on February 7, 1965 (FCC 65–127, released February 19, 1965).

3. Operating with its presently authorized facilities, the applicant's predicted Grade B contour extends less than 25 miles from its transmitter site and falls no closer than 21 miles from Montgomery and substantially farther from Birmingham, Tuscaloosa, and Anniston. Under either proposal, the applicant would place a predicted principal city signal (77 dbu) over all of Birmingham and Tuscaloosa as well as Selma. The proposed Grade B contour of the non-directional proposal would extend not less than 77 miles from the transmitter site and would encompass all of Montgomery and would fall within 10 miles of Anniston. Operating with suppressed radiation in the direction of Montgomery, the applicant's proposed Grade B contour would fall just short of the city limits of Montgomery and would exclude Alexander City, a city of 13,140 persons, both of which would be embraced by the applicant's non-directional Grade B contour. On November 27, 1964, the Commission granted the application (BPCT–3322) of WCOV, Inc.[5] for a construction permit to increase effective radiated visual power and antenna height above average terrain. The effect of this grant is to increase Station WCOV–TV's Grade B coverage area and, consequently, the area of overlap between the applicant's proposed Grade B contours and Station WCOV–TV's predicted Grade B contour as authorized by the recent grant. It is to the introduction of the additional VHF television signal from the proposed operation of the Selma station that the petitioners object.

4. Applicant alleges that Station WSLA–TV has been operated consistently at a loss and that in 1963, its broadcast expenses exceeded its broadcast revenues by more than $20,000. The applicant states that the sole purpose of its application is to expand substantially its coverage area to include the populous areas to the north, around Birmingham and Tuscaloosa. Such an expansion is necessary, the applicant alleges, in order to increase its revenues and to permit it to survive. If it is unable to expand its coverage area, the applicant states that it will be unable to survive and its demise would mean the loss of Selma's only local television station. The applicant states that there is ample precedent for a grant of its proposal, citing *St. Anthony Television Corporation,* FCC 64–330, 2 RR 2d 248; appeal pending before U.S.C.A., D.C. Circuit.

5. Each of the petitioners alleges standing in this proceeding as a "party in interest" within the meaning of Section 309(d)(1) of the Communications Act of 1934, as amended, on the basis that the proposed operation would have a substantial adverse economic effect on each of the petitioners. Birmingham Television Corporation (WBMG), however, has not constructed its station and its standing is predicated upon the premise that if the Selma application were granted, WBMG could not undertake construction and operation of the station because financial failure would be certain. We think that it is clear, therefore that WBMG, Montgomery Independent Telecasters, Inc. (WKAB–TV) and WCOV, Inc.,

[5] See Appendix, Footnote 3.

(WCOV–TV), have standing as "parties in interest" within the meaning of Section 309(d)(1) of the Communications Act.[6]

6. As we have stated, the applicant, by its amendment of October 23, 1964, offered alternative proposals, one involving the use of a directional antenna to suppress radiation in the direction of Montgomery, Alabama, and the other for non-directional operation. The applicant recognizes that these proposals are, on their face, conflicting and inconsistent and are therefore inconsistent with Section 1.518 of the Commission's Rules. The applicant has, accordingly, requested a waiver of the Rules and has accompanied its request with a statement in an effort to justify a waiver. The applicant acknowledges that the opposition of the Montgomery UHF stations constitutes an obstacle to immediate grant of its application and in order to obviate this opposition and expedite Commission consideration of the application, the applicant has submitted its alternative directional proposal to demonstrate its willingness to compromise to achieve its expansion. In view of the unique situation presented in this matter, we are of the opinion that a waiver is warranted and that the Commission should have the opportunity to consider both proposals. The directional proposal would entail the use of a directive transmitting antenna providing a ratio of maximum to minimum radiation in the horizontal plane of 15 db. Section 73.685(e) of the Commission's Rules limits the ratio to 10 db and the applicant has, accordingly, requested a waiver of this section of the Rules. In view of our disposition of this matter, we believe that the applicant must justify its request for waiver of this Section in the hearing which will be ordered. An appropriate issue will be specified with re-waiver of Section 73.685(e) of the Rules.

7. The basic question presented in this matter is the impact, if any, which the proposed operation of Station WSLA–TV may have on the development of UHF television broadcasting in the area which the applicant proposes to serve. Station WKAB–TV provides the only ABC network Grade A service to much of the Montgomery, Alabama, market. Its predecessor, WCCB–TV, failed financially after 11 months of operation and Station WKAB–TV resumed operations on March 12, 1964. Station WKAB–TV states that the incursion of the applicant's proposed Grade A signal into WKAB–TV's coverage area would seriously threaten the latter's ABC affiliation and, consequently, its survival. Similar fears with respect to its CBS affiliation are expressed by Station WCOV–TV, about 40% of the coverage area of which would be overlapped by the Grade B contour of the directional proposal of the Selma station.

8. On the basis of our experience with respect to the effect of the introduction of a new VHF television signal into the service areas of operating UHF television stations, and particularly in view of the burgeoning interest in the construction and operation of new UHF television stations in central Alabama, we cannot say that petitioners' fears are baseless. In *Triangle Publications, Inc.*,

[6] *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 9 RR 2008.

29 FCC 315, 17 RR 624, affirmed *sub nom Triangle Publications, Inc. v. Federal Communications Commission,* 110 U.S. App. D.C. 214, 291 F. 2d 324, 21 RR 2039, we said:

> The inescapable conclusion to be drawn from the record herein is that an existing UHF station will suffer losses in income following the introduction of a new or improved VHF signal into the market area of a UHF station. The same is true of our experience in general.[7]

The Commission there cited and reiterated its language in the Report and Order and Further Notice of Proposed Rule Making in Docket No. 11759 (Fresno Deintermixture Case, FCC 60–279, 19 RR 1581):

> If there is one circumstance which has been established beyond doubt in the manifold experience of UHF operators everywhere that they compete with VHF, it is that, for a complex of familiar reasons related to receiver conversion, advertising support, program availabilities and other related factors, UHF operations, however serviceable to the public, are subjected to competitive adversities which impose seemingly inescapable and substantial burdens upon the chances for financially successful operation of a UHF service in competition with an available VHF service.

While the Commission believes that the so-called "All-Channel Receiver Law"[8] will ultimately enable UHF television stations to achieve a more favorable competitive position *vis-a-vis* VHF stations, it does not appear that that time has yet come. In the matter now before us, we are not asked to consider a remote possibility that a UHF station competing with VHF stations may fail, but we are faced with a situation where one of the UHF stations in the intermixed market has already suffered financial failure and its successor has only recently returned to the air.

9. The applicant's reliance upon the *St. Anthony* case, *supra,* is misplaced. Entirely different considerations required a grant in that case, and, unlike here, we were not faced with the question of whether a grant would adversely affect the development of UHF television in the area. In the *St. Anthony* case, we concluded that "a move of an authorized VHF transmitter would have little adverse effect on the potential development of UHF, in view of the multiple VHF signals already in the market." The same cannot be said of the Birmingham-Montgomery-Tuscaloosa-Anniston markets. WKAB–TV has suggested that the Montgomery UHF stations can be protected from the encroachment of yet another VHF signal by requiring the applicant to suppress radiation in the direction of Montgomery. While we found such a solution appropriate on an interim basis in *WHAS, Inc.,* FCC 64–604, 2 RR 2d 1073, we are here faced with a different situation in which such a solution would not appear to be entirely satisfactory. In the *WHAS* case, the problem involved UHF television stations in a single city, whereas in the matter now before us, we are required to consider the possible impact of a new VHF television signal on existing and proposed UHF television operations in several cities in a widely scattered area. For example, Birmingham lies to the northeast of the applicant's proposed site, Tuscaloosa lies to the

[7] See also *KTIV Telcvision Company,* FCC 64–212, 2 RR 2d 95.
[8] Section 330 of the Communications Act of 1934, as amended, implemented by Section 15.65 of the Commission's Rules.

northwest, and Montgomery lies to the southeast. Furthermore, since it is the avowed purpose of the applicant to expand its coverage area into the major cities such as Birmingham and Tuscaloosa, petitioner's suggestion would offer no solution to the problem. This conclusion is reinforced by the directional proposal of the applicant which, notwithstanding the fact that a predicted Grade B signal would not be placed into Montgomery itself, would nevertheless place a principal city signal over all of Birmingham and Tuscaloosa and the proposed Grade B contour would overlap nearly 40% of the Grade B coverage areas of the Montgomery UHF stations. Since WSLA's predicted Grade B contour presently overlaps less than 10% of the Grade B coverage areas of the Montgomery UHF stations, a grant of the application would more than quadruple the area of overlap. It is apparent, therefore, that the lack of a Grade B signal over Montgomery would not eliminate the problem of whether the UHF stations could survive the introduction of the proposed Grade B signal of the Selma station.

10. Petitioners allege that a grant of the application would virtually destroy the opportunity for further development of UHF television in central Alabama; the applicant alleges that a failure to grant the application would result in its ultimate demise and the consequent loss to Selma, Alabama, of its only local television station. This, in essence, is the dilemma with which the Commission is faced. We are, however, unable to determine, on the basis of the pleadings and the facts now before us, whether a grant of the application would have an adverse effect upon the existing UHF television stations and the further development of UHF television in central Alabama, and, if so, whether it may be to an extent inconsistent with the public interest. Neither are we able to form a judgment, on the facts now before us, as to the possible effect on the continuation of local television service to Selma of a failure to grant the application. We think it is obvious that substantially more information will be required before we can draw any valid conclusions and determine whether a grant of the application would serve the public interest, convenience and necessity. The best tool available to us for this purpose is an evidentiary hearing in which the parties will have an opportunity to present all of the facts and circumstances necessary to enable us to reach a decision which will protect the public interest. We will, therefore, designate the application for hearing upon appropriate issues.

11. The petitioners have raised various other questions in this matter which we think require discussion. WBMG alleges that, operating as proposed, Station WSLA–TV would be a Birmingham station rather than a Selma station, in contravention of Section 307(b) of the Communications Act; that the applicant has not shown that it has made any efforts to ascertain the programming needs and interests of the new area it proposes to serve; and that there is a site near Uniontown, Alabama, from which the applicant could operate and render service far superior to that which it proposes. The applicant has stated that it proposes to remain a Selma station, that it will make no change in the location of its main studios, and will continue to be responsive to the programming needs

and interests of Selma, and finally, that it will continue to deliver a principal city signal to all of Selma. Nevertheless, the applicant states that, in order to survive, it must expand its coverage into Birmingham and the populous areas to the north. We are led to believe that the applicant will depend upon these areas, primarily Birmingham, as the principal base for economic support. These circumstances raise a question as to whether the station would, in reality, be a Birmingham station rather than a Selma station. We think that an issue is warranted to determine whether a grant of the application would comport with Section 307(b) of the Communications Act with respect to the "fair, efficient, and equitable distribution of radio service" among communities, and our scheme of television broadcast channel assignments embodied in Section 73.606 of the Commission's Rules. *Triangle Publications, Inc.*, supra. The applicant states that it has surveyed many of the communities in the new area which it proposes to serve, that its principals are thoroughly familiar with Birmingham and its programming requirements, and that on the basis of these facts, it has formulated its proposed programming to accommodate the needs and interests of the new coverage area as it has determined them to be. These allegations, together with the fact that the applicant is an operating broadcast station in central Alabama, convinces us that a Suburban issue [9] is not warranted. Finally, the petitioner, WBMG, suggests that there is another site, near Uniontown, Alabama, from which the applicant could operate and better serve the public interest, convenience and necessity than from that which the applicant proposes. The petitioner, however, has alleged no facts to show that a site is actually available in the suggested alternative area. There is no indication that a tower in the suggested alternative area could meet air safety requirements, that such a site would be accessible, nor that other factors such as zoning, geology, or terrain would permit the location of a transmitter in the area. More important, however, is the fact that the petitioner is, in essence, urging that we must order the applicant into hearing against a hypothetical alternative for which the applicant has not applied. Carried to its logical conclusion, such a policy could result in our requiring every applicant to defend its choice of transmitter site, tower height, power, perhaps even the frequency for which it has applied, against hypothetical alternatives. The adoption of such a policy could only result in introducing chaos into the Commission's processes and would impose upon the Commission an almost impossible burden. The Commission has consistently rejected consideration of hypothetical alternatives and we will, accordingly, reject such consideration in the matter now before us. *WKYR, Inc.*, FCC 63–893, 1 RR 2d 314; *Television Broadcasters, Inc.*, FCC 65–15, 4 RR 2d 119; *TLB, Inc.*, FCC 65–103, released February 15, 1965.[10] In this connection, we also note that WCOV has offered several suggestions, in its latest opposition

[9] *Patrick Henry et al.* v. *Federal Communications Commission*, 112 U.S. App. D.C. 257, 302 F. 2d 191, 23 RR 2016.

[10] The above cases discuss the applicability of *Wometco Enterprises, Inc.* v. *Federal Communications Commission*, 114 U.S. App. D.C. 261. 314 F. 2d 266, and that discussion will not be repeated here.

to a grant of the application, as to alternative courses of action which the applicant might pursue to achieve its objectives, including rule making proceedings to move Channel 8 into Birmingham. Whatever the merits of these suggestions, a petition to deny is not the proper vehicle by which to bring them to the Commission's attention.

12. Petitioner WCOV–TV has raised various questions pertaining to the applicant's estimates of operating expenses and anticipated revenues as related to its proposed number of spot announcements, increased number of broadcast hours, and increased size of staff; the adequacy of the staff proposed by the applicant; and whether the applicant has the requisite character qualifications to be a broadcast licensee. Petitioner alleges that in February 1964 the applicant proposed to broadcast 73 hours per week, of which less than 6 hours would be local live programming and all of the local live would be commercial programming, but by its amendment in July 1964, the applicant has increased its total broadcast hours to 132½, of which more than 23% (30 hours) will be local live and 8.3% of the proposed local live will be sustaining programming. Despite these changes, petitioner states, the applicant has made no change in its estimate of $120,000 first-year operating expenses and $150,000 in first-year revenues. Moreover, the petitioner points out that the applicant, in February 1964, proposed 492 commercial spot announcements per week, but in July 1964 it proposed to produce the same $150,000 in annual income with 715 commercial spot announcements. With respect to the staffing proposal, the applicant, in February 1964, proposed a staff of 14 employees plus additional employees as needed, and in July 1964 it proposed 26 employees plus others as needed, but there is no commensurate increase in anticipated annual operating expenses. There is nothing in the application or pleadings which will explain these apparent discrepancies. We think, however, that these are questions which may be considered by the Hearing Examiner, if properly brought before him on motion for an "Evansville" issue.[11] With respect to the adequacy of the staff proposed, however, the petitioner has alleged no facts to support its conclusion that the staff proposed would not be adequate to effectuate the type of operation proposed. In this respect, the petitioner has clearly not met the burden of making specific allegations of fact such as the Communications Act requires.

13. Petitioner WCOV–TV requests that an issue be specified to determine whether the applicant possesses the requisite character qualifications to be a broadcast licensee. The basis for this request is the allegation by the petitioner that in 1960 Station WSLA–TV rebroadcast programs of Television Broadcast Station WBRC–TV, Channel 6, Birmingham, Alabama, without authority from that station. The applicant concedes that such rebroadcasts may have been made without authority from Station WBRC–TV, but it alleges that it had, since February 1960, authority from Station WBRC–TV to rebroadcast locally originated programs of that sta-

[11] *South Central Broadcasting Corporation*, 9 RR 1035.

tion, and that there has been no repetition of the errors. Station WBRC–TV has not complained about the unauthorized rebroadcasts and it appears that in the ensuing four years there has been no repetition of this conduct. Under these circumstances, we believe that the applicant's actions in this respect do not constitute a reflection on its character warranting an issue which could conceivably lead to its disqualification to be a broadcast licensee.

14. We have carefully considered all of the matters raised in the various pleadings and, except as indicated by the issues specified below, we find that the applicant is legally, financially, technically, and otherwise qualified to construct and operate as proposed and that, except as indicated in preceding paragraphs hereof, no substantial and material questions of fact have been raised by the pleadings. The Commission, however, is unable to make the statutory finding that a grant of the application would serve the public interest, convenience and necessity, and is of the opinion that the application must be designated for evidentiary hearing on the issues set forth below:

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

1. To determine whether a grant of the application would impair the ability of authorized and prospective UHF television broadcast stations in the area to compete effectively, or would jeopardize, in whole or in part, the continuation of existing UHF television service.

2. To determine whether a grant of the application would be consistent with the objectives of improving the opportunities for effective competition among a greater number of stations.

3. To determine whether a grant of the application would be consistent with the objective of promoting the future activation of UHF television broadcast stations in central Alabama.

4. To determine whether a grant of the application would be consistent with Section 307(b) of the Communications Act, Section 73.606 of the Commission's Rules, and the principles upon which the assignment of television broadcast channels has been made by the Commission.

5. To determine, in connection with the proposal for a directive antenna to suppress radiation in the direction of Montgomery, Alabama, whether circumstances exist which would warrant a waiver of Section 73.685(e) of the Commission's Rules.

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

IT IS FURTHER ORDERED, That Section 1.518 of the Commission's Rules IS HEREBY WAIVED;

IT IS FURTHER ORDERED, That, to the extent indicated herein, the Petitions to Deny filed by Montgomery Independent Telecasters, Inc., Birmingham Television Corporation, and WCOV, Inc., ARE GRANTED, and in all other respects ARE DENIED.

IT IS FURTHER ORDERED, That Birmingham Television Corporation, Montgomery Independent Telecasters, Inc., and WCOV, Inc., ARE MADE PARTIES RESPONDENT in this proceeding.

IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to Issues 1, 2, and 3 herein IS HEREBY PLACED upon the parties respondent.

IT IS FURTHER ORDERED, That the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or upon petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

> To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

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

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

Adopted March 17, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

## APPENDIX

*Pleadings filed herein:*

(a) Petition to Designate Application for Hearing, filed January 17, 1961, by Capitol Broadcasting Co.

(b) Opposition to Petition to Designate Application for Hearing, filed February 24, 1961, by Selma Television, Incorporated, against (a), above.

(c) Reply to Opposition to Petition to Designate Application for Hearing, filed March 6, 1961, by Capitol Broadcasting Co., against (b), above.

(d) Petition for Grant of Application, filed April 24, 1962, by Selma Television, Incorporated.

(e) Opposition to Petition for Grant of Application, filed May 8, 1962, by Capitol Broadcasting Co., against (d), above.

(f) Opposition to Petition for Grant of Application, filed May 23, 1962, by First Alabama Corp., against (d), above.

(g) Reply to Oppositions to Petition for Grant of Application, filed June 18, 1962, by Selma Television, Incorporated, against (e) and (f), above.

(h) Supplemental Petition for Grant of Application, filed April 29, 1963, by Selma Television, Incorporated.

(i) Opposition to Supplemental Petition for Grant of Application, filed May 22, 1963, by Capitol Broadcasting Co., against (h), above.

(j) Opposition to Supplemental Petition for Grant of Application, filed May 24, 1963, by Robert J. Thomas, Receiver in Bankruptcy of First Alabama Corp., against (h), above.

(k) Reply to Oppositions to Supplemental Petition for Grant of Application, filed June 11, 1963, by Selma Television, Incorporated, against, (i) and (j), above.

(l) Petition to Deny, filed April 1, 1964, by Birmingham Television Corporation.[1]

(m) Opposition to Petition to Deny, filed May 13, 1964, by Selma Television, Incorporated, against (1), above.

(n) Reply of Birmingham Television Corporation to Opposition to Petition to Deny, filed June 8, 1964, by Birmingham Television Corporation, against (m), above.

(o) Petition to Deny, filed July 29, 1964, by Montgomery Independent Telecasters, Inc.[2]

(p) Supplement to Petition to Designate Application for Hearing, filed July 31, 1964, by Capitol Broadcasting Co.

(q) Opposition to Petitions of Capitol Broadcasting Co. and Montgomery Independent Telecasters, Inc., filed September 16, 1964, by Selma Television, Incorporated, against (o) and (p), above.

(r) Reply to Opposition to Supplement to Petition to Designate Application for Hearing, filed September 28, 1964, by Capitol Broadcasting Co., against (q), above.

(s) Supplement to Petition to Deny, filed November 5, 1964, by Birmingham Television Corporation, against application as amended October 23, 1964.

(t) Petition to Deny and/or Supplement to Petition to Designate Application For Hearing, filed December 10, 1964, by WCOV, Inc.[3]

(u) Opposition to Petition of WCOV, Inc., filed December 24, 1964, by Selma Television, Incorporated, against (t), above.

NOTES:

A. The parties requested, and were granted, extensions of time within which to file their various pleadings.

B. On December 9, 1960, The Washington Post Company filed a "Request for Commission Action" asking that grant of the application be withheld pending a final decision in the Rule Making proceeding in Docket No. 12945 which proposed to allocate Channel 8 to Birmingham, or, in the alternative, that a grant be conditioned upon the outcome of that proceeding.

On December 27, 1960, Selma Television, Incoporated, filed a 'Reply to Request for Commission Action'", opposing the request of The Washington Post Company.

Because the proceeding in Docket No. 12945 was terminated without the assignment of Channel 8 to Birmingham, both of these pleadings are moot and they have not, therefore, been considered in this proceeding.

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[1] Birmingham Television Corporation is permittee of Television Broadcast Station WBMG, Channel 42, Birmingham, Alabama.

[2] Montgomery Independent Telecasters, Inc. is permittee of Television Broadcast Station WKAB-TV, Channel 32, Montgomery, Alabama. The Permittee is successor to First Alabama Corp., which was permittee of Station WCCB-TV, whose call letters were subsequently changed to WKAB-TV.

[3] WCOV, Inc. is licensee of Television Broadcast Station WCOV-TV, Channel 20, Montgomery, Alabama. WCOV, Inc. is successor to Capitol Broadcasting Co., the transfer having been approved by the Commission in November, 1964.

F.C.C. 65–220

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Application of NEBRASKA EDUCATIONAL TELEVISION COMMISSION (NETC), LEXINGTON, NEB. For Construction Permit for a New Noncommercial Educational Television Station | File No. BPET–183 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE DISSENTING.

1. The Commission has before it for consideration: (a) The above-captioned application for a construction permit for a new educational television broadcast station to operate on Channel *3 at Lexington, Nebraska, filed by the Nebraska Educational Television Commission (NETC) on January 25, 1964, and requests for waiver of Sections 73.685(a), 73.610(b), and 73.613(a) of the Commission's Rules; (b) a "Petition for Relief" filed by NETC on February 24, 1965; (c) "Objections of Association of Maximum Service Telecasters, Inc." (MST) filed February 24, 1964, directed, in part, against the above-captioned application; (d) "Answer to 'Petition for Relief' " filed on March 6, 1964, by May Broadcasting Company (May), licensee of Station KMTV, Channel 3, Omaha, Nebraska; (e) "Reply of Nebraska Educational Television Commission to 'Objections of Association of Maximum Service Telecasters, Inc.' " filed March 2, 1964; (f) "Petition to Withdraw 'Petition for Relief' for Waiver of Section 73.610 and for Expeditious Grant of Application" filed on October 7, 1964, by NETC; (g) "Response by KMTV to NETC's Petition" filed on October 28, 1964, by May; (h) "Further Objections of Association of Maximum Service Telecasters Inc." filed October 28, 1964; (i) "Reply to 'Further Objections and Response to NETC Petition to Withdraw, Etc.' " filed November 9, 1964; (j) "MST Response to NETC 'Reply' " filed November 17, 1964.

2. The above-captioned application proposes the establishment of a new noncommercial educational television broadcast station operating on Channel 3, to serve south central Nebraska, with visual effective radiated power of 100 kw, an antenna height above average terrain of 1,062 feet, from a site near Atlanta, Nebraska, approximately 30 miles southeast of Lexington. The proposed station will be a part of a state-wide educational network and will operate as a satellite of Station KUON–TV (University of Nebraska) at Lincoln, which will originate all programs. Consequently, no main studios are proposed and waiver of Section

73.613(a) of the Commission's Rules is requested. Waivers are also requested of Sections 73.685(a)[1] because the applicant will not place a 74 dbu signal over Lexington, and 73.610(b)[2] of the Commission's Rules.

3. A brief background summary of events preceding the filing of the NETC application will, we believe, serve to outline clearly the situation and problems presented. We discuss first the reservation of Channel 3 to Lexington for educational use.

4. In a Report and Order in Docket No. 13860, FCC 62–1169, 24 R.R. 1571, adopted November 8, 1962, the Commission, *inter alia*, reserved Channel 3 at Lexington for noncommercial educational use. In that proceeding, the Commission was aware of certain factors which could complicate the use of the Lexington reservation to serve the south central area of Nebraska, and took note of these factors, stating,

> Location of the Channel 3 facility at Lexington in order to serve Kearney may be complicated by the attempts of the three Omaha stations (including KMTV, Channel 3 in Omaha) to locate on a single tower 15 miles west of Omaha in the direction of Lexington. The location of a Sterling, Colorado, Channel 3 station to the west of Lexington is a further complicating factor. We see no need to pass on these questions, however, as the Omaha proposal is dependent on air space clearance and is not an actual proposal before us. [Footnote 4, 14 R.R. 1571, 1579.]

5. During the pendency of Docket 13860, there was also pending before the Commission an application (BPCT–3005) by Frontier Broadcasting Co., filed February 16, 1962, for a construction permit for a new commercial television broadcast station to operate on Channel 3 at Sterling, Colorado. The site proposed by Frontier was approximately 9.3 miles east of Sterling in the direction of Lexington. Objections to the proposal were filed by MST and by May. In substance, May urged that a location east of Sterling could prejudice the attempt of May, together with the other Omaha stations, to locate a tower site 15 miles west of Omaha, in view of the assignment of Channel 3 to Lexington with the possible consequence that a Lexington site would be chosen east of that city in the direction of Omaha. But May had no application pending before the Commission and, therefore, the Commission found its interest was too remote to warrant any claim to standing.[3] The Commission, however, conceded that May's objections, potentially at

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[1] Section 73.685(a) of the Rules provides as follows:
"The transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, the following minimum field intensity in decibels above one microvolt per meter (dbu) will be provided over the entire principal community to be served.

| "Channels 2–6 | Channels 7–13 | Channels 14–83 |
|---|---|---|
| 74 dbu | 77 dbu | 80 dbu" |

[2] Section 73.610(b) of the Rules provides:
"Minimum co-channel assignment and station separations:
"(1)

| "Zone | Channels 2–13 | Channels 14–83 |
|---|---|---|
| I | 170 Miles | 155 Miles |
| II | 190 | 175 |
| III | 220 | 205 |

"(2) The minimum co-channel mileage separation between a station in one zone and a station in another zone shall be that of the zone requiring the lower separation."

[3] *In re application of Frontier Broadcasting Co.*, FCC 63–127, 24 R.R. 1092d, at 1094.

least, had substance.[4] Thus, while it did not believe that this should delay the establishment of a Sterling station, the Commission stated that if May's tower proposal ultimately appeared feasible, it had adequate means at its disposal to effectuate such a plan if the public interest would thereby be served,[5] and granted Frontier's application and denied May's petition. May appealed and the Court affirmed the Commission's decision in *May Broadcasting Co.* v. *Federal Communications Commission*, 17,730 D.C. Cir., December 20, 1963. NETC filed comments in connection with Frontier's application, in which it indicated that use of the Lexington reservation contemplated, as part of the state-wide plan, a site southeast of Lexington to serve the residents of south central Nebraska.

6. On January 24, 1964, May Broadcasting Company filed its application (BPCT–3288) for a site west of Omaha, seeking waiver of Section 73.611(b) because of 1.2 miles shortage to the reference point at Lexington. On February 4, 1964, NETC filed the above-captioned application specifying a site some 8 miles short of the required 190 mile co-channel separation to the site proposed in the pending May application, and 1.2 miles short to the existing site of Station KTVS, Channel 3, Sterling, Colorado.[6] This is the background up to the time NETC filed its "Petition for Relief".

7. MST's objections, directed to both the May and NETC applications, are filed pursuant to Section 6(a) of the Administrative Procedures Act and Section 1.587 of the Commission's Rules. As such, MST makes no claim to standing under Section 309 of the Communications Act, and it is in the role of an informal objector that the Commission recognizes MST's posture in this case. MST's basic objection is to the waiver of Section 73.610(b) of the Rules, requested by May and NETC, and apart from this, takes no position with respect to the merits or comparative merits of either the May or NETC application. The thrust of MST's objections is three-fold: (a) That the high technical quality wide-area television service enjoyed by the American public has been due to the Commission's minimum spacing requirements; and that continued enjoyment of such high quality technical service would be threatened by *ad hoc* departures from these standards; (b) that the Commission in Docket No. 13860, *supra*, indicated that spacings would be maintained, and restated this position when it granted the Frontier application for Sterling, Colorado; (c) that there are sites available from which NETC could serve the area proposed which would meet all spacing requirements.

8. The Commission agrees with MST that firm adherence to the spacing requirements must be maintained to prevent mass proliferation of short-spaced assignments, with the concomitant threat to the wide range of existing service. And, except in limited and unusual circumstances where overriding considerations of public interest so warranted, we have insisted on maintenance of the spacing requirements. In those cases where waivers of Section 73.610 (b) have been granted, they have, as a rule, been expressly conditioned on the concept of providing "equivalent protection" to mini-

[4] *Ibid.*
[5] *Id.* at 1095.
[6] Frontier Broadcasting Co. (KTVS) has consented to the short spacing.

mize interference. MST asserts that there is a site available to NETC which would meet all spacing requirements and, at the same time, enable NETC to achieve its objective of providing south central Nebraska with an educational service. NETC has, in our view, made a showing that selection of a site consistent with all the Rules, and consistent with its objective of providing service to south central Nebraska, is not possible because such a site, which calls for the location of a Lakin, Kansas, Channel *3 transmitter site 16.5 miles southwest of Lakin in the direction of Colorado, would waste so much of the proposed ETV service over an adjacent state, and would provide insufficient service to the State of Nebraska. We find, therefore, that MST's objections are not well taken. *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327.

9. The need for the proposed ETV service is not seriously challenged, and it is obvious that designation of the NETC and May applications for comparative hearing would further delay and adversely affect the state-wide plan. NETC urges that the pendency of its application and that of May does not create an *Ashbacker*[7] situation. However, NETC has indicated its willingness to provide "equivalent protection" to May by use of precise frequency control equipment to be installed at the Lexington and Millard sites. May does not object to equivalent protection, but asserts that the use of the precise offset technique as a means for accomplishing equivalence has not been confirmed by field tests, and that the Commission has rejected its use for this purpose. In connection with proposals to utilize precision offset for purposes of providing equivalent protection, the Commission has stated:

> However, practical considerations involving the need for coordination between licensees as well as the maintenance of complex equipment preclude making the use of this method mandatory for obtaining the required protection to existing stations and use of this technique will not be an acceptable basis for obtaining the required protection." *In the Matter of Interim Policy on VHF Television Channel Assignments,* Docket No. 13340, 21 R.R. 1695, at page 1700, par. 19.

11. As pointed out elsewhere, the Commission has authorized the use of the "equivalent protection" technique to permit operation at less than standard spacings where overriding considerations of public interest so required.[8] The prompt implementation of the Nebraska state-wide plan for educational television, we find to be such a situation. However, equivalence is to be achieved consistent with the criteria established in Docket No. 13340, and in this connection, reliance may not be placed upon the use of the precise offset technique. May's pleadings indicate that its major concern is that its *Ashbacker* rights be preserved, and, in this connection, has indicated that any grant to NETC should be conditioned upon the use of "equivalent protection" as described in Docket No. 13340.

In view of the foregoing, the Commission finds that no substantial and material questions of fact have been raised by MST. The Com-

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[7] *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327 (1945).

[8] *Capital Cities Broadcasting Corp. (WTEN),* 24 R.R. 1067 (1963); *Van Curler Broadcasting Corp. (WAST),* 24 R.R. 1079, 1081, 1083 (1963); *WTEV Television, Inc. (WTEV),* 23 R.R. 1051 (1962), *aff'd sub nom Rhode Island Television Corporation, et al.* v. *Federal Communications Commission,* 320 F. 2d 762 (D.C. Cir. 1963).

mission further finds that the applicant is legally, technically, financially, and otherwise qualified to construct and operate as proposed, and that grant of the application will serve the public interest, convenience and necessity.

We find that good cause has been shown for waiver of Sections 73.610(b), 73.685(a), and 73.613(a) of the Commission's Rules. In order to assure that NETC will provide "equivalent protection" to May's proposed operation from the Millard site, in the event that proposal is granted, we will condition the grant to assure compliance.

Accordingly, IT IS ORDERED, That the "Objections of Association of Maximum Service Telecasters, Inc." ARE DISMISSED.

IT IS FURTHER ORDERED, That Sections 73.610(b), 73.685(a), and 73.613(a) of the Commission's Rules ARE HEREBY WAIVED.

IT IS FURTHER ORDERED, That the application (BPET-183) of National Educational Television Commission, for a new noncommercial educational television broadcast station to serve Lexington, Nebraska, IS GRANTED, subject to specifications to be issued, and subject to the following condition:

> That Nebraska Educational Television Commission will provide "equivalent protection", under Docket No. 13340, to May Broadcasting Corporation's pending proposal (BPCT-3288) to relocate the transmitter of Station KMTV to a site near Millard, Nebraska (north lat. 41°, 14′, 44″, west long. 96°, 11′, 20″), in the event such application specifying the Millard site is granted.

Adopted March 17, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65M–371

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| SYMPHONY NETWORK ASSOCIATION, INC., FAIRFIELD, ALA. | Docket No. 15460<br>File No. BPCT–3238 |
| WILLIAM A. CHAPMAN AND GEORGE K. CHAPMAN, D.B.A. CHAPMAN RADIO AND TELEVISION CO., HOMEWOOD, ALA. | Docket No. 15461<br>File No. BPCT–3282 |
| For Construction Permits for a New Television Broadcast Station | |

### MEMORANDUM OPINION AND ORDER

BY CHESTER F. NAUMOWICZ, JR., HEARING EXAMINER

1. The Hearing Examiner has for consideration a petition for leave to amend application filed by Symphony Network Association, Inc. on February 25, 1965, together with pleadings properly filed in response thereto.[1]

2. Symphony seeks to amend its application to specify a new transmitter site and main studio location, alleging that only recently has it discovered that the facilities proposed in its application will be unavailable. In that the subject petition has been filed subsequent to the designation of the Symphony application for hearing, and includes a request to amend the engineering portion of the proposal, Symphony must satisfy that portion of Rule 1.522(b) applicable in such circumstances. In determining whether it has done so, it will be helpful to review the history of this proceeding.

3. At Exhibit No. 8 of its application filed on September 10, 1963, Symphony stated that "The applicant proposes to locate its main studio on the campus of Birmingham Southern College in Birmingham, Alabama. The specific location of the main studio will be in the conservatory of music building . . . . The complete second story of the west wing of the building is immediately available for use of transmitter and live studio facilities; however, construction will begin this fall of a new fine arts building housing the conservatory of music. Thus, within one year the applicant will have available the entire building with 20,000 square feet of space including a 300 seating capacity auditorium. The auditorium is also available to the applicant presently. The above facilities will be available to the applicant on a lease-free basis for a period of over six years, and to construct an equivalent building in Fairfield,

[1] During a hearing session on March 8, 1965, the Hearing Examiner authorized Symphony to file a supplement to its petition on or before March 15, 1965, and for the other parties to reply thereto on or before March 22, 1965.

Alabama, would cost the applicant approximately $350,000.00." At Section V–C of the application form and the supporting exhibits, Symphony identified its transmitter site as being on the campus of Birmingham Southern College.

4. Because the specified site was outside of Symphony's proposed principal community of Fairfield, Alabama, the Commission's order of designation released on May 12, 1964, contained an issue as to whether the proposal was consistent with Rule 73.613(a), and, if not, whether the rule should be waived. During the adduction of evidence directed to this issue, which phase of the proceeding was ostensibly concluded on October 8, 1964, there was no suggestion that the proposed site might not be available.

5. However, during a hearing session on January 11, 1965, the matter of Symphony's proposed site was again raised when Chapman Radio and Television Company offered into evidence its Exhibit H–12. The exhibit consisted of a lease between Birmingham Southern College, lessor, and James V. Melonas (as an individual and not as an officer of the instant applicant, Symphony Network Association, Inc.), and Melonas Broadcasting Co., Inc., lessees, together with an affidavit of N.M. Yielding, Financial Vice-President and Treasurer of Birmingham Southern College. The lease was non-assignable, contained no privilege to sublet, provided that it was "for the purpose of conducting therein a radio broadcasting business and for no other purpose," and specifically identified the said "broadcasting business" as "an FM station known as WSFM." The lease read in conjunction with Mr. Yielding's affidavit, indicated that the then-available space consisted of only one room with an area of 1,056 square feet, and Mr. Yielding averred that "Mr. Melonas has not made a request to Birmingham Southern College for any additional space in the building or in any other building on the campus," and that "should this request be made, I feel certain that the trustees of the college would not grant any additional space, as building space is badly needed for the purposes of the college."

6. In a brief filed on January 22, 1965, Symphony consented to the admission into evidence of Chapman H–12, provided that it was afforded an opportunity to rebut the exhibit. This procedure was approved by the Hearing Examiner in an order released on January 29, 1965. However, rather than attempting to rebut the Chapman showing, Symphony filed its instant petition for leave to amend.

7. In the petition, and the supplement filed on March 15, 1965, Symphony presents the affidavits of Mr. Melonas and of Mr. Hugh Thomas, Director of the Conservatory of Music, Birmingham Southern College. These affidavits, read in conjunction, indicate that early in 1963 Mr. Melonas discussed his television plans with Mr. Thomas who "saw no reason why Birmingham Southern College could not renegotiate this lease to the Symphony Network Association since the same principals were involved;" however, Mr. Thomas also "did re-emphasize that [he] did not make College policy," and recommended that Mr. Melonas see Mr. Yielding; that in the summer of 1963 Mr. Melonas "approached Mr. N. M. Yielding, then acting president of Birmingham Southern College and

discussed with him the future College policies and leasing arrangements with Melonas Broadcasting Company, Inc."[2]; that Mr. Yielding did not commit the College, but adopted a "wait and see" attitude; that, nevertheless, "having had the spirit of co-operation from the College through the use of the auditorium, the Symphony Network fully expected continuing space facilities in the Conservatory Building"; but that when Mr. Melonas approached the College authorities to obtain clarification of the situation created by Chapman Exhibit H–12, the College responded by terminating the lease immediately pursuant to a clause contained therein permitting such action. It was the termination of the lease which engendered the instant petition for leave to amend.

8. The Commission policy applicable to transmitter site availability is not a stringent one. Applicants are not required to have title to, or a binding legal commitment for their sites, only a reasonable assurance that the site will be available to them, *Beacon Broadcasting System, Inc.*, 21 RR 727. Moreover, even the reasonable assurance test is applied liberally, *Pinellas Radio Co.*, 25 RR 100. However, it cannot be concluded that Symphony has met even these minimal requirements. Mr. Melonas and his corporation, Melonas Broadcasting Co., Inc., had a lease on the proposed site which, by its plain and specific terms, was non-assignable and precluded any use other than for a FM broadcast station. Nothing in the terms of the lease could have led him to believe that he had a right to assign his interest to another corporation for use as a TV station.

9. Nor could his conversations with officials of the College have misled him. Mr. Thomas was encouraging, but he emphasized to Mr. Melonas that he did not make policy for the College. Indeed, Mr. Thomas suggested that Mr. Melonas discuss the matter with the acting President of the College, Mr. Yielding, and that gentleman was wholly noncommittal. Thus, at the time the Symphony application was filed, the most optimistic appraisal of transmitter site availability was that the owners hadn't actually said no. In that they had been afforded an opportunity to say yes, and had not availed themselves of it, Symphony's expectations were based only on hope, not on a reasonable belief that the site would be available. Yet, fully aware of the precarious uncertainty of site availability, Symphony, in its exhibits and testimony offered detailed and specific proposals for its use of the College property, not limiting itself to that portion of the building which it was using for its FM station but proposing the utilization of premises which it had never theretofore used. Having run so obvious a risk, Symphony cannot now be heard to claim that it was surprised when use of the College property was denied it, or that the event was one it might not reasonably have foreseen.

10. Under these circumstances, it is concluded that Symphony has failed to meet the burden imposed on it by Rule 1.522(b), to demonstrate that the amendment is necessitated by events which

[2] In view of the ultimate disposition of the petition for leave to amend, which is based on accepting the Symphony averments at full face value, it is unnecessary to resolve the apparent conflict with Mr. Melonas' quoted statement and that of Mr. Yielding quoted at paragraph 5, *supra*.

the applicant could not reasonably have foreseen. Having so concluded, it is unnecessary to determine whether the subject petition has succeeded in satisfying the other requirements of that rule.

Accordingly, IT IS ORDERED, this 25th day of March 1965, that the subject petition for leave to amend, IS DENIED, and the amendment tendered therewith IS REJECTED.

FEDERAL COMMUNICATIONS COMMISSION,

CHESTER F. NAUMOWICZ, JR., *Hearing Examiner.*

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–115

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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| In Re Applications of<br>DWIGHT L. BROWN, TRADING AS BROWN RADIO & TELEVISION CO. (WBVL), BARBOURVILLE, KY.<br>For Renewal of License | Docket No. 15769<br>File No. BR–3228 |
| BARBOURVILLE-COMMUNITY BROADCASTING CO., BARBOURVILLE, KY.<br>For Construction Permit | Docket No. 15770<br>File No. BP–16297 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Before the Review Board for consideration is the March 11, 1965, motion of Barbourville-Community Broadcasting Co. (Barbourville) for extension of time to file reply and request for temporary suspension of procedures.[1]

2. Barbourville is an applicant for a construction permit for the facilities now occupied by Dwight L. Brown, tr/as Brown Radio & Television Company (WBVL) (Brown); its application was consolidated for hearing with Brown's application for renewal of license of WBVL by Commission Order (FCC 64–1198) released December 31, 1964. On January 21, 1965, Barbourville filed a motion to enlarge issues in this proceeding which raised several matters allegedly reflecting upon the basic character qualifications of Brown. Brown has also filed a motion to enlarge; that motion likewise requests addition of a character issue, on the basis of allegations as to one of Barbourville's principals. All responsive pleadings have been filed in connection with Brown's motion. Barbourville now seeks to have the Review Board suspend further action on both motions to enlarge on the ground that Barbourville and Brown have reached an understanding providing for the acquisition by Barbourville of Brown's Station WBVL, which will render moot the motions to enlarge. Barbourville states that Brown consents to the filing of the instant motion and that the parties will shortly file a written agreement and related pleadings.

3. The Bureau opposes Barbourville's motion as violative of the express and long-standing Commission policy against approving assignments while unresolved character questions remain outstanding against the parties concerned. Brown and Barbourville both

[1] Also before the Board are the Broadcast Bureau's opposition, filed March 15, 1965; reply to opposition and request for waiver of Rule 1.294, filed March 18, 1965, by Brown Radio & Television Company (WBVL) (Brown); motion for leave to file reply, filed March 19, 1965, by Barbourville; and Barbourville's reply to opposition, filed March 19, 1965.

replied to the Bureau's opposition;[2] Brown alleged that consideration of the pending motion to enlarge would be unnecessary and wasteful since the applicants no longer want a hearing and the public interest does not require one, and that since WBVL was found by the Commission [3] to be legally, technically and financially qualified for renewal before consolidation of the two applications and after consideration of matters raised in Barbourville's motion, those matters are now only of comparative significance. Despite the fact that both Brown and Barbourville specifically requested disqualifying issues in their respective motions to enlarge, Brown now attempts to avoid the substance of the Bureau's opposition with the following statement:

> Surely the Commission is sufficiently aware of the adjudicatory hearing process, which so often involves mutual allegations (however well-intentioned) of comparative disadvantage between two qualified applicants, that it should not mistakenly treat parties' allegations as if they were the same thing as demonstrated issues of a disqualifying nature that demand a hearing not otherwise indicated.

Barbourville is of the view that the parties should be given an opportunity of "getting together" to work out an "amicable solution" to "this hotly contested case."

4. However the parties now choose to characterize their intentions when they sought to enlarge the issues, the fact remains that as stated by Barbourville in its motion to enlarge, ". . . the question of character qualification extends beyond the comparative aspect and is, in itself, an ultimate issue which can result in the absolute disqualification of Brown as a licensee of this Commission." The applicants are in effect suggesting that the Board either recognize that their petitions to enlarge constituted an abuse of process, or permit them to resolve privately public interest questions. The Bureau has correctly stated Commission policy in cases of this kind; the Commission made clear the reasons for its position in *Publix Television Corp.*, 33 FCC 98, 23 RR 856, 856a–856b (1962), where it refused to authorize payment pursuant to a dismissal agreement on the ground that:

> . . . to permit an applicant to drop out of competition, with substantially complete compensation, without resolving outstanding issues of this nature, can only serve to encourage others to employ dubious tactics, in the hope that even if such tactics are discovered it will be possible to withdraw and receive full compensation.

5. In the case of a transfer, as contemplated in the instant case, resolution of outstanding character issues against Brown and renewal of license of WBVL must necessarily be a condition precedent to approval of any agreement, since an adverse finding on a disqualifying issue would leave him with nothing to transfer. See *Jefferson Radio Company, Inc.* v. *FCC*, 340 F. 2d 781, 2 RR 2d 2090 (D.C. Cir. 1964). Accordingly, any request for approval of a transfer agreement which the parties may choose to file cannot be considered until determination of the outstanding motions to enlarge

[2] The Review Board will consider Brown's reply as requested in view of Brown's involvement in the matter at issue.

[3] On April 30, 1963, WBVL's renewal application (BR–3228) was granted pursuant to delegated authority (Rule 0.241) by the Chief of the Broadcast Bureau.

issues and, if issues are added, the resolution of such issues. *Cf. Radio 13, Inc.*, FCC 65–47, 4 RR 2d 322. In view of our disposition of this motion, Barbourville will be given 5 days from release of this Order in which to file its reply to opposition to its motion to enlarge issues.

Accordingly, IT IS ORDERED, This 29th day of March, 1965, That the Motion for Extension of Time to File Reply and Request for Temporary Suspension of Procedures, filed March 11, 1965, by Barbourville-Community Broadcasting Co., IS DENIED; and

IT IS FURTHER ORDERED, That the Motion for Leave to File Reply, filed March 19, 1965, by Barbourville-Community Broadcasting Co., IS GRANTED, and the concurrently filed Reply to Bureau Opposition, IS ACCEPTED; and

IT IS FURTHER ORDERED, That Barbourville-Community Broadcasting Co. has 5 days from release of this Order in which to file a Reply to Opposition to its Motion to Enlarge Issues in this proceeding, filed January 21, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–208

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>MARSHALL BROADCASTING CORP. (ASSIGNOR)<br>and<br>O. L. KIMBROUGH AND DELWIN W. MORTON<br>D.B.A. GEMINI ENTERPRISES (ASSIGNEE)<br>For Voluntary Assignment of License<br>of KADO, Marshall, Tex. | File No. BAL–5186 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN THE GRANT.

The Commission has before it the above-entitled application and the following pleadings relating thereto:

(1) A Petition to Deny filed September 8, 1964 by Harrison County Broadcasting Company (Harrison County), licensee of Station KMHT, Marshall, Texas;

(2) A joint Opposition to that Petition to Deny filed September 2 , 1964 by Marshall Broadcasting Corporation and O. L. Kimbrough and D. W. Morton (d/b as Gemini Enterprises) (Gemini Enterprises);

(3) A Reply and Supplemental Statement of Station KMHT, filed October 1, 1964 by Harrison County;

(4) A letter filed October 28, 1964 by Harrison County;

(5) A Motion to Strike or Request for Consideration of Special Pleading filed November 2, 1964 by Marshall Broadcasting Company and Gemini Enterprises;

(6) A Joint Opposition to the Reply and Supplemental Statement of KMHT filed November 2 by Marshall Broadcasting Company and Gemini Enterprises;

(7) A Reply of Radio Marshall, Inc.[1] to Joint Opposition to Reply and Supplemental Statement of KMHT filed November 12, 1964 by Radio Marshall, Inc.;

(8) A Response to the Motion to Strike or Request for Consideration of Special Pleading filed November 12, 1964, by Radio Marshall, Inc.; and

(9) A letter filed December 9, 1964 by Marshall Broadcasting Company and Gemini Enterprises.

1. In its duly filed pleadings Petitioner alleged that it is a party in interest within the meaning of Section 309(d) of the Communi-

[1] On November 5, 1964, the Commission granted an application for modification of license to change the licensee name of KMHT from Harrison County Broadcasting Company to Radio Marshall, Inc. (BML–2099).

cations Act of 1934, as amended, because it is the licensee of Station KMHT, the only other standard broadcast station in Marshall, Texas and thus KADO's only competitor.[2] Petitioner alleges that while the assignor is inexperienced in the broadcast field the assignees are experienced broadcasters and therefore that this assignment will result in increased competition for Station KMHT.

2. In order to have standing to petition to deny an application under Section 309(d) of the Communications Act, petitioners must establish that they are parties in interest within the meaning of Section 309(d)(1) thereof. From an economic standpoint, a "party in interest" is one reasonably certain to incur a substantial injury specifically as a result of the potential Commission action to which objection is made. *F.C.C.* v. *Sanders Brothers,* 309 U.S. 470 (1940); *James Robert Meachem,* 12 R.R. 1427 (1955); *A. B. W. Broadcasters, Inc.* 1 RR 2d. 65 (1963). Section 309(d)(1) requires that the petition to deny "contain specific allegations of fact sufficient to show that the petitioner is a party in interest," and that "such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof."

3. In the subject petition there are no specific allegations of fact sufficient to show standing on the part of the petitioner. On the contrary, the petitioner has only relied on his position as a competitor, claiming that the assignee is a more experienced broadcaster than the assignor. This showing falls considerably short of the statutory requirements for standing. We hold, therefore, that petitioner is not a party in interest within the meaning of Section 309(d) of the Communications Act.

4. Despite this lack of standing on the part of the petitioner we have considered its allegations on the merits but find them to be of no substance. In its pleading petitioner submitted an engineering exhibit showing overlap of the 1 mv/m contours of Station KADO and Station KEES (Gladewater, Texas), owned by the assignee partnership, in contravention of Section 73.35(a) of the Commission's Rules. The service contours in that exhibit were computed according to the conductivity values in the Commission's "M–3 Chart." The Commission's rules provide that actual measurements take precedence over measurements derived from the pertinent maps of ground conductivity (Section 73.183(c)). Accordingly, the parties to the application submitted an engineering exhibit with their Opposition, based on actual measurements taken in the field, which showed no overlap. Petitioner made no attempt to refute such a showing and we are satisfied from our own studies that the exhibit submitted by the parties is accurate and that in fact, there is no overlap of the 1 mv/m contours of Stations KADO and KEES and hence no violation of Section 73.35(a).

5. The petitioner also filed a series of pleadings in contravention of Section 1.45 of our rules. While we are dismissing them, our

[2] KMHT (1450 kc 1 kw-D, 250 w-N) was acquired by its present owners in 1955; KADO (1410 kc, 500 w-D DA) was acquired by the assignor corporation in 1959.

examination of them discloses no valid grounds on which to designate the assignment application for hearing.

6. In view of the foregoing we find that the public interest would be served by a grant of this application. Therefore it is hereby *Ordered* that the Petition to Deny filed by Harrison County Broadcasting Company be *Dismissed* and the application for assignment of the license of Station KADO, Marshall, Texas from Marshall Broadcasting Corporation to O. L. Kimbrough and D. W. Morton, d/b as Gemini Enterprises (BAL–5186) be *Granted.*

Adopted March 17, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–273

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of NEW SECTION 0.417 AND AMENDMENT OF SECTIONS 1.526 (FORMERLY IN 0.406), 1.580 (FORMERLY 1.359), AND 1.594 (FORMERLY IN 1.362) OF THE COMMISSION'S RULES RELATING TO INSPECTION OF RECORDS, TO PREGRANT PROCEDURES, AND TO LOCAL NOTICE OF FILING OR OF DESIGNATION FOR HEARING OF BROADCAST APPLICATIONS [1] | Docket No. 14864 |

REPORT AND ORDER

BY THE COMMISSION: COMMISSIONER LOEVINGER ABSENT.

1. The Commission has before it for consideration the Notice of Proposed Rule Making issued in this proceeding on November 27, 1962 (FCC 62–1218), and the comments and reply comments filed in response to the Notice by a number of broadcast licensees (including two of the national networks), state broadcasters' associations, law firms engaged in the practice of communications law, and by the National Association of Broadcasters.

2. The purpose of this proposal is to enable local inspection to be made of broadcast applications, reports, and related documents that are filed with the Commission by applicants, permittees, and licensees and that are already available for public inspection at the Commission's offices in Washington, D. C. Thus, the proposed rules would have required broadcast applicants, permittees, and licensees to keep for public inspection in the community in which the main studio is located, or proposed to be located, a file containing a copy of *every* application and report, amendments, and documents incorporated by reference, which is by the provisions of Section 0.417 of the Rules open for public inspection at the Commission's offices in Washington, D. C.

3. As we stated in the Notice, it was our belief that, in addition to reports, all applications and related material should be kept on file locally even though not subject to the "local notice" requirements of Sections 1.580 and 1.594 of the Rules. It is our desire to

[1] By order adopted October 31, 1963, and published in 28 F.R. 12386, Parts 0 and 1 of the Rules were editorially revised and renumbered. As a result of this action, as indicated in the caption above, the portions of former Sections 0.406 and 1.362 which were pertinent to the present proceeding now appear in Sections 0.417 and 1.594 respectively; and former Section 1.359 has been redesignated Section 1.580. For the sake of simplicity, in the remainder of the present document we shall refer only to the new section numbers 0.417, 1.580 and 1.594. In addition, we have decided that the proposed new Section 0.418 should be numbered 1.526. The latter number is therefore used in the present document.

make our pre-grant and hearing procedures more effective, and to effectuate the mandate of Congress to permit greater public participation in such proceedings, and we were of the opinion that such a proposal would implement effectively attainment of this goal. However, a study of the comments filed in this proceeding has convinced us that, at least until more experience is gained in this subject, it would be best to restrict local inspection generally to major applications which are subject to the provisions of Sections 1.580 and 1.594, and to ownership reports. The rules adopted herein reflect this view. They also contain language designed to clarify certain ambiguities in the proposal which were pointed out by the comments and to effect other changes found appropriate.

*Discussion of Comments*

*General statement*

4. Westinghouse Broadcasting Company, Inc., concurs in the proposal but would modify proposed Section 1.526 to specify public inspection "by parties having a bona fide interest therein for a reasonable period of time. . . ." Storer Broadcasting Company also states that subject to certain limitations it will not oppose local inspection of those applications concerning which local notice must be published under Rule 1.580. Columbia Broadcasting System, Inc. takes a similar position. To a substantial degree, however, the comments are in opposition to adoption of the proposed rule.

*Arguments against keeping records for local inspection*

5. Some object to what is characterized as an intrusion upon the right of broadcasters to privacy. Others suggest that the information proposed to be made available will be of use only to competitors and to cranks, and that there is no substantial evidence of a legitimate demand for the information proposed to be made available locally to the public. It is maintained that responsible groups can by simple request to the station have access to the information they require. Some contend that the public is interested only in programming and can best obtain programming information by listening to or viewing the station involved. Argument is made that much of the data which would be required to be kept is too technical for public use. Substantial opposition fixes upon what, it is contended, will be a heavy burden upon the licensee to meet the requirements for public inspection.

6. The Commission is of the opinion that sound argument has not been advanced to offset the prospective benefit to the public interest. Many of the comments argue that there will be substantial burdens imposed upon broadcasters by the proposal, notably in the form of having to make available physical facilities for the file and for its use by interested members of the public. We have considered the arguments addressed to this point, but we do not believe that this will be such a burden as to make the plan unworkable or unduly burdensome. We have provided for the use of any of several techniques for making the file available to the public. Because of the admittedly novel feature of the proposal, we intend

to review its operation as experience accrues, and, if it appears necessary, to modify the rules accordingly.

7. The present proposal is objected to on the grounds that only those members of the public with a "legitimate" interest in any of the proceedings before the Commission have or should have a right to inspection. Some go further and maintain that such persons would have to be "parties in interest" in the technical sense of the term. Another recurring objection is that the proposal is unnecessary because "legitimate" requests for information are not denied, that in any event anyone with serious intent can get the desired information from the Commission's offices in Washington, and that there is little or no public demand for information.

8. With regard to the objection that only persons with a legitimate interest or who are technically parties in interest should have access to local files, we observe that the pre-grant procedures of the FCC are not merely a procedural system for applicants and the Commission. They establish basic conditions with respect to the public's right to be informed. Notice is required to be given to the public by Rules 1.580 and 1.594. These rules are based on the pre-grant procedures established by Congress in present Sections 309 and 311 of the Act.

9. Congress, in enacting the present pre-grant provisions of the statute, zealously guarded the rights of the general public to be informed, not merely the rights of those who have special interests. See, *e.g.*, Senate Report No. 690, 86th Cong., 1st Sess., to accompany S. 1898, "New Pre-Grant Procedure" (August 12, 1959), p. 2: "The proposed procedure provided herein for pre-grant objections would not be workable unless objectors were given a reasonable opportunity to make known their objections. . . ." Note that the simple, non-technical reference is to "objectors." Again, in referring to the section which is now Section 309(b)(1), which provides for petitions by "any party in interest," a footnote is appended thereto which states (*Id.* at p. 3): "Although the right to file a petition to deny is limited to a 'party in interest,' it is not intended to deprive any person of the privilege of filing informal objections to the grant of any authorization." Similar support is found in House Report No. 1800, 86th Cong., 2d Sess., "Communications Act Amendments, 1960" (June 13, 1960), p. 10, where it is stated that "the establishment of the new 'pre-grant' procedure for parties in interest is not intended to preclude any person who is interested in doing so from filing formal or informal pleadings with the Commission." It is clearly the mandate of Congress that the public should be fully informed. If we are to follow that mandate, we must see to it that as a practical matter needed information is readily accessible, locally, to all who seek it.

10. Section 311 of the Act was amended in 1960 to authorize the Commission to hold hearings "at a place in, or in the vicinity of, the principal areas to be served by the station involved" in such hearing if the Commission determines that the public interest, convenience, or necessity would be served by conducting such a local hearing. It is self evident that the details of the effectuation of the Congressional purpose were left in the hands of the Com-

mission, just as it is as readily apparent that Congress intended that such hearings should be open to any interested persons. Consistent with Congressional intent to permit any interested person to participate in such hearings or in any phase of the pre-grant procedure, we are now amending our rules to provide that certain information be more easily and readily available to the public. The information is already a matter of public record available at the Commission's offices in Washington. We do but recognize the fact that the existence hundreds, and in some cases thousands, of miles away of a voluminous public file is of little practical value in providing interested persons with the kind of information needed for them to participate in pre-grant procedures as Congress intended.

11. As to the objection that the proposed rules are unnecessary because there is little or no demand for information, we do not base our decision in this proceeding on a widespread articulate demand by the public for the information we propose to make locally available. Our primary purpose in the present proceeding is to make information to which the public already has a right more readily available, so that the public will be encouraged to play a more active part in a dialogue with broadcast licensees.

12. In our Report and Statement of Policy re: Commission *en banc* Programming Inquiry (Public Notice, FCC 60–970, July 29, 1960), 20 Pike & Fischer R.R. 1901, 1912, we pointed out that broadcast licensees have an obligation to make a "diligent, positive and continuing effort . . . to discover and fulfill the tastes, needs and desires of . . . [their] service area." We stated further that broadcast licensees must "take the necessary steps to inform themselves of the real needs and interests of the areas they serve, and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests." *Id.* at 1913. Therefore, what we proposed was "documented program submission prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life . . . organizations, and others who bespeak the interests which make up the community." *Id.* at 1915. It is clear that the responsibility for the success of such a policy does not rest with the broadcaster alone. The local community should assess its needs and articulate its desire for needed broadcast service. It should encourage an interchange of ideas with local broadcasters that will lead to a defining of realistic and attainable goals that recognize the legitimate interests of the broadcaster as well as of the public. The Congress contemplated such a community role when it adopted the 1960 amendments to the Communications Act, and predicated its action on the fact that the public is entitled to pertinent information concerning broadcast licensees. In this proceeding we seek to enhance the effectiveness of this policy by making practically accessible to the public information to which it is entitled.

13. Many of the comments are based on assumptions that the

proposal herein would make available for local inspection matter which is not available for inspection at the Commission's offices in Washington, D.C. That is not the case. The requirement in the proposal makes reference only to applications and reports which are open for public inspection at the offices of the Commission. For example, profit and loss data reported to the Commission in the annual financial report pursuant to Rule 1.611, and transcription contracts filed pursuant to Rule 1.613 are not open to public inspection at the Commission's offices and would not be reached by the rules here proposed.[2]

14. Some parties urge that if applications are required to be maintained locally, then not the entire application but only a portion of it should be so maintained. Some state that it is only necessary to maintain the programming section to make pre-grant procedures more effective. Others say that financial sections of applications should not be on file locally. It is our opinion that the entire application should be made available locally if the purposes of the local notice provisions of the Act are to be made fully effective. All parts of the application are relevant and material to the Commission's consideration of whether a grant would serve the public interest, convenience, and necessity. To shut off the flow of information from local listeners by withholding from them information in the application would be contrary to this philosophy.

15. The following consideration of the five sections of the Form 301 illustrates the importance of filing locally all portions of the application (other application forms could be similarly analyzed):

*Section I. Name of Applicant and Facilities Applied For.* This section contains the name and address of the applicant, the facilities requested, the hours of operation, the minimum daily hours of operation, type of station, station location, and other essential information. This basic information should be available to the local public to enable them to understand what is involved in the application and who the applicants are.

*Section II. Legal Qualifications.* This section contains a detailed description of the applicant, citizenship and other statutory qualifications, the business and broadcast interests of the applicant and its principals, and other crucial information. Because the licensee is ultimately accountable for the program service and policies of a broadcast station, it is essential that the public have ready access to ownership information which will identify the principals of the applicant and give relevant information about them.

*Section III. Financial Qualifications.* This section contains the applicant's estimates of costs of installation, expected revenues and plans for financing. Objections are raised that placing financial information in the local file would put licensees at a disadvantage with regard to competitors both

[2] However, various broadcast applications contain a caveat that confidential information incorporated by reference into the application is thereafter open to the public. To this extent, such normally confidential material would have to be kept in the local file if incorporated by reference into an application required to be in the file.

within and outside the broadcast industry, that this is an invasion of privacy which would open the station's records to cranks and others with no legitimate interest in them, and that there is no reason to keep financial information in the file. We believe, however, that any competitor seriously wishing financial information about an applicant can get it from the Commission's offices in Washington, D.C. In addition, we would point out that broadcasting is a business invested with a public trust and broadcasters engage in this business with a foreknowledge that the operation is subject to public scrutiny. Finally, as to the reason for keeping financial information in the file, we are of the opinion that if such information is kept locally, the Commission might be aided by persons in the area who could bring to light financial information not apparent in the application. Moreover, as was pointed out at pages 56–57 of the Report of the Presiding Officer in Docket No. 14863, In the Matter of Inquiry Into Local Television Programming in Omaha, Nebraska, the record in that proceeding supports a requirement that financial information be kept on file together with programming information because of the direct relationship between the financial health of a station and its ability to present locally produced programs.

*Section IV. Statement of Program Service.* This section details the applicant's program proposal. Since programming is the essence of a station's public service to its community, giving the local public practical access to material containing promises and other statements about the programming of a station will be conducive to achieving ultimate improvement in the public service which the station renders. The "Omaha Report" mentioned above states, at page 56, that the record in that proceeding indicates that there is a serious need for community leaders and members of the public at large to have more definite information about the programming service provided by their stations. It is argued that the information in Section IV is not intelligible to the public, but only to experts in the use of the form. If kept on file locally, the section will give considerable information intelligibly to the public. As revised in Docket No. 13961, even more useful information may be contained in it.

*Section V. Engineering Data.* This section contains engineering and other information. Although much of this section may be too technical for the general public, we believe that it should be retained because, among other things, it is the only section which contains the location of the main studio and a description of the station's service area.

*Changes in Original Proposal*

16. The proposal set out in our Notice would have required every applicant, permittee, or licensee to maintain local files containing "a copy of *every application and report (including amendments thereto and papers filed therewith and documents incorpo-*

*rated by reference therein) filed by him* . . . which [is] . . . open for public inspection at the offices of the Commission." (Emphasis added.) Consideration of this proposal in the light of the record leads us to make the changes discussed below.

*Applications*

17. We are persuaded by the comments that at present the purpose of making pre-grant procedures more effective will be served by limiting the applications required to be kept on file locally, with a few exceptions, to copies of broadcast applications as to which public notice is required to be given under Sections 1.580 and 1.594 of our rules. The revised rules will require that copies of the following applications be kept in the local file: new main construction permits, construction permits for major changes of facilities of authorized stations, and license renewals. The file must also contain copies of all applications for consent to assignment or transfer under Section 310(b) of the Act regardless of whether public notice under Section 1.580 or 1.594 is required. In addition, minor applications reporting changes in program service will be required to be filed locally, as will applications for extension of time in which to complete construction of new stations. This means it will *not* be necessary to maintain a local file with regard to applications for most minor changes in the facilities of an authorized station, licenses to cover construction permits, extensions of time in which to complete authorized construction of other than new stations, authorizations for remote pickup or studio links for use in connection with the operation of broadcast stations, and certain other types of applications. This will serve to limit the local availability requirements to those applications with which the public is most concerned. As experience dictates, the requirements for local filing may be revised or expanded.

*Ownership reports*

18. As stated previously, we believe it essential for the public to have ready access to ownership information which will identify the principals of the licensee who are responsible for the program service and policies of a broadcast station. Accordingly, the rules adopted herein require that ownership and supplemental ownership reports form a part of the local file.[3] Concerning the contents and number of such reports to be kept on file by multiple owners, see paragraphs 24 and 25.

*Amendments*

19. The proposal requires local files to contain all amendments to applications and reports required to be kept locally. No distinction is made between major and minor amendments. Although there is no requirement of local notice with regard to minor amendments, we believe that the public should have access to full information on those applications and reports which are to be kept in the local file.

[3] Although the Notice in this proceeding proposed to keep in the local file every report which was open for public inspection in the Commission's offices, only ownership reports were intended, and the rule which we adopt is changed accordingly.

*"Papers filed therewith"*

20. The comments correctly point out that the phrase "papers filed therewith" should be clarified to indicate more specifically what documents are intended to be kept in the local files, since the proposed language is broad enough to be construed to include all of the documents mentioned in Section 0.417(a)(5) of the rules as open to public inspection (including such items as pleadings, depositions, and transcripts of testimony). In order to achieve the purposes previously mentioned, we believe that the local file should include all letters, exhibits or other documents filed as part of the application. Thus, for example, exhibits required by the application form or letters of local citizens attached to the application should appear in the local file. In addition, we also believe that such files should include subsequent correspondence between the Commission and the applicant concerning the application, since it often contains facts which shed light on various portions of the application. It is not our view, however, that the local file need contain other items mentioned in Section 0.417(a)(5) of the rules such as, for example, pleadings, briefs, transcripts of testimony, and depositions pertaining to hearings on an application. Such material, we believe, would be likely to make the local file so large and cumbersome that its practical utility as a source of information for the average member of the public would be severely restricted. Moreover, by the time a proceeding has reached the stage of an adjudicatory hearing it must be presumed that interested parties in a community have had an opportunity to express their views. We are of the opinion, however, that copies of Initial and Final Decisions in hearing cases should be made a part of the local file, and have made appropriate provision therefor in the rules. The language in the rules which we adopt has been accordingly delimited and is not as broad as originally proposed. We are also of the opinion that, for the sake of providing full information in connection with the ownership and supplemental ownership reports, material filed as part thereof such as, for example, an exhibit, or a Form 323 filed by a holding company under the provisions of instruction 4 of the ownership report, should be maintained in the local file, as should subsequent correspondence concerning the reports.

21. A question arises as to program logs or copies of program logs submitted with renewal applications. It is our belief that they form an important part of applications held for public inspection, and that a copy should be on file locally.

*Documents incorporated by reference*

22. Various arguments are advanced which urge that documents incorporated by reference into applications or reports should not be required to be kept on file locally. It is stated, for example, that loan agreements, bulk time contracts, consultant agreements and other contracts filed with the Commission under Section 1.613 of its rules and open to public inspection at the Commission's offices in Washington, D.C., should not be kept on file locally. We disagree. Incorporation by reference in documents filed with the

Commission is permitted where the matter so incorporated already appears in other Commission records and is therefore available to the Commission. This practice is permitted to avoid unnecessary paper work on the part of applicants, permittees or licensees. However, the purpose of disclosure of information to the local public would be defeated if items incorporated by reference were not available in the local file. We do not believe that the expense of preparing copies of such incorporated material for local filing is prohibitive, and in many cases copies are probably already available. Furthermore, as time passes after the adoption of the new rules, it will not be necessary to provide material incorporated by reference if that material is already in the local file. The language of the rules adopted herein so states.

23. Under the provisions of Section 1.615(a)(4)(i) of the Rules, the licensee must list in ownership reports all contracts still in effect which are required to be filed with the Commission under the provisions of Section 1.613. This listing, in effect, incorporates the contracts into the reports by reference since it allows Commission reference to the contracts in its files as needed. Filing an ownership report locally without making copies of the contracts locally available would, for reasons given above, be inconsistent with the policy underlying the new local inspection rules. The new rules are drafted to make it clear that such contracts must be provided in the local file as a supplement to the ownership report if they are open to public inspection at the offices of the Commission.

*Filing by multiple owners*

24. Some parties raise the question as to whether the language of the proposed rules would require multiple owners to keep at each station the applications they file not only for that station but for all of their other stations. This was not our intent, and the rules as adopted require that the public file to be maintained by the station need contain only the applications and related material pertaining to that station. One other matter concerning multiple owners requires comment. Our rules permit one Ownership Report (FCC Form 323) to be filed for all stations under common ownership. To carry out the purpose of local availability, it is necessary that each station maintain a copy of this report, and the new rules so provide.

*Requests for political time*

25. Under the provisions of Sections 73.120(d), 73.290(d), 73.590(d), and 73.657(d), of the rules, licensees are required to "keep and permit public inspection of" certain records pertaining to requests for political broadcasting time. No place of retention for such records is specified in those sections. The rule adopted herein provides that such records shall be part of the local file.

*Other matters*

26. There are a number of comments to the effect that the time allowed for inspection—"during regular business hours"—is too vague and will result in some instances in a round-the-clock period

of inspection. We do not so construe the requirement. Broadcasters are free to determine their regular business hours—*i.e.*, those hours during which their normal commercial business is transacted in their communities—and to use these same hours for local inspection. Application of the requirements here with common sense will avoid abuses or hardship either for the broadcaster or members of the public.

27. It has been suggested by several of the parties that the Commission should establish public reference rooms in its regional and field offices, and that the public should be so advised. However, the local availability of the file proposed in Section 1.526 could not be accomplished by its availability at our field offices. Except for those communities in which these offices are located, the purpose of this proposal would be defeated.

28. It has also been suggested that, rather than require the keeping of local files as proposed, the rules of the Commission be amended so as to require more detail in the local notice given under the provisions of Sections 1.580 and 1.594. We are of the opinion that adequate detail could not be given in such notices without making them too unwieldy and the cost too burdensome.[4]

29. A specific time period for the retention of records in the file is sought by several parties, with periods of one and two years suggested. As we stated in our Notice of Proposed Rule Making, we shall consider establishing limits on the useful duration of the period for which the files would have to be maintained as experience under the new provisions accrues. In two respects, the rules do contain specific retention periods. First, they require that records pertaining to requests for political broadcasting time be kept in the local file for the time periods specified in Part 73 of the rules. (The time is two years.) Second, parties whose applications for construction permits are denied may destroy the file after the time indicated in the new Section 1.526(e)(1). If the applications are granted, the applicant then becomes a permittee and must, under the provisions of Section 1.526(e)(2), retain the material on file indefinitely.

30. In view of the foregoing, the Commission is of the opinion that the public interest would be served by amendment of the rules as set out in the Appendix.

31. Authority for the amendments adopted herein is contained in Sections 4(i), 303(r) and 311 of the Communications Act of 1934, as amended.

32. Accordingly, IT IS ORDERED, That, effective May 14, 1965, Parts 0, 1, and 73 of the Commission's Rules ARE AMENDED as set forth in the Appendix hereto.

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

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[4] Metromedia filed a document in this proceeding entitled "Comments of Metromedia, Inc. and Request for Further Amendment of Section 1.359 of the Rules" in which it not only commented on the proposal in this docket but also requested the Commission to institute a rule making proceeding looking toward amendment of its local notice rules so as to permit operating stations to satisfy the requirements thereof by giving notice over the station only, instead of by publishing in a newspaper *and* giving notice over the station. This matter will be dealt with separately at another time.

Adopted March 31, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

NOTE: Rules changes herein will be covered by T.S. I(63)-6.

## APPENDIX

1. Section 0.417 of the Commission Rules and Regulations is hereby amended by addition of a note at the end of subparagraph (5) of paragraph (a) of that section to read as follows:

§ 0.417 *Inspection of records.*

(a) * * *

(5) * * *

NOTE: Certain broadcast applications, reports, and records are also available for inspection in the community in which the main studio of the station in question is located or is proposed to be located. See § 1.526 of this chapter.

2. Section 1.526 is hereby added to the Commission Rules and Regulations to read as follows:

§ 1.526 *Records to be maintained locally for public inspection by applicants, permittees, and licensees.*

(a) *Records to be maintained.* Every applicant for a construction permit for a new station in the broadcast services shall maintain for public inspection a file for such station containing the material in subparagraph (1) of this paragraph, and every permittee or licensee of a station in the broadcast services shall maintain for public inspection a file for such station containing the material in subparagraphs (1), (2), (3), and (4) of this paragraph, as follows:

(1) A copy of every application tendered for filing by the applicant for such station after May 13, 1965, pursuant to the provisions of this part, with respect to which local public notice is required to be given under the provisions of § 1.580 or 1.594; and all exhibits, letters and other documents tendered for filing as part thereof, all amendments thereto, copies of all documents incorporated therein by reference, all correspondence between the Commission and the applicant pertaining to the application after it has been tendered for filing, and copies of Initial Decisions and Final Decisions in hearing cases pertaining thereto. Information incorporated by reference which is already in the local file need not be duplicated if the entry making the reference sufficiently identifies the information so that it may be found in the file, and if there has been no change in the document since the date of filing and the applicant, after making the reference, so states.

(2) A copy of every application tendered for filing by the licensee or permittee for such station after May 13, 1965, pursuant to the provisions of this part, which is not included in subparagraph (1) of this paragraph and which involves changes in program service, which requests an extension of time in which to complete construction of a new station, or which requests consent to involuntary assignment or transfer, or to voluntary assignment or transfer not resulting in a substantial change in ownership or control and which may be applied for on FCC Form 316; and copies of all exhibits, letters, and other documents filed as part thereof, all amendments thereto, all correspondence between the Commission and the applicant pertaining to the application after it has been tendered for filing, and copies of all documents incorporated therein by reference. Information incorporated by reference which is already in the local file need not be duplicated if the entry making the reference sufficiently identifies the information so that it may be found in the file, and there has been no change in the document since the date of filing and the licensee, after making the reference, so states.

(3) A copy of every ownership report or supplemental ownership report filed by the licensee or permittee for such station after May 13, 1965, pursuant to the provisions of this part; and copies of all exhibits, letters, and other documents filed as part thereof, all amendments thereto, all correspondence between the permittee or licensee and the Commission pertaining to the reports after they have been filed, and all documents incorporated therein by reference, including contracts listed in such reports in accordance with the provisions of

§ 1.615 (a) (4) (i) and which according to the provisions of § 0.417 of this chapter are open for public inspection at the offices of the Commission. Information incorporated by reference which is already in the local file need not be duplicated if the entry making the reference sufficiently identifies the information so that it may be found in the file, and if there has been no change in the document since the date of filing and the licensee or permittee, after making the reference, so states.

(4) Such records as are required to be kept by §§ 73.120(d), 73.290(d), 73.590(d), and 73.657(d) of this chapter, concerning broadcasts by candidates for public office.

(b) *Responsibility in case of assignment or transfer.* (1) In cases involving applications for consent to assignment of broadcast station construction permits or licenses, with respect to which public notice is required to be given under the provisions of § 1.580 or 1.594, the file mentioned in paragraph (a) of this section shall be maintained by the assignor. If the assignment is consented to by the Commission and consummated, the assignee shall maintain the file commencing with the date on which notice of the consummation of the assignment is filed with the Commission. The file maintained by the assignee shall cover the period both before and after the time when the notice of consummation of assignment was filed. The assignee is responsible for obtaining copies of the necessary documents from the assignor or from the Commission files.

(2) In cases involving applications for consent to transfer of control of a permittee or licensee of a broadcast station, the file mentioned in paragraph (a) of this section shall be maintained by the permittee or licensee.

(c) *Station to which records pertain.* The file need contain only applications, ownership reports, and related material that concern the station for which the file is kept. Applicants, permittees, and licensees need not keep in the file copies of such applications, reports, and material which pertain to other stations with regard to which they may be applicants, permittees, or licensees, except to the extent that such information is reflected in the materials required to be kept under the provisions of this section.

(d) *Location of records.* The file shall be maintained at the main studio of the station or at any other accessible place (such as a public registry for documents or an attorney's office) in the community to which the station is or is proposed to be licensed, and shall be available for public inspection at any time during regular business hours.

(e) *Period of retention.* The records specified in paragraph (a) (4) of this section shall be retained for the periods specified in §§73.120(d), 73.290(d), 73.590(d), and 73.657(d) of this chapter (2 years). The records specified in paragraph (a) (1), (2), and (3) of this section shall be retained as follows:

(1) The applicant for a construction permit for a new station shall maintain such a file so long as the application is pending before the Commission or any proceeding involving that application is pending before the courts. (If the application is granted, subparagraph (2) of this paragraph shall apply.)

(2) The permittee or licensee shall maintain such a file so long as an authorization to operate the station is outstanding.

3. Section 1.580 of the Commission's Rules and Regulations is hereby amended by the addition of a new subparagraph (10) to paragraph (f) as follows:

§ 1.580 *Local notice of filing; public notice of acceptance for filing; petitions to deny.*

* * * * * * *

(f) * * *

(10) A statement that a copy of the application, amendment(s), and related material are on file for public inspection at a stated address in the community in which the main studio is maintained or is proposed to be located. See § 1.526.

4. Section 1.594 of the Commission's Rules and Regulations is hereby amended by the addition of subparagraph (5) to paragraph (d) to read as follows:

§ 1.594 *Local notice of designation for hearing.*

* * * * * * *

(d) * * *

(5) A statement that a copy of the application, amendment(s), and related material are on file for public inspection at a stated address in the community

in which the main studio is maintained or is proposed to be located. See § 1.526.

5. Section 1.615 of the Commission's Rules and Regulations is hereby amended by the addition of paragraph (f) to read as follows:

§ 1.615 *Ownership reports.*

* * * * * * *

(f) A copy of all ownership and supplemental ownership reports and related material filed pursuant to this section shall be maintained and made available for public inspection locally as required by § 1.526.

6. Section 73.120 of the Commission's Rules and Regulations is hereby amended by addition of a note at the end of paragraph (d) of that section to read as follows:

§ 73.120 *Broadcasts by candidates for public office.*

* * * * * * *

(d) * * *

NOTE: See § 1.526 of this chapter.

7. Section 73.290 of the Commission's Rules and Regulations is hereby amended by the addition of a note at the end of paragraph (d) of that section to read as follows:

§ 73.290 *Broadcasts by candidates for public office.*

* * * * * * *

(d) * * *

NOTE: See § 1.526 of this chapter.

8. Section 73.590 of the Commission's Rules and Regulations is hereby amended by the addition of a note at the end of paragraph (d) of that section to read as follows:

§ 73.590 *Broadcasts by candidates for public office.*

* * * * * * *

(d) * * *

NOTE: See § 1.526 of this chapter.

9. Section 73.657 of the Commission's Rules and Regulations is hereby amended by the addition of a note at the end of paragraph (d) of that section to read as follows

§ 73.657 *Broadcasts by candidates for public office.*

* * * * * * *

(d) * * *

NOTE: See § 1.526 of this chapter.

F.C.C. 65M–427

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| LESLIE L. STERLING AND WILLIAM H. PATTERSON D.B.A. FLATHEAD VALLEY BROADCASTERS (KOFI), KALISPELL, MONT. | Docket No. 15815<br>File No. BP–16369 |
| GARDEN CITY BROADCASTING, INC. (KYSS), MISSOULA, MONT. | Docket No. 15816<br>File No. BP–16400 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY H. GIFFORD IRION, HEARING EXAMINER

1. On March 15, 1965, Garden City Broadcasting, Inc. filed a petition for leave to amend its application. The effect of the amendment would be to reduce proposed nighttime power from 50 kilowatts to 25 kilowatts. Comments were filed by the Broadcast Bureau on March 22, 1965 in which the Bureau stated that it had no objection to a grant of the relief sought.

2. This proceeding involves two applications for Class II–A facilities on 1180 kilocycles, a clear channel station on which Station WHAM, Rochester, New York, is the dominant station. Garden City has proposed power of 50 kilowatts day and night with a two element directional antenna at night. In its order of designation released January 29, 1965, the Commission referred to "terrain irregularities" in the vicinity of the proposed antenna site and included an issue to determine whether the Garden City directional antenna could be adjusted and maintained so as to provide adequate nighttime protection to Station WHAM. In the discussion of the proposed antenna pattern there was reference to the fact that Garden City had not submitted a "site survey" with the result that the Commission could not determine whether there would be scatter and reradiation. Garden City now contends that it could not reasonably have anticipated the need for an amendment prior to designation for hearing.

3. According to the petition a proposed antenna site was selected on the advice of a consulting engineer after consideration of other potential sites which were rejected because of terrain features. The present site was considered to be the best one available and the consultant for Garden City concluded that the site, which is on relatively high ground, did not present serious questions of signal scatter or reradiation from surrounding terrain features. According to the petition, neither the Commission's staff nor Station WHAM and Flathead Valley Broadcasters (which are now parties to the proceeding) raised any question concerning the possibility

of signal scatter or reradiation.[1] It thus appears that Garden City had its first notice of the problem in the order of designation.

4. Garden City also contends the making of a site survey would be excessively costly and that it would constitute an impossible requirement, "so severe that it practically constitutes a prejudgment of the facts at issue." The Bureau disagrees with this contention but concedes that prior to designation Garden City might not have foreseen that there would be this requirement. The Hearing Examiner expresses no opinion regarding the dispute about making a site survey inasmuch as this kind of question does not readily lend itself to resolution on the basis of pleadings. He agrees, however, that prior to the order of designation the petitioner could not reasonably be expected to foresee the necessity or desirability of the present amendment. *Ottawa Broadcasting Corp.* (WJBL), 3 RR 2d 575 (1964).

5. Acceptance of the amendment will not result in prejudice to the other applicant nor the intervenor. Nor will it require the addition of other parties. An enlargement of issues will not be necessary and the amendment will, in fact, tend to simplify the technical problems with respect to protection of Station WHAM. According to the Bureau's comments, no new or increased objectionable interference will result from a grant of the amendment and this statement must be accepted by the Examiner in the absence of contradiction.

6. Garden City appears to have proceeded with proper diligence and the effect of this amendment, being to simplify rather than aggravate the problems involved, will consequently favor the public interest. *Radio St. Croix, Inc.*, 18 RR 1009 (1959). A grant of the petition is, therefore, in order.

IT IS ORDERED, This 6th day of April, 1965, that the petition of Garden City Broadcasting, Inc. for leave to amend so as to reduce its proposed nighttime power from 50 to 25 kilowatts IS GRANTED and the amendment tendered therewith IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,

H. GIFFORD IRION, *Hearing Examiner.*

BEN F. WAPLE, *Secretary.*

[1] It is also to be noted that neither of these parties filed any opposition to the present petition.

F.C.C. 65–263

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application of
B & K BROADCASTING CO., SELINSGROVE, PA.
Requests: 1240 kc., 250 w., U, Class IV
For Construction Permit

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LOEVINGER ABSENT.

1. The Commission has before it for consideration (a) the above-captioned and described application; (b) a letter filed on June 1, 1964 by B & K Broadcasting Company, Selinsgrove, Pennsylvania requesting a waiver of the "AM freeze" provisions of Section 1.571 of the Rules and Regulations; (c) "Petition to Commission to Return Application" filed on June 5, 1964, by PAL Broadcasters, Inc., licensee of Station WBAX, Wilkes-Barre, Pennsylvania; (d) "Opposition to Petition to Return Application and Request that Application be Accepted for Filing" filed June 26, 1964 by B & K Broadcasting Company; (e) "Petition to Commission to Return Application" filed on August 11, 1964 by PAL Broadcasters, Inc.; (f) "Opposition to Petition to Dismiss Application" filed on September 4, 1964 by B & K Broadcasting Company; (g) "Petition for Waiver" filed on September 4, 1964 by B & K Broadcasting Company; (h) Reply of PAL Broadcasters, Inc., filed on September 24, 1964 by PAL Broadcasters, Inc.; and (i) other related pleadings.

2. Those requests made in the letter and pleadings filed prior to July, 1964, related to the applicant's request for waiver of the interim criteria governing the acceptance of standard broadcast applications which were superseded by the present standard broadcast allocation standards adopted by the Commission on July 1, 1964, *In re Amendment of Part 73 of the Commission's Rules regarding AM station assignment standards*, 2 R. R. 2d 1658. Therefore, the matters raised by the applicant and petitioner prior to July 1, 1964, have become moot.

3. After the new standards were adopted and became effective the petitioner again filed its "Petition to Commission to Return Application". Petitioner requests that the application be returned as unacceptable for filing pursuant to the provisions of Section 73.24(b) (1) and 73.37 of the new rules. Petitioner states that in paragraph 32 of the Commission's Report and Order in Docket No. 15084,[1] revising in major respects the rules regarding AM station assignment standards, it is stated that applications accepted

[1] FCC 64–609, July 1, 1964, 2 RR 2d 1658, 1673.

prior to publication of the Report and Order in the Federal Register will be processed under the old rules but those accepted after publication will be processed under the new rules. Therefore, petitioner alleges that the subject application is governed by the new rules since the application had not been accepted for filing prior to July 11, 1964, the date the new rules were published in the Federal Register. Petitioner further alleges that the proposal involves overlap of the applicant's .025 mv/m contour with the 0.5 mv/m contour of petitioner and that such overlap is in contravention of Section 73.37(a) of the new rules. Therefore, the application being governed by the new rules and being in violation of Section 73.37 of the new rules, it should be returned as unacceptable for filing.

4. On September 4, 1964, the applicant concurrently filed an "Opposition to Petition to Dismiss Application", a "Petition for Waiver" of Sections 73.24(b) and 73.37, and an amendment to the engineering portion of the instant application. In its opposition applicant states that the amendment clearly indicates that the area of overlap caused to WBAX is located in an area already subject to interference from existing stations and that no new or additional interference would be caused by the subject proposal to WBAX. Thus, WBAX would not suffer electrical interference or economic injury. Applicant further states that because the overlap area is a distance from Wilkes-Barre any interest in this area is *de minimis* to WBAX. Therefore, applicant concludes that since WBAX is not a "party aggrieved" and will not be adversely affected by the subject application, the petitioner does not have standing to request that the application be dismissed and its petition must be dismissed.

5. The applicant in the "Petition for Waiver" alleges that since the application was filed some time prior to the effective date of the new rules, it was entitled to processing and should have been accepted for filing before the adoption of the new rules. Notwithstanding this allegation, the applicant claims that the following circumstances warrant a waiver of the new rules: (1) the proposal would serve 100% "white area" nighttime; (2) no overlap would occur between the 1 mv/m contour of the proposal and the 0.05 mv/m contour of any co-channel station calculated pursuant to the provisions of Section 73.37 of the rules; (3) no new objectionable interference would be caused to any existing or proposed station; (4) prohibited overlap of contours would be caused by WBAX but the resulting interference would occur in an area already receiving interference from existing stations; (5) a waiver would be in the public interest, convenience and necessity since there is no licensed AM or FM broadcast station in Selinsgrove, Pennsylvania or in Snyder County where Selinsgrove is located; and (6) the proposal would not contribute to the "*Ad Hoc* Erosion" of the AM spectrum since no objectionable overlap is received and the overlap which would be caused occurs within an area already subject to objectionable overlap.

6. Petitioner in its Reply alleges that since it will receive additional overlap from the proposed operation, notwithstanding the fact that such overlap will occur in an area already subject to interference, under the new rules it is a "party aggrieved" and there-

fore has standing to petition for a return of the instant application. In support of its allegation petitioner states that the Commission in its Report and Order revising the AM station assignment standards did not make an exception for overlap occurring in areas subject to overlap from other existing stations. Therefore, petitioner feels that it is clear from the Report and Order that the Commission recognized that even when prohibited overlap occurs in areas already receiving prohibited overlap from other stations, additional interference is caused to the station receiving the prohibited overlap and is undesirable.[2]

7. Petitioner further states, as it did in its petition (*supra,* paragraph 4), that the application must be processed under the new rules since it had not been accepted for filing prior to the effective date of the new rules. Since the proposal causes overlap of WBAX in contravention of new Section 73.37, the petitioner concludes that the application is unacceptable for filing. Finally, petitioner states that although there is no AM service in Selinsgrove, there is the possibility of at least two FM assignments, and where such possibility exists there is even less reason for waiver of the new AM rules.[3]

8. Notwithstanding the fact that the operation of the proposed station will result in prohibited overlap of the proposed 0.025 mv/m contour and the 0.5 mv/m contour of Station WBAX in an area that already involves overlap of contours of existing stations resulting in interference to WBAX under the former technical standards and that, under the former technical standards, the proposed operation would cause no new interference to WBAX, the Commission finds that the licensee has standing to oppose the acceptance of the application of the B & K Broadcasting Company. This is so because the present standards (Section 73.37 of the Rules) contemplate the allocation of standard broadcast facilities on the basis of minimum separations between stations based on such factors as frequency, power, soil conductivity, antenna efficiency and radiation pattern. Under the present standards the site proposed by the B & K Broadcasting Company does not comply with the present Rule in that the separation from the WBAX site does not meet the present requirements. Therefore, the Commission finds that WBAX has the requisite standing.

9. Since the application was not acceptable for filing under the interim criteria because of indicated new interference to Station WBAX, it was held without action, together with several somewhat similar applications, in order that they could be considered under new rules which were under consideration and later adopted July 1, 1964. However, upon examination of the proposal under our new rules, we find that the proposal is in contravention of Section 73.37, since the proposed 0.025 mv/m contour would overlap the 0.5 mv/m contour of co-channel stations WBAX and WHUM.

10. Commission studies have failed to disclose the availability of an FM channel for assignment to Selinsgrove. Further, our studies reveal that there is no AM primary service presently avail-

[2] It appears clear that the petitioner intends to speak in terms of interference within existing interference areas.

[3] Commission studies fail to disclose the possibility of such assignment.

able to the city during nighttime hours; there is no AM station in the city or even in the county of which Selinsgrove is the largest community; and the area in which prohibited overlap of contours would occur in violation of Section 73.37 is already subject to prohibited overlap of contours with an existing station. In these unique circumstances, the Commission finds that the applicant has presented compelling circumstances which warrant waiver of the rules to the extent necessary to permit acceptance of the application for filing. The combined force of all the factors enumerated lead to this conclusion. Thus, we will waive Sections 73.24 and 73.37 of our rules to such extent and deny the WBAX petitions insofar as they request that this application be returned. In all other respects, the WBAX allegations will be considered when the Commission acts further on the Selinsgrove application on its merits.

Accordingly, IT IS ORDERED, That the petitions on file against this proposal by PAL Broadcasters, Inc. ARE DISMISSED to the extent indicated above and the petition by the B & K Broadcasting Company for waiver of Sections 73.24(b) and 73.37 of our rules IS HEREBY GRANTED only insofar as necessary to permit acceptance of the application for filing. The applicant's petition IS HEREBY DENIED in all other respects.

Adopted March 31, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–125

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>ABACOA RADIO CORP. (WRAI), RIO PIEDRAS (SAN JUAN), P.R. | Docket No. 14977<br>File No. BP–14070 |
| MID-OCEAN BROADCASTING CORP., SAN JUAN, P.R. | Docket No. 14978<br>File No. BP–14994 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARDS

1. The Review Board has before it a petition to enlarge issues, filed by Abacoa Radio Corporation (Abacoa). Mid-Ocean Broadcasting Corporation (Mid-Ocean) and the Broadcast Bureau have submitted oppositions to tthe petition.[1]

2. This proceeding involves the mutually-exclusive applications of Mid-Ocean and Abacoa. By Order, FCC 63–174, released February 26, 1963, the Commission designated the Mid-Ocean and Abacoa applications for consolidated hearing. In an Initial Decision, FCC 64D–37, released June 2, 1964, Hearing Examiner Walther W. Guenther proposed to grant the Mid-Ocean application. Abacoa has filed exceptions to the Initial Decision which are now pending before the Review Board:

3. Abacoa in the instant petition requests that the issues in this proceeding be enlarged to include determinations as to (1) whether the transmitter site proposed by Mid-Ocean is satisfactory with particular regard to any conditions that may exist in the vicinity of the antenna system which would distort the proposed antenna radiation pattern of Mid-Ocean and (2) whether Mid-Ocean has made a full and complete disclosure of all matters affecting adjustment and maintenance of the directional antenna systems as proposed in its application, and, if so, whether it possesses the qualifications to receive a construction permit. Abacoa alleges that "in the latter part of 1964" it discovered that 80-foot steel towers, as well as wooden poles, are used to support transmission lines in the immediate vicinity of Mid-Ocean's proposed transmitter site. It claims that a specific issue must be included to determine whether the presence of these tall metal towers will prevent satisfactory adjustment and maintenance of the directional antenna systems involved. Abacoa claims that the addition of these issues is required so as to provide assurance of stability of

[1] The following pleadings are under consideration: (1) Petition to enlarge issues, filed by Abacoa Radio Corporation, on February 9, 1965; (2) opposition, filed by the Broadcast Bureau, on February 25, 1965; (3) opposition, filed by Mid-Ocean Broadcasting Corporation on March 4, 1965; and (4) reply to opposition, filed by Abacoa Radio Corporation, on March 15, 1965.

directional array where under the circumstances problems of adjustment through re-radiation and other technical difficulties are presented. Abacoa has submitted a supporting affidavit of its engineering consultant. Abacoa further contends that the frequency proposed by Mid-Ocean is governed by the provisions of NARBA, and that the addition of this particular issue will aid in insuring compliance with United States treaty obligations. Abacoa concedes that Mid-Ocean has not deliberately withheld information from the Commission, but urges that because Mid-Ocean has not brought to the Commission's attention these significant developments an issue should be added to inquire into the eligibility of Mid-Ocean to receive a construction permit.

4. Abacoa admits that it has not complied with the timeliness requirements of Section 1.229 of the Rules. However, it alleges that these facts were only discovered because its consulting engineers were required to go to Puerto Rico on other matters late in 1964 and that the facts have been brought to the Commission's attention at the earliest possible date. Abacoa requests the Board to consider these matters on its own motion, if it is determined that good cause does not exist for late filing of its petition.

5. Mid-Ocean in its opposition argues that no good cause exists to warrant consideration of Abacoa's late filed petition and that no reasons have been advanced for the Board to accept this petition on its own motion. Moreover, Mid-Ocean argues that Abacoa's petition is substantively without merit. It claims that Abacoa does not specifically allege that serious distortion problems will result from the presence of the steel towers, but merely states that some problems "can be encountered." Mid-Ocean's opposition contains an affidavit of Mid-Ocean's consulting engineer which states that the situation existing with respect to its transmitter site is far less serious than other situations which the Commission has accepted, that no serious problem in the adjustment and maintenance of the directional antenna array will be encountered, and that efforts will be made to correct any deficiencies which may occur.

6. The Bureau submits in its opposition that Abacoa has not shown good cause for its late-filed petition or offered any factual support for enlargement of the issues on the Board's own motion. The Bureau further contends that Abacoa's petition does not contain specific allegations of fact sufficient to support the action requested as required by Section 1.229(c) of the Rules. The Bureau states that Abacoa has not alleged that it would be either impossible or impractical for Mid-Ocean to reduce radiation from nearby power lines to a level where the effect on the proposed station's directionalized operation would be minimal. The Bureau asserts that the alleged deficiencies of Mid-Ocean's site are no more restrictive than others which have been resolved to the Commission's satisfaction. The Bureau further claims that the requested character issue should be denied and disputes Abacoa's contention that a substantial, significant change has taken place in Mid-Ocean's proposal which has not been reported to the Commission.

7. In its reply, Abacoa argues that it was Mid-Ocean's duty, not Abacoa's, to bring these matters to the Commission's attention and that since the engineering consultants to both applicants disagree as to the effect which the presence of the steel poles will have on the operation of Mid-Ocean's directional antenna array, the issues should be enlarged to resolve the conflict.

8. Abacoa's petition is untimely filed (see Section 1.229 of the Rules) and no good cause has been shown for the late filing. Abacoa has failed to indicate why it could not have obtained this information earlier and without this showing we cannot accept the petition at this late date, some ten months after the release of the Initial Decision. Therefore, Abacoa's petition will be denied on the grounds of untimeliness. Even assuming that Abacoa's petition had been timely filed, the Board is of the opinion that Abacoa has not set forth sufficient allegations of fact as required under Section 1.229(c) of the Rules to show that the steel towers will create problems affecting Mid-Ocean's directional antenna array or that it would be impractical or impossible for Mid-Ocean to correct any distortions which might occur. We agree with Mid-Ocean and the Bureau that the *KRLA* situation, on which Abacoa relies, involves a more critically adjusted directional array, and that the facts in the cases are not comparable. The degree of suppression involved in the *KRLA* situation was greater than with respect to the Mid-Ocean applicant, and, as reflected in both the Bureau's opposition and Mid-Ocean's enclosed engineering statement, re-radiation from the transmission lines in the vicinity of the KRLA antenna system has now been reduced to the extent that the Commission has granted program test authority to the interim permittee.[2] Finally, in view of Mid-Ocean's assurance that the steel towers will be considered in the adjustment of the Mid-Ocean antenna, that it anticipates that some of the closer structures will require detuning, and that its engineering affidavit establishes that it is familiar with the methods utilized in detuning such structures, we are of the opinion that addition of the requested issues is not warranted.

Accordingly, IT IS ORDERED, This 8th day of April, 1965, That the petition to enlarge issues, filed February 9, 1965, by Abacoa Radio Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] See Commission letter of February 4, 1963, to *Oak Knoll Broadcasting Corporation* (Mimeo No. 8841).

F.C.C. 65R–130

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>JACK O. GROSS, TRADING AS GROSS BROADCASTING CO., SAN DIEGO, CALIF. | Docket No. 15824<br>File No. BPCT–3346 |
| CALIFORNIA WESTERN UNIVERSITY OF SAN DIEGO, SAN DIEGO, CALIF. | Docket No. 15825 |
| For Construction Permit for New Television Broadcast Station | File No. BPCT–3421 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The above-captioned applications were designated for consolidated hearing by Commission Order FCC 65–84, released February 5, 1965. The issues to be determined included comparative coverage issues, standard comparative issues, and issues with respect to the financial qualifications and staffing proposals of California Western University of San Diego. On February 25, 1965, Jack O. Gross, tr/as Gross Broadcasting Company (hereinafter referred to as Gross) petitioned the Commission to enlarge the issues [1] to include the following:

(1) To determine the nature and composition of the "membership" of California Western University of San Diego, whether it is legally qualified to construct, own and operate its proposed television broadcast station, and whether a grant of its application would be consistent with the provisions of Section 310(a)(4) of the Communications Act of 1934, as amended, or the provisions of Section 73.636 of the Commission's Rules.

(2) To determine whether the estimate by California Western University of San Diego of expected operating revenues is reasonable.

(3) To determine the efforts, if any, made by California Western University of San Diego to ascertain the programming needs and interests of the area proposed to be served and the manner in which the applicant proposes to meet such needs and interests.

(4) To determine the proposed policy and practice of California Western University of San Diego with respect to matters covered by paragraph 9 of Section IV of FCC Form 301, and to determine, in the light thereof, whether a grant of its application would serve the public interest, convenience or necessity.[2]

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[1] The Review Board has before it the following additional pleadings: Opposition to Petition to Enlarge Issues, filed March 10, 1965, by California Western University of San Diego; Broadcast Bureau's Comments on "Petition to Enlarge Issues" filed March 10, 1965; and Reply Statement by Gross Broadcasting Company filed March 29, 1965.

[2] Paragraph 9 of Section IV of FCC Form 301 requests information concerning the average number of hours per week which will be used in advertising or promoting any business, profession or activity other than broadcasting in which the applicant is engaged or financially interested, either directly or indirectly.

2. In support of his first additional issue, Gross alleges that California Western University of San Diego (hereinafter referred to as California Western) is composed of:

The Trustees of the corporation
The Bishop of the Los Angeles Area of The Methodist Church
The District Superintendents of the Southern California-Arizona Annual Conference of The Methodist Church
The Executive Committee of the Board of Education of the Southern California-Arizona Conference of The Methodist Church
The Board of Trustees of the Southern California-Arizona Annual Conference of The Methodist Church
The Members of the Board of Ministerial Training and Qualifications of the Southern California-Arizona Annual Conference of The Methodist Church
The Executive Secretary of the Division of Educational Institutions of the Board of Education of The Methodist Church
The Lay Leader of the Southern California-Arizona Annual Conference of The Methodist Church
The President of the Woman's Society of Christian Service of the Southern California-Arizona Annual Conference of The Methodist Church;

that the data supplied by California Western was limited to 25 members of its Board of Trustees,[3] and that the membership of the corporation elects the Board of Trustees and exercises other important governing functions. Gross argues that without the information required by Section IV of FCC Form 301 with respect to all of the members of the corporation, it is impossible for the Commission to determine whether California Western is legally qualified to be the licensee of a television station. California Western in its opposition argues that all of the information upon which Gross relies was before the Commission at the time the issues were designated for hearing and that it is clear that the issue requested by Gross is not warranted. Moreover, it argues that it had informally checked with the Commission's staff and been advised that the information submitted with respect to the Trustees would be adequate for Commission purposes.

3. Section 310(a) of the Communications Act requires the Commission to make certain determinations as to citizenship of the persons who compose its licensees. Moreover, it is necessary for the Commission to be advised as to the business and financial interests of the members of the corporation in order for it to determine whether a grant of a construction permit to the corporation would comply with the provisions of Section 73.636 of its rules and regulations. Since the information which is necessary to make these findings is not now before the Commission, the issues must be enlarged to provide the applicant an opportunity to develop the necessary facts on the record.

4. With respect to the second issue requested by Gross, he has argued that since California Western proposes to obtain most of

[3] The Board of Trustees presently is composed of not less than 30, nor more than 33 members.

its revenue from institutional advertising rather than the sale of spot announcements, a special showing concerning the expected revenue of the proposed station must be made. He has also urged that a parallel exists between this case and certain cases which involved allegations of economic impact and that, therefore, a specific issue concerning the validity of California Western's estimates as to operating revenues should be added. The Bureau takes the position that the economic impact cases are not applicable to this proceeding and that no factual showing has been made to justify the addition of such an issue. With this, we must agree. Gross has alleged no facts nor has he otherwise provided any basis for enlarging the issues which already contain a general issue with respect to the financial qualifications of California Western.[4] It is, therefore, inappropriate to include such an issue in this proceeding.

5. Gross has urged that the Board add an issue to determine the efforts which California Western has made to ascertain the programming needs and interests of the area proposed to be served. In support of this request, it is argued that since California Western proposes to operate partially as an educational station and partially as a commercial station, with 8.4% religious programing, 31.93% educational programming, and 19.33% discussion programing, and with only 23.53% entertainment programing, it must make a special showing of need for this "different" program format. The Bureau has noted that this argument alone is not sufficient to warrant the enlargement of the issues. It is pointed out that Gross has alleged no facts supported by affidavits which tend to show that California Western did not make an adequate investigation of the program needs of its community. Accordingly, this issue will not be added.

6. With policy to Gross's request that we include an issue to ascertain the policy of California Western with respect to promotion of other businesses, professions or activities in which the applicant is engaged, it has been urged that since California Western is a University, all of its operation can be effectively used to promote its educational activities and that, therefore, a special issue concerning this aspect of the case is warranted. Gross has alleged no facts whatsoever which might lead us to believe that California Western would improperly use its proposed television station for the purpose of promoting its educational activities. In the absence of some specific showing with respect to these matters, the addition of such an issue is not justified.

Accordingly, IT IS ORDERED, This 9th day of April, 1965, That the Petition to Enlarge Issues filed by Jack O. Gross, tr/as Gross Broadcasting Company, February 25, 1965, IS HEREBY GRANTED to the extent that the issues in the above-captioned proceeding are enlarged by the inclusion of the following issues, and DENIED in all other respects:

(1) To determine whether a grant of the application of

[4] We note that Gross's estimate of annual revenue is substantially greater than that estimated by California Western. Thus he clearly has not argued that San Diego will not provide adequate economic support for one additional TV station.

California Western University of San Diego would be consistent with the provisions of Section 310(a)(4) of the Communications Act of 1934, as amended; and

(2) To determine whether a grant of the application of California Western University of San Diego would be consistent with the provisions of Section 73.636 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–299

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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| In Re Applications of<br>AMERICAN COLONIAL BROADCASTING CORP.,<br>PONCE, P.R.<br>For Construction Permit To Change Transmitter Site and Antenna Height Above Average Terrain of Station WSUR–TV, Channel 9, Ponce, P.R. | Docket No. 15271<br>File No. BPCT–3104 |
| AMERICAN COLONIAL BROADCASTING CORP.<br>CAGUAS, P.R.<br>For Construction Permit To Increase Power of Station WKBM–TV, Channel 11, Caguas, P.R. | Docket No. 15451<br>File No. BPCT–3300 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the petition filed on January 15, 1965, by American Colonial Broadcasting Corporation for a waiver of Section 73.685(e) of the Rules and for leave to amend its pending application in Docket No. 15451; (b) the opposition filed on February 5, 1965, by El Mundo, Inc., licensee of WKAQ–TV, Channel 2, San Juan, Puerto Rico; (c) the comments of the Broadcast Bureau filed February 3, 1965; and (d) the reply of the petitioner filed February 25, 1965.[1]

2. American Colonial is the licensee of television Station WSUR–TV, Channel 9, Ponce, Puerto Rico, and the permittee of television Station WKBM–TV, Channel 11, Caguas, Puerto Rico. Pending before the Commission are applications to relocate the transmitter site and to change the antenna height of WSUR–TV; and to increase power, change antenna type, and directionalize the antenna of WKBM–TV. The WSUR–TV application was designated for hearing by an order (FCC 64–12) released January 13, 1964, and by a Memorandum Opinion and Order, FCC 64–388, released May 5, 1964, the two applications were designated for a consolidated hearing on specified issues. The background of this proceeding is fully set forth in our designation orders and need not be repeated here. For our purpose, it is sufficient to note that the issues are intended to determine (a) the facts and circumstances surrounding the preparation and filing of the applications; (b) the areas and populations which may be expected to

[1] The petitioner's request for an extension of time to February 25, 1965 within which to file its reply pleading is granted.

gain or lose service by a grant of each application, and the availability of other television service to such areas and populations; (c) whether a grant of either or both applications would be consistent with the provisions of Section 73.636 of the Rules with respect to overlap; (d) matters pertaining to the accessibility of WSUR–TV's present transmitter site; and (e) in the light of the evidence adduced, whether a grant of either or both applications would serve the public interest.

3. After the applications were designated for consolidated hearing, we amended the provisions of Section 73.636 by the adoption of fixed standards with respect to overlap, and the amended rule was expressly made applicable to pending applications. *1964 Multiple Ownership Rules* (Docket No. 14711), 29 FR 7535, 2 Pike & Fischer, R.R. 2d 1588, 1603, released June 9, 1964.[2] The application of the amended rule was thereafter relaxed to the extent of permitting a major change of existing facilities with an overlap situation as long as the amount of area subjected to overlap is not increased, and provided no substantial increase in "overlap" population occurs. (29 FR 13896, 3 Pike & Fischer, R.R. 2d 1554, 1558, released October 5, 1964). Nevertheless, American Colonial's pending application to increase the power of WKBM–TV is subject to dismissal under amended Section 73.636.[3]

4. In an effort to achieve compliance with the revised requirements of Section 73.636, American Colonial has tendered an amendment to the WKBM–TV application which proposes to utilize a directional antenna having a ratio of maximum to minimum radiation in the horizontal plane of 12 db. Since, however, Section 73.685(e) prohibits the use of a directional antenna with a suppression in excess of 10 db, American Colonial seeks a waiver of the Rule. El Mundo opposes the petition on the grounds that good cause has not been shown for the amendment of the application after designation for hearing as required by Section 1.522(b) of the Rules; that with respect to the request for waiver of Section 73.685(e), the petition was improperly directed to the Commission; and that, in any event, a grant of the waiver would not serve the public interest, and the request therefor should be denied on the merits.

5. We conclude that good cause has been shown for acceptance of the amendment after designation of the WKBM–TV application for hearing. The more restrictive provisions of Section 73.636 with respect to overlap were not adopted until after the issuance of our designation order, and American Colonial asserts that the tendered amendment was engineered to achieve compliance with the revised rule in the light of the modification thereof enunciated in our October, 1964 Memorandum Opinion and Order. Under the circumstances, we believe that the petitioner proceeded with due diligence. Leave is therefore granted to amend the WKBM–TV application, and the tendered amendment is accepted.

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[2] The amended provisions became effective July 16, 1964.

[3] Presently pending before the Review Board is a petition by American Colonial for the addition of an issue to determine whether a waiver of the amended rule is warranted. The Broadcast Bureau has requested the Review Board to hold that petition in abeyance until the Commission acts on the petition for waiver of Section 73.685(e) and for leave to amend.

6. In support of the contention that the petition is not properly before the Commission, El Mundo asserts that the question of whether a waiver of Section 73.685(e) should be granted is a matter for determination after hearing. Since authority to add issues has been delegated to the Review Board by Section 0.365 (b) (1), El Mundo argues that the petition is defective for seeking to circumvent the jurisdiction of the Review Board and should either be dismissed or be referred to the Review Board. The fact remains, however, that American Colonial requests a waiver of Section 73.685(e), not an enlargement of issues, and we conclude that the matter is properly before us.

7. The Broadcast Bureau states that a waiver of Section 73.685(e) would be justified provided American Colonial supplements its showing by (1) setting forth the procedures, equipment, and tests that would be employed to establish the directional antenna pattern; and (2) the submission of a statement concerning the conditions at the transmitter site to show that no local obstructions or obstacles exist which might have a deleterious effect on the proposed directional antenna pattern. In addition, the Bureau suggests that any grant be made subject to the following conditions:

1. An affidavit by a qualified and licensed surveyor shall be submitted stating that the proper true azimuthal orientation of the transmitting antenna of WKBM–TV has been achieved at the time of installation.

2. A verified statement of a qualified engineer shall be submitted fully setting forth the method used to establish the specified power division for the N–S and E–W radiators.

3. Radiation on a bearing of 270 degrees true shall not exceed 13 dbk (20 kw).

8. In a reply pleading, American Colonial submitted an engineering statement which appears to contain the additional information requested by the Broadcast Bureau. The petitioner also agreed to accept a grant subject to the conditions suggested by the Bureau.

9. We also believe that the use of a directional antenna with a 12 db suppression is warranted in this case. Although Section 73.685(e) of the Rules limits the use of directional antennas to those having a ratio of maximum to minimum radiation in the horizontal plane of 10 db, we have found that suppressions up to 15 db may be reliable and produce no undesirable effects. *Interim Policy on VHF Channel Assignments* (Docket No. 13340), FCC 61–994, 21 Pike & Fischer, R.R. 1695, 1700. WKBM–TV presently operates with a power of only 27 kw [4], and American Colonial contends that use of a directional antenna with a 12 db suppression would permit an increase of power, thus improving service to San Juan, without violating the overlap provisions of Section 73.636 of the Rules. In our view, the circumstances of this case justify the use of the proposed directional antenna, and the

[4] Section 73.614(b) of the Rules authorizes maximum effective radiated powers of television broadcast stations on Channels 7-13 of 316 kw.

requested waiver of Section 73.685(e) of the Rules should be granted.

Accordingly, IT IS ORDERED, This 15th day of April, 1965, that the petition for leave to amend filed by American Colonial Broadcasting Corporation on January 15, 1965 IS GRANTED, and the tendered amendment IS ACCEPTED;

IT IS FURTHER ORDERED, That the request of American Colonial Broadcasting Corporation for a waiver of the provisions of Section 73.685(e) of the Commission's Rules IS GRANTED;

IT IS FURTHER ORDERED, That the petition of American Colonial Broadcasting Corporation for an extension of time to February 25, 1965, within which to file a reply pleading IS GRANTED and the reply pleading submitted on February 25, 1965 IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–286

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

F.C.C. ESTABLISHES ADVISORY COMMITTEE ON BROADCAST OF HORSE RACING INFORMATION } Public Notice

BY THE COMMISSION:

On June 17, 1964, the Commission terminated proceedings in Docket 15040 looking toward the adoption of rules to regulate the broadcast of horse racing information. In our Report and Order,[1] we decided against the adoption of specific rules and determined to proceed in this area on a case-by-case basis, as had been our practice. At the same time, we also revised and clarified the existing policy statement concerning the broadcast of horse racing information and stated our intention to avail ourselves of offers of cooperation which had been received from the horse racing industry.

The horse racing industry and the Commission have a common interest and concern with the broadcasting of horse racing information. Both are interested in preventing the broadcasting of information which aids those engaged in illegal off-track gambling. There is, at the same time, a mutual concern lest FCC policies or regulations interfere with the broadcasting of legitimate information and advertising concerning horse racing. These concerns are reflected in the industry's offer to cooperate with the Commission in this area. Since June of 1964, we have been in touch with various representatives of the horse racing industry [2] and have considered with them the establishment of a liaison committee and the functions which it should perform. Members of the industry have been most cooperative and have offered a number of constructive suggestions. We believe that a sufficient period has now passed to permit a meaningful assessment by such a committee of industry experience under the revised policy statement.

In view of the foregoing, and in accordance with section 3(b) of Executive Order 11007, the Commission is today establishing an Industry Advisory Committee for the Horse Racing Industry under the Chairmanship of Commissioner Robert E. Lee. The Committee will function under Executive Order 11007, a copy of which is attached. Membership of the Committee will consist of representatives of the horse racing industry. Participation by the National Association of Broadcasters or other representative broadcast industry groups will also be welcomed. Federal Government officials will not serve as members of the Committee, but will attend and participate in its meetings in a non-member capacity. Ar-

[1] FCC 64–533, 29 F.R. 8013, June 24, 1964.
[2] See the attached list.

rangements will be made to facilitate the interchange of information and ideas between the Commission and Committee members during the periods between meetings of the Committee.

We believe the Committee should be free to consider and advise the Commission generally concerning the broadcasting of horse racing information. Without therefore intending to limit its role, we have concluded that the Committee could render a useful service in the following areas: (1) The Committee can review current practices in the broadcasting of racing news and advertising, both generally and in specific areas, and advise the Commission as to whether such practices are furnishing aid to illegal gambling interests or as to whether the broadcasting of legitimate racing information is being inhibited. (2) The Committee can study general or specific problems referred to it by the Commission. (3) Where its studies indicate the need, it can recommend changes in those policies and can also recommend appropriate action at Federal, State, local and industry levels. It can, finally, serve as a forum for the interchange of information and ideas, with the purpose of anticipating and dealing with mutual problems.

Eighteen persons connected with the horse racing industry have advised the Commission of their interest in such a committee and of their willingness to serve as members. These include 13 members of an existing "Industry Committee to Work with the Federal Communications Commission" appointed by Mr. Williams S. Miller, President of the National Association of State Racing Commissioners; 4 representatives of harness racing organizations, selected jointly by the Harness Tracks of America, Inc., The Harness Racing Institute, and the United States Trotting Association; and the President of the National Turf Writers Association. A list of these 18 persons is attached. Others who are interested in participating in the work of the Committee should advise the Committee Chairman in writing to that effect on or before May 7, 1965, stating their relationship to the horse racing industry or the broadcasting industry.

The first meeting of the Committee will be held at 10:00 A.M. on May 27, 1965, at the Commission's offices in Washington, D.C.

Adopted April 8, 1965.

FEDERAL COMMUNICATIONS COMMISSION.

BEN F. WAPLE, *Secretary.*

ATTACHMENT

*Representatives of the Horse Racing Industry Who Have Expressed an Interest in an Industry Advisory Committee*

Members of the "Industry Committee to Work with the Federal Communications Commission", appointed by William S. Miller, President, National Association of State Racing Commissioners:

Neil J. Curry
4055 Wilshire Boulevard
Los Angeles, Calif. 90005
Chairman, NASRC Committee: Immediate Past President, NASRC; Member, California Horse Racing Board

Edmund M. Hanrahan
70 Pine Street
New York N.Y.
Treasurer, NASRC; Member, New York State Racing Commission
William Fitzgerald
3618 37th Avenue South
Seattle, Wash.
Chairman, Washington State Racing Commission
William H. May
Box 423
Frankford, Ky.
Chairman, Kentucky State Racing Commission
Dr. Porter R. Rodgers
308 East Race
Searcy, Arkansas
Member, Arkansas State Racing Commission
Edward T. Dickinson
Post Office Box 90
Ozone Park
Jamaica, N.Y. 11417
Member of the Board, Thoroughbred Racing Associations; President, New York Racing Association
Robert P. Strub
Santa Anita Park
Arcadia, Calif.
President, Thoroughbred Racing Associations; President, Los Angeles Turf Club, Inc.
Spencer T. Drayton
220 East 42nd Street
New York, N.Y. 10017
Executive Vice President, Thoroughbred Racing Associations; President, Thoroughbred Racing Protective Bureau
Wathen B. Knebelkamp
Post Office Box 8427
Station E
Louisville, Ky. 40208
Secretary, Thoroughbred Racing Associations; President, Churchill Downs, Inc.
Herve Racivitch
American Bank Building
New Orleans, La.
President, Horsemen's Benevolent and Protective Association
Bryan Field
Box 2287
Wilmington, Del.
Vice President, Delaware Racing Association
Mrs. Marjorie L. Everett
Post Office Box 7
Arlington Heights, Ill.
Executive Vice President, Arlington Park Jockey Club; Executive Vice President, Washington Park Jockey Club
Eugene Mori
Post Office Box 311
Camden, N.J., and Post Office Box 158
Hialeah, Fla.
President, Garden State Racing Association; Chairman of the Board, Hialeah Race Course, Inc.

*Representatives of Harness Racing Interests Selected at the National Congress of Harness Racing*:

Stanley F. Bergstein
333 North Michigan Avenue
Chicago, Ill. 60601
Executive Director, Harness Racing Institute; Executive Secretary, Harness Tracks of America

John J. Chester
8 East Broad Street
Columbus, Ohio
Director, Harness Tracks of America; President, Mid-America Racing Association
Walter J. Michael
Post Office Box 511
Bucyrus, Ohio
President, United States Trotting Association
Byron D. Kuth
1630 Illuminating Building
Cleveland, Ohio
General Counsel, United States Trotting Association
Representative of the National Turf Writers Association: To be designated.

## ATTACHMENT

### EXECUTIVE ORDER 11007, PRESCRIBING REGULATIONS FOR THE FORMATION AND USE OF ADVISORY COMMITTEES

WHEREAS the departments and agencies of the Government frequently make use of advisory committees; and

WHEREAS the information, advice and recommendations obtained through advisory committees are beneficial to the operations of the Government; and

WHEREAS it is desirable to impose uniform standards for the departments and agencies of the Government to follow in forming and using advisory committees in order that such committees shall function at all times in consonance with the antitrust and conflict of interest laws:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, it is hereby ordered as follows:

SECTION 1. The regulations prescribed in this order for the formation and use of advisory committees shall govern the departments and agencies of the Government to the extent not inconsistent with specific law.

SEC. 2. As used herein,

(a) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, that is formed by a department or agency of the Government in the interest of obtaining advice or recommendations, or for any other purpose, and that is not composed wholly of officers or employees of the Government. The term also includes any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, that is not formed by a department or agency, but only during any period when it is being utilized by a department or agency in the same manner as a Government-formed advisory committee.

(b) The term "industry advisory committee" means an advisory committee composed predominantly of members or representatives of a single industry or group of related industries, or of any subdivision of a single industry made on a geographic, service or product basis.

SEC. 3 No advisory committee shall be formed or utilized by any department or agency unless

(a) specifically authorized by law or

(b) specifically determined as a matter of formal record by the head of the department or agency to be in the public interest in connection with the performance of duties imposed on that department or agency by law.

SEC. 4. Unless specifically authorized by law to the contrary, no committee shall be utilized for functions not solely advisory, and determinations of action to be taken with respect to matters upon which an advisory committee advises or recommends shall be made solely by officers or employees of the Government.

SEC. 5. Each industry committee shall be reasonably representative of the group of industries, the single industry, or the geographical, service, or product segment thereof to which it relates, taking into account the size and function of business enterprises in the industry or industries, and their location, affiliation, and competitive status, among other factors. Selection of industry members shall, unless otherwise provided by statute, be limited to individuals actively

engaged in operations in the particular industry, industries, or segments concerned, except where the department or agency head deems such limitations would interfere with effective committee operation.

SEC. 6. The meetings of an advisory committee formed or used by a department or agency shall be subject to the following rules:

(a) No meeting shall be held except at the call of, or with the advance approval of, a full-time salaried officer or employee of the department or agency, and with an agenda formulated or approved by such officer or employee.

(b) All meetings shall be under the chairmanship, or conducted in the presence of, a full-time salaried officer or employee of the Government who shall have the authority and be required to adjourn any meeting whenever he considers adjournment to be in the public interest.

(c) For advisory committees other than industry advisory committees, minutes of each meeting shall be kept which shall, as a minimum, contain a record of persons present, a description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the committee. The accuracy of all minutes shall be certified by a full-time salaried officer or employee of the Government present during the proceedings recorded.

(d) A verbatim transcript shall be kept of all proceedings at each meeting of an industry advisory committee, including the names of all persons present, their affiliation, and the capacity in which they attend: PROVIDED, that where the head of a department or agency formally determines that a verbatim transcript would interfere with the proper functioning of such a committee or would be impracticable, and that waiver of the requirement of a verbatim transcript is in the public interest, he may authorize in lieu thereof the keeping of minutes which shall, as a minimum, contain a record of persons present, a description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the committee. The accuracy of all minutes shall be certified to by a full-time salaried officer or employee of the Government present during the proceedings recorded.

(e) Industry advisory committees shall not be permitted to receive, compile, or discuss data or reports showing the current or projected commercial operations of identified business enterprises.

(f) In the case of advisory committees other than industry advisory committees, the department or agency head may waive compliance with any requirement contained in subsection (a), (b) or (c) of this section when he formally determines that compliance therewith would interfere with the proper functioning of such a committee or would be impracticable, that adequate provisions are otherwise made to insure that committee operation is subject to Government control and purpose, and that waiver of the requirement is in the public interest.

SEC. 7. The head of each department or agency sponsoring an advisory committee may prescribe additional regulations, consistent with the provisions and purposes of this order, to govern the formation or use of such committees, or the appointment of members thereof.

SEC. 8. An advisory committee whose duration is not otherwise fixed by law shall terminate not later than two years from the date of its formation unless the head of the department or agency by which it is utilized determines in writing not more than sixty days prior to the expiration of such two-year period that its continued existence is in the public interest. A like determination by the department or agency head shall be required not more than sixty days prior to the end of each subsequent two-year period to continue the existence of such committee thereafter. For the purpose of this section, the date of formation of an advisory committee in existence on the date of publication of this order shall be deemed to be July 1, 1960, or the actual date of its formation, whichever is later.

SEC. 9. The requirements of this order shall not apply:

(a) to any advisory committee for which Congress by statute has specified the purpose, composition and conduct unless and to the extent such statute authorizes the President to prescribe regulations for the formation or use of such committee;

(b) to any advisory committee composed wholly of representatives of State or local agencies or charitable, religious, educational, civic, social welfare, or other similar nonprofit organizations;

(c) to any local, regional, or national committee whose sole function is the dissemination of information for public agencies, or to any local civic com-

mittee whose primary function is that of rendering a public service other than giving advice or making recommendations to the Government.

SEC. 10. (a) Each department and agency utilizing advisory committees shall publish in its annual report, or otherwise publish annually, a list of such committees, including the names and affiliations of their members, a description of the function of each committee and a statement of the dates of its meetings: PROVIDED, that the head of the department or agency concerned may waive this requirement where he determines that such annual publication would be unduly costly or impracticable, but shall make such information available, upon request, to the Congress, the President, or the Attorney General.

(b) A copy of each such report shall be furnished to the Attorney General, and all records and files of advisory committees, including agenda, transcripts or notes of meetings, studies, analyses, reports or other data compilations or working papers, made available to or prepared by or for any such advisory committee, shall be made available upon request by the Attorney General, to his duly authorized representatives, subject to such security restrictions as may be properly imposed on the materials involved.

SEC. 11. This order supersedes the directive of February 2, 1959, entitled "Standards and Procedures for the Utilization of Public Advisory Committees by Government Departments and Agencies," and all provisions of prior Executive orders to the extent they are inconsistent herewith.

JOHN F. KENNEDY.

THE WHITE HOUSE,
*February 26, 1962.*

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In the Matters of | |
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| AMENDMENT OF SECTION 3.606 OF THE COMMISSION'S RULES AND REGULATIONS | Docket Nos. 8736 and 8975 |
| AMENDMENT OF THE COMMISSION'S RULES, REGULATIONS ANT ENGINEERING STANDARDS CONCERNING THE TELEVISION BROADCAST SERVICE | Docket No. 9175 |
| UTILIZATION OF FREQUENCIES IN THE BAND 470 TO 890 MCS. FOR TELEVISION BROADCASTING | Docket No. 8976 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS JONES AND BARTLEY NOT PARTICIPATING.

The Commission has before it a petition filed in these proceedings on May 7, 1951 by Peoples Broadcasting Company which requests a comparative hearing with WGAL, Inc., the licensee of television broadcast station WGAL–TV, Lancaster, Pennsylvania, for channel 8 in that city. An opposition to the petition was filed on June 11, 1951 by WGAL, Inc., and Peoples Broadcasting Company (hereinafter referred to as Peoples) filed a reply on June 20, 1951. On September 4, 1951 Peoples filed a statement "Setting Out Its Position" and WGAL, Inc. filed a "Statement of Counsel and Renewal of Motion to Dismiss Petition and request of Peoples Broadcasting Co." On September 25, 1951 WGAL, Inc. filed an "Opposition and Motion to Strike" the Peoples statement filed September 4, 1951; and on October 8, 1951 WGAL, Inc. filed a brief.

WGAL–TV has been operating on channel 4 in Lancaster, hitherto the only channel assigned to that city under § 3.606 of the Commission's Rules and Regulations. On March 21, 1951 the Commission adopted its Third Notice of Further Proposed Rule Making in the present proceedings ( released March 22, 1951; 16 F.R. 3072). This Notice proposed the deletion of channel 4 from Lancaster, and the addition of VHF channel 8 and UHF channel 21 in that city. This Notice, which provided a full opportunity for the submission of comments, also stated that if the proposal made therein with respect to these channels should be adopted, it was proposed to modify the license of WGAL, Inc. so as to substitute channel 8 for channel 4 in its authorization. This proposal was one of many made in the Notice to secure a better and more efficient utilization of television channels, promote the public interest, convenience and necessity, and carry out the provisions of the Communications Act of 1934, as amended.

The Third Notice of Further Proposed Rule Making also directed WGAL, Inc. along with other licensees and permittees whose authorizations were proposed to be changed, to show cause why its license should not be so modified in the event channel 4 should be deleted from Lancaster. This order to show cause was issued pursuant to Sections 303(f) and 312(b) of the Communications Act. On May 7, 1951, WGAL, Inc. responded to the show cause order and expressed its consent to the proposed modification of its license. It also supported the proposed assignment of channel 8 to Lancaster. In its Sixth Report and Order, adopted today, the Commission is adopting the proposed assignment of channels in Lancaster.

Peoples originally filed an application for a television broadcast station on channel 9 in Lancaster on August 3, 1950. A previous notice of rule making issued on July 11, 1949 had proposed the assignment of that channel to the city. On May 4, 1951, following the Notice of March 21, 1951, which made no provision for channel 9 in Lancaster, Peoples amended its application to specify channel 8. Peoples contends that its operation on channel 8 would better serve the public interest that would the operation of WGAL.[1]

Peoples filed both its original application for channel 9, and its amendment specifying channel 8, in the period during which the assignment of new television stations was suspended by the Commission [2] and befor ethe present rule making proceedings were concluded. The Peoples application was therefore filed before Peoples could know the final assignment of television channels to be made to Lancaster. It was also filed while the Commission was conducting proceedings looking toward the amendment of its rules and engineering standards applicable to television broadcasting. All applications filed prior to the adoption, in the Sixth Report and

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[1] As an alternative, Peoples requests that WGAL be moved to UHF channel 21.

[2] The purpose of the present proceedings was to provide a strong and permanent, yet flexible, framework upon which the development of television broadcasting might proceed. However, as is pointed out in the Sixth Report and Order of the Commission, if the proceeding was actually to be productive of a sound basis for the orderly development of television, it was necessary to halt the continued proceeding and grant of new applications while new standards and rules were being formulated. Otherwise any new assignment plan and attendant rules and stadnards might be frustrated at the outset by the continuing grant of new applications which would make the establishment of the plan impossible. On September 30, 1948 the Commission issued a Report and Order, the so-called "freeze" order, which amended § 1.371 of the Commission's Rules and Regulations by adding thereto footnote 10 which provided:

[10] Pending further consideration of the issues in Docket Nos. 8975 and 8736, requests for television authorizations on channels 2 through 13 will be considered in accordance with the following procedure:

"(a) Applications pending before the Commission and those hereafter filed for permits to construct television stations on channels 2 through 13 will not be acted upon by the Commission but will be placed in the pending files.

"(b) Applications pending before the Commission and those hereafter filed for modification of existing permits or licenses will be considered on a case-to-case basis and Commission action thereon will depend on the extent to which they are affected by the issues to be resolved in the proceedings bearing Docket Nos. 8975 and 8736.

"(c) No hearing dates will be scheduled with respect to applications for construction permits which have been designated for hearing, and in cases in which hearings have been commenced or completed but deciiosns have not been issued, no further action will be taken.

"(d) This procedure does not apply to construction permits or other television authorizations heretofore issued by the Commission." (47 CFR 1.371, Footnote 10 (1949 ed.)).

In its Third Notice of Further Proposed Rule Making, the Commission again (para. 15) stated that prospective new applicants should postpone filing their applications or amendments pending a final determination on the rules and standards then proposed, and stated that at the conclusion of the proceeding a reasonable period of time would be afforded during which new applications might be filed, and pending applications amended, in conformity with the new rules, standards and assignments. That period is provided for in the Sixth Report and Order. In accordance with footnote 10 to § 1.371, no new applications for television broadcast stations have been acted on by the Commission, although applications tendered for filing have not been summarily returned.

Order, of these changes in the rules and standards, must be amended to comply therewith, or be dismissed.

In view of the fact that the Peoples application was filed before the conclusion of these proceedings, and before the adoption of final assignments for Lancaster and the adoption of the new rules and standards, the Commission believes that the Peoples petition must be considered moot, and no determination will be made on its merits. In the event that the Peoples application is not amended in accordance with the rules adopted today, it will be dismissed. (See footnote 10 to § 1.371 of the Commission's Rules and Regulations, adopted in the Sixth Report and Order.) In the event that Peoples amends its application in accordance with the rules and regulations adopted in the Sixth Report and Order, and continues to seek channel 8 in Lancaster, it may at that time again raise the question of whether it is entitled to a comparative hearing with WGAL, Inc., since WGAL's license cannot be finally amended to specify channel 8 before the effective date of the assignment of that channel to Lancaster. That date, under Section 4(c) of the Administrative Procedure Act, 5 U.S.C. § 3(c), will be at least 30 days from publication of the Sixth Report and Order in the Federal Register.

Accordingly, it is ordered, this 11th day of April, 1952, that the "Petition of Objections to Commission's Third Notice of Further Proposed Rule Making" filed by Peoples Broadcasting Company on May 7, 1951, requesting a comparative hearing for channel 8 in Lancaster, Pennsylvania, be, and it is hereby, dismissed.

FEDERAL COMMUNICATIONS COMMISSION.

BEN F. WAPLE, *Secretary.*

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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| In the Matter of New Classifications, Regulations and Practices of THE WESTERN UNION TELEGRAPH CO. In Connection With Use of Interstate and Foreign Leased Facilities for the Dissemination of Horse or Dog Racing News | Docket No. 10112 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSIONERS WALKER, CHAIRMAN, WEBSTER, AND HENNOCK NOT PARTICIPATING.

The Commission has before it a motion and verified application in support thereof, filed by the State of California, intervenor herein, on March 5, 1952, to enlarge the issues in the above-entitled proceeding specified in the Commission's Order of January 30, 1952. Oppositions to the motion were filed on March 10, 1952, by respondent The Western Union Telegraph Company, and on March 12, 1952, by the Chief of the Commission's Common Carrier Bureau.

2. In the order of January 30, 1952, the Commission suspended until May 1, 1952,[1] the operation of a new tariff provision appearing on Western Union's Tariff F.C.C. 219, 7th Revised Page 8, proposing to restrict the users of Western Union's interstate and foreign leased facilities for the dissemination of horse or dog racing news to certain described categories.[2] The suspension order recited that the Commission was unable to determine upon examination whether the new tariff provision would be lawful under the Communications Act of 1934, as amended, and that the Commission should enter upon a hearing and investigation concerning the lawfulness of the classifications, regulations and practices set forth in the provision. Without in any way limiting its scope, it was ordered that the investigation herein should include

[1] By agreement of respondent Western Union the suspension period has been extended to July 1, 1952.

[2] The proposed new tariff provision reads as follows:

"The 'customer or lessee' and each 'authorized user' of facilities furnished under this tariff which are used for the dissemination of horse or dog racing news must be (1) a press association as defined in Western Union Tariff F.C.C. No. 205, amendments thereto and reissues thereof, (2) a publisher of a newspaper or other periodical publication which is entered as second-class matter in the United States Post Office Department, (3) a duly licensed radio or television broadcasting station, or (4) a person, firm or corporation engaged in the collection or transmission of horse or dog racing news to press associations, newspapers or radio stations for publication or broadcasting; and each 'station' or 'drop' on a circuit used for the dissemination of such racing news must be located in premises occupied by (1) a press association, (2) a person, firm or corporation who or which therein prints a publication entered as second class matter in the United Statet Post Office Department, (3) a duly licensed radio or television broadcasting station, or (4) a person, firm or corporation engaged in the collection or transmission of horse or dog racing news to press associations, newspapers or radio stations for publication or broadcasting."

consideration of six specific matters for the purpose of determining whether the classifications, regulations and practices set forth in the new tariff provision are just, reasonable and lawful under the Communications Act. Hearing in the matter before a Commission Examiner is now scheduled for May 1, 1952.

3. In the instant motion California requests the Commission to enlarge the above-mentioned issues so "that the Commission may determine:

(a) If the use being made of communications facilities or instrumentalities, in any instance, is in violation of law, or s aiding or abetting, directly or indirectly, a violation of law, or is not in the public interest and, if said use be found to exist, what action the Commission should take to prohibit or abate such use; and

(b) What action should be taken by this Commission to cause communications facilities and instrumentalities, if found to be employed in the use described in item (a) above, to be utilized solely for the purpose of satisfying legitimate demand for communications service.

4. In the verified application filed by California in support of its motion, after referring to the order of its Public Utilities Commission, dated April 6, 1948, and still in effect, directed toward abatement of use of communication facilities for unlawful purposes, it asserts that information of aid to persons engaged in the illegal activity of bookmaking is being transmitted over a wire leased from Western Union [3] in interestate and foreign commerce over which this Commission has jurisdiction, into many places, including California. California contends that "a mandatory prohibition against the use of interstate and foreign communications service, facilities and instrumentatilities by wholesalers of information to 'bookmakers' " is necessary to enforce State laws against bookmaking; and requests this Commission "to institute an investigation into the use to which interstate and foreign communications service, facilities and instrumentalities are being put to ascertain if said service, facilities and instrumentalities are being used to violate or to aid or abet, directly or indirectly, the violation of any State law, and if such conditions be found to exist, to prescribe an appropriate rule or regulation designed to abate such unlawful use". Finally, California asserts that evidence responsive to the issues enlarged as it requests "will disclose the appropriateness and necessity for the new provision of the revised tariff schedule filed by the Western Union Telegraph Company and quoted in the order of the Federal Communications Commission issued herein on January 31, 1952, or for some other or more effective method of curbing the use of communication facilities and instrumentalities for the purpose of aiding and abetting the unlawful business of 'bookmaking.' "

5. It is our view that it would be inappropriate for the Commission to conduct the sweeping type of administrative investigation

[3] On March 12, 1952, the Commission received the following telegram from Western Union:
"This is to give you formal advice that Western Union has been requested by Continental Press Service [the lesse of the facilities to which California refers] to cancel as of close of business today March twelfth all circuits leased from this company for the transmission of racing news. Further details will be furnished to you as soon as the effects of this cancellation develop."

requested by California.[4] Moreover, it is evident that California is requesting an entirely different type of proceeding from that contemplated by the Commission's Order of January 30, 1952, While the extent of the investigation requested by California is not entirely clear, it appears from its use of the unqualified term "communication facilities and instrumentalities", that it desires the Commission to investigate, in addition to Western Union's leased wire facilities, that carrier's other communication services, including Western Union's message services; the communication services, both telephone and telegraph, of all other carriers subject to the Commission's jurisdiction and, possibly, radio facilities. As indicated above, Western Union's interstate and foreign leased facilities are the only communication facilities within the range of the issues in the Commission's order of January 30, 1952. The object of the issues in the Commission's order of January 30, 1952, is to elicit facts to test the lawfulness of Western Union's new tariff provisions, the focal point of the investigation instituted by that order. Such an investigation looks toward a relatively uncomplicated inquiry. In our view, the recital of these differences between the investigation contemplated by the Commission's order of January 30, 1952, and the scope and type of investigation apparently requested by California, is sufficient to demonstrate that California's request should not here be entertained.

6. Accordingly, it is ordered, this 18th day of April, 1952, that the above described motion to enlarge issues, filed by the State of California on March 5, 1952, is denied.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[4] The Commission has expressed its opinion to Congress that the transmission of gambling information in interstate commerce should be outlawed (see, e.g. letter to the Chairman of the Senate Interstate and Foreign Commerce Committee, dated September 19, 1951, submitting comments on S. 2116, a bill to prohibit transmission of certain gambling information in interstate commerce, Senate Report No. 925, 81st Congress, 1st Session, page 37).

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT; AND INTERNATIONAL MONETARY FUND, COMPLAINANTS<br>v.<br>ALL AMERICA CABLES & RADIO, INC., THE COMMERCIAL CABLE CO.; MACKAY RADIO & TELEGRAPH CO., INC.; RCA COMMUNICATIONS, INC.; AND THE WESTERN UNION TELEGRAPH CO., DEFENDANTS | Docket No. 9362 |

### ORDER

The Commission having under consideration a petition, tendered for filing by the United States Department of State on March 11, 1952 (the affidavit of service thereof having been filed on March 14, 1952), seeking leave to intervene herein for the limited purpose of requesting "that the Commission not adopt Conclusion 17 of the initial decision of the Hearing Examiner, appearing at pages 29–30 of that decision";

It appearing, that an opposition to said petition to intervene was filed on March 17, 1952, by defendants All America Cable's and Radio, Inc., The Commercial Cable Company and Mackay Radio and Telegraph Company, in which they request that the petition be dismissed, asserting, among other things, that petitioner, though granted the opportunity by the Commission to participate at the hearings of this proceeding as an intervenor, had not done so, that § 1.722 of the Commission's Rules, under which intervention is sought by petitioner, does not provide for intervention after the completion of hearings, as in the present case, and that now to permit intervention by petitioner for the purpose stated in the petition would be prejudicial to the defendants, "since they have had no opportunity during the hearing stages of the case to hear, consider and rebut the new views of the Department on the subject of the applicability of the International Organizations Immunities Act to communication rates"; and that an opposition to said petition was also filed by defendant RCA Communications, Inc., on March 21, 1952, requesting dismissal of the petition, contending, among other things, that intervention should not be permitted because it would be prejudicial to the defendants, inasmuch as they "would have no opportunity to consider these new opinions [of the Department of State], or examine and be heard concerning the arguments in respect thereof"; and

It further appearing, that § 1.722(b) of the Commission's Rules provides that the Commission may limit participation by an inter-

venor to "particular issues or to a particular stage o fthe proceedings", and thus permits intervention by petitioner at this time; and that defendants are not prejudiced by the fact that petitioner has not hitherto sought to participate as an intervenor, since they are afforded an opportunity by way of reply to any exceptions which may be filed by petitioner after intervention, and in any oral argument that may be held herein, to rebut petitioner's views;

It is ordered, this 26th day of March, 1952, that the aforesaid petition to intervene, filed by the United States Department of State, is granted; and that petitioner is granted leave to intervene herein, for the limited purpose of requesting that the Commission not adopt Paragraph 17 of the Conclusion of the initial decision in this proceeding.

ROBERT F. JONES, *Commissioner.*

**BEFORE THE**

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
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| TRAVELERS BROADCASTING SERVICE CORP., HARTFORD, CONN. | Docket No. 8621<br>File No. BPCT–193 |
| THE CONNECTICUT BROADCASTING CO., HARTFORD, CONN. | Docket No. 8622<br>File No. BPCT–195 |
| THE HARTFORD TIMES, INC., HARTFORD, CONN. | Docket No. 8760<br>File No. BPCT–273 |
| EURITH DICKINSON RIVERS, JR., ATLANTA, GA. | Docket No. 8818<br>File No. BPCT–266 |
| BOARD OF REGENTS, UNIVERSITY SYSTEM OF GEORGIA, FOR AND ON BEHALF OF GEORGIA INSTITUTE OF TECHNOLOGY, ATLANTA, GA. | Docket No. 8819<br>File No. BPCT–286 |
| MIKE BENTON D.B.A. GENERAL BROADCASTING CO., ATLANTA, GA. | Docket No. 8820<br>File No. BPCT–309 |
| NEW ENGLAND TELEVISION CO., INC., FALL RIVER, MASS. | Docket No. 8661<br>File No. BPCT–209 |
| E. ANTHONY & SONS, INC., NEW BEDFORD, MASS. | Docket No. 8662<br>File No. BPCT–217 |
| FALL RIVER HERALD NEWS PUBLISHING CO., FALL RIVER, MASS. | Docket No. 8781<br>File No. BPCT–301 |
| MIAMI BROADCASTING CO., MIAMI, FLA. | Docket No. 8766<br>File No. BPCT–218 |
| THE FORT INDUSTRY CO., MIAMI, FLA. | Docket No. 8767<br>File No. BPCT–228 |
| ISLE OF DREAMS BROADCASTING CORP., MIAMI, FLA. | Docket No. 8768<br>File No. BPCT–237 |
| MIAMI HOLLYWOOD TELEVISION CORP., MIAMI, FLA. | Docket No. 9071<br>File No. BPCT–397 |
| WKAT, INC., MIAMI BEACH, FLA. | Docket No. 9321<br>File No. BPCT–399 |
| NEW ENGLAND TELEVISION CO., INC., KANSAS CITY, MO. | Docket No. 8802<br>File No. BPCT–267 |
| KCMO BROADCASTING CO., KANSAS CITY, MO. | Docket No. 8803<br>File No. BPCT–291 |
| MIDLAND BROADCASTING CO., KANSAS CITY, MO. | Docket No. 8804<br>File No. BPCT–292 |
| WHB BROADCASTING CO., KANSAS CITY, MO. | Docket No. 8805<br>File No. BPCT–316 |
| THE KCKN BROADCASTING CO., KANSAS CITY, KANS. | Docket No. 8806<br>File No. BPCT–312 |
| NEW ENGLAND TELEVISION CO., INC., ST. LOUIS, MO. | Docket No. 8808<br>File No. BPCT–277 |
| THE ST. LOUIS UNIVERSITY, ST LOUIS, MO. | Docket No. 8809<br>File No. BPCT–294 |

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| KWK, INC., ST. LOUIS, MO. | Docket No. 8810<br>File No. BPCT–324 |
| STAR TIMES PUBLISHING CO., ST. LOUIS, MO. | Docket No. 8811<br>File No. BPCT–327 |
| HUDSON BROADCASTING CO., INC., ALBANY, N.Y. | Docket No. 8940<br>File No. BPCT–389 |
| PATROON BROADCASTING CO., INC., ALBANY, N.Y. | Docket No. 8942<br>File No. BPCT–405 |
| VAN CURLER BROADCASTING CORP., ALBANY, N.Y. | Docket No. 8943<br>File No. BPCT–408 |
| TROY BROADCASTING CO., INC., TROY, N.Y. | Docket No. 8944<br>File No. BPCT–412 |
| MEREDITH CHAMPLAIN TELEVISION CORP., ALBANY, N.Y. | Docket No. 8971<br>File No. BPCT–421 |
| RADIO STATION WSOC, INC., CHARLOTTE, N.C. | Docket No. 8837<br>File No. BPCT–304 |
| INTER-CITY ADVERTISING CO., CHARLOTTE, N.C. | Docket No. 8838<br>File No. BPCT–344 |
| SURETY BROADCASTING CO., CHARLOTTE, N.C. | Docket No. 8839<br>File No. BPCT–349 |
| SUMMIT RADIO CORP., AKRON, OHIO | Docket No. 8723<br>File No. BPCT–230 |
| ALLEN T. SIMMONS, AKRON, OHIO | Docket No. 8724<br>File No. BPCT–243 |
| THE VINDICATOR PRINTING CO., YOUNGSTOWN, OHIO | Docket No. 8761<br>File No. BPCT–259 |
| WKBN BROADCASTING CORP., YOUNGSTOWN, OHIO | Docket No. 8762<br>File No. BPCT–275 |
| MANSFIELD RADIO CO., YOUNGSTOWN, OHIO | Docket No. 8790<br>File No. BPCT–295 |
| ALLEGHENY BROADCASTING CORP., PITTSBURGH, PA. | Docket No. 7287<br>File No. BPCT–147 |
| WESTINGHOUSE RADIO STATIONS, INC., PITTSBURGH, PA. | Docket No. 8694<br>File No. BPCT–221 |
| WWSW, INC., PITTSBURGH, PA. | Docket No. 8730<br>File No. BPCT–254 |
| UNITED BROADCASTING CORP., PITTSBURGH, PA. | Docket No. 8743<br>File No. BPCT–276 |
| WCAE, INC., PITTSBURGH, PA. | Docket No. 8782<br>File No. BPCT–293 |
| PITTSBURGH RADIO SUPPLY HOUSE, INC., PITTSBURGH, PA. | Docket No. 8840<br>File No. BPCT–345 |
| MATTA BROADCASTING CO., PITTSBURGH, PA. | Docket No. 9024<br>File No. BPCT–482 |
| LOUIS G. BALTIMORE, WILKES-BARRE, PA. | Docket No. 8679<br>File Nok BPCT–134 |
| WYOMING VALLEY BROADCASTING CO., WILKES-BARRE, PA. | Docket No. 8680<br>File No. BPCT–231 |
| SUSQUEHANNA BROADCASTING CO., YORK, PA. | Docket No. 8791<br>File No. BPCT–302 |

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| H. J. WILLIAMS, M. E. COUSLER, LOWELL W. WILLIAMS, AND EDWARD C. HALE, PARTNERS D.B.A. THE HELM COAL CO., YORK, PA. | Docket No. 8902<br>File No. BPCT–356 |
| L. F. CORRIGAN, TRADING AS TEXAS TELEVISION, TEX. | Docket No. 8748<br>File No. BPCT–238 |
| VARIETY BROADCASTING CO., INC., DALLAS, TEX. | Docket No. 8750 |

For New Television Stations

ORDER

At a session of the Federal Communications Commission, held at its offices in Washington, D.C., on the 11th day of April, 1952;

The Commission having under consideration (1) the above-entitled applications requesting construction permits for new television stations and (2) the Commission's Sixth Report and Order (FCC 52–294) [§ 91:45 *supra*] issued simultaneously with this Order; and

It appearing, that the above-entitled applications were designated for hearing prior to September 30, 1948, but that no hearings were held prior to that date and that said hearings were continued indefinitely; and

It further appearing, that on September 30, 1948, the Commission issued a Report and Order (FCC 48–2182) (usually referred to as the freeze order) adopting footnote 10 to § 1.371 of its Rules and Regulations wherein the Commission provided with respect to applications for construction permits for new television stations which had been designated for hearing, no hearing dates would be scheduled and no further action would be taken pending further consideration of the issues in Docket Nos. 8975 and 8736; and

It further appearing, that the Commission, simultaneously with the issuance of this Order, has issued a Sixth Report and Order (FCC 52–294) [§ 91:45 *supra*] in Docket Nos. 8736, et al, amending its Rules and Regulations including the technical standards, and Table of Assignments for the television broadcast service so as to provide for the prediction of field strengths upon the basis of propagation charts which differ from the charts provided prior to September 30, 1948, to require greater field strengths, for service to the principal city sought to be served, than were required under the engineering standards in effect prior to September 30, 1948, to require the maintenance of greater minimum separations between the transmitters of television stations operating on the same channel than were required under the standards in effect prior to September 30, 1948, and has made numerout other changes in said television Rules and Regulations affecting the nature of applications for television broadcast stations which are eligible for consideration; and

It further appearing, that the above-entitled applications were accepted for filing and were designated for hearing in the light of said Rules and Regulations in effect prior to September 30, 1948; and that in numerous respects the engineering data submitted in

the applications are not of the nature or form required under the the Commission; and

It further appearing, that the above-mentioned changes in the Commission's Rules and Regulations were adopted in rule making proceeding (Docket No. 8736, et al); that each of the applicants named above was afforded an opportunity to participate fully in those proceedings and to submit comments on the matters in issue therein, including the various proposals for revising the Commission's Rules and Regulations, including the technical standards and Table of Assignments; and

It further appearing, that in the period since the above-entitled applications were designated for hearing the Commission has conducted extensive rules making proceedings looking toward the development of a nationwide television broadcast service and new developments in the art; that extensive amendments to the above-entitled applications are required to bring the minto conformity with said new Rules and Regulations; and

It further appearing, that the Commission in the exercise of its discretionary powers may adjust its procedures to the exigencies of the occasion, FCC v. Pottsville Broadcasting Company, 309 U.S. 146 (1940); that the changed situation brought about by the passage of time and the adoption of these new Rules and Regulations has created a unique situation which now makes it necessary for the Commission, in the interest of effectively administering the Communications Act of 1934, as amended, to adjust its procedures in a manner that would conduce to the dispatch of the Commission's business, serve the ends of justice and would otherwise be in the public interest, convenience and necessity; and that the Commission can more effectively discharge its administrative responsibilities and serve the ends of justice by removing from hearing the above-entitled applications to make them available for consideration with other applications in accordance with applicable Commission Rules and Regulations;

Accordingly, it is ordered, upon the Commission's own motion, that the above-entitled applications for new television stations are removed from the hearing docket.

FEDERAL COMMUNICATIONS COMMISSION.

NOTE: Substantially identical orders were entered in a large number of other dockets in which applications had been designated for hearing prior to the "freeze" as well as in a number of dockets in which hearings or partial hearings had been held prior to the "freeze".

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of PACIFIC COAST BROADCASTING CO. (KXLA), PASADENA, CALIF. For Modification of License | Docket No. 9594 File No. BML–1328 |
| In Re Order To Show Cause Directed to PACIFIC COAST BROADCASTING CO. (K–LA), PASADENA. CALIF. | Docket No. 9595 File No. BS–1189 |

ORDER

The Commission having under consideration (1) a petition filed on March 22, 1951, by Pacific Coast Broadcasting Co. (KXLA) requesting leave to amend its application herein and secondly, that the hearing record in the proceeding be held open beyond March 23, 1951 to permit the receipt therein of an exhibit; (2) the Commission's Order of March 30, 1951; extending the time for filing any opposition to said petition to April 16, 1951; (3) an opposition to said petition filed on April 16, 1951, on behalf of KFAB Broadcasting Company (KFAB), party respondent herein; and (4) the oral argument on said petition and opposition held on April 20, 1951; and

It appearing, that the hearing herein was concluded on March 9, 1951, and that by Order of the Examiner, the record of the proceeding was held open until March 23, 1951 to permit the applicant to supply for the record, copies of an exhibit (numbered Exhibit 28), consisting of an official map of the city of Pasadena; that the record herein was closed on March 23, 1951; that the petitioner alleges that copies of said exhibit were not filed within the time allowed therefor because they were lost in the mail; that so much of the petition herein as requests that the record be held open is, in effect, a request that the record be reopened for the purpose of receiving said exhibit after the time allowed for the filing of the same; that there is no opposition to so much of the petition herein as reqlests leave to file said exhibit late; and good cause has been shown therefor; and

It further appearing, that so much of the petition as requests leave to amend, seeks generally to conform the engineering portions of the application herein to the proof offered during the course of the hearing herein; that the amendment specifically seeks: (1) to correct a typegraphical error in the original application describing one of the monitoring points set out in the applicant's license, (2) to make part of the application two engineering reports offered in evidence (as Exhibits 2 and 3) during the course of the hearing herein and (3) with the receipt of said new engineering reports, to enlarge the prayer for relief set forth in

the application herein for modification of license, so as to request that the license of Station KXLA be modified to set forth new values of groundwave field intensities at the various monitoring points of the KXLA nighttime directional array, which values would conform to the latest available measured data relating to the operation of said array, as shown by the evidence in the record; and

It further appearing, that on two separate occasions between the time when the application herein was designated for hearing and the hearing was begun, power lines were constructed in the vicinity of applicant's site, the presence of which had re-radiating effects upon the operation of KXLA's nighttime directional array; that on both occasions the applicant caused groundwave field intensity measurements to be made, similar to those required in connection with the proof of performance; that the second set of groundwave field intensity measurements (which is the principal material sought to be incorporated in the application by this amendment) were not, and could not, have been completed until immediately prior to the opening of the hearing in this proceeding and that, therefore, good cause has been shown why the petition for leave to amend its application could not have been filed earlier; and

It further appearing, that the opposition to said petition alleges (1) that the record of the hearing, which extended over a period of six days, would be materially affected if the petition herein were allowed, (2) that the amendment is major in character and was not tendered at least twenty days before the hearing, and (3) that good cause has not been shown by KXLA for a waiver of paragraphs 1.365(a) and 1.387(b) (3) of the Commission's Rules; and

It further appearing, that a grant of said petition would not necessitate any further hearing in this proceeding and would not affect the record heretofore made herein; that there is no "twenty-day rule" with respect to amendments of applications, the only requirement being that requests for leave to amend an application after it has been designated for hearing, be upon good cause shown; that there is no need for waiver of §§ 1.365(a) and 1.387(b) (3) of the Commission's Rules, since neither rule is applicable herein; and

It further appearing, that counsel for KFAB Broadcasting Company has noted his exception to any action which the Examiner might take granting the petition herein for leave to amend the application of Pacific Coast Broadcasting Company and has requested that his exception be carried forward in the record;

It is ordered, this twenty-third day of April, 1951, that the petition herein of Pacific Coast Broadcasting Company is hereby granted; the record in the proceeding herein is hereby reopened for the limited purpose of receiving in evidence Exhibit 28; that the amendment attached to said petition is hereby accepted; and the record herein is hereby closed, as of this date.

JACK P. BLUME, *Hearing Examiner.*

F.C.C. 65R–139

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>KFOX, INC. (KFOX), PASADENA, CALIF. AL.<br>For Construction Permits | Docket No. 15751 through 15766<br>File No. BP–16149 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Pasadena Broadcasting Company (Pasadena Broadcasting) requests enlargement of issues with respect to the application of Orange Radio, Inc. (Orange).[1] The requested issues read as follows:

(1) To determine whether there is a reasonable likelihood that Orange Radio, Inc. will be able to construct its proposed antenna system on the property specified in its application in view of problems with respect to a railroad easement, a highway right-of-way, and zoning.

(2) To determine whether maximum expected operating values specified for the directional antenna pattern of Orange Radio, Inc. are those which can reasonably be expected to be achieved for the directional antenna array and power proposed.

*Site Feasibility*

2. Pasadena Broadcasting contends that Orange's proposed transmitter site has two easements of record, one of which is 42 feet wide along the entire southern portion of the site to accommodate the proposed Pomona Freeway, and the other is 20 feet wide curving through the site for a proposed railroad spur track. It argues that there is no indication that the applicant has considered the effect on its proposed nighttime directional antenna array of such a spur track, and that the prospect of having large steel masses (railroad cars) standing near the towers would not be considered as good engineering practice, citing *Hamtramck Radio Corp.*, 6 RR 472. Pasadena Broadcasting also contends that some of the ground system radials around Orange's Tower No. 1 to the south are reduced from 221 feet long to 170 feet long because of property limitations, that if the 42 foot highway easements along the southern boundary of the site is taken into account, the applicant will have to further reduce this portion of the ground system by another 42 feet, and that this reduction could affect the stability of the array.[2]

[1] The Review Board has before it (a) petition of Pasadena Broadcasting Company to enlarge issues with respect to application of Orange Radio, Inc., filed January 18, 1965; (b) Broadcast Bureau's opposition, filed February 12, 1965; and (c) opposition of Orange Radio, Inc., filed February 15, 1965.

[2] The engineering affidavit attached to Pasadena Broadcasting's petition is more restrictive; stating only that such a reduction of the ground system around Tower No. 1 "will not contribute to the stability" of Orange's array.

3. Pasadena Broadcasting further contends that the zoning regulations of City of Industry do not allow for radio towers; that if a use permit were to be granted, the grounds for the exceptions are that it must be shown that the exception is necessary for the preservation of a substantial property right of the owner and that the exception will not be materially detrimental to the public welfare nor to the property of other persons located in the vicinity of the said use; and that objections would be raised by the developer and residents of Sunshine Village Homes, located immediately south of the site, to obstruction of the view that would be created by seven tall radio towers, and other protests would come from owners of other residential properties in the area and from the governing body of the local school district. Petitioner further contends that, if a zoning exception were granted, such grant may be conditioned upon the towers being no closer to the property line than actual physical height to prevent damage to adjacent property should one of the towers fall; that it may be subject to judicial attack since the city would be violating the terms of its own ordinance; and that permission would have to be obtained from the State Division of Highways to locate a ground system beneath the Pomona Freeway right-of-way, which would be extremely difficult to obtain.

4. In opposition, Orange submits a copy of a quitclaim deed executed on October 30, 1963, and recorded on November 6, 1963, showing that the railroad easement terminated more than one year before the petition was filed. As to the question of highway right-of-way along the southern border of the property, Orange foresees no difficulty in obtaining permission from the California Department of Public Works to bury its radials across this easement, and if the permission to bury the radials across this right-of-way is not obtained, it states that some of the ground system wires around Tower No. 1 will be terminated at the easement line, but that such action would have no measurable effect upon the stability of the proposed antenna system. With respect to zoning, Orange argues that Commission requirements are satisfied when an applicant proposes a site with reasonable assurance in good faith that the site will be available to him for the intended purpose, citing *Beacon Broadcasting System, Inc.*, FCC 61–684, 21 RR 727 (1961), and that assertions of difficulties in securing a zoning clearance, or that a zoning variance must be sought, are insufficient to show an unlikelihood, an improbability, or an impossibility of securing the zoning approval, and are not enough to support the addition of a zoning issue, citing *Eastside Broadcasting Co.*, FCC 63R–528, 1 RR 2d 763; *Chronicle Publishing Co. (KRON–TV)*, FCC 64R–309, 3 RR 2d 529 (-964). Orange contends that the site, already zoned for manufacturing purposes, is ideal for tower construction, that the City Manager of the City of Industry does not anticipate any problems and the city officials would be pleased to have a radio station tower on the specified site, and that the City Manager has said that the proper time to proceed further before the City of Industry would be after a grant of the Orange application. The Broadcast Bureau also opposes the petition.

5. Since the easement for the railroad spur track no longer exists,

the problem or reradiation of signal from large steel masses will not arise. As to the problem of easement along the southern border of the property which could affect the stability of the array, Orange asserts that, if the ground radials of number one tower were curtailed, the experience of their engineers show that no measurable effect on the array's stability will be observed. It is noted that the reduction in the length of the ground radials appears not to be such as to measurably affect the operation of the antenna system.[3] However, in the event that the Orange application is granted, permittee must conduct a complete proof of performance to show that the station is capable of operating as proposed. *Pinellas Radio Company,* FCC 63R–125, 25 RR 100. With respect to zoning, there appears to be a difference of opinion between petitioner's and Orange's counsel as to the probable action of the local zoning board. At this juncture, Orange has not filed an application for zoning action on the selected transmitter site, and the action of the local zoning board remains to be seen. The allegation, based upon a letter from a law firm, is not sufficient to cause an addition of an issue. *Eastside Broadcasting Co., supra.* Thus, the request to include the site feasibility issue will be denied.

*Maximum Expected Operating Values* [4]

6. Pasadena Broadcasting states that (1) the purpose of a maximum expected operating value (MEOV) is to allow for safety factor in the desing of a directional antenna system as to assure protection to other stations by providing for unknown variables, (2) an MEOV should be used within the limits of good engineering judgment and not used in an arbitrary manner to prevent allocation problems, and (3) an MEOV used for a directional antenna pattern must bear a direct mathematical relationship to the pattern to which it is applied. Petitioner alleges that the MEOV's proposed by Orange are not realistic, do not directly relate mathematically to its daytime directional antenna pattern, are not symmetrical, and have been chosen arbitrarily. Pasadena Broadcasting alleges substantially that Orange has used a "pick and choose" method of determining its MEOV's, that there is "no mathematical reason" for an MEOV, and that, although nighttime in-line array shows symmetrical MEOV's in the horizontal plane, the MEOV's in the vertical plane should show the same increase over calculated values as does the MEOV at the zero degree elevation.

7. As pointed out by petitioner, among the variables for which allowance must be made in specifying MEOV's are reradiation or reflections from extraneous objects, different attenuation factors for tall towers, and levelness of site; these factors are not covered in the mathematical expression for directional array. These variables are not usually located symmetrically around a directional antenna system, and thus allowances are made for the unpredictable effects of these variables upon the operation of the direc-

[3] A 40 foot by 40 foot ground screen at the tower base, and 80 of the 120 radial wires would be unaffected. Of the 40 wires affected, the reduction in length would vary from no reduction to a maximum of 42 feet.

[4] In this proceeding, substantially similar allegations by petitioner were considered, and a requested enlargement of issues denied by Memorandum Opinion and Order, FCC 65R-103, released March 22, 1965.

tional antenna system. The values so specified are based upon the engineer's judgment and experience, and upon the amount of expected departure of the MEOV from the calculated value of radiation at the azimuth under consideration. *Edina Corp.*, FCC 62R–94, 24 RR 436, 438 (1962). With respect to the example to which petitioner makes reference, Orange submits an affidavit that the MEOV at a specific vertical angle was misplotted inadvertently. Petitioner's statement that an MEOV should not be used in an arbitrary manner to prevent allocation problems is valid, but the petitioner does not allege that Orange's array cannot be adjusted within its proposed MEOV's. In view of the above and the fact that, under Issue 8 herein, Orange must establish that it will be able to adjust and maintain its directional antenna system, petitioner has failed to allege facts sufficient to warrant addition of the requested issue.

Accordingly, IT IS ORDERED, This 19th day of April, 1965, That the petition, filed January 18, 1965, by Pasadena Broadcasting Company to enlarge issues with respect to the application of Orange Radio, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–138

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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| In Re Applications of KFOX, INC. (KFOX), PASADENA, CALIF., ET AL. For Construction Permits | Docket No. 15751 through 15766 File No. BP–16149 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Pasadena Broadcasting Company (Pasadena Broadcasting) has filed four petitions requesting addition of issues concerning the nighttime directional antenna proposals of four applicants.[1] The petitions are directed to the applications of Radio Southern California, Incorporated; Goodson-Todman Broadcasting, Inc. (Goodson-Todman); Crown City Broadcasting Co. (Crown City); and Pasadena Community Station, Inc. (Pasadena Community). Each applicant proposes to use the existing KRLA directional antenna array. Pasadena Broadcasting contends that each of these applicants assumed that the electrical heights and the physical heights of KRLA antenna towers are the same, but that the KRLA measured data on file with the Commission show that this assumption is incorrect. Petitioner further contends that the differences between the physical heights and the actual electrical heights vary as much as 24.6 degrees; that the use of physical heights as the electrical heights of towers has resulted in incorrect vertical radiation factors being used in determining the nighttime vertical radiation patterns; and that, therefore, applicants' showings cannot be relied upon to determine the vertical values of radiation toward Station KFAB.[2] Pasadena Broadcasting thus requests the following issues as to each of the four applicants mentioned above:

G To determine whether the proposed directional antenna parameters accurately depict the proposed nighttime radiation pattern of [each applicant].

2. Oppositions to the petitions were filed by Goodson-Todman, Pasadena Community, Crown City, and the Broadcast Bureau. The oppositions point out that, although petitioner has based its

[1] The Review Board has before it (a) four petitions of Pasadena Broadcasting Company to enlarge issues with respect to the following applications filed on the date shown: Goodson-Todman Broadcasting, Inc., January 19, 1965; Crown City Broadcasting Co., January 19, 1965; Pasadena Community Station, Inc., January 21, 1965; Radio Southern California, Incorporated, January 21, 1965; (b) Broadcast Bureau's oppositions to each of the applications listed above, filed February 11, 1965; (c) opposition of Goodson-Todman Broadcasting, Inc., filed February 15, 1965; (d) reply of Pasadena Broadcasting Company to oppositions of Goodsn-Todman Broadcasting, Inc. and Broadcast Bureau, filed March 1, 1965; (e) opposition of Crown City Broadcasting Company, filed February 15, 1965; and (f) joint opposition of The Bible Institute of Los Angeles, Inc. and Pasadena Community Station, Inc., filed February 15, 1965.

[2] Petitioner cites instances wherein it asserts that radiation increases of 118.5% and 147.4% would result. Actually, it is alleged that in one instance the value would increase from 12.4 mv/m to 14.7 mv/m, an increase of 18.5%; and that in another instance, the increase would be from 3.1 mv/m to 4.57 mv/m, an increase of 47.4%.

contentions on curves depicting the current distributions of KRLA's four antenna towers, the required supporting measurement data, from which the curves were derived and information as to the procedure, and method employed in measuring the current distribution on each tower are not available; and that, therefore, it is improper to use such incomplete information as a basis to question the design of a directional antenna array. The opponents also argue that the purpose of the KRLA current distribution measurements was to demonstrate that the measured current distributions were in substantial agreement with the theoretical values, and that such agreement was shown. Goodson-Todman in its opposition submits an engineering analysis showing that its theoretically computed vertical radiation factors, calculated in accordance with the standard design formula, compare closely with such factors when determined by a formula utilizing KRLA's measured current distributions. Goodson-Todman also contends that the petitioner erred in relying upon the standard formula for computing the vertical radiation factors from the hypothetical taller towers, since the relations from which the standard formula is derived include a term relating to the actual height of the tower, not to some hypothetical extended height, and that, consequently, petitioner's further computations and conclusions are in error and unworthy of further consideration. The respondents note that it is common practice to assume that the electrical height of towers in a directional array is the same as the physical height and that the current distribution along such towers is sinusoidal; that for many years the Commission has been approving directional antenna designs which utilized such assumptions; that in the absence of precise information concerning currents, phases and other variables, it is preferable to rely on such assumptions; and that their directional antenna system can be adjusted to operate as proposed.

3. In reply, Pasadena Broadcasting contends that Goodson-Todman used an invalid formula for analyzing the current distribution; that the objection that KRLA's engineer, who made the measurements, did not go into details as to how he took the measurements is unimportant in view of that engineer's reputation and standing; and that the fact that the Commission may have made no use of the current distribution curves is not significant since they were not required by KRLA's construction permit, and probably never were examined.

4. Our disposition of Pasadena Broadcasting's request for enlargement of issues requires the resolution of engineering questions. Petitioner contends that the measured current distributions of the towers of the KRLA array establish that the electrical heights of the towers in the directional arrays proposed by Goodson-Todman, Crown City, Radio Southern California, and Pasadena Community (all proposing to utilize the existing KRLA array) are greater than their physical heights; that the vertical radiation patterns of these proposals, being calculated on the basis of the physical heights of the KRLA towers rather than their measured electrical heights, cannot be achieved. However, Pasadena Broadcasting has not adequately substantiated its allegations

that the vertical radiation factors relied upon by the four applicants are incorrect or that those tabulated in its petition are correct. Petitioner has nowhere explained the basis for its "correct" vertical radiation factors, other than that they are based upon the measured electrical heights of the KRLA towers. As to how these factors were calculated and what formula was employed in their calculations are not set forth by petitioner. It can only be inferred that the standard formula [3] universally employed by engineers for calculating vertical radiation factors has been used. If so, this formula is normally used when the following assumptions are made: that the physical height is the same as the electrical height, and the current distribution along a tower is sinusoidal; ths same assumptions employed by petitioner in the design of its proposed array. Petitioner failed to show what formula it used, and that such formula is appropriate for use in the manner in which it was employed. Commission Rule, Section 73.150(a), sets forth the engineering data required to be submitted in connection with a directional antenna proposal, subsections 4(i) and (ii) thereof requires the following to be submitted:

(i) Formula used for calculating the horizontal patterns, sample calculations. (Derivation of formula if other than standard is used.)

(ii) All assumptions made and basis therefore, including electrical height, current distribution and efficiency of each element, and ground conductivity.

5. As stated above, petitioner has not indicated the formula used in its computations, or sample calculations, or any other information supporting its conclusions. In addition, Pasadena Broadcasting has failed to submit the essential corroborating measurement data from which the current distribution curves upon which it bases its case were derived. Consequently, the current distribution curves alone are insufficient to serve as a basis for addition of the requested issue. Nor has petitioner alleged any other facts warranting a departure from the usual assumptions which applicants and the Commission have relied upon over the years in the design of directional arrays to warrant the addition of the requested issue. Thus, petitioner has failed to support its allegations and its petition must be denied.

ACCORDINGLY, IT IS ORDERED, This 19th day of April, 1965, That the petitions of Pasadena Broadcasting Company to enlarge issues with respect to the following applications, filed on the date shown, ARE DENIED:

Goodson-Todman Broadcasting, Inc., January 19, 1965
Crown City Broadcasting Co., January 19, 1965
Pasadena Community Station, Inc., January 21, 1965
Radio Southern California, Incorporated, January 21, 1965

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[3] The engineering affidavit attached to Goodson-Todman Broadcasting, Inc. states, in part, as follows: "[Petitioner's engineer] then erroneoursly used the standard formula for the vertical radiation factor of the taller tower, as though the physical height of the structure had actually increased. An error arises because the relation from which the standard formula is derived include a term relating to the actual height of the tower, not to some hypothetical extended height."

F.C.C. 65–318

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| SPANISH INTERNATIONAL TELEVISION CO., INC., PATERSON, N.J. | Docket No. 15089<br>File No. BPCT–3032 |
| BARTELL BROADCASTERS, INC., PATERSON, N.J. | Docket No. 15091<br>File No. BPCT–3103 |
| TRANS-TEL CORP., PATERSON, N.J. | Docket No. 15092 |
| For Construction Permits for New Television Broadcast Stations | File No. BPCT–3114 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE ABSENT.

1. The Commission has before it for consideration a petition to enlarge issues filed by Trans-Tel Corp. (hereinafter Trans-Tel) on July 31, 1964.[1]

2. Trans-Tel requests enlargement of the issues with respect to the Spanish International Television Company, Inc., application (hereinafter sometimes SITC), as follows: "(1) To determine whether grant of the Spanish International Television Co., Inc., application would be consistent with letter and/or spirit of Section 310(a) of the Communications Act, in view of the participation of Emilio Azcarraga in the applicant; (2) To determine whether grant of the Spanish International Television Co., Inc., application would be contrary to Section 73.636 (a) (2) of the Commission's rules, in view of the participation of Emilio Azcarraga in the applicant; (3) To determine what understandings and/or agreements exist between Spanish International Television Co., Inc., and Daniel K. Ludwig or companies which he controls; the relationship among Spanish International, Ludwig and William B. St. John; whether Ludwig is a principal in, or controls Spanish International; and, if so, whether Ludwig is legally and/or otherwise qualified to be a party to the application of Spanish International and in the event Ludwig is found to be a party, whether Spanish International is legally and otherwise qualified."

*The Alien Issue*

3. In support of the requested 310(a) issue, Trans-Tel points out that SITC is composed of five stockholders, as follows: Emilio Azcarraga (a Mexican citizen)—20%, Reynold Anselmo—5%;

[1] Also before the Commission are the Broadcast Bureau's comments on such petition and an opposition thereto by Spanish International Television Company (SITC), each filed on September 16, 1964; a reply to the SITC opposition filed by Trans-Tel on September 28, 1964, and an erratum thereto filed by Trans-Tel on September 29. Although each of these pleadings was directed to the Review Board, the Commission certified this matter to itself for resolution by order, FCC 65–202, released March 19, 1965.

Julian B. Kaufman—5%, Frank L. Fouce—20%, and William B. St. John—50%; that Section 310(a) of the Communications Act of 1934, as amended, provides that a station license will not be granted to "any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens . . ."; and that Emilio Azcarraga occupies a position in SITC greater than that permitted by Section 310(a) by virtue of his relationship to the other SITC stockholders and by virtue of the fact that Azcarraga and his Mexican network will program the proposed station.

4. In connection with the allegation as to relationships, Trans-Tel points out that Azcarraga, Anselmo, Kaufman and Fouce have joint ownership interests in KMEX–TV, Los Angeles, California, and KWEX–TV San Antonio, Texas, each of which presents 40 to 50 hours a week of video taped network programs from Telesistima, the Mexican network owned in part by Azcarraga and his family; that Anselmo is the operating head in New York and sales representative of Spanish International Network Sales, Inc., the stock of which is owned by Azcarraga's son, as well as general manager of Teleprogramas, owned by Azcarraga; that Kaufman is general manager of Bay City Television, the U. S. representative of XETV, Tijuana, Mexico, owned by the Azcarraga family; that Fouce, both personally and through Fouce Amusement Enterprises, in which he has a beneficial interest, has connections with Azcarraga in XETV, in the Fouce Spanish language theater operations in Los Angeles, and in Pan American Television Corporation, engaged in the distribution of television films in Latin America. From the foregoing, Trans-Tel concludes that Azcarraga's influence necessarily extends beyond his 20% ownership interest to include the combined 10% stock interest of Anselmo and Kaufman, who are basically his employees, and to include control of the three member SITC Board of Directors since two of such members are Anselmo and Kaufman.

5. Trans-Tel further argues that when the SITC application was originally filed, its stockholders were as follows: Azcarraga—20%, Anselmo—10%, Kaufman—5%, Fouce—45% and Edward J. Noble—20%; that when St. John came into the group at Azcarraga's invitation, Anselmo and Fouce reduced their participation and Noble retired; and that, therefore, not only did Azcarraga do the inviting, but he kept his full 20% while others with whom he was associated stepped aside. These developments, according to Trans-Tel, reflect a very real and practical kind of control by Azcarraga—not consistent with a mere 20% investment interest.

6. In regard to the programming matter, Trans-Tel alleges that although there is no formal proposal that Azcarraga participate in the day-to-day operations of the station, the bulk of the programming to be carried by SITC will be tape and film originating in Azcarraga's Mexican program production facilities. According to Trans-Tel, "it runs contrary to the Communications Act . . . for an alien who purports to have a mere 20% investment interest to be programming the station in significant degree with film and tape produced by him."

7. The Broadcast Bureau supports each of Trans-Tel's requests for enlargement, adding that the burden of proof should be placed upon SITC. SITC opposes addition of any or all of the requested issues. In the Commission's view, the charge that Azcarraga asserts a degree of control over the applicant greater than indicated by his 20% interest rests on no more than unsupported speculation. This is true both in regard to the assertion that Anselmo and Kaufman, as employees, are "beholden" to Azcarraga and in regard to Trans-Tel's charge that less than independent voting judgments have been made in the election of Anselmo and Kaufman as directors.

8. In answer to Trans-Tel's argument that St. John's joining SITC as a 50% stockholder, simultaneously with the reduction or elimination of all other original interests save that of Azcarraga, reflects a measure of control by Azcarraga inconsistent with his 20% investment interest, SITC indicates that, as originally filed on May 2, 1962, the SITC application reflected estimated construction costs of $365,000 and estimated first year's operating costs of $200,000. The stockholders' contributions were to have been as follows:

| | Stock | Loan |
|---|---|---|
| Fouce | $45,000 | $45,000 |
| Azcarraga | 20,000 | 20,000 |
| Noble | 20,000 | 20,000 |
| Anselmo | 10.000 | 10,000 |
| Kaufman | 5,000 | 5,000 |
| Total | 100,000 | 100,000 |

9. SITC points out that the above-listed estimated construction and operating costs had been based upon those contained in the KMEX–TV application for Los Angeles; that during the construction and initial operation of KMEX–TV in the summer and fall of 1962, it became apparent that these estimates were low and that additional capital would be required; and that St. John's participation as a stockholder, as well as his assistance in obtaining a loan agreement from American Tankers Corporation, enabled SITC to make a realistic proposal in its amended Paterson application. SITC further explains that at this same time, the unexpected high costs encountered by KMEX–TV caused Noble to reevaluate his commitments to SITC, resulting in the latter's decision to withdraw. Additionally, delays encountered in winding up the estate of Fouce's father weakened Fouce's cash position to the point where he reduced his stock and loan commitment to a total of $38,000. The Commission accepts this explanation and rejects Trans-Tel's unsupported charges that Azcarraga has manifested control over and above that which would ordinarily flow from his 20% investment interest.

10. Finally, the Commission finds no substance in Trans-Tel's bald charge that SITC's proposal to program its station in substantial part with Spanish language programming, produced by organizations in which Azcarraga has an interest, "runs contrary to the Communications Act." The Commission has not been referred to, nor is it cognizant of any section of the Act or of the

Commission's Rules which restricts the use of foreign-created programming on the theory that such constitutes a surrender of control to its producers. Rather, the Commission is persuaded that the type of programming proposed by SITC is the result of a valid exercise of the applicant's judgment as to the manner in which it may best meet the needs of the community it proposes to serve.

*The Concentration Issue*

11. Azcarraga has ownership interests in the following five television stations in or rendering primary service to the United States:

KMEX–TV, Channel 34, Los Angeles, California
KWEX–TV, Channel 41, San Antonio, Texas
XETV, Channel 6, Tijuanna, Mexico (the ABC affiliate for the San Diego, California television market)
XEWT–TV, Channel 12, Tijuanna, Mexico
XEM–TV, Channel 3, Mexicali, Mexico

12. Additionally, Azcarraga or his family have interests in a substantial number of television and radio stations in Mexico, as well as in Telesistema, the national network. His family owns and operates Spanish International Network Sales, and Televicentro, a 22-studio complex, employing 2000 persons, which prepares television programs for world-wide distribution.

13. Trans-Tel does not urge that Azcarraga's operations violate the letter of the Commission's multiple ownership rules. Rather, it urges that those rules exist to promote a basic policy of diversification of ownership of mass communications media serving the United States, and that Azcarraga's operations do violence to that policy. A grant of the SITC application will give Azcarraga a sixth station serving the United States and will, according to Trans-Tel, cement his dominance over Spanish language television programming in this country.

14. Section 73.636 of the Commission's Rules permits common ownership of seven television stations, no more than five of which may be VHF assignments. The Broadcast Bureau cites the Notice and Order in *National Broadcasting Company, Inc.*, 21 Pike & Fischer, R.R. 524, outlining the proposed scope of that proceeding and indicating the Commission's concern at that time with the question of whether the acquisition by RKO General of a fifth United States VHF station when it already owned a Canadian VHF station would be contrary to the provisions of Section 73.636 or consistent with the letter and spirit of that section. Subsequently, on related facts, the Review Board designated such an issue. *National Broadcasting Company, Inc.*, 24 Pike & Fischer, R.R. 246. The present situation differs from that in the *NBC* case. SITC is applying for a UHF assignment. All that it presently owns in the United States are two UHF stations. Thus, a grant of the instant application will not violate Section 73.636. The Commission does not find that common ownership of three UHF stations, in such widely separated markets as Los Angeles, San Antonio and Paterson, in addition to three Mexican VHF sta-

tions serving areas in the United States, raises a substantial question of violation of either the letter or spirit of our multiple ownership rules or will in any way derogate the public interest.

*The Undisclosed Principal Issue*

15. In support of requested issue 3, Trans-Tel points out that 78% of the financing of the SITC proposal ($450,000) will be provided by a loan from American Tankers Corporation (ATC), with all of the SITC stock pledged as security. ATC is controlled by Daniel K. Ludwig, a shipping magnate who also owns and is president of National Bulk Carriers and Exporte de Sal, S.A., the two companies by whom St. John, SITC's president, is employed as assistant to the president. Trans-Tel states that the connection between ATC, Ludwig and St. John is undisclosed in the SITC application. As just indicated, however, Ludwig is the principal source of funds for the SITC application as well as the employer of St. John, its largest stockholder. Azcarraga and Ludwig have certain business and personal connections, including the development of the natural resources, particularly coal, of certain Azcarraga-owned property. Trans-Tel states that, based upon information furnished it by counsel for SITC, it appears that Azcarraga had originally suggested that Ludwig join the Paterson group but that because of other commitments Ludwig had declined. Instead, St. John joined as a 50% stockholder, standing, according to Trans-Tel, in Ludwig's shoes and resulting in a *prima facie* case of a hidden principal and of non-disclosure of an ownership interest.

16. Trans-Tel alleges that under the formula established in *WLOX Broadcasting Co.* v. *F.C.C.*, 260 F.2d 712 (1958), since Ludwig occupies a significant position in SITC's plan, he is in essence a principal to the SITC application. Further, states Trans-Tel, as the Court indicated in *Heitmeyer* v. *F.C.C.*, 95 F.2d 91, 99, "It is well-known that one of the most powerful and effective methods of control of any business, organization, or institution . . . is control of its finances."

17. In its opposition to Trans-Tel's petition to enlarge, SITC states that Ludwig and St. John, his assistant, had discussions with Azcarraga concerning the possibility of a cooperative venture in Mexico. As a result of these discussions, Azcarraga and St. John became acquainted. After Azcarraga described the plans of SITC, St. John decided to join the applicant. SITC states that Ludwig's name was not reflected in its application for the simple reason that Ludwig is not a principal of the applicant. According to SITC, the *WLOX* case is inapplicable since, here, the terms of the loan agreement between American Tankers and SITC are fully described in the application. Nothing is "undisclosed." SITC further points out that in responding to the hearing examiner's expressed desire for details concerning the relationship among the SITC principals (Order, released April 29, 1964, FCC 64M–361), SITC, out of an abundance of caution, detailed in its May 18 amendment, "the entirely peripheral relationship which Mr. Ludwig bears to the applicant." Specifically, SITC stated (May 18, 1964 Amendment, page 5, paragraph (a)):

No relationship exists between William B. St. John, on the one hand, and Emilio Azcarraga, Julian Kaufman, Reynold V. Anselmo, and Frank L. Fouce, on the other. Mr. D. K. Ludwig, controlling stockholder of National Bulk Carriers, Inc., by which Mr. St. John is employed, has previously had negotiations with Emilio Azcarraga and/or members of the Azcarraga family concerning possible ventures (unrelated to broadcasting) in Mexico. No contracts, commitments or agreements have been made by either Mr. Ludwig or the Azcarragas.

18. In light of the foregoing, the Commission finds no basis for the addition of any of the issues proposed by Trans-Tel.

Accordingly, IT IS ORDERED, This 21st day of April, 1965, That the petition of Trans-Tel Corp. to enlarge issues with respect to the application of Spanish International Television Company, Inc., filed July 31, 1964, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–332

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
LIABILITY OF EASTERN BROADCASTING CO., LICENSEE OF STATION WFPG, ATLANTIC CITY, N.J.
For Forfeiture

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS LEE AND COX ABSENT.

1. The Commission has before it for consideration (1) a Notice of Apparent Liability dated November 25, 1964, addressed to Eastern Broadcasting Company, the licensee of Station WFPG, Atlantic City, New Jersey, and (2) the response to the Notice of Apparent Liability by the licensee filed December 22, 1964.

2. The material facts leading to the issuance of the Notice of Apparent Liability are as follows: Station WFPG was inspected on August 25, 1964, and cited for nine violations of the Commission's Rules and Regulations. Among the violations cited was failure to have a properly licensed operator on duty at the transmitter or authorized control point as required by Section 73.93(b).[1]

3. Thereafter, pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended, the Commission issued a Notice of Apparent Liability in the amount of five hundred dollars because of the licensee's apparent willful and repeated failure to observe the provisions of Section 73.93(b) of the Commission's Rules.

4. In its response to the Notice of Apparent Liability the licensee readily acknowledged that "The nub of the licensee's transgression in this matter is that the general manager of WFPG did not take the trouble to follow up on the steps he had taken to arrange for compliance with the new Rules for operator requirements." Because of difficulties confronting some members of the staff of WFPG in traveling to the Commission's Philadelphia field office to take the required examination to acquire a third-class operator permit with broadcast endorsement, the general manager had obtained a thirty-day waiver of the pertinent requirement, which waiver expired May 22, 1964. Thereafter, the manager took no action to insure that the two aforementioned employees had in fact acquired the proper operator permits. The licensee states that the general manager "had reason to believe . . . the [men] involved to be essentially responsible and reliable and it simply did not occur to

[1] As a result of the inspection, it was determined that on numerous occasions during August 1964, Anthony Purfield and Robert Weems who held only Restricted Radiotelephone Operator permits, had operated Station WFPG in violation of the above section.

him that any of them would fail to take the examination within the time he had arranged for them." Further, in this connection, the licensee states that one of the men involved, Robert Weems, would have had to arrange a one-day switch in working schedule with another announcer in order to go to Philadelphia to take the test and that this undoubtedly "led him to procrastinate about it." As to the operator, it was explained that he worked at the station only part time and since he lived only seven or eight miles from Philadelphia he had ample opportunity to take the examination, and for this reason the station discharged him whe nit was discovered that he had failed to comply.

5. The licensee also notes in explanation for the general manager's "inadvertent" oversight in following up, that, beginning in April he was deeply involved in station business matters and additionally was assisting in arrangements for broadcast coverage of the Democratic National Convention, which was held in Atlantic City during August 1964.

6. The reply also states that it is unlikely that any "persistent" operational error could have resulted from "a shortcoming on the part of one of the operators," because, it states, the chief engineer inspects the transmitter every morning and one of the four first-class license holders employed by the station is "available at all times for whatever problem might occur." The response also states that the staff of WFPG includes 13 employees holding operator licenses and that the violation in question involved only two, who account for less than one quarter of the broadcasting hours in any week.

7. Finally, the response calls attention to the otherwise fine record of the station's general manager, and the fact that the violations were "cured within a matter of days after they were revealed."

8. The licensee has not denied that the violations took place, but has pleaded in mitigation that they were not caused by the failure of the licensee to give attention to its responsibility nor by any reckless disregard for its obligations, but only by virtue of the "understandable" failure of its general manager to follow up on his initial effort to insure compliance because he was distracted by other duties. The Commission cannot accept this explanation. The licensee had ample notice of the Commission's actions pertaining to the revised Rules, and responsibility for compliance with those Rules rests with the licensee. The violations could and indeed should have been easily avoided by closer attention to the Commission's Rules. The Commission is entitled to a high standard of conduct from its licensees. In this case the licensee should have taken positive steps to ensure that all operators were properly licensed. Citing the press of summer business as an excuse for non-compliance in August with a rule requirement that became effective in April and whose enactment was brought to the attention of all licensees many months in advance of this date [2] does not, in the opinion of the Com-

[2] The pertinent Rule was adopted July 10, 1963 with an effective date of August 19, 1963 including a provision that after February 19, 1964 it would be necessary to use at least third-class operators with broadcast endorsement for routine transmitter operation. Subsequently because of a further stay of the effective date of the new rules, the aforementioned date of February 19, 1964 was changed to April 19, 1964.

mission, represent a valid excuse. Furthermore, in this connection it should be noted that the violations were detected only as a result of a Commission inspection of the station.

9. All other matters offered in mitigation have also been considered but do not appear to be sufficient to relieve the licensee of responsibility nor to advance any valid reason why the forfeiture should be reduced from the amount stated in the Notice of Apparent Liability. The operator requirements which were violated were adopted by the Commission because experience showed that "holders of restricted radiotelephone operator permits in many cases are not qualified for the duties that must be performed by them" and "to help correct the situation, the new rules . . . raise the minimum operator requirements . . ." [3] Thus, the Commission requires that the operator on duty must be properly licensed regardless of the number of other qualified operators employed by the station.

10. Accordingly, we find that the licensee failed to observe the provisions of Section 73.93(b) of the Rules, and we believe that the amount of liability should be set at five hundred dollars ($500), in view of the facts before us.

11. In consideration of the foregoing, IT IS ORDERED, That Eastern Broadcasting Corporation, the licensee of Station WFPG, Atlantic City, New Jersey, FORFEIT to the United States Government the sum of five hundred dollars ($500). Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

12. 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 Eastern Broadcasting Corporation.

Adopted April 21, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[3] Docket 14746, Memorandum Opinion and Order, adopted October 16, 1963.

F.C.C. 65–320

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application of
AGNES J. REEVES GREER (ASSIGNOR)
AND
D. H. OVERMYER COMMUNICATIONS CO. (ASSIGNEE)
For Assignment of Construction Permit of Station WAND–TV, Channel 53, Pittsburgh, Pa.

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN THE RESULT; COMMISSIONER LEE ABSENT.

1. The Commission has before it for consideration (a) the above-captioned assignment of construction permit application tendered for filing on February 9, 1965; and (b) a petition by D. H. Overmyer Communications Company (Overmyer) for a waiver of Section 73.636(a) (2) of the Rules (the multiple ownership rule which imposes a limit of seven television stations, no more than five of which can be VHF), to allow the acceptance for filing and the grant of the above-captioned application.[1]

2. Pursuant to Rule 1.3 of the Rules,[2] the proposed assignee requests waiver of Section 73.636 (a) (2) of the Rules which imposes a limit of seven television stations to any one party. Station WAND–TV, channel 53, Pittsburgh, Pennsylvania, would be the eighth television station licensed to the assignee or a wholly-owned company, in the event that all the pending applications were granted.

3. D. H. Overmyer or a corporation controlled by Mr. Overmyer now has the following authorizations or applications pending:

| Channel | City | File Number |
|---|---|---|
| 79 | Toledo, Ohio | [1]BPCT–3173 |
| 36 | Atlanta, Ga. | BAPCT–351 |
| 74 | Newport, Ky (Cincinnati) | [2]BAPCT–352 |
| 55 | Stamford, Conn. | BPCT–3443 |
| 20 | San Francisco, Calif. | BAPCT–354 |
| 29 | Dallas, Tex. | BPCT–3463 |
| 17 | Rosenberg, Tex. (Houston) | BPCT–3518 |

[1] Permit issued. Favorable initial decision issued January 19, 1965, and finalized March 10, 1965.
[2] Permit issued. Franted by Commission action on March 10, 1965.

[1] By action taken March 17, 1965, the Commission set the permittee of Station WAND-TV for oral argument on its requested extension of time to construct application (BMPCT-4205).

[2] Section 1.3 of the Rules reads as follows:
"The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."

4. The assignee advances the view that the seven station limit should be waived in this instance in order to foster the growth of UHF television in general and in Pittsburgh in particular without any concomitant undesirable concentration of control by Mr. Overmyer. Stressed by the assignee is the beneficial effect the waiver would have on educational television in Pittsburgh since an active commercial UHF station in that city would stimulate all-channel receiver sales and conversions. Assignee also points out the fact that UHF in general has had a poor financial history and that the future development of UHF needs the support of those, such as Mr. Overmyer, who are willing and able to risk the necessary capital for investment. The assignee maintains that the public interest would be benefited more through the advance of UHF than it would be harmed by waiving the multiple ownership rule to allow one person to control eight UHF stations. It is argued that eight UHF stations, widely scattered as the assignee's will be, would not constitute a concentration of control inimical to the public interest.

5. Petitioner must set forth reasons, sufficient if true, to justify a waiver of the rule in question. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). Special circumstances must be alleged to warrant a departure from the general standard. *Storer Broadcasting Co.*, 14 R.R. 742, 746 (1956). The main thrust of the reasons advanced for the waiver apply to UHF in general and are more appropriate as reasons to change the general rule, rather than applying to Pittsburgh in particular and a waiver specifically. This is certainly true of assignee's argument that the Commission should allow organizations such as his with adequate financing to acquire in excess of seven UHF stations in order to stimulate interest in and financing of UHF development and thereby prepare the base for a 4th UHF network. However, the method of instituting such a change in the rules is through proposed rule making, not through an *ad hoc* proceeding seeking a waiver of the multiple ownership rule for a particular city. Further, the arguments advanced by Overmyer in an attempt to justify the requested waiver to allow consideration of an application by him for an eighth UHF station situated in Pittsburgh are self-defeating. If there is a high set count of all-channel receivers in that city as is maintained, and if conditions are such that they give promise of early establishment of viable commercial UHF, a waiver of the rule would not seem appropriate, since these considerations increase the likelihood that another applicant would come forward to operate this channel without the need for waiving our multiple ownership rules.[3] We have also noted the contention based upon assistance to educational television, which is now operating on both a UHF and a VHF channel in Pittsburgh. We do not believe that Overmyer's ownership of WAND–TV is the best or the only method of fostering educational UHF in Pittsburgh, and in any event this consideration is not such as to outweigh the policy embodied in our

[3] See 14 R.R. 748, paragraph 11 as to providing service where the channel is inactive. However, in Pittsburgh there is certainly no dearth of television service and petitioner has not shown that only it can or will operate a commercial UHF in that city. Indeed, the present permittee states in Exhibit No. 1 to the application that
"a reluctant determination was made to assign the permit to *one of the parties* which had earlier expressed a substantial interest in constructing and operating the station." (Emphasis added).

multiple ownership limitation. In short, Overmyer has not shown that the limit of seven television stations "works against the public interest" in Pittsburgh. Since adequate reasons to justify a waiver have not been given, the waiver will be denied.

6. The application for the assignment of the construction permit in question is therefore inconsistent with the other pending applications of Overmyer for UHF television stations since if they are all granted, Pittsburgh cannot be granted. As noted earlier, the application of Overmyer for Newport, Kentucky, has been granted and the application for Toledo, Ohio, received a favorable initial decision from the hearing examiner, which was finalized. The applications for Atlanta, Stamford, San Francisco, Dallas and Rosenberg are pending and have been accepted for filing. This totals seven potential UHF authorizations. The instant application for the assignment of the permit in Pittsburgh has been tendered for filing, but has not as yet been found acceptable for processing. Processing has commenced on the other applications of Overmyer.[4] The Pittsburgh application is inconsistent with these earlier filed applications. Section 1.518 of the Rules [5] prohibits the filing of a subsequent inconsistent or conflicting application while an earlier application is pending or undecided. *WSTV, Inc.*, 8 R.R. 854 (1953).

7. The above-captioned application for the assignment of construction permit of Station WAND–TV, Pittsburgh, Pennsylvania, is an inconsistent application within the meaning of Section 1.518 of the Rules. Accordingly, IT IS ORDERED, that the petition by D. H. Overmyer Communications Company for waiver of Section 73.636 (a) (2) of the Rules IS DENIED; and that the above-captioned application be returned by the Secretary of the Commission as not acceptable for filing.

Adopted April 21, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[4] The Rosenberg, Texas application (BPCT–3518) was tendered for filing only a few days before the Pittsburgh application. It was the seventh application of Overmyer and contained no request for waiver of the multiple ownership rule, whereas the Pittsburgh application was the eighth and did request the waiver. Apparently Overmyer had decided at that time which application he wished to pursue.

[5] Section 1.518 reads as follows:

"Inconsistent or conflicting applications.

"While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by the same applicant, his successor or assignee, or on behalf or for the benefit of the same applicant, his successor or assignee."

F.C.C. 65–262

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Application of METROPOLITAN TELEVISION CO., DENVER, COLO. (KOA) Has: 850 kc./s., 50 kw., U, Class I–B Requests: Improved Ground System | File No. BP–14673 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LOEVINGER ABSENT.

1. The Commission has before it for consideration Metropolitan Television Company's June 1, 1964 "Petition for Reconsideration" of our earlier dismissal of the above-captioned application, and related correspondence.

2. The application, originally filed by Metropolitan Television (MTC) on February 15, 1961 was amended several times by the submission of additional engineering data, most recently on December 14, 1962. Examination of this material indicated that the proposal neither conformed with the 1950 North American Regional Broadcasting Agreement, 11 UST 413 (NARBA) nor the 1957 United States/Mexican Agreement, 12 UST 734 (Mexican Bilateral), and therefore, that the application was dismissible under Section 1.570(a) of the Commission's Rules. MTC was informally apprised of this view, but submitted no further amendment. Consequently, the application was dismissed by letter of April 24, 1964, public notice of which was given on April 30, 1964. MTC, in its timely petition of June 1, 1964, argues that the dismissal of the application should be set aside as having been based on an "unnecessarily narrow" treaty interpretation.

3. Some discussion concerning the nature of MTC's proposal is necessary in order to place this matter in proper perspective. MTC proposed the installation of a new, improved ground system to increase KOA's antenna efficiency. According to MTC, the resulting increase in KOA's inverse field from 1590 mv/m would provide a new daytime service to 89,000 persons within an area of 25,000 square miles and a new nighttime service to 2,300,000 persons within an area of 170,000 square miles. MTC conceded that in so doing, KOA would cause interference to domestic co-channel Class II stations affecting 54,000 people, but argued that this interference was no impediment to grant of the application because Class II stations are, under our Rules, obliged to accept interference from Class I–B stations such as KOA. MTC does not contend that the increased radiation would not affect foreign co-channel assign-

ments; rather, that this interference is without significance in light of current treaty provisions.

4. MTC's petition is premised on its belief that KOA is the only Class I–B assignment on 850 kc/s in the North American Region, and that co-channel Class II stations are not entitled to protection against interference from I–B operations. MTC supports its conclusion by quoting provisions in the Mexican Bilateral which, standing alone, appear to (1) require Class II stations to accept such interference, and (2) call for use of an assumed efficiency of 225 mv/m/kw (KOA's present efficiency) in calculating objectionable interference. MTC concedes that NARBA does not explicitly require acceptance by Canadian Class II stations of objectionable interference from I–B operations. Instead, MTC relies on various NARBA provisions concerning the priorities accorded to the high-power, wide-area Class I stations, and argues that these provisions, by implication, require Class II stations to accept interference caused by Class I stations seeking to improve their Clear Channel operations.

5. For a number of reasons, we cannot accept MTC's treaty interpretations. Although NARBA lists KOA as the only I–B assignment on 850 kc/s, the Mexican Bilateral recognizes the protected I–B status of Radio Station XETQ, Orizaba, Vera Cruz. Hence, the contention that Mexican Class II stations must accept interference becomes irrelevant. Rather, we must consider XETQ's status *vis-a-vis* KOA in the context of their respective I–B priorities. According to the Mexican Bilateral, XETQ must afford protection to KOA (which it does by directionalization), but by the same token, is entitled to receive protection as a Class I–B assignment. Therefore, any proposal which would cause new interference to XETQ would be in conflict with the Mexican Bilateral, and properly dismissible on that basis. The question of new interference depends, in turn, upon the method of calculation employed.

6. Article II, E, 1 of the Mexican Bilateral agreement states that an assumed efficiency of 225 mv/m/kw is to be used for the purpose of calculating the presence and degree of objectionable interference caused by Class I stations. Unlike the parallel Appendix G provisions of NARBA, the Mexican Bilateral does not expressly provide for the use of more precise data, if available, indicating higher radiation values. Nonetheless, we have consistently held that it is not the intent of the Mexican Bilateral to exclude such data in making interference computations, for its exclusion would lead to the creation of considerable interference, in sharp conflict with the express purpose of that agreement to minimize interference between stations in the two countries. Even more to the point, Annex VI, A, 2, a, (2), (ii), of the Mexican Bilateral specifically calls for the notification of antenna efficiency data which, if MTC's view were to be accepted, would be irrelevant.[1] In this case, using KOA's proposed efficiency, it is

[1] In actual practice, the assumed efficiency value (225 mv/m/kw) is used, but only when the station in question operates with a *lesser*, rather than greater efficiency. In this way, the station's opportunity to improve a substandard operation is preserved. Otherwise, such opportunity might be foreclosed as a result of assignments made on the basis of the actual, but inadequate, efficiency.

clear that new interference to XETQ would result; specifically, XETQ's nighttime limit would be increased from 3.29 mv/m to 3.87 mv/m.

7. Likewise, we cannot accept MTC's view that NARBA, when read as a whole, requires Class II stations to accept interference from foreign I–B's. Actually, Appendix B of NARBA specifically protects Class II stations against interference from all foreign co-channel stations, except Class I–A. The provision in the original (1938) NARBA requiring acceptance of interference caused by I–B assignments was found to be unsatisfactory, and is significantly absent from the current NARBA. Consequently, since MTC admits that KOA would cause new interference to Canadian Class II stations (found by the Commission to include Radio Stations CJJC, Langley Prairie, B.C., and CKRD, Red Deer, Alberta), we find no basis for altering our earlier conclusion that NARBA also precludes acceptance of the application.

8. In addition, MTC has presented a number of arguments concerning public interest advantages offered by the proposed operation. These arguments, however, do not require disposition, since MTC again has failed to satisfy the threshhold question of the application's acceptability for filing.

9. Consequently, IT IS ORDERED this 31st day of March, 1965 that the relief requested in MTC's Petition for Reconsideration IS DENIED, and the earlier discissal of the above-captioned appplication IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–346

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Application of EFFINGHAM BROADCASTING CO., LICENSEE OF RADIO STATION WCRA, EFFINGHAM, ILL. For License To Cover Construction Permit for Power Increase | Docket No. 15822 File No. BL–10634 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE AND LOEVINGER ABSENT.

1. The Commission has before it for consideration (a) a petition for reconsideration filed on March 10, 1965, by Effingham Broadcasting Co. (hereinafter WCRA); (b) a petition for extension of time for filing pleadings, filed on March 30, 1965, by KAAY, Inc. (hereinafter KAAY); (c) a petition for dissolution of stay, filed on April 6, 1965, by KAAY; and (d) a petition for stay filed on April 8, 1965, by WCRA, as well as responsive pleadings in regard to each of the foregoing.

2. Radio Station WCRA is a Class II, daytime only, standard broadcast station operating non-directionally on the frequency 1090 kilocycles. KAAY is a Class I–B clear channel station operating from Little Rock, Arkansas, on the same channel. On August 13, 1959, WCRA applied for a construction permit to increase power from 250 watts to 1 kilowatt. Action on this application was initially delayed because of clear channel considerations. Later, preliminary examination of the application suggested that, operating as proposed, WCRA would cause objectionable interference to KAAY. WCRA was, therefore, requested to and did, in fact, furnish certain field measurement data as a result of which the Commission concluded that no interference would occur. On this assumption, the WCRA application was granted on February 19, 1964. KAAY entered no objection at that time. On May 28, 1964, WCRA received program test authority for its 1 kilowatt operation. The covering license was granted October 9, 1964.

3. On November 13, 1964, KAAY filed a petition for reconsideration directed against the Commission's action granting WCRA's application for license to cover its authorized increase in daytime power. In support of such petition, it submitted measurements of WCRA's 1 kilowatt signal which convinced us that objectionable interference is being caused within KAAY's 0.1 mv/m protected daytime service area. As a result, by Memorandum Opinion and Order, FCC 65–81, released February 8, 1965, we set aside our

grant of WCRA's license, concluding that the public interest would be served by designating such license application for evidentiary hearing on issues seeking a determination of (1) the areas and populations which would gain or lose primary service from the proposed operation and the availability of other primary service to such areas and populations, and (2) whether interference would be caused to KAAY or any other existing station and, if so, the nature and extent of such interference. Additionally, we ordered a reduction in WCRA's operating power to its formerly authorized level of 250 watts pending the outcome of the hearing. WCRA seeks reconsideration of these actions or, alternatively, that it be permitted to continue to operate with 1 kilowatt of power until final adjudication of this proceeding.[1]

4. In support of its petition to reconsider, WCRA submitted an engineering affidavit indicating that it has been impossible to confirm the KAAY measurements on WCRA upon which the Commission relied in reaching its determination to designate WCRA's license application for hearing. Specifically, the affidavit alleged that attempts to check the KAAY measurements were rebuffed by a triple heterodyne from stations WBAL, Baltimore, Maryland; WGLC, Mendota, Illinois; and KAAY, which made it impossible to take reliable and accurate readings. This being so, WCRA concluded that KAAY's measurements are unreliable and that its 1 kilowatt authorization should be reinstated without the difficulty and expense of a hearing. Further, WCRA contended that the KAAY measurements were affected by the groundwave signal of WGLC and the skywave signal of WBAL, resulting in erratic readings not reported to the Commission. It further contended in detail that the methods of determination which it used were far more reliable than KAAY's effort to read a very small signal overridden by other signals.

5. WCRA also took the position that KAAY had notice of the pendency of its application since it was filed in 1959, and that for at least a year prior to its grant, KAAY was on constructive notice of the fact that, as indicated by measurements contained in an amendment to the WCRA application, a minor amount of interference would be caused to KAAY.

6. In response to WCRA's procedural argument, premised on the presumption that KAAY had either actual or constructive notice of the WCRA measurements, we merely refer to paragraph 9 of our February 8, 1965 Memorandum Opinion and Order wherein we conceded that KAAY's objections to WCRA's power increase were untimely but stated that ". . . . KAAY was never officially apprised of the possibility of this interference and, as indicated above, we later resolved the matter in WCRA's favor, without hearing, on the basis of supplemental information provided by its engineering consultant. The facts now relied upon by KAAY could not, through the use of ordinary diligence, have been ascertained and presented to the Commission at an earlier time. Under

[1] At the request of WCRA and with the consent of all parties hereto, the Commission stayed until March 12, 1965, the effectiveness of its order that WCRA reduce its operating power to 250 watts. This stay was continued, again with the consent of the parties, until April 15. By order of the Commission on the latter date, FCC 65-300, the existing stay has been further continued until May 5, 1965.

these circumstances, we have, under Section 319(c) of the Act and 1.106(c) of the Rules, discretionary authority to entertain KAAY's Petition for Reconsideration." We adhere to this view.

7. In response to WCRA's attack on the validity of the measurements submitted by KAAY upon which we relied in designating WCRA's license application for hearing, KAAY submitted to us the results of further measurements taken by its consulting engineer on March 26, 27, 28 and 29, 1965, purporting to confirm the existence of the interference indicated by KAAY's original measurements and alleging that none of the problems encountered by WCRA in its remeasuring attempts had been experienced. KAAY offered numerous possible explanations for WCRA's difficulties, including the fact that WCRA's engineer did not advise KAAY that he was taking measurements and that, accordingly, no arrangement was made to cut the KAAY carrier while he was measuring. Also, inasmuch as the exact time of his measurements was not given, KAAY stated that it is possible WCRA's engineer was measuring too early or too late in the day, or that the skywave might have been greater than usual the day of the attempted measurements.

8. WCRA answers the foregoing by stating, among other things, that it is difficult to determine what the problem may now be with respect to KAAY's position on the conductivity between WCRA and KAAY since KAAY now has two sets of measurements on file which, according to WCRA, bear no reasonable relation one to the other. Clearly, a question of fact is here presented which we cannot resolve on the basis of the pleadings before us. We note that at a prehearing conference held in this proceeding on March 10, 1965, WCRA, KAAY and the Broadcast Bureau agreed to a procedure suggested by WCRA, namely, the use of a 10 kilowatt test transmitter for the purpose of taking joint measurements from the WCRA location in order to obtain reliable data upon which the issue of interference may be resolved. Exhibits reflecting this data are to be prepared and exchanged on May 26, 1965. The evidentiary hearing at which such exhibits will be offered into evidence has been scheduled to commence on June 9, 1965. We concur in this procedure. Accordingly, we deny WCRA's petition to reconsider.[2]

9. On April 6, 1965, KAAY filed a petition requesting the Commission to dissolve the stay referred to in footnote 1, above. The Broadcast Bureau supported this request. On April 8, WCRA filed a petition requesting that we extend the existing stay until May 19, 1965. As indicated above, we have already continued the life of the stay until May 5, 1965. WRCA has been operating with 1 kilowatt of power since May 28, 1964. As discussed in paragraphs 3 through 8, we recognize that the facts in regard to the extent of interference to KAAY are in sharp dispute. In our view, the public interest will be served by staying until the conclusion

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[2] On March 30, 1965, KAAY filed a petition requesting that the time for filing its opposition to WCRA's petition to reconsider be extended to April 5, 1965. WCRA opposed this request. However, on April 8, withdrew such opposition. We grant KAAY's request for extension and accept its opposition as filed April 5, 1965, including the errata thereto filed April 6, 1965.

of this proceeding the requirement contained in our February 8, 1965, Memorandum Opinion and Order that WCRA reduce its operating power to 250 watts. We are persuaded that by allowing WCRA to continue its 1 kilowatt operation until the conclusion of this proceeding, we will facilitate an actual rather than a projected comparison of the WCRA 1 kilowatt operation with the field strength measurements obtained from the 10 kilowatt test operation. Otherwise stated, we believe such continued 1 kilowatt operation will achieve a realistic and accurate appraisal of the WCRA interference potential, leading to the most expeditious possible resolution of this proceeding, and thus serving the public interest, convenience and necessity.

In view of the foregoing, IT IS ORDERED, (1) That the petition to reconsider filed on March 10, 1965, by Effingham Broadcasting Co. IS DENIED; (2) That the petition for dissolution of stay filed on April 6, 1965, by KAAY, Inc. IS DENIED; and (3) That the petition for stay filed on April 8, 1965 by Effingham Broadcasting Co. IS GRANTED insofar as the requirement contained in our February 8, 1965 Memorandum Opinion and Order (FCC 65–81) that WCRA reduce its operating power to 250 watts IS STAYED and that WCRA is authorized to continue its 1 kilowatt operation until the conclusion of this proceeding. In all other respects, the WCRA petition to stay IS DENIED.

IT IS FURTHER ORDERED, in view of the stay we have granted, That the Examiner and all parties herein ARE DIRECTED to proceed to the conclusion of this proceeding with all possible expedition.

Adopted April 28, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–159

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
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| JOE ZIMMERMAN, ARTHUR K. GREINER, GLENN W. WINTER, WILLIAM W. RAKOW, ROBERT M. LESHER D.B.A. AS LEBANON VALLEY RADIO, LEBANON, PA. | Docket No. 15835<br>File No. BP–16098 |
| JOHN E. HEWITT, THOMAS A. EHRGOOD, CLIFFORD A. MINNICH, AND FITZGERALD C. SMITH D.B.A. CEDAR BROADCASTERS, LEBANON, PA. | Docket No. 15836<br>File No. BP–16103 |
| CATONSVILLE BROADCASTING CO., CATONSVILLE, MD. | Docket No. 15838<br>File No. BP–16105 |
| RADIO CATONSVILLE, INC., CATONSVILLE, MD. | Docket No. 15839<br>File No. BP–16106 |
| COMMERCIAL RADIO INSTITUTE, INC., CATONSVILLE, MD. | Docket No. 15840<br>File No. BP–16107 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it for consideration a petition, filed by Cedar Broadcasters (Cedar), to delete issue 7 (the financial issue) in this proceeding insofar as it refers to Cedar Broadcasters.[1]

2. In support of its request, Cedar claims that the inclusion of the financial issue as to Cedar "springs wholly from a misapprehension on the Commission's part." In its Memorandum Opinion and Order, FCC 65–102, released February 15, 1965, designating the subject proceeding for hearing, the Commission stated:

> With respect to the financial portion of the Cedar Broadcasters application, it is noted that funds of approximately $28,576, are required to cover the downpayment on equipment, building, miscellaneous expense and to operate the station for a reasonable period of time without working capital. The applicant has submitted a bank letter indicating that a loan of $30,000 would be made available in the event of a grant. However, the letter fails to show the terms of repayment and the security for the loan as required by Section III, Paragraph 4(h) of the application form. Thus, based on the information at hand, the Commission cannot now conclude that adequate funds are available to construct and operate the proposed operation and a financial issue with respect thereto will be included.

[1] The following pleadings are under consideration: (1) petition to delete issue, filed by Cedar Broadcasters on March 5, 1965; (2) opposition, filed by Lebanon Valley Radio on March 29, 1965; (3) Comments of Broadcast Bureau, filed March 29, 1965; and (4) Reply, filed by Cedar Broadcasters on April 14, 1965.

Cedar contends, however, that it has complied fully with Section III, Paragraph 4(h) of the application which states:

> For financial institutions or equipment manufacturers who have agreed to make a loan or extend credit, submit a verified copy of the agreement by which the institution or manufacturer is so obligated, showing the amount of loan or credit, terms of payment, if any, and security, if any.

This paragraph, Cedar asserts, does not require that terms of payment and security be spelled out where the terms have not been formulated. The pertinent portion of the agreement between the Farmers Trust Company of Lebanon and Cedar states:

> This is to confirm that this bank is willing to lend to you a total of $30,000.00 upon your receipt of a final and incontestable grant from the Federal Communications Commission to establish a new broadcast station in Lebanon. This loan is subject to the following conditions: (1) The receipt of such collateral as the bank deems necessary to secure the loan, and (2) the bank's satisfaction at the time the loan is advanced with your financial condition and the management of the station, both of which presently are satisfactory. Any loan would be made at the rate of interest which then prevails; the terms of repayment will be blocked out at such time as the loan monies are advanced it being understood that no portion of principal will be due and payable during the first year of the station's operation.

3. Both Lebanon Valley Radio (Valley) and the Broadcast Bureau oppose deletion of reference to Cedar in Issue 7. They contend that the Farmers Trust-Cedar agreement on its face is not a firm commitment and that Cedar has alleged no facts not present to the Commission at the time of designation.

4. In its reply, Cedar contends that the Commission has deleted financial issues when the basis for their designation involved an error (*Cleveland Broadcasting, Inc.*, FCC 63R–519, 1 RR 2d 676); that the Farmers Trust-Cedar agreement is a firm commitment (in fact, Cedar claims, the very "language of the letter relating to the bank's satisfaction with Cedar's financial and managerial situation" was derived from the terms employed in *Consolidated Broadcasting Industries, Inc.*, FCC 60–412, 19 RR 1370, where the Commission held that "the bank's letter provides sufficient assurance that the loan will be forthcoming;") and that the Commission has previously held (*Flower City Television Corp.*, FCC 62–578, 23 RR 795) that where a loan or credit agreement is firm, even though the terms for repayment and security are not given, the Commission will not designate the financial issue on such basis.

5. We have reviewed the circumstances which led up to the designation of the financial issue in this proceeding. By letter dated June 24, 1964, the Commission, prior to hearing, informed Cedar that the financial information which it had originally submitted with its application was insufficient to establish its ability to meet anticipated construction costs of $24,303 plus three months operating expenses of $15,000 for a total of $39,303. The information originally filed provided for deferred credit of $10,727.25. A financial statement of Cedar stated that it had assets only of the 5,000 contributed as capital. The remaining $28,585.75 of necessary funds were to be supplied by the four principals as needed in proportion to their participation. Financial statements of three of the principals were submitted and the fourth (Smith's) incorpo-

rated by reference from another application.[2] The three financial statements showed only a total of $9,000 in cash and various amounts of unspecified securities and realty, it being noted thereon that this was only a partial list of assets. In each of the balance sheets of the three principals, liabilities were listed as "none" without qualification. The Commission indicated in its letter that, among other deficiencies, the financial statements submitted by the four principals established insufficient liquid assets to meet their commitments to the applicant and did not conform to Section III, paragraph 4(d) of the application form.

6. In response to the Commission's letter a pre-designation amendment was filed as of August 4, 1964, which changed Cedar's plan of financing. Since it was contemplated that the applicant would no longer rely on the funds of the four principals to meet anticipated costs and expenses, no further financial information relating to such principals was submitted. In place thereof, the Farmers Trust-Cedar agreement was substituted.

7. In view of the fact that the Farmers Trust-Cedar agreement contemplates a deposit of collateral at the time of the $30,000 loan and that the financial information available to the Commission as to Cedar itself and as to its principals does not without further clarification establish the availability or source of such collateral, the Board at this time is unable to determine whether Cedar is financially qualified to construct and operate the station as proposed. Since the Board has been provided by Cedar with no more information in this regard than was presented to the Commission at the time of designation, we have no basis for concluding that the Commission under the circumstances of this case was under any "misapprehension" in making issue 7 applicable to Cedar. Cedar will have an opportunity at the hearing to introduce evidence under the issue to show that it has the ability to comply with such terms. See *KFOX, Inc.*, FCC 65R–143, released April 26, 1965.

Accordingly, IT IS ORDERED, This 3rd day of May, 1965, That the petition to delete issue, filed March 5, 1965, by Cedar Broadcasters, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] Smith's balance sheet for November, 1963, appears in File No. BAP–658 (assignment of WLNG, Sag Harbour, New York, effective December 31, 1963). The Commission's letter pointed out that Smith was required to furnish a balance sheet showing sufficient liquid assets to cover his obligations in connection with the AM station WLNG, and the FM proposal for Sag Harbour, in which he also had an interest, in addition to his obligations in the instant application.

F.C.C. 65R–161

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| LESLIE L. STERLING AND WILLIAM H. PATTERSON D.B.A. FLATHEAD VALLEY BROADCASTERS (KOFI), KALISPELL, MONT. | Docket No. 15815<br>File No. BP–16369 |
| GARDEN CITY BROADCASTING, INC. (KYSS), MISSOULA, MONT. | Docket No. 15816<br>File No. BP–16400 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration a petition to enlarge issues [1] filed by Flathead Valley Broadcasters (KOFI) on February 18, 1965, to determine: (1) whether the financial arrangement contemplated by Garden City Broadcasting, Inc. (KYSS) is consistent with the rules and policies of the Commission; and (2) whether Garden City Broadcasting, Inc., is financially qualified to construct and operate its station as proposed.

2. In order to meet the cash requirements necessitated by its proposal for increased power and change of frequency, Garden City (KYSS) has obtained a loan commitment from a small business investment company, Washington Capital Corporation (hereinafter WCC), in the sum of $65,000. Flathead contends that the terms of this loan agreement are not consistent with the Commission's rules and policies and an issue is needed to inquire more fully into its provisions.

3. As partial security the loan agreement requires an "assignment of the capital stock of Garden City Broadcasting, Incorporated, subject to approval of the Federal Communications Commission." Petitioner argues that without knowledge of the details as to who holds legal title and/or voting rights in the assigned stock the validity of the agreement cannot be determined. In opposition, KYSS asserts that the assignment is "subject to approval of the Federal Communications Commission" and that legal title and voting rights remain with the present stockholders until the Commission approves any change. W. G. Strong, secretary-treasurer of WCC, in an affidavit submitted with KYSS's opposition pleading, states that WCC has not been promised any ownership interest in Garden City. At the present time all legal and equitable incidents of ownership of the stock of Garden City reside in the three stock-

[1] Other pleadings before the Board are: comments, filed March 11, 1965, by the Broadcast Bureau; opposition, filed March 15, 1965, by Garden City Broadcasting, Inc. (KYSS); and reply, filed March 22, 1965, by Flathead.

holders named in the application, with the exception of the right of sale which is subject to WCC's approval. In the event of default, then, WCC has essentially a lienor's interest in the loan collateral (i.e., Garden City's capital stock). In view of the specific condition that Commission approval must be obtained prior to any assignment of the stock, we hold that this portion of the agreement is not inconsistent with the Commission's rules and policies.

4. The other security provisions of the loan agreement which Flathead claims raise questions requiring further exploration are:

(2) Mortgages on real estate subject to first mortgage indebtedness and;
(3) Assignment of the vendor's interest in real estate contacts.

Flathead argues that it is unable to discern what real estate and persons are involved, as Garden City's application does not reflect such real estate. In his affidavit W. G. Strong identifies the real estate mortgages and contracts referred to in the above provisions as specific tracts belonging to Garden City and to two of the three named stockholders, Margaret Ann and Chester M. Murphy. On the basis of the information contained in KYSS's opposition pleading, no substantial question remains as to the acceptability of these provisions.

5. In addition to the above security provisions, the loan agreement contains several conditions, one of which is questioned by the petitioner. The condition in question states "the loan agreement is to contain a covenant limiting officers' salaries, prohibiting bonuses, prohibiting loans to officers, prohibiting dividends, limiting capital expenditures, and sale of capital stock all except by written permission of the mortgagee." Flathead questions whether this provision will place actual control in the hands of WCC without Commission approval. In support of this question the Bureau cites *WLOX Broadcasting Company* v. *FCC* 17 RR 2119 (1958). The petitioner further alleges that KYSS's application reflects 30 shares of stock "outstanding" and 30 shares of stock "subscribed." The 30 "outstanding" shares are held by three stockholders listed in Section II, Table I but none of the listed shareholders is designated as a stock subscriber. The "subscribed" stock reflects a 50% dilution of the present ownership, and could, Flathead argues, represent a transfer of negative control to unknown persons.

6. Garden City asserts that the covenant in question is aimed solely at unusual expenditures of working capital in derogation of the security value of the pledged stock and will not limit the day-to-day operation of its station nor will it disrupt KLSS's performance in the public interest. In our view, the fact that Garden City would be unable to make major expenditures not contemplated in the ordinary course of a broadcast operation without the lender's approval does not indicate that effective "control" of the station will vest in WCC. Further, there is no evidence to indicate in the event of default, WCC would be entitled to any sum in excess of the amount outstanding at that time; this is in accord with the standard procedure of money lending institutions. *WLOX, supra,* is not dispositive of the instant case. The agreement presented in *WLOX,* specified no definite sum to be advanced; the lender was to determine the need for additional funds as the work progressed and he was to be given weekly financial reports; in addition, it was

agreed that the lender was to give the applicant financial advice. In the instant agreement the rights and obligations of the parties and the amount of the loan are fully set out. WCC is to acquire no control in the stockholder's management of construction and operation of the proposed facility, with the exception of extraordinary expenditures not contemplated in the ordinary operation of a broadcast station. Petitioner presents no allegations of fact, but merely speculates, that this agreement would preclude the owners of Garden City fro mcontrolling the operation of KYSS. The Board cannot find on the facts presented any reason to assume that the principals of Garden City are not the real parties in interest. In the absence of any indication to the contrary, the 30 shares indicated as "subscribed" appear to be the same 30 shares listed in the application as "outstanding." If this is not the case, Garden City is under an obligation to report such fact.

7. Other allegations made by the petitioner are that Garden City has not indicated what disposition or settlement has been made regarding a prior pledge of 470 shares of the 500 pledged to WCC which was held by Sherwood and Roberts, Inc.; if an issue is added to inquire into the terms of the loan agreement, then a standard financial issue is also required because without the $65,000 loan Garden City does not meet the standard test of financial qualifications; and even if an issue as to the loan agreement is not added, a standard financial issue should be included because Garden City does not have an "unconditional" loan commitment, but one which will expire on December 31, 1965.[2] Garden City, in its opposition to these allegations, states that: WCC is a subsidiary of Sherwood and Roberts, Inc., and that Garden City's loan commitment is as firm as could be required of an applicant. The existence of a prior stock pledge by Garden City to Sherwood and Roberts, Inc., raises no substantial question in view of the relationship which exists between Sherwood and Roberts, Inc. (first pledgee) and WCC (second pledgee). Under the circumstances, it is proper to impute to WCC knowledge of the first pledge in favor of Sherwood and Roberts. There is no indication or allegation that WCC did not agree to its assignment subject to the prior pledge; nor is there any allegation that Garden City has undertaken any further obligation to either of the lenders. In view of the above, the only allegation which remains is that Garden City's loan commitment expires on December 31, 1965. At the present time Garden City has a valid loan commitment and WCC has shown its willingness to consider necessary extensions of the loan commitment. Therefore, we conclude that Flathead has not set forth a basis for adding a financial qualifications issue as to Garden City.

Accordingly, IT IS ORDERED, This 5th day of May, 1965, That the petition to enlarge issues, filed February 18, 1965, by Flathead Valley Broadcasters, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] At the time of Flathead's petition, Garden City's loan commitment was to expire on May 1, 1965. In its opposition pleading, Garden City presented an affidavit by which WCC extended the loan to December 31, 1965.

F.C.C. 65R–165

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| JOE ZIMMERMANN, ARTHUR K. GREINER, GLENN W. WINTER, WILLIAM W. RAKOW, OBERT M. LESHER D.B.A. LEBANON VALLEY RADIO, LEBANON, PA. | Docket No. 15835<br>File No. BP–16098 |
| JOHN E. HEWITT, THOMAS A. EHRGOOD, CLIFFORD A. MINNICH AND FITZGERALD C. SMITH D.B.A. CEDAR BROADCASTERS, LEBANON, PA. | Docket No. 15836<br>File No. BP–16103 |
| CATONSVILLE BROADCASTING CO., CATONSVILLE, MD. | Docket No. 15838<br>File No. BP–16105 |
| RADIO CATONSVILLE, INC., CATONSVILLE, MD. | Docket No. 15839<br>File No. BP–16106 |
| COMMERCIAL RADIO INSTITUTE, INC., CATONSVILLE, MD. | Docket No. 15840<br>File No. BP–16107 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Commission designated the above-captioned applications for consolidated hearing by its Memorandum Opinion and Order, FCC 65–102, released February 15, 1965. On March 5, 1965, Radio Catonsville, Inc. (Radio Catonsville) filed a petition to enlarge the issues [1] in which it seeks to have an issue concerning the financial qualifications of Commercial Radio Institute, Inc. (CRI). It also requests an issue concerning the reasonableness of CRI's estimated cost of operation and an issue concerning CRI's planning and preparation.

2. The petitioner notes that according to CRI's proposal, $27,000 will be needed to construct and operate the station for an initial period of three months. CRI relies upon two loan commitments from stockholders—one in the amount of $20,000, the other in the amount of $10,000—and a certain piece of real estate with an appraised value of $14,000, which it will dispose of if the funds are needed. Radio Catonsville argues that since there is no contract of sale for the real estate or other evidence that there is a present buyer willing to purchase at that price, this property may

[1] The Board also has before it for consideration, Broadcast Bureau's Comments on Petition to Enlarge Issues filed by Radio Catonsville, Inc., filed March 29, 1965; Opposition to Petition to Enlarge Issues, filed March 29, 1965, by Commercial Radio Institute, Inc.; and Reply to Opposition to Petition to Enlarge Issues (CRI) and Comments of Broadcast Bureau, filed April 14, 1965.

not be considered as a liquid asset available for use in the construction and maintenance of the proposed station. Moreover, Radio Catonsville argues that Frederick Himes, Jr., the CRI stockholder who is committed to lend $10,000 to the corporation, has not established his financial qualifications to make the loan. In support of this position, petitioner notes that Himes' financial statement is incomplete and that his showing of personal assets is limited to $2,000 cash and "more than $5,000 in listed securities", that for any additional funds he will rely on a loan of $5,000 from Frederick Himes, Sr., that the security, terms of repayment and rate of interest on this loan were not included in the informal letter from Himes, Sr. to Himes, Jr., and that thus we cannot assume that those funds will be available to Himes, Jr. to meet his loan commitment to the corporation. Radio Catonsville has also urged that even if all of the funds which CRI proposes to rely upon are available to it, there will nevertheless be a question as to the financial qualifications of that applicant. It argues that this is so because certain essential construction expenses were not taken into account by CRI in its application. As an example of this oversight, Radio Catonsville alleges that CRI made no provision for moving its existing FM tower.[2]

3. CRI responds to these allegations with a statement that in arriving at the $14,000 figure on its real estate, it sought the advice of a conservative appraiser who has been in the real estate business in Baltimore for more than 45 years, and as a further check it ascertained the ratio between the appraised value of property for tax purposes and the current market value of such property, that by applying this ratio to the appraised value of the property for tax purposes, it determined that the current market value of the property was $14,833. It, therefore, urges that we accept the $14,000 figure as a fair market value at which this asset might be liquidated. With respect to the commitment of Mr. Fred Himes, Jr. to lend the corporation $10,000, CRI notes that the arrangement between Fred Himes, Jr. and Fred Himes, Sr. is one between father and son and that Radio Catonsville did not challenge the ability of Fred Himes, Sr. to make the loan to his son, that the details of this informal arrangement are not necessary to establish its validity. With respect to its alleged failure to provide for the expense of moving its FM tower, CRI states that there is a figure of $8,205.33 identified in paragraph 1 of section III of its application, as other items. Included in that list of other items is moving. CRI planned to use $3,000 of that sum to move its existing FM antenna to its new position in the proposed AM directional array. With respect to the other "technical deficiencies" noted by Roher, CRI states that it has available to it substantial quantities of used equipment for studio and other purposes which became obsolete when its FM operation was changed from monaural to stereo operation, and that this equipment will be used in the proposed new AM station.

4. The facts set forth above do not warrant the addition of a

[2] In his affidavit, Mr. Raymond E. Roher, an engineering consultant for Radio Catonsville, alleges that there are several other deficiencies in CRI's technical equipment proposal.

financial qualifications issue with respect to CRI. Radio Catonsville does not question that the $20,000 to be lent by one of CRI's stockholders will be available. Thus, the balance of the funds required would be only $7,000. It is apparent that the property appraised at $14,000 can most certainly be liquidated for more than enough to meet this requirement. Thus, even should the loan from Himes, Jr. not be available, CRI will be financially qualified to construct and operate its proposed new station. Questions raised by Radio Catonsville concernng the most of moving CRI's FM antenna and the cost of certain other technical equipment have been adequately explained in CRI's opposition and the attached affidavit of Mr. Julian Smith, President of CRI.

5. Radio Catonsville has requested the Board to include an issue concerning the "reasonableness of estimated costs of operation". In support of this issue it has noted that CRI proposes monthly expenses of $3,000. Equating this to CRI's proposed staffing schedule, it has ascertained that with no other operating expenses, CRI would be able to pay each of its employees only $187 per month. This, Radio Catonsville argues is clearly unreasonable and impossible of accomplishment. Furthermore, Radio Catonsville notes that there are many other expenses involved in running the proposed new AM station.

6. In response to these allegations, CRI states that the proposed new AM station will be operated in conjunction with its existing commercial FM station n Baltimore. It notes that in paragraph 1 of section III of its application it pointed out that a "part of the costs and expenses of operation in addition to the above will be met from existing FM operations". Mr. Julian S. Smith in his affidavit which is attached to CRI's opposition, explains in some detail CRI's proposal for a joint operation of the existing FM station with the proposed AM station. Mr. Smith points out that the staff of the existing FM station will be available for the operation of the AM station, that since the AM station will be programmed separately, separate announcers will be required for the AM station and that a part time program consultant will be employed for the AM station. Otherwise the stations will be operated jointly with one chief engineer, one sales manager, one technical director, and one operations manager and one clerical staff for both operations. Moreover, both stations will use the same studio facilities.

7. CRI's explanation concerning the joint operation of its proposed AM station with its existing FM station appears to resolve any questions concerning the reasonableness of its estimated costs which might have been raised by allegations advanced by Radio Catonsville. Accordingly, this issue will not be added.

8. The third issue requested runs to the question of planning and preparation for the operation of the proposed new AM station. In support of the request for this issue, Radio Catonsville relies upon "obvious deficiencies contained in the CRI application", and facts advanced in support of the requested issues which have already been dealt with herein. No additional facts have been alleged in support of this requested issue. In view of our dispo-

sition of requests for a financial qualifications issue and for an issue with respect to the reasonableness of operating costs, this request must also be denied.

Accordingly, IT IS ORDERED, This 6th day of May, 1965, That the Petition to Enlarge Issues, filed by Radio Catonsville, Inc., March 5, 1965, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–382

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of CAPITAL CITIES BROADCASTING CORP., WESTERLY, R.I., AND PAWCATUCK, CONN. For Construction Permit for New VHF Television Broadcast Translator Station | File No. BPTTV–2293 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND WADSWORTH ABSENT.

1. The Commission has before it for consideration: (a) the above-captioned application filed by Capital Cities Broadcasting Corporation (applicant), licensee of Station WPRO–TV, Channel 12 (CBS), Providence, Rhode Island; (b) a "Petition to Deny" filed on August 10, 1964, by The Outlet Company (petitioner), licensee of Station WJAR–TV, Channel 10 (NBC), Providence, Rhode Island, directed against a grant of the above-captioned application; (c) an "Opposition to Petition to Deny" filed on September 8, 1964, by the applicant directed against (b) above; and (d) a "Response to Opposition to Petition to Deny" filed on September 18, 1964, by the petitioner directed against (c) above.

2. On July 2, 1964, the applicant filed the above-captioned application for a construction permit for a new VHF television broadcast translator station to serve Westerly, Rhode Island, and Pawcatuck, Connecticut, with output power of one watt on Output Channel 13, rebroadcasting its Station WPRO–TV. The communities to be served are within the predicted Grade A contours of Stations WJAR–TV and WJRO–TV [1]. In addition, these communities are within the predicted Grade B contours of the following stations: WTEV, Channel 6 (ABC), New Bedford, Massachusetts; WTIC–TV, Channel 3 (CBS), Hartford, Connecticut; and WNHC–TV, Channel 8 (ABC), New Haven, Connecticut.

3. The petitioner is the licensee of a television broadcast station which provides a predicted signal over the communities to be served, and alleges that as a result of a grant of the proposed translator it would face increased competition for viewers and hence for revenues. In view of this, it is clear that the petitioner has standing as a "party in interest" within the meaning of Section 309(d) of the Act. *Federal Communications Commission* v.

[1] The applicant has filed an uncontroverted engineering statement to establish that in fact Station WPRO-TV's signal intensity in this area falls below Grade A strength.

*Sanders Brothers Radio Station.* 309 U.S. 470. On the merits, petitioner advances the following arguments against a grant of the present application: (a) that since the proposed translator would operate on an output channel adjacent to its input channel, it is apparent that interference must result and the application therefore violates Section 74.703(a) of the Commission's Rules [2]; (b) that in view of other predicted service in the area, no need for the translator has been established; and (c) that authorization of the proposed VHF translator would retard UHF development in the area.

4. Petitioner's argument of possible interference is entitled to careful consideration. In the usual case, it is obvious that an applicant for a translator would avoid selection of such adjacent channels in order to avoid the apparent interference problems which can result. However, this is not the usual case since it does not appear that there is any more suitable VHF channel available [3]. Petitioner argues that it is probable that even Channel 13 would not be available but for the fact that the applicant is the licensee of the Channel 12 station involved. While this may be true, nonetheless it offers an ameliorating circumstance. As the Commission has recognized in other circumstances, adjacent channel interference is characterized by substitution of service, rather than destruction of signals which occurs in cases of co-channel interference, so that even if such interference were to occur here, it by no means follows that the public would necessarily be deprived of service. For, since the same programs are to be carried on channels 12 and 13 it is obvious that any viewer experiencing interference on one channel need only turn to the other for an acceptable picture. Even recognizing this circumstance, however, it is clear that the proposed operation will pose substantial technical problems to the applicant and, at best, may reqsire an unusually sophisticated and expensive installation if it is to prove feasible. However, since it is the applicant itself which will be injured if it is unable to overcome the resulting technical problems, the Commission has reasonable circumstantial assurance that the proposed translator will not be operated in a manner which will cause apparent interference within the meaning of Section 74.703(a) of the Rules. The petitioner argues that it is apparent that interference must result since the proposed translator site is only about 50 miles from Station WPRO–TV's transmitter site, and this separation would fail to satisfy the Commission's minimum adjacent channel separation requirements for television broadcast stations. But the Commission's separation requirements for telecision broadcast stations are not applicable to VHF translator cases. Accordingly, in view of the foregoing considerations, the

[2] Section 74.703(a) of the Rules provides that,
"(a) An application for a new television broadcast translator station or for changes in the facilities of an authorized station will not be granted where it is apparent that interference will be caused. In general, the licensee of a new UHF translator shall protect existing UHF translators from interference resulting from its operation. If interference develops between VHF translators, the problem shall be resolved by mutual agreement among the licensees involved."

[3] As stated in paragraph 2, this area receives predicted signals on Channels 3, 6, 8, 10, and 12. Thus, regardless of the channel selected a question either of adjacent or co-channel interference would be present.

Commission holds that it is not apparent that the proposed translator will cause interference within the meaning of Section 74.703(a) of the Rules.

5. The petitioner's second contention is that the applicant has not made a showing of a need for the proposed translator service. The Commission's Rules do not require such a showing and, indeed, the purpose for which the translator service was established was to provide a means to improve direct reception rather than service *per se*. See Section 74.731(a) of the Rules [4]. Finally, the petitioner has not challenged the applicant's engineering statement which indicates that Station WPRO–TV's actual signal intensity in this area falls considerably below its predicted level. In these circumstances, the Commission does not believe that a hearing would be warranted on the question of the need for the proposed service. See *KCMC, Inc.*, FCC 64–413, 2 R.R. 2d 691.

6. The petitioner's remaining argument is that grant of the present proposal would retard UHF development in the area. The Commission is keenly aware of its responsibility to encourage expanded use of UHF and, consistent with this responsibility, authorizes the use of VHF translators in such a way that they will not retard the future expansion of UHF. Compare *Spartan Radiocasting Co.*, FCC 64–95, 1 R.R. 2d 1085; *Triangle Publications, Inc.*, FCC 64–414; 2 R.R. 2d 695. Here, however, the only fact alleged by the petitioner in support of its argument is a recitation of the availability of UHF channels in the same general area [5]. However, the bare fact of the availability of UHF channels is not sufficient to show that a grant of this application could retard in any way the inauguration of new UHF service for this area. See *Reeves Broadcasting Corporation*, FCC 65–59. Consequently, the Commission does not believe that it is necessary to designate this application for hearing on this issue.

7. In view of the foregoing, it appears that no substantial or material questions of fact have been presented by the petitioner, and the Commission finds that a grant of the above-captioned application would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the "Petition to Deny" filed by The Outlet Company IS HEREBY DENIED. IT IS FURTHER ORDERED, That the above-captioned application of Capital Cities Broadcasting Corporation IS GRANTED in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[4] Section 74.731(a) of the Rules provides that,

"(a) Television broadcast translator stations provide a means whereby the signals of television broadcast stations may be retransmitted to areas in which direct reception of such television broadcast stations is unsatisfactory due to distance or intervening terrain barriers."

[5] The Commission notes that in 1953 it granted a construction permit for Station WCTN, Channel 63, Norwich, Connecticut, to the Connecticut State Board of Education. Norwich is approximately 20 miles from the proposed translator. However, there is no indication that grant of the proposed translator could have any effect on the plans for Station WCTN.

F.C.C. 65-378

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>EMERALD BROADCASTING CORP. (KPIR),<br>EUGENE, ORE.<br>Has: 1500 kc., 10 kw., D, Class II<br>Requests: 1120 kc., 50 kw., DA-1, U, Class II-A | Docket No. 15998<br>File No. BP-15590 |
| PENDLETON BROADCASTING CO. (KZMA),<br>PENDLETON, ORE.<br>Has: 1290 kc., 5 kw., DA-N, U, Class III<br>Requests: 1120 kc. 10 kw., DA-N, U, Class II-A | Docket No. 15999<br>File No. BP-16220 |
| HI-DESERT BROADCASTING CORP. (KDHI),<br>TWENTY-NINE PALMS, CALIF.<br>Has: 1250 kc., 1 kw., D, Class III<br>Requests: 1120 kc., 10 kw., DA-N, U, Class II-A<br>For Construction Permits | Docket No. 16000<br>File No. BP-16503 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT.

1. The Commission has before it for consideration (a) the above-captioned and described applications; (b) "Petition for a Public Hearing Pursuant to the Provisions of Section 316 and Petition to Deny" filed on August 16, 1962, by the Columbia Broadcasting System, Inc., licensee of Station KMOX, St. Louis, Missouri, directed against the above-captioned application for Emerald Broadcasting Corporation; (c) an "Opposition to Petition for a Public Hearing Pursuant to the Provisions of Section 316 and Opposition to Petition to Deny" filed June 27, 1963, by Emerald Broadcasting Corporation; (d) a petition to deny the application of the Hi-Desert Broadcasting Corporation, filed February 26, 1965, by the Columbia Broadcasting System, Inc.; and (e) an opposition to the latter petition filed by the Hi-Desert Broadcasting Corporation on March 11, 1965.

2. With respect to the KPIR proposal, CBS claims, in substance, that the Commission's Rules that were in force at the time that Station KMOX received its license, which provided, in part, for the licensing of no other unlimited time station on 1120 kilocycles, the KMOX frequency, are incorporated into the terms of the KMOX license (*F.C.C.* v. *National Broadcasting Co.* (*KOA*), 319 U.S. 239, 245 (1942)); that the acceptance of the KPIR application and sub-

sequent grant of the application pursuant to new allocation rules adopted by the Commission in the Clear Channel proceeding on September 13, 1961 (Docket No. 6741), (21 RR 1801 (1961)) would constitute a modification of the KMOX license; that, therefore, the Commission is required according to CBS, to afford CBS an opportunity at a hearing pursuant to Section 316 of the Communications Act of 1934, as amended, to show cause why the license of KMOX should not be modified; that, in the event the Commission finds, after hearing that the alleged modification of the KMOX license would serve the public interest, convenience and necessity, the Commission would then be required to hold a hearing pursuant to Section 309 of the Communications Act to determine whether the proposed operation of KPIR would comply with the provisions of Section 73.24(g) which governs the limitations on the population within the 1000 mv/m contour of a standard broadcast station.

3. Since the filing of the CBS petition against the KPIR application, certain acts of the applicant and a court decision have resolved two of the matters raised by CBS. After the Commission affirmed its adoption of standards which permit the assignment of a second unlimited time station on the KMOX frequency, 24 RR 1595 (1962), the United States Court of Appeals for the District of Columbia Circuit upheld the validity of the new rules and confirmed the principle that the new rules are incorporated into the licenses of existing stations when a renewal of license is granted subsequent to the adoption of the new standards. The *Goodwill Stations, Inc.*, v. *Federal Communications Commission*, 398 F.2d 339, 113, U.S. App. D.C. 384, 23 R.R. 2064 (1962). The license of KMOX expired February 1, 1962 and was renewed February 19, 1963. Therefore the license under which KMOX is currently operating is subject to rules adopted in the clear channel proceeding and the contention of CBS that the licensing of a second station on 1120 kilocycles constitutes a modification of license as contemplated by Section 316 of the Act will be rejected. CBS, in the petition to deny, claimed that the proposed operation of KPIR would cause interference to the nighttime operation of KMOX. KPIR has amended its proposal concerning this allegation of interference. However, as set forth in paragraph 8a, a question is presented as to whether adequate protection is afforded to the nighttime operation of KMOX, and based on this alleged interference, an issue will be specified. *Federal Communications Commission* v. *National Broadcasting Company (KOA)*, 319 U.S. 239 (1942). The petition of KMOX will be granted to this extent and KMOX will be made a party to the proceeding.

4. One further matter contained in the pleadings on the KPIR proposal will be considered. KMOX alleged that the proposed operation of KPIR violates Section 73.24(g) of the Rules as to population residing within the 1000 mv/m contour. By amendment filed June 12, 1964, the applicant indicates that the population residing within the 1000 mv/m contour is less than 300 persons and therefore the proposal complies with Section 73.24(g) of the Rules.

5. In the petition to deny the application of the Hi-Desert Broadcasting Corporation filed on February 26, 1965, CBS alleged that

the KDHI proposal may cause interference within the 0.5 mv/m–50% secondary service area of KMOX. It is contended by CBS that the terrain in the vicinity of the proposed antenna site is generally mountainous in character; that a high degree of suppression is incorporated in the Hi-Desert nighttime directional antenna system; that antenna current deviations of less than 3.5 percent would cause the proposed MEOV's to be exceeded; and that, as a result, the proposed antenna system may not be adjusted and maintained in a manner to afford adequate nighttime protection to KMOX.

6. In Hi-Desert's opposition to the CBS petition to deny its application, Hi-Desert contends that the proposed antenna site is located on flat terrain with no gross terrain obstructions located within several miles; that no difficulty is expected in adjusting the array within the proposed MEOV's of radiation; that it may be necessary to maintain the antenna currents and phase relations within one percent and one degree to avoid exceeding the proposed MEOV's, but that the monitors to be installed will have a rated accuracy capable of assuring adequate maintenance; that good engineering techniques will be utilized in construction and maintenance of the proposed directional antenna system; and that the array will be adjusted in a manner to afford adequate protection to KMOX.

7. The Commission's study of the Hi-Desert proposal indicates that the terrain in the vicinity of the proposed antenna site is reasonably flat and free of obstructions which would tend to cause adverse problems of scatter and re-radiation; that the degree of suppression proposed is not so great that it cannot be reasonably expected to be achieved; and that no substantial question of adequate protection to KMOX obtains. The Commission will, in the event of a grant of the Hi-Desert application, impose appropriate conditions to assure adequate protection to KMOX. The CBS petition to deny the Hi-Desert proposal will therefore be dismissed as moot.

8. The following additional matters are to be considered in connection with the issues specified below:

(a) The Emerald Broadcasting Corporation proposes to operate with 50 kilowatts of power utilizing a four-tower parallelogram directional array (DA–1) to suppress the radiation towards the dominant co-channel station (KMOX, St. Louis, Missouri). In the null areas the radiation is suppressed to values as low as 14.0 mv/m (calculated theoretical value) with a MEOV of 35.2 mv/m. While this proposed low value of radiation is not in a direction towards the secondary service area of KMOX, the degree of suppression directly towards KMOX is critically low for a 50 kilowatt operation. (Calculated value is 19.2 mv/m and MEOV is 44.0 mv/m.)

A study of a topographic may submitted by the applicant indicates that terrain irregularities may exist in the vicinity of the proposed antenna site which may cause signal scatter and reradiation and further aggravate the problem of adjusting and maintaining the array within the proposed critically low values.

Since the applicant has not submitted any data obtained from

a site survey which would afford a means of determining the feasibility of the directional operation, a substantial question obtains as to whether the proposed antenna system can be adjusted and maintained as proposed and whether adequate protection will be afforded KMOX.

(b) KPIR proposes to maintain its main studio at the existing transmitter site which is not located within the city limits of Engene, Oregon, and which is not located at the proposed transmitter site and therefore is in violation of Section 73.30 of the Rules. A waiver of Section 73.30 has been requested.

(c) It has not been determined that the proposed antenna system of KDHI would not constitute a menace to air navigation.

(d) The KUMA proposal does not comply with the provisions of Section 73.24(g) of the Rules in that the population within the proposed 1000 mv/m contour would be in excess of 300 persons and over one percent of the population residing within the proposed 25 mv/m contour. An issue will be included to determine whether circumstances exist which would warrant a waiver of that section.

9. The Commission finds that the applicants are, except as indicated by the issues specified below, legally, technically, financially and otherwise qualified to construct and operate their respective stations as proposed, but that the proposed operations involve mutual interference and Section 73.22(a) provides for the assignment of only one Class II–A facility on 1120 kilocycles. Therefore, the Commission is unable to find that a grant of any of the applications would serve the public interest, convenience and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below:

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

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operations of Stations KPIR, KUMA and KDHI and the availability of other primary service to such areas and populations.

2. To determine whether the directional antenna system of Emerald Broadcasting Corporation can be adjusted and maintained within the maximum expected operating values of radiation proposed, and whether adequate nighttime protection will be afforded Station KMOX, St. Louis, Missouri.

3. To determine whether the proposed operation of Emerald Broadcasting Corporation is in compliance with Section 73.30 (a) of the Commission's Rules with respect to location of the main studio, and, if not, whether circumstances exist which would warrant a waiver of said Section.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by KDHI would constitute a menace to air navigation.

5. To determine whether the proposed operation of Pendle-

ton Broadcasting Company is in compliance with Section 73.24 (g) of the Rules concerning population within the 1000 mv/m contour, and, if not, whether circumstances exist which would warrant a waiver of said Section.

6. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

7. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the applications should be granted.

IT IS FURTHER ORDERED, That, the Columbia Broadcasting System, Inc., licensee of Station KMOX, St. Louis, Missouri, and the Federal Aviation Agency, ARE MADE PARTIES to the proceeding.

IT IS FURTHER ORDERED, That the "Petition for Public Hearing Pursuant to the Provisions of Section 316 and Petition to Deny" filed August 16, 1962 by Columbia Broadcasting System, Inc., IS DISMISSED, in part, IS DENIED, in part and IS GRANTED, in part, as indicated above.

IT IS FURTHER ORDERED, That the petition to deny the application of the Hi-Desert Broadcasting Corporation filed February 26, 1965, by the Columbia Broadcasting System, Inc., IS DISMISSED.

IT IS FURTHER ORDERED, that, in the event of a grant of any of the applications, the construction permit shall contain the following condition:

Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

IT IS FURTHER ORDERED, That, in the event of a grant of the application of the Hi-Desert Broadcasting Corporation, the construction permit shall contain the following conditions:

A study, based upon anticipated variations in phase and magnitude of current in the individual antenna towers, after initial adjustment, must be submitted with the application for license to indicate clearly that the inverse distance field strengths at one mile can be maintained with the maximum expected operating values of radiation specified in the radiation pattern. Allowable deviation in phase and current determined from this study will be incorporated in the instrument of authorization.

A properly designed phase monitor of sufficient accuracy and resolution shall be installed in the transmitter room, and shall be continuously available as a means of indicating that the relative phase and current ratios of the antenna towers are maintained within the maximum allowable deviation values indicated in the authorization.

opportunity to be heard, the applicants and parties respondent herein, pursuant to Section 1.221(c) of the Commission Rules, in

IT IS FURTHER ORDERED, That, to avail themselves of the

person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

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

IT IS FURTHER ORDERED, That, the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceeding, upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

Adopted May 5, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–394

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| GROUP I | |
| JOE L. SMITH, JR., INC., CHARLESTON, W.VA. (WKNT–TV) | Docket No. 15889<br>File No. BMPCT–4201 |
| UNITED BROADCASTING CO. OF EASTERN MARYLAND, INC., BALTIMORE, MD. (WTLF–TV) | Docket No. 15892<br>File No. BMPCT–4222 |
| ET AL. | ET AL. |
| For Extension of Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER HYDE ABSENT; COMMISSIONERS BARTLEY AND LOEVINGER VOTING TO DISMISS ON LATE FILING ONLY; COMMISSIONER WADSWORTH ABSTAINING.

1. The Commission has before it for consideration: (a) a "Petition to Intervene", filed May 6, 1965, by ElmerNolte; (b) an "Opposition to and Motion to Dismiss Petition to Intervene", filed May 7, 1965, by United Broadcasting Company of Eastern Maryland, Inc. (WTLF–TV); and (c) an opposition by the Broadcast Bureau, field May 10, 1965. By order, released March 23, 1965 (FCC 65–217), and published in the Federal Register on March 27, 1965 (30 FR 4085), the Commission set for oral argument at 10:00 a.m. on May 13, 1965, twenty-two applications for additional time within which to complete construction; for license to cover construction permit for new television station; and for renewal of licenses. The application of WTLF–TV for additional time within which to complete construction is one of those set for oral argument.

2. Nolte requests intervention in the oral argument for "the limited purpose of requesting the Commission to deny the application for additional time to complete construction of Station WTLF–TV", and to advise the Commission that he and other residents of Baltimore, Maryland: (a) "will have completed organization of a corporation by May 13, 1965, for the purpose of preparing, filing and prosecuting an application for a construction permit for a new UHF television channel at Baltimore on the first available channel, and constructing and operating such a station when authorized by the Commission", (b) "have negotiated an option to purchase the land, building and antenna tower formerly owned by and licensed to Station WBAL–TV, Baltimore, for use by the proposed station"; and (c) "are ready, willing and able to immediately construct and operate a UHF station at Baltimore which would have higher

power, wider coverage and superior programming than any of the proposals of United Broadcasting Company of Eastern Maryland, Inc. for Station WTLF–TV." Nolte claims that delay in the construction of WTLF–TV has not been prevented by causes not under the control of the grantee and that its construction permit has been "automatically forfeited" under 47 USC 319(b).

3. Nolte's petition will be dismissed. 47 CFR 1.233 provides in part:

> (b) [Persons] desiring to participate as a party in any hearing may file a petition for leave to intervene not later than 30 days after the publication in the Federal Register of the hearing issues or any substantial amendment thereto ...
>
> (d) Any person desiring to file a petition for leave to intervene later than 30 days after the publication in the Federal Register of the hearing issues or any substantial amendment thereto shall set forth the interest of petitioner in the proceedings, show how such a petitioner's participation will assist the Commission in the determination of the issues in queston, and set forth reasons why it was not possible to file a petition within the time prescribed by paragraphs (t) and (b) of this section ...

Nolte's petition was filed on May 6, 1965, well over a week past the date within which petitions to intervene were due. Moreover, Nolte has failed to indicate, as required by subsection (d), any reason why his petition could not have been filed within the requisite 30 day period. Nolte has also failed to state how his intervention would aid the Commission in considering WTLF–TV's application, and his petition is not accompanied by an "... affidavit of a person with knowledge as to the facts set forth in the petition", as required by Section 1.223(b).

4. Even had the petition not been procedurally deficient, it is clear that Nolte has no standing to intervene in the instant proceeding. His interest is no greater than that of any member of the general public, and he is neither a licensee, permittee nor applicant and thus cannot assert standing either because of electrical interference or economic injury because of competition. *Central Wisconsin Television, Inc.*, FCC 63–62, 24 RR 912; *Rhode Island Television Corporation* v. *Federal Communications Commission* 116 U.S. App. D.C. 370, 320, F.2d 762, 25 RR 2103 (1963) and cases cited therein. Moreover, potential applicants have no standing either to file petitions to deny or to participate in proceedings regarding applications for extensions of time within which to complete construction. *Central Wisconsin Television, Inc., supra; Mass Communicators, Inc.* v. *Federal Communications Commission* 105 U.S. App. D.C. 277, 266 F.2d 681, 18 RR 2098 (1959). As to Nolte's claim of automatic forfeiture, *Mass Communicators, Inc., supra,* also held that no automatic forfeiture occurs unless and until the Commission has exercised its discretion pursuant to 47 USC 319(b). This, the Commission has not yet done.

Accordingly, IT IS ORDERED, This 11th day of May, 1965, That the Petition to Intervene, filed May 6, 1965, by Elmer Nolte IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65M–552

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| LILLIAN LINCOLN BANTA AND DEARE DEVERE BANTA D.B.C. TELEVISION SAN FRANCISCO, CALIF. | Docket No. 15780<br>File No. BPCT–3303 |
| JALL BROADCASTING CO., INC., SAN FRANCISCO, CALIFORNIA | Docket No. 15781<br>File No. BPCT–3425 |
| For Construction Permit for New Television Broadcast Station (Channel 26) | |

### MEMORANDUM AND ORDER FOLLOWING CONFERENCE

1. At prehearing conferences held in this proceeding on February 3 and February 24, 1965, two matters of significance emerged. A fair hearing problem developed and a calendar governing future procedural steps was adopted.

2. The facts concerning the fair hearing problem are these: At the outset of the second conference Bureau counsel was queried concerning a proposed stipulation agreed to by the applicants. He announced that the Bureau intended to participate in the hearing-proper only on that issue which dealt with the financial qualifications of Jall Broadcasting (Issue One). He continued to the effect that on matters relating to the financial qualifications of Jall he stood ready to consider stipulating. On matters relating to other issues he would not stipulate but had no objection to the applicants doing so. When asked if the Bureau, in connection with its limited participation, would not then refrain from filing proposed findings and exceptions Bureau counsel responded "It has been the Bureau's position that we do participate in the post hearing stage." (T. 15)

3. Counsel for both applicants made clear their disapproval of the position taken by the Bureau. The examiner stated that in his view, were Bureau to adhere to its position, a fair hearing could not be afforded the applicants. At the close of conference Bureau's position remained unchanged.

4. The position of the Bureau is not unsupported by color of authority. While the rules of the Commission circumscribe with great particularity the extent to which private parties may participate in its processes, see e.g. Sections 1.22–1.52 of the Commission's rules, members of the Commission's staff operate under the following standards:

§ 1.21 *Parties.*

* * * * * * *

(b) The appropriate Bureau Chief(s) of the Commission shall be deemed to be a party to every adjudicatory proceeding (as defined by the Administra-

tive Procedure Act) without the necessity of being so named in the order designating the proceeding for hearing.

(c) When, in any proceeding, a pleading is filed on behalf of either the General Counsel or the Chief Engineer, he shall thereafter be deemed a party to the proceeding.

§ 1.263 *Proposed findings and conclusions.*

(a) Each party to the proceeding may file proposed findings of fact . . . provided, however, That the presiding officer may direct any party other than the Commission counsel to file proposed findings . . .

* * * * * * *

(c) In the absence of a showing of good cause therefor, the failure to file proposed findings . . ., when directed to do so, may be deemed a waiver of the right to participate further in the proceeding.

In connection with the foregoing provisions of the rules, it might be pointed out that the powers of the hearing examiner originate in Section 7 of the Administrative Procedure Act and those powers are thus limited:

(b) Hearing power.—Officers presiding at hearings shall have authority, subject to the published rules of the agency . . . to . . . (5) regulate the course of the hearing. . . .

The rules of the Commission referred to above are published.

5. The position of the Bureau here also has support in precedent. For a number of years it has engaged in such selective participation as it now contemplates. Tacit approval of the Commission to its staff engaging in hearings at stages of their own choosing has been effected. See *Frederick Franklin Moore,* 18 R.R. 524. In that case one of the Commission's Bureaus tried the hearing. Initial Decision issued. The Bureau that tried the hearing did not except. Another Bureau located some 1,000 miles away at the time hearing was tried filed exceptions. Its exceptions were granted.

6. On the other hand, Section 12 of the Administrative Procedure Act (5 U.S.C. 1001) provides:

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. . . .

7. Rules and statutes aside, it seems patent that anyone familiar with trial practice must surely be affronted by the trial toga the Bureau wears here. If there is anything well established in our jurisprudence it is the principle that an accused has a right to face his accuser in open forum. In the ebb and flow of hearing the Commission's staff, acting as it does as public counsel, must in the nature of things find itself in an adversary position toward one or another of the other parties to the proceeding, and toward a whole or part of their proof. Is the confrontation so deeply in grained in our law accomplished when a party's position first becomes known to its adversaries after the close of record and then only by way of pleading? Is it enough that a party can file a counter pleading? Is it enough that it can orally urge before review authority denial or amelioration of a late comer's attack? Is it enough that it can seek leave to hie itself back to Washington,

and to hearing, to adduce proof to allay doubts raised by a Johnny-come-lately adversary as to the sufficiency of its evidence? Can parties afford to enter into such timesaving procedural devices as admissions and stipulations if at the time they propose to adopt such measures a foreigner to them, but a party to the proceeding, is silent as to what they cover?[1] What is the Commission's staff function in these proceedings? Is it that of counsel or advisor to review authority? If it is the latter, does that square with the thrust of the Administrative Procedure Act? Is another hurdle really necessary in the already hazardous and long lane that applicants must negotiate between application filing and final grant or denial?

8. All but two of the questions posed above richly deserve a resounding negative by way of reply. The two questions that do not cry for such a response should be answered to the effect that the Commission's counsel are counsel and are neither appelate advisors nor roving hearing kibitzers.

9. Effort has been made without success to find cases in the field of administrative law dealing with the problem here under discussion. This is not surprising. In reliance on the general latitudinarian attitude of the rules toward them, were Commission's staff to insist on the right to punch witnesses in the nose if their answers were not satisfactory, it it also doubtful that the corpus of Administrative Law would yield up much express precedent on that point. Similarly, explanation for the dearth of precedent frowning on the bizarre trial conduct Bureau insists on engaging in here is also no doubt attributable to the fact that it is so outside the pale of normal behavior on the part of counsel that the problem has not heretofore been presented. Such an explanation seems particularly persuasive when the provisions of Section 12 of the Administrative Procedure Act, *supra*, are recalled. In any event, need for correction of the fault at issue springs from higher order. Both our Constitution and the whole tradition of our jurisprudence demand fair hearing.

10. The foregoing comments are not to be construed as wholesale condemnation of the Bureau limiting its participation in hearings. Bureau's reason for the participation it contemplates, lack of manpower, is no doubt good and is here unquestioned. Were Bureau to refrain wholly from participation in hearing it would be regrettable but it would not offend fair hearing concepts. The same can be said were Bureau to limit its entire participation to a specified facet or facets of a case. The rub comes when it wants to participate on all matters in part and selected matters in whole.

11. Because of the provisions of the Commission's rules governing participation in hearing by the Commission's staff and the Commission precedent on that subject cited above, it would appear

[1] The problem here referred to was pointed up at the conference:
"MR. CHACHKIN: [counsel for Bureau] Yes, sir. We will only be present as far as the financial qualifications issue is concerned.
"PRESIDING EXAMINER: And you are going to stipulate on the financial issue.
"MR. CHACHKIN: Yes, we would be willing to enter into a separate stipulation as far as the financial qualification.
"MR. WELCH: That poses a little difficulty, and you have put your finger on it already; that it is very difficult for two of the parties to come up with a working series of stipulations and then have the Broadcast Bureau not agree." (T. 14–15).

that reform here, if it is to be effected, must be handled by someone other than the examiner. The Commission's Review Board may, if it chooses, deem this portion of the Memorandum a motion filed under the provisions of Section 0.341 of the Commission's Rules seeking such action in the premises as the Board deems appropriate. In the absence of ruling the examiner will of course try the matter within its existing framework. It seems regrettable however to proceed further in a proceeding that has reversible error built into its core.

12. The following procedural steps and calendar governing them were adopted at the conference held on February 24, 1965. They will be effected as specified.

April 27, 1965—Commencement of hearing; identification and exchange of direct written case.

May 18, 1965—Final date for requests by parties for stipulations or additional information on the comparative issue.

May 31, 1965—Final date for requesting oral argument before the examiner.

June 29, 1965—Final date for furnishing stipulations or additional information requested on comparative issue.

July 6, 1965—Hearing before examiner for the offer of written exhibits into evidence, and rulings on objections. It will not be necessary for witnesses to appear in person at this time.

July 20, 1965—Examination of witnesses.

SO ORDERED, This 30th day of April 1965.

FEDERAL COMMUNICATIONS COMMISSION,

THOMAS H. DONAHUE, *Hearing Examiner.*

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–162

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>PAUL D. NICHOLS, WILLIAM C. REID, AND HOUSTON L. PEARCE D.B.A. BIGBEE BROADCASTING CO., DEMOPOLIS, ALA.<br>For Construction Permit | Docket No. 14832<br>File No. BP–13976 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON CONCURRING IN PART AND ISSUING A STATEMENT; BOARD MEMBER KESSLER NOT PARTICIPATING.

1. By Memorandum Opinion and Order (FCC 65–M132), released February 3, 1965, the Hearing Examiner dismissed the above-captioned application and approved an agreement between the applicant and Demopolis Broadcasting Company, licensee of Station WXAL, Demopolis, Alabama, whereby the applicant would be reimbursed by WXAL, in an amount not to exceed $5,000, for the applicant's out-of-pocket expenses incurred by it in prosecuting its application. The Broadcast Bureau appeals.[1]

2. On March 9, 1960, Bigbee Broadcasting Company (hereinafter referred to as Bigbee) filed an application for a construction permit for a new standard broadcast station at Demopolis, Alabama. The application was granted on June 27, 1962. On July 27, 1962, Demopolis Broadcasting Company (hereinafter referred to as WXAL), licensee of Station WXAL at Demopolis, filed a petition for reconsideration of the grant of Bigbee's application. In its petition, WXAL contended that Demopolis could not support a second station, and a variety of allegations was made in support of this contention. Bigbee opposed WXAL's request, and, in turn, made factual allegations in support of its contention that Demopolis could support a second station. By Memorandum Opinion and Order (FCC 62–1124), released October 29, 1962, the Commission granted, in part, WXAL's petition for reconsideration, made WXAL a party to the proceeding, and designated Bigbee's application for hearing on a *Carroll* issue, a financial qualifications issue and a Suburban issue. The Commission placed upon WXAL the burden of proof and the burden of proceeding with the introduction of evidence under the *Carroll* and financial qualifications issues.

3. On October 21, 1964, Bigbee filed with the Hearing Examiner

[1] Before the Review Board for consideration are: (1) the Bureau's appeal, filed February 10, 1965; (2) an opposition, filed February 23, 1965, by the applicant, Bigbee Broadcasting Company; and (3) the Bureau's reply, filed March 5, 1965.

a petition for leave to dismiss its application. The basis of its request was that it had become convinced that Demopolis could not support a second station; the basis of its conviction was an economic analysis prepared by one Horace W. Gross, who was retained by WXAL. In its petition, Bigbee also requested approval of an agreement, a copy of which was attached to the petition, whereby WXAL agreed to pay Bigbee no more than $6,500 in consideration of Bigbee's agreement to dismiss its application and in consideration an agreement by Bigbee's principals not to compete with WXAL for a period of ten years. The covenant not to compete was subsequently deleted because of the Broadcast Bureau's objection to such covenant, and, at the same time, the payment by WXAL to Bigbee was reduced from $6,500 to $5,000.[2]

4. The agreement as thus modified was approved by the Hearing Examiner and Bigbee's application was dismissed. Contrary to the views expressed by the Broadcast Bureau in its appeal from the Examiner's order, it is clear that the Hearing Examiner had jurisdiction to act in this dismissal agreement. Under Section 0.341 of the Commission's Rules, the Hearing Examiner has jurisdiction over all motions, petitions and other pleadings except those which are to be acted upon by the Commission, the Review Board or Chief Hearing Examiner. The Commission did not reserve to itself original jurisdiction over dismissal agreements involving only one applicant, nor did it delegate original jurisdiction over such agreements either to the Review Board or Chief Hearing Examiner. Hence, the Hearing Examiner had jurisdiction to act on the agreement in question.

5. The Review Board is, however, in agreement with the Broadcast Bureau that the Hearing Examiner was in error in approving the agreement between Bigbee and WXAL and in dismissing Bigbee's application. The governing considerations are set forth in *Woma Typa Broadcasting Company*, FCC 63M–702, 25 RR 900, which was affirmed by the Commission (FCC 63–912, 1 RR 323). In that case an applicant seeking dismissal of its application and approval of an agreement for reimbursement alleged that after observing the financial operations of various stations in the area, it concluded that the operation of a third station in the community would be unprofitable and would result in decreased revenues and degradation of program service. The applicant was to be reimbursed by the two local stations. The Hearing Examiner, in denying approval of the agreement, questioned the propriety of sanctioning an agreement between existing licensees, which had a substantial interest in the competitive situation, and an applicant whose proposal would result in increased competition, where it appeared that the object was to forestall Commission determination and eliminate potential competition. It was the Examiner's view that such agreements encouraged filing of applications not entirely in good faith and that the Commission should on the basis of an evidentiary record make a determination whether the public interest would or would not be served by the increased competi-

[2] The total out-of-pocket expenses of Bigbee exceed $5,000. These expenses are authenticated by appropriate affidavits and vouchers.

tion. The Commission, in denying review, stated:

> 3 . . . The public interest standard still stands. The issue here is thus whether the agreement, which regardless of its objectives, would result in the elimination of potential competition, is consistent with the public interest. Upon the basis of the showing made, we cannot find that it is. The basic public interest ground advanced is that operation of a third station in this community would result in decreased revenues and degradation of the program service. But the general statements in the affidavits submitted in support of this agreement fall far short of the type of showing required. We wish to stress that in an area such as this, warranting our close scrutiny because of possible abuses, a clear and compelling showing must be made.

6. On the basis of the information of record in this proceeding and in light of the factual allegations of the parties, it cannot be concluded that approval of the agreement is consistent with the public interest. The Hearing Examiner was apparently satisfied that the motivating inducement so far as Bigbee was concerned in entering into this agreement was its conviction, based upon Gross' study, that Demopolis could not support another station. However, as the Broadcast Bureau cogently points out, Gross' study was never introduced in evidence, he was not qualified as an expert, and the Bureau had no opportunity to cross-examine him. In support of the request for approval of the dismissal agreement, Bigbee relies solely upon a summary of Gross' study. This summary indicates that Gross' ultimate conclusion was based upon (a) a comparison of the Demopolis market with other two-station markets, which were not specifically identified, in the South; (b) the experience in other unidentified markets of the earnings of two stations as opposed to one station in unidentified comparable markets; (c) the economic trends in Demopolis and the county in which it is located; (d) the revenues which two stations in Demopolis could be expected to earn in view of the earnings in other two-station markets which are not identified; and (e) the operating expenses which Bigbee would probably incur, based upon average expenditures of stations in other unidentified two-station markets. These conclusionary statements cannot be evaluated inasmuch as the data upon which they are based are not set forth. Opposed to these conclusionary statements is the extremely detailed showing which Bigbee made in its opposition to the inclusion of a *Carroll* issue. In that opposition, Bigbee noted that between 1956 and 1960, farm income in the Demopolis trading area had increased by 16%; consumer incomes had increased by 25%; the population of Marengo County, of which Demopolis is the county seat, had increased by 16%; retail sales increased by nearly 20%. In the ten year period from 1950 to 1960, postal receipts had doubled, the number of houses in Demopolis had increased by 80%, and bank deposits had nearly doubled. It was on the basis of this showing that the Commission, though it added a *Carroll issue,* placed upon WXAL the burden of proof under that issue. In view of this detailed showing, it cannot be concluded on the basis of the summary of Gross' study that a "clear and compelling showing", as required in *Woma Typa Broadcasting Company, supra,* has been made that the institution of a second service in Demopolis would not be in the public interest.

Accordingly, IT IS ORDERED, This 5th day of May, 1965, That the Broadcast Bureau's Appeal, filed February 10, 1965, IS APPROVED, and that the Hearing Examiner's Memorandum Opinion and Order, FCC 65M–132, released February 3, 1965, which dismissed the above-captioned application of Bigbee Broadcasting Company and approved an agreement between Bigbee Broadcasting Company and Demopolis Broadcasting Company, IS SET ASIDE.

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

F.C.C. 65–385

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of AMENDMENT OF SECTION 73.79 OF THE COMMISSION'S RULES TO SPECIFY A NEW METHOD OF CALCULATING UNIFORM SUNSET TIMES | RM–301 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND WADSWORTH ABSENT; COMMISSIONER LOEVINGER DISSENTING.

1. The Commission has before it for consideration a petition filed on December 14, 1964, by Conant Broadcasting Co., Inc., licensee of Station WHIL, Medford, Massachusetts, seeking reconsideration of our Memorandum Opinion and Order (FCC 64–1059, released November 13, 1964) denying its petition looking toward amendment of Section 73.79 of the Commission's rules to specify that uniform sunset times be based upon the actual times of sunset for the fifteenth day of the month, adjusted to the last minute of that quarter-hour during which actual sunset occurs.[1]

2. In support of its request for reconsideration, Conant asserts, first, that for the reasons set forth hereinafter (paragraph 3), the denial of its request was incorrect; and, secondly, that, in any event, the decision here should not have been made by an affirmative vote of less than a majority of the Commissioners, and in the face of a dissenting opinion.

3. Conant acknowledges that the proposed change would result in a loss of some service by unlimited time stations during the period involved, but argues that many of the persons losing such service would gain new service from nearby local facilities. And, while recognizing that the proposed rule change would tend to benefit daytime only stations at the expense of unlimited time stations, Conant urges that "a complete record would have demonstrated that the benefits to the public far outweigh any slight detriment that may be caused to the unlimited time facilities." These arguments by petitioner had been carefully considered by the Commission in acting on the original request for rule making. No new facts have been alleged here which were not previously considered by us. Accordingly, there is no reason to depart from the conclusions contained in our prior Memorandum Opinion and Order.

[1] In pertinent part, Section 73.79 of the Commission's Rules specifies that uniform sunset times are based upon actual times of sunset for the fifteenth day of the month, adjusted to the nearest quarter hour.

4. Petitioner urges that a decision on such an important policy matter should not have been made by less than a majority of the Commissioners and in the face of a dissent. The petition for rule making was dismissed on the affirmative vote of three Commissioners, with a fourth Commissioner dissenting without opinion; three of the Commissioners were absent and, therefore, did not participate in the vote. Petitioner does not contend, however, that the Commission's action was invalid, as, of course, it was not. Section 4(h) of the Communications Act of 1934, as amended, provides that four members of the Commission shall constitute a quorum. The act of the quorum is the act of the Commission. *Jefferson Standard Broadcasting Co.*, 1 Pike and Fischer R.R. 2d 423 (1963). We agree with petitioner that its petition concerns a policy matter of importance. Moreover, a practice such as petitioner suggests would not contribute to the orderly dispatch of the Commission's business but inevitably would lead to delay. Petitioner's suggestion would unreasonably restrict the Commissioners in the performance of duties which demand their absence from a particular Commission meeting.

5. Accordingly, IT IS ORDERED, This 5th day of May, 1965, that the petition for reconsideration filed December 14, 1964, by Conant Broadcasting Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65-392

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
LIABILITY OF ARTHUR C. SCHOFIELD, LICENSEE OF STATIONS WKYX-AM-FM, PADUCAH, KY.
For Forfeiture

MEMORANDUM OPINION AND ORDER

BY THE COMMISSIONERS BARTLEY AND WADSWORTH ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated February 17, 1965, addressed to Arthur C. Schofield, the licensee of Stations WKYX-AM-FM, Paducah, Kentucky; and (2) the response to the Notice of Apparent Liability filed March 22, 1965.

2. The Notice of Apparent Liability was issued because, following a Commission staff investigation into the operation of Stations WKYX-AM-FM, it appeared that (a) On January 1, 1964, the licensee entered into a contract with Raymond F. Damgen (later cancelled in July 1964) which provided for a transfer of a 20 per cent interest in Stations WKYX-AM-FM from the licensee to Mr. Damgen's payment of $15,000. The licensee did not until July 1964 file a copy of the agreement relating to ownership, in willful or repeated violation of Section 1.613 of the Commission's Rules; and (b) From June 22, 1962, until at least September 1964, Stations WKYX-AM-FM were operated by a corporation, Nationwide Stations, Inc., as though it were the licensee, without the filing of an application for assignment of license and without the licensee's receipt of the Commission's consent to the assignment, in willful or repeated violation of Section 310(b) of the Communications Act of 1934, as amended, and Section 1.540 of the Commission's Rules. The Notice of Apparent Liability indicated that for the willful or repeated failure to observe the Act and the Rules the licensee was, pursuant to Section 503(b) of the Communications Act, subject to a forfeiture of five hundred dollars ($500).

3. In his response to the Notice of Apparent Liability, the licensee maintains with respect to (a) above that the contract with Damgen was merely executory, no interest was to pass to Damgen until the entire amount of the contract price was paid, and the licensee did not believe that he had to file such a contract. The licensee also contends that imposition of a forfeiture at this time would be inequitable in that, after discovery of this violation, the staff sent him a letter dated August 4, 1964, stating that no further action was anticipated in connection therewith.

4. With respect to (b) above the licensee contends that "the charge that the stations have been operated in the name of Nationwide Stations, Inc., is contrary to the weight of the evidence which shows only that the stations' books of accounts were maintained in the name of Nationwide." The licensee alleges that shortly after he acquired WKYX–AM–FM he intended to transfer the operation to a corporation which he had just formed and which he would control but that he was "dissuaded from doing so . . ." and that, aside from matters over which the bookkeeper exercised domain, the stations were operated in all respects as a sole proprietorship.

5. The minute book of Nationwide Stations, Inc., revealed that on June 22, 1962, the day the licensee took over control of WKYX–AM–FM, Articles of Incorporation were registered and filed with the Kentucky Secretary of State. The first meeting of the board of directors was held on July 30, 1962, and resolutions were then adopted authorizing the corporation to accept an assignment of the stations. Numerous documents which were obtained during the Commission's investigation and which establish that the licensee, contrary to his contention, operated and held himself out as a corporation from June 1962 to at least September 1964, include the following:

(a) A copy of a sales report for June 1962, listing advertising accounts owing Nationwide Stations Inc., certain amounts.

(b) A copy of a payroll journal entry dated June 28, 1962 with a note attached reading "This payroll was thru Nationwide Stations Inc. . . ."

(c) A copy of Report of Change of Ownership dated October 11, 1962, filed with the Commonwealth of Kentucky, Department of Economic Security. The report designates the successor to WKYX as a corporation to be operated under the name of Nationwide Stations, Inc.

(d) Numerous copies of balance sheets, profit and loss statements and statements of income and expense for 1962 through 1964, in the name of Nationwide and listing as an operating expense the licensee's salary as an officer of Nationwide Stations, Inc.

(e) Copies of employer's contribution reports to the Commonwealth of Kentucky, Division of Unemployment Insurance for the years 1963 and 1964, listing the firm name as Nationwide Stations, Inc.

(f) Copies of Kentucky state and Federal tax withholding statements for 1962 and 1963 showing Arthur C. Schofield as an employee of Nationwide Stations, Inc.

(g) Copies of corporation income tax returns, both Federal and state, for 1962 through 1964, prepared in the name of Nationwide Stations, Inc. and signed by Arthur C. Schofield as president.

6. We conclude from the above that the licensee did in fact transfer the operation of the stations from himself to a corporation and that he represented to state and federal agencies (except the Commission) that he was a corporation. In this regard, it

should be pointed out that while corporate tax returns were filed with the State of Kentucky and the Federal Government, the annual financial reports filed with the Commission were prepared in the name of Arthur C. Schofield as individual owner-licensee.

7. In our opinion, the licensee has demonstrated a lack of concern for or indifference to compliance with the Communications Act and our Rules. We believe that the violations could, and indeed should, have been easily avoided and there is ample evidence of both willful and repeated violations of Section 310(b) of the Communications Act and Sections 1.613 and 1.540 of the Rules thereunder. *Midwest Radio-Television, Inc.*, FCC 63–1024; *Cheyenne Broadcasting Company, Inc.*

8. The licensee contends finally that imposition of a $500 forfeiture would create economic hardship on the station. However, we considered the financial status of the station before issuing our Notice of Apparent Liability in this case. Although the licensee apparently has committed both of the violations recited in the Notice of Apparent Liability, in view of the fact that a letter was sent to him indicating that no further action was contemplated in connection with the first violation, we shall not impose a forfeiture therefor. Therefore, we have decided to impose a forfeiture of two hundred and fifty dollars ($250) for willful and repeated violation of Section 310(b) of the Act and Section 1.540 of the Rules.

9. In consideration of the foregoing, IT IS ORDERED, that Arthur C. Schofield, the licensee of Station WKYX–AM–FM, Paducah, Kentucky, FORFEIT to the United States Government the sum of two hundred and fifty dollars ($250). Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

10. 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 Arthur C. Schofield.

Adopted May 5, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–377

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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|---|---|
| In Re Application of<br>HI-DESERT BROADCASTING CORP. (KDHI),<br>TWENTY-NINE PALMS, CALIF.<br>Has: 1250 kc., 1 kw., Day, Class III<br>Requests: 1120 kc., 10 kw., DA–N, U,<br>Class II–A<br>For Construction Permit | File No. BP–16503 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER ABSENT.

1. The Commission has before it for consideration (a) the above-captioned and described application which was amended on December 16, 1964, to specify operation on 1120 kilocycles in lieu of 1110 kilocycles originally specified (acceptance of the amendment was announced by Public Notice of December 21, 1964 (Report No. 7433)); (b) a petition for reconsideration of the acceptance of the amendment filed on January 21, 1965, by the Pendleton Broadcasting Company, (hereinafter sometimes referred to as petitioner or KUMA), applicant for a construction permit to change the facilities of Station KUMA, Pendleton, Oregon, to specify operation on 1120 kilocycles; (c) a motion to strike the petition filed by the Hi-Desert Broadcasting Corporation (KDHI); (d) petitioner's opposition to the motion; and (e) KDHI's reply to the opposition.

2. KUMA claims standing to petition for reconsideration of the acceptance of the KDHI amendment on the ground that the KUMA application specified the frequency now sought by KDHI and that KUMA is a party who would be aggrieved by a grant of the KDHI application as amended. KDHI opposes KUMA's claim of standing on the ground that KUMA was not a party to an action by the Commission on December 23, 1964, in which the Commission approved an agreement between KDHI and nine other applicants who seek authority to operate a standard broadcast station in the Los Angeles area on 1110 kilocycles. The agreement provided for partial reimbursement to KDHI in consideration of its amending its application to remove the conflict between the KDHI proposal and the proposals of the other parties to the agreement. The Commission finds that, notwithstanding the fact that KUMA was not a party to the December 23 action, KUMA has a right to object to the acceptance of the amendment which brought KDHI's proposal into conflict with the KUMA proposal. The Commission

will therefore consider the KUMA petition on its merits.

3. In support of its petition for reconsideration KUMA alleges that the KDHI amendment does not qualify for further consideration as a matter of law and does not meet the current technical standards for acceptance.

4. It appears to be the petitioner's position that the KDHI amendment is not acceptable as a matter of law because, according to the petitioner's interpretation of Section 311(c) of the Communications Act of 1934, as amended, and Section 1.525 of the Commission's Rules, KDHI should not be allowed to amend its application to remove the conflict with one group of applications, accept reimbursement for expenses incurred up to that point, and at the same time create a conflict with the KUMA application. Petitioner states that Section 311(c) contemplates Commission approval of "an agreement whereby one or more of such applicants *withdraws* his or their application or applications" (emphasis supplied by petitioner). Petitioner urges that the legislative history of 311(c) as amended in 1960 evidences that the term "withdrawal" in the context of this statute was intended to refer to "dismissal" of an application and that the Congressional purpose of allowing such arrangements in order to eliminate time-consuming hearings on the withdrawn application would not be furthered by allowing a "paid off applicant" to amend into a second comparative hearing situation, thus generating a new cycle of hearing issues of indeterminate and inevitable delay. Petitioner contends that Section 1.525 of the Commission's Rules does not allow an applicant after being reimbursed for his expenses to amend to eliminate one conflict and to create another and that Section 1.525 (b)(1) contemplates two courses of action for the withdrawing applicant; either (1) dismissal of the application as the only application for a community specified, or (2) amending "to specify a different community". KUMA further contends that the rule makes no special provision for those situations where an existing station is seeking to change frequency and power in its designated community and does not justify what the petitioner characterizes as an inconsistent interpretation of the rule to allow an applicant to amend to remove one conflict and create another. Petitioner states that it does not contest the approval of the agreement to the extent that it removes the KDHI application from the proceeding involving the applicants for 1110 kilocycles, but submits that there is no legal authority for amending in the manner and under the circumstances in which KDHI amended to specify 1120 kilocycles.

5. The petitioner's interpretation must be rejected. Section 1.522(a) of the Commission's Rules provides that any application may be amended as a matter of right prior to the adoption of an order designating such application for hearing merely by filing the appropriate number of copies of the amendment. The KDHI amendment was tendered and accepted pursuant to that Section. Thereafter, the Commission approved the agreement providing for partial reimbursement for expenses incurred in prosecuting the KDHI application, having found that the agreement was consistent with the public interest, convenience and necessity. The

Commission affirms that finding. We believe that such finding is particularly appropriate in the circumstances of this case. The amendment of the KDHI application to a Class II–A frequency for which, up to that time, only applications for the State of Oregon had been filed, affords the Commission an opportunity to determine the disposition of such frequency on the basis of whether the proposal for California or one of the proposals for Oregon would best provide a fair, efficient and equitable distribution of radio service as contemplated by Section 307(b) of the Communications Act of 1934, as amended. The Class II–A frequencies such as this one involved here were made available by the Commission for the specific purpose of providing service to areas which are presently underserved, and we believe that conflicting applications proposing to provide service in substantially different areas offers the best opportunity for disposition of these frequencies in a manner most likely to serve the public interest.

6. KDHI disclaims any objection to the approval of the agreement to the extent that it removed the conflict with other applications, but attempts by a process of statutory and regulatory construction to invalidate wholly unrelated procedural provisions. As previously indicated, the amendment to which the petitioner objects is acceptable insofar as the provisions of Section 1.522(a) are concerned, and the procedural right provided by Section 1.522(a) is not altered by the provisions of Section 311(c) of the Act or Section 1.525 of the Rules. With specific reference to some of petitioner's constructions, the Commission finds nothing in Section 311(c) of the Act or its legislative history to restrict the applicability of the provisions of that section to dismissals when the word used in the statute is "withdraws". An amendment to an application specifying a change in frequency necessarily results in a withdrawal of the proposal previously specified. Section 1.525(a) clearly contemplates the approval of agreements when a conflict is removed by withdrawal or amendment of an application or by dismissal of an application. Petitioner misconceives the purpose of Section 1.525(b) of the Rules which is intended to assure the Commission an opportunity to discharge its statutory duty prescribed by Section 307(b) of the Act to provide a fair, efficient and equitable distribution of radio service. A further purpose of Section 1.525(b) is to preclude, insofar as practicable, the frustration of a 307(b) determination by the Commission through agreements between applicants. See In the Amendment of Section 1.316 [now 1.515], etc., 20 RR 1673. The two courses of action enumerated in Section 1.525(b) (dismissal of the only application for a specified community or amending to specify a different community) are the two situations in which the Commission will consider the question of whether a dismissal or amendment would unduly impede achievement of a fair, efficient and equitable distribution of radio service. Enumeration of the two courses in Section 1.525(b) does not constitute a limitation on the situations in which the Commission will approve an agreement resulting in the removal of a conflict. This is true whether or not the removal of one conflict results in the creation of another.

Moreover, contrary to the petitioner's suggestion, the conflict between the KDHI and KUMA proposals was not created by the Commission's approval of an agreement. The conflict was created by KDHI's amending its application as a matter of right. The Commission, having found that the agreement was consistent with the public interest and that the amount claimed by KDHI was legitimately and prudently expended in the prosecution of its application, approved the agreement.

7. In support of the petitioner's contention that the KDHI proposal does not meet the current technical standards governing the acceptance of applications, it is alleged, first, that there will be prohibited overlap of 0.5 mv/m contours with various proposals of applicants for the adjacent frequency, 1110 kilocycles, in the Los Angeles-Pasadena area, and, second, that the KDHI proposal does not comply with the requirements of Section 73.22(b) of the Rules, which provides that:

> No Class II–A station shall be assigned unless at least 25% of its nighttime interference-free service area or at least 25% of the population residing therein receives no other interference-free nighttime primary service.

8. In support of the first allegation, the petitioner cites a statement in the KDHI engineering report to the effect that:

"In the event that an application for 1110kc that involves such overlap is granted, this applicant proposes to take field intensity measurements from Twenty-Nine Palms and, or, from the Pasadena area, to attempt to demonstrate that no overlap of contours would occur."

Petitioner offers nothing more in support of this allegation. Section 73.37(a) of the Commission's Rules expressly exempts the KDHI proposal, an application for a new Class II–A assignment, from the provisions with respect to prohibited overlap of 0.5 mv/m contours. Therefore, in the event such overlap should occur, this does not constitute ground for rejecting an amendment proposing a new Class II–A assignment.

9. Petitioner urges that the KDHI proposal does not comply with the requirements of Section 73.22(a) of the Commission's Rules, and, therefore, is not acceptable as a new Class II–A proposal on the ground that the data submitted by KDHI does not support its claim that at least 25 percent of the population residing within its interference-free nighttime primary service area receives no other nighttime primary service. This is so according to the petitioner because the population of Twenty-Nine Palms is under 2500 and therefore a signal of at least 0.5 mv/m from Station KFI, Los Angeles, constitutes primary service under the Commission's Rules.

10. KDHI's population data is based on population figures for various enumeration districts which, according to KDHI, constitute the Twenty-Nine Palms community in which there is a population of at least 4489, a figure which KDHI calls extremely conservative. Petitioner questions the validity of the figure on the basis of discussions with officials of the Census Bureau. Petitioner's engineering consultant states that there was a disagreement between the Census Bureau and the officials of San Bernar-

dino County in which Twenty-Nine Palms is located with respect to the appropriate boundaries to be employed for Twenty-Nine Palms which is not incorporated. According to the petitioner's consultant, the disagreement resulted from the local officials' desires to use boundaries which would overstate the population of Twenty-Nine Palms according to Census Bureau standards, and therefore Twenty-Nine Palms is not listed as a separate place in the 1960 Census Report. Petitioner's consultant states that the 1964 Rand-McNally estimate of the year-round population of Twenty-Nine Palms is 2000. Insufficiency of the population density is also cited by petitioner in support of its position.

11. It appears to be the petitioner's position that KDHI's population figure is not wrong but that the number of residents shown is not the population of Twenty-Nine Palms. Since Twenty-Nine Palms is not incorporated, there would appear, on the basis of both KDHI's contentions and KUMA's contentions, that there are no established boundaries. It does appear, however, on the basis of both contentions that there is a concentration of population in the area which can be regarded, for the purpose of allocating broadcast facilities, as a community with a population of something in excess of 2500. The Commission finds that KDHI's showing is sufficient to establish, *prima facie*, that at least a population of 4489 is concentrated in an area which, because the population is in excess of 2500, does not receive primary service within the 0.5 mv/m contour of Station KFI. That population represents approximately 46 percent of the 9720 residing within KDHI's proposed interference-free nighttime primary service area. It may well be that, for the purpose of a 307(b) determination in a hearing proceeding, other competing applicants may be able to present a more favorable population showing than KDHI. For the present purpose of determining whether the KDHI amendment was properly accepted, the Commission finds that KDHI's showing is sufficient. The Commission has noted the Review Board's observation in its Memorandum Opinion and Order in the matter of *Marion Moore*, 3 RR 2d 920, at page 912, and cited by the petitioner, to the effect that the population of Twenty-Nine Palms is less than 1000 persons and that Twenty-Nine Palms is unincorporated. As KDHI points out, this observation does not appear to have been based on any facts of record and does not vitiate the showing made by KDHI in its application.

12. We note one further request made by the petitioner in its opposition to KDHI's motion to strike its petition. KUMA requested that, pending the Commission's action on its petition, it issue a "cut-off" order to establish a date on which both the KUMA and KDHI applications and a third conflicting application, that of Emerald Broadcasting Corporation (BP–15590), are available for processing. Simultaneously with the present action, the Commission is ordering a hearing on the three applications and, therefore, KUMA's further request is rendered moot. In any event, Section 1.571 of the Rules does not contemplate the use of the "cut-off" procedure in connection with action on applications for Class II–A assignments.

Accordingly, for the reasons hereinabove indicated, IT IS ORDERED, This 5th day of May, 1965, that the petition of the Pendleton Broadcasting Company for reconsideration of the action in accepting an amendment to the application of Hi-Desert Broadcasting Corporation to specify 1120 kilocycles IS HEREBY DENIED.

IT IS FURTHER ORDERED, That Hi-Desert Broadcasting Corporation's motion to strike the petition of Pendleton Broadcasting Company IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65-403

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
|---|---|
| FLOWER CITY TELEVISION CORP., ROCHESTER, N.Y. | Docket No. 14394<br>File No. BPCT-2929 |
| GENESEE VALLEY TELEVISION CO., INC., ROCHESTER, N.Y. | Docket No. 14395<br>File No. BPCT-2944 |
| ROCHESTER AREA EDUCATIONAL TELEVISION ASSOCIATION, INC., ROCHESTER, N.Y. | Docket No. 14459<br>File No. BPCT-2943 |
| STAR TELEVISION, INC., ROCHESTER, N.Y. | Docket No. 14460<br>File No. BPCT-2948 |
| COMMUNITY BROADCASTING, INC., ROCHESTER, N.Y. | Docket No. 14461<br>File No. BPCT-2953 |
| HERITAGE RADIO & TELEVISION BROADCASTING CO., INC., ROCHESTER, N.Y. | Docket No. 14462<br>File No. BPCT-2961 |
| MAIN BROADCAST CO., INC., ROCHESTER, N.Y. | Docket No. 14464<br>File No. BPCT-2964 |
| THE FEDERAL BROADCASTING SYSTEM, INC., ROCHESTER, N.Y. | Docket No. 14465<br>File No. BPCT-2966 |
| CITIZENS TELEVISION CORP., ROCHESTER, N.Y. | Docket No. 14466<br>File No. BPCT-2967 |
| ROCHESTER BROADCASTING CORP., ROCHESTER, N.Y. | Docket No. 14467<br>File No. BPCT-2972 |
| ROCHESTER TELECASTERS, INC., ROCHESTER, N.Y. | Docket No. 14468<br>File No. BPCT-2974 |
| For Construction Permits for New Television Broadcast Stations (Channel 13) | |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING TO THE REMAND; COMMISSIONERS COX AND WADSWORTH NOT PARTICIPATING.

1. The Commission has before it for consideration (a) the Initial Decision in the above-captioned proceeding (FCC 64D-5, released January 28, 1964) proposing grant of the applications of Rochester Area Educational Television Association, Inc. (RAETA) and Rochester Telecasters, Inc. (RTI), and denial of the other applications;[1] (b) the exceptions, with supporting briefs, of the parties, and replies to exceptions with supporting briefs; (c) a petition for leave to amend application, filed January 28, 1964, by Heritage Radio and Television Broadcasting Company, Inc.; (d) a brief as *amicus curiae* filed with the Commission's permission on April 27,

[1] The application of Rochester Broadcasting Corporation was denied by the Examiner as in default for failure to prosecute its application. No exception to this action has been taken.

1964, by American Broadcasting Company; (e) a request for official notice, filed May 27, 1964, by Community Broadcasting, Inc.; (f) a petition for leave to amend application, filed June 24, 1964, by RAETA; (g) a petition to reopen the record and to remand, filed October 15, 1964, by all parties to the proceeding except RAETA, Rochester Telecasters, Inc., Rochester Broadcasting Corporation, and the Chief, Broadcast Bureau; (h) the oral argument held November 2, 1964, before the Commission *en banc*, on the exceptions to the Initial Decision, at which time each party was afforded the opportunity to address itself to the above-described petition to reopen the record and to remand, and when American Broadcasting Company was permitted to participate as *amicus curiae;* (i) a letter from counsel for Star Television, Inc., dated February 11, 1965, informally advising the Commission that Mr. Isaac Gorden (treasurer, director, and a 14% stockholder) died on January 29, 1965; and (j) the entire record herein.

2. The Commission believes that the public interest would be best served at this juncture by remanding the proceeding on a reopened record to a Hearing Examiner so that further evidence may be adduced regarding questions which give the Commission some concern. These questions are: (a) whether alternative means are available for the broadcast of the type of educational programming which RAETA proposes; and (b) whether a share-channel applicant such as RTI would provide an effectively competitive outlet for a third network service, including the question whether American Broadcasting Company would affiliate with such an applicant.

3. Since no specific issue was designated to elicit information on whether RAETA could accomplish its objective by means other than its present proposal, the Examiner refused to admit evidence relating to other methods for doing so. Although she stated originally that she would take official notice of the then pending rulemaking proceeding in Docket No. 14744, the Examiner later reversed this ruling.

4. We understand the Examiner's reluctance to receive such evidence. Consistent with RAETA's right to file for Channel 13, she believed that taking official notice of the pendency of the rulemaking proceeding would result in the exploration of alternative means of carrying out RAETA's proposal, and would introduce irrelevant considerations. This position would be correct in the usual circumstances. However, the later adoption and issuance of a Report and Order in Docket No. 14744, establishing an Instructional Television Fixed Service,[2] casts the matter in a different light. The primary purpose of this newly-established service is to provide for the transmission of visual and aural instructional material to students enrolled in formal courses of instruction. Although the new service is intended to supplement, and not replace, the educational television broadcast service, we believe that we must note this significant development, because failure to do so would not be in accord with our public interest responsibilities. Accordingly, it will be appropriate in the remanded proceeding to inquire into the impact which establishment of the Instructional Television

[2] 25 RR 1785, released July 30, 1963.

Fixed Service may have upon the RAETA proposal. In this connection, it is pertinent also to ascertain the impact which a recent grant of a construction permit to the City School District of Rochester, New York, (BPIF–28) in the Instructional Television Fixed Service may have upon the RAETA proposal. Inasmuch as this proceeding is not one where the VHF channel at issue provides the last opportunity for an educational organization to program for the Rochester area, the fact that UHF Channel 21, reserved for educational use in Rochester, is not in use is another matter warranting consideration.[3] Although the University of the State of New York, State Education Department, was granted a construction permit (BPET–6) on July 23, 1952, for a non-commercial educational television broadcast station to operate on Channel 21 in Rochester, the station has not yet been built. The authorization is still outstanding, however. Since the eventual use of Channel 21 in Rochester may have a direct bearing upon the disposition of the subject proceeding, the Commission desires current information on the permitee's plans—or lack thereof—to construct and operate a station on Channel 21. Therefore, the permittee is being made a party to this proceeding with its participation limited to exploration of its plans for activation of its 13-year old construction permit.

5. Our determination to remand the proceeding to inquire into other means whereby RAETA's proposal could be carried out stems, in part, from discovery of the fact that of RAETA's proposed 44 weekly broadcast hours, 18½ hours would be devoted to in-school programming with 10½ of these hours being devoted to repeated in-school programs. When nearly 41% of RAETA's proposed programming would be devoted to programs clearly not designed to be received by the general public, a question arises whether the use proposed of the VHF Channel at issue would constitute the best available use.

6. Uncertainty exists in the present state of the record as to affiliation commitments from the American Broadcasting Company network. Thus, RTI and each of the other commercial applicants proposes to affiliate with the ABC network. RTI alone of the applicants was unable to produce an affiliation commitment from ABC. The Examiner stated that since there are three television networks, and since Channel 13 is the third VHF Channel assigned to Rochester, she was "unable to find from the record that RTI (or any of the other commercial applicants) will be unable to effectuate its proposed network programming. The indications are to the contrary." The present record will not support an affirmative finding that ABC programming would be available to RTI. In this connection, we think it is advisable to have the record reflect the reasons of ABC for its apparently ambivalent position as to possible affiliation with RTI. The Examiner rejected evidence as to ABC's reasons for its reluctance to affiliate with RTI, and an offer of proof

[3] Although arising in a somewhat different context, compare Memorandum Opinion and Order, FCC 65–329, RM–321, released April 26, 1965, where the Commission stated, among other things, that even in the absence of extensive UHF conversion generally at the present time, a UHF channel reserved for educational use can be used to meet in-school training and instructional-edccational needs of a given area; and that with the implementation of the all-channel receiver law, it may be expected that in the reasonably near future the more general cultural and educational needs of an area may be adequately met by a UHF station.

was thereupon made. Since the close of the record, we permitted ABC to file an *amicus curiae* brief addressed solely to the question whether a share-channel grant would prevent the inauguration in Rochester of a third, competitive commercial service. ABC was permitted also to participate as *amicus curiae* in the oral argument herein. Because of the importance of the question of affiliation,[4] we believe that the Examiner's ruling noted above should be reversed,[5] and that in the remanded proceeding the reasons regarding network affiliation should be explored. To facilitate this, ABC will be made a party to the proceeding, with its participation restricted to this phase of the hearing.

7. In addition to remanding the proceeding to explore the above-mentioned matters, the Commission believes that it is advisable to have the record up-dated as to all the applications. To this end, a period of 90 days from the date of release of this order will be provided within which the parties may up-date their applications in the respects noted below. It should be stated at the outset that the order herein is not to be construed as inviting the parties to submit virtually new applications; that is not the case. The pending petitions for leave to amend certain of the applications disclose that, with the passage of time, changes have occurred in the make-up of the applicants. Where involuntary changes have occurred in stockholdings or in officers and directors, either because of death or disability of principals, the applications are to be made current to reflect such changes. Changes of a voluntary nature will not be permitted, for it is not the Commission's intention that the competitive position of any applicant be improved to the prejudice of any other applicant. As to the changes which will be permitted, resulting from death or disability, the Commission believes that the backgrounds of any replacements should be set forth so that the comparative qualifications of the applicants may be fully evaluated. Cf. *The Young People's Church of the Air, Inc.*, FCC 61–401, 21 RR 476. In this manner, further comparison of the applicants will be more meaningful and more reflective of the present realities.

8. We invite changes in the program proposals which have been advanced in the several applications. The ever-changing needs of a community such as Rochester may now be somewhat different from those needs ascertained by the applicants several years ago. If, during the 90-day period provided herein, some of the applicants determine that the needs previously ascertained by them are reflective of present needs, they may so indicate when the material up-dating their applications is submitted. If others find that the needs are different from those previously ascertained by them, the programming proposals in these instances may be modified to reflect any changes. What may be done with regard to ascertainment of present needs in the Rochester area will, of course, have some bearing upon the planning and preparation comparative criterion.

[4] Cf. *Television Broadcasters, Inc.*, FCC 65–15, 4 RR 2d 119 (1965), where the Commission stated, among other things, "[w]hile it is neither our purpose nor function to assure competitive equality in any given market, we have a duty at least to take such actions as will create greater opportunities for more effective competition among the network in major markets. *Peninsula Broadcasting Corporation*, FCC 64–763, 3 RR 2d 243."

[5] The reopening on this question is to determine whether an ABC affiliation with RTI would adequately provide for a third competitive network service in Rochester, as well to determine ABC's intentions and reasons for either an affiliation or refusing to affiliate with RTI.

This is to be expected, for ascertainment of needs necessarily entails elements of planning and preparation. We believe that the 90-day period provided herein is ample for these purposes.

9. The further hearing ordered herein will commence within a reasonable time after the end of the 90-day period. No further order will be issued by the Commission specifying the date of commencement of the hearing. This date will be left to the discretion of the Hearing Examiner, who is designated as presiding officer by the Chief Hearing Examiner, so that the hearing may be conducted as expeditiously as possible consistent with the Hearing Examiner's calendar of cases.

10. The scope of the further hearing has been set out above.[6] Of necessity, findings as well as conclusions must be made as to these new areas of inquiry, as well as to revisions of such other areas as planning and preparation and proposed programming. Since the Examiner who originally presided at the hearing is now unavailable, a question arises as to the completeness of the Initial Decision which the newly-assigned Hearing Examiner will render. Because we do not envision a lengthy, full-scale hearing of the kind which led to the first Initial Decision, we are of the view that after the customary hearing procedures have been followed, the presiding officer should issue a document in the nature of a supplemental initial decision. Thereafter, in accordance with the pertinnent provisions of the Commission's Rules and Regulations, the parties may perfect their appeals, if any, to the Commission.

In view of the foregoing, IT IS ORDERED, This 12th day of May, 1965, That the record herein IS REOPENED and that the proceeding IS REMANDED for further hearing consistent with this Memorandum Opinion and Order; and

IT IS FURTHER ORDERED, That American Broadcasting-Paramount Theatres, Inc. (ABC) and the University of the State of New York, State Education Department, ARE MADE PARTIES TO THIS PROCEEDING, with their participation herein limited to the areas of Commission concern treated in paragraphs 4 and 6 of this Memorandum Opinion and Order; and

IT IS FURTHER ORDERED, That the above-described petition to reopen the record and remand, filed October 15, 1964; IS GRANTED to the extent indicated herein, and otherwise IS DENIED; and

IT IS FURTHER ORDERED, That the above-described petitions for leave to amend applications in various respects, and the request for official notice, ARE DISMISSED, the materials contained therein to be submitted as the respective applications are up-dated; and

IT IS FURTHER ORDERED, That the applicants herein, within 90 days from the date of release of this Order, SHALL SUBMIT any and all materials up-dating their respective applications, consistently with the terms of the Order herein.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[6] The nature of the further hearing ordered herein does not lend itself to the designation of specific, additional issues.

F.C.C. 65–413

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of NEW SECTION 0.418 AND AMENDMENT OF SECTIONS 0.417 (FORMERLY IN 0.406), 1.580 (FORMERLY 1.359), AND 1.594 (FORMERLY IN 1.362) OF THE COMMISSION'S RULES RELATING TO INSPECTION OF RECORDS, TO PREGRANT PROCEDURES, AND TO LOCAL NOTICE OR OF DESIGNATION FOR HEARING OF BROADCAST APPLICATIONS | Docket No. 14864 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER HYDE DISSENTING; COMMISSIONER WADSWORTH ABSENT.

1. The Commission has before it for consideration a "Petition for Stay of Effective Date of New Local-File Rules" filed on April 15, 1965, by the law firm of Grove, Paglin, Jaskiewicz, Sells, Gilliam and Putbrese on behalf of a number of broadcast stations and applications which it represents before the Commission, and a "Petition for Reconsideration and Request for Immediate Stay of Effective Date Pending its Consideration by the Commission," filed by the National Association of Broadcasters (NAB) on April 28, 1965.[1]

2. We deal here only with the two requests for stay. Petitioners request that the Commission stay the effective date of the rules adopted on March 31, 1965, in this proceeding in a Report and Order (FCC 65–273) published in the Federal Register on April 8, 1965 (30 F.R. 4543). The rules, which are effective on May 14, 1965, provide for the maintaining of a file by broadcast applicants, permittees, and licensees at the main studio or other accessible place in the community served or to be served, so that members of the public may inspect locally certain applications and related material which until now have been available only at the Commission's offices in Washington.

3. To obtain a stay, it must be shown (1) that failure to grant a stay will result in irreparable injury to the public, or to petitioner's interest, *and* (2) that petitioner is likely to succeed on the merits of its petition for reconsideration. *WHDH, Inc.*, 20 Pike & Fischer, R. R. 410a (1960).

[1] Grove, Paglin, *et al.* also filed a petition for reconsideration.

4. We do not here pass upon the likelihood of ultimate success on the merits, since clearly neither petitioner has met the first test. They have failed to make the requisite showing of irreparable injury either to themselves or to the public. In fact, neither petitioner alleges that irreparable injury to itself or the public will result from denial of a stay. NAB does not advance any arguments in support of its request for a stay (as opposed to its request for reconsideration), and the Grove petition simply states that a stay pending reconsideration would achieve a more orderly and effective administrative process, and avoid the wasteful commencement of a burdensome system that may be modified as a result of reconsideration. Thechief thrust of the Grove petition for reconsideration is that if all of the material now specified is to be retained for an extended period, the file will soon be too bulky to permit any significantly useful inspection. Whatever the merits of this argument for the long run, obviously it is inapposite for the relatively short period during which we will have the petitions for reconsideration under study.

5. In view of the foregoing, we are of the opinion that grant of a stay is not warranted under the circumstances, and therefore IT IS ORDERED That the "Petition for Stay of Effective Date of New Local-File Rules" filed by the law firm of Grove, Paglin, Jaskiewicz, Sells, Gilliam and Putbrese on April 15, 1965, IS DENIED; and the "Petition for Reconsideration and Request for Immediate Stay of Effective Date Pending its Consideration by the Commission," filed by the National Association of Broadcasters on April 28, 1965, IS DENIED insofar as it requests a stay of the effective date of the rules adopted in this proceeding.

Adopted May 12, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–404

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| DOVER BROADCASTING CO., INC., DOVER-NEW PHILADELPHIA, OHIO | Docket No. 15429<br>File No. BPH–3560 |
| THE TUSCARAWAS BROADCASTING C*., NEW PHILADELPHIA, OHIO | Docket No. 15430<br>File No. BPH–4196 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER WADSWORTH NOT PARTICIPATING.

1. We have before us for consideration applications for review, filed January 22, 1965 [1] and February 23, 1965, by Dover Broadcasting Company, Inc. (hereinafter Dover) of two Review Board Memorandum Opinions and Orders (FCC 64R–564 CORRECTED and FCC 65R–22), released December 23, 1964 and January 22, 1965, respectively; oppositions thereto filed by the Chief, Broadcast Bureau, on February 18, 1965 and April 1, 1965, and by The Tuscarawas Broadcasting Company (hereinafter Tuscarawas) on February 18, 1965 and March 25, 1965; and replies to the above oppositions filed by Dover on March 3, 1965 [2] and April 14, 1965.

2. Dover and Tuscarawas are mutually exclusive applicants seeking authority to construct and operate new FM stations on Channel 269 at Dover-New Philadelphia, Ohio, and at New Philadelphia, Ohio, respectively. The applications were designated for hearing to determine, among other issues, whether a grant of the Dover application would contravene the overlap provisions of the then FM duopoly rules (FCC 64–358, released April 27, 1964). The 1 mv/m contour of Dover's proposed FM station at Dover-New Philadelphia would overlap the 1 mv/m contour of its existing FM station at Canton, Ohio. This overlap would include approximately 86.5% of the population and 76% of the area within the 1 mv/m contour of Dover's proposed station.

3. Subsequent to this order of designation, we adopted a Report and Order (FCC 64–445, released June 9, 1964), which substanti-

[1] This first application for review was not timely filed within the five day period prescribed by Section 1.115(e)(1) of our Rules. Dover requests waiver. In light of the fact that a second application for review was later filed and we subsequently stayed this proceeding pending disposition of both applications for review (FCC 65–92, released February 8, 1965), we conclude that Dover's untimely filing has not unduly disrupted our administrative processes and that, therefore, good cause exists for waiver of Section 1.115(e)(1).

[2] This reply pleading, thirteen pages in length, exceeds the ten page limitation imposed upon such pleadings by Section 1.115(f) of our Rules. On March 4, 1965, Dover filed a Motion for Leave To File Reply To Oppositions Exceeding Permissible Length. This unopposed motion is granted.

ally amended our duopoly rules to provide, in pertinent part, as follows (Section 73.240(a)):

(a) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if:

(1) Such party directly or indirectly owns, operates, or controls one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1 mv/m contours of the existing and proposed stations, computed in accordance with Section 73.313.

4. At footnote 23 of this Report and Order, we stated that the new rules would be effective as to pending applications, including hearing cases, and that non-conforming applications not amended to achieve compliance would be summarily dismissed. This dismissal procedure was temporarily suspended only to be reinstated as of September 30, 1964, when we substantially denied petitions for reconsideration of the new rules (FCC 64–904, released October 5, 1964).

5. In light of the foregoing, Dover petitioned us on October 27, 1964, to waive Section 73.240(a) or, alternatively, to modify the existing duopoly issue to permit a determination as to whether a waiver would be in the public interest. We referred this petition to the Review Board for disposition (FCC 64–1112, released December 3, 1964) since, in the interim between the filing of Dover's petition for waiver and our referral order, the Examiner had: (1) heard oral argument on a Tuscarawas petition to dismiss Dover's application and in regard to a petition filed by Tuscarawas seeking leave to amend its application, and (2) by Memorandum Opinion and Order (FCC 64M–1096, released November 4, 1964), dismissed Dover's application for non-conformance with Section 73.240(a) and granted Tuscarawas' petition for leave to amend. Inasmuch as an appeal from the Hearing Examiner's rulings was pending before the Review Board, we concluded that it would conduce to the orderly dispatch of Commission business to have both the appeal and Dover's petition decided by the Board.

6. By Memorandum Opinion and Order (FCC 64R–564 CORRECTED, released December 23 1964), the Review Board denied Dover's petition for waiver. Thereafter, by further Memorandum Opinion and Order (FCC 65R–22, released January 22, 1965), the Board affirmed the actions of the Examiner dismissing Dover's application and granting Tuscarawas' petition for leave to amend. We are now asked to review these actions of the Board.

7. Pursuant to Section 1.115 (g), (h) and (i), we shall grant limited review of the Board's December 23, 1964 Memorandum Opinion and Order. Although we concur in its result, we revise it as follows:

8. We delete paragraphs 6 and 7, including footnote 5 thereto, and in their stead hold as follows: Section 73.240(a) of our Rules was amended to incorporate fixed overlap standards in place of the previous *ad hoc* approach to this problem. The purpose of the multiple ownership rules is to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power contrary to the public interest. Experience has shown that the *ad hoc* approach is not a satisfactory one

in effectuating this policy and that the adoption of a fixed standard through the rule-making process is in the public interest. *In re Amendment of Multiple Ownership Rules* (Docket 14711), FCC 64–445, 2 Pike & Fischer, R.R. 2d 1588 (1964).

9. The adoption of the fixed rules contained in Section 73.240 governing multiple ownership situations does not preclude the granting of a waiver or holding a hearing where a request for waiver is made and it is shown that the application of the rule would be inappropriate. On the basis of the information before us, we do not deem it appropriate to consider in a hearing the question of whether a waiver should be granted. Only those cases which set forth allegations of fact sufficient, if true, to justify waivers need be accorded such treatment. The burden is on the applicant to meet this threshold test. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

10. We hold that petitioner has not met its burden. Its allegations, even if true, are general in nature and fail to demonstrate a compelling public need. The fact that certain local groups may prefer the petitioner over the competing applicant does not warrant the action here requested. The further fact that the overlap of the predicted 1 mv/m contours of Dover's existing FM station in Canton, Ohio, and its proposed FM station for Dover-New Philadelphia is very substantial, including 86.5% of the population and 76%[3] of the area within the predicted 1 mv/m contour of the proposed station, militates against the requested action. In view of the foregoing, we find that a grant of the waiver or holding of a hearing on such request is not appropriate under the circumstances of this case.

11. We also note that in footnote 5 (now deleted) to the Board's decision, as well as in the dissenting statement to such decision, emphasis is placed upon the alleged fact that Dover does not propose to duplicate the programming of either its existing AM station in Dover, Ohio, or of its FM station in Canton, Ohio, while Tuscarawas would duplicate the programming of its AM station in nearby Uhrichsville, Ohio. This is contrary to the programming representations contained in the applications before us. In its proposed broadcast schedule, Exhibit 5 to its application herein, Dover unequivocally states that it will "pick up"[4] the programming of WNCO, its existing Canton FM station, as well as "duplicate" the programming of WJER, its existing AM station in Dover. Specifically, on Monday through Saturdays, Dover proposes to broadcast 18 hours daily. Of these, 12 hours and 35 minutes will consist of WNCO pick ups, and 2 hours and 25 minutes will consist of WJER–AM duplicated programs. On Sundays, of the 17 hours broadcast, 8 hours and 10 minutes will be devoted to WNCO

[3] These figures, contained in the Review Board's January 22, 1965 Memorandum Opinion and Order, FCC 65R–22, reflect the data contained in exhibits exchanged at the hearing which was commenced in this proceeding. Although they differ from the area and population percentages contained in Dover's petition for waiver, reflected in the Review Board's December 23, 1964 Memorandum Opinion and Order, FCC 64R–564 (Corrected), Dover did not oppose their use.

[4] In Exhibit 5 to its application, Dover uses the words "pick up" in regard to WNCO rather than "duplicate." In its Exhibit 4, however, Dover states that it "proposed to *duplicate*, in part, the programming of its sister station in Canton, Ohio—FM Broadcast Station WCNO . . ." [Emphasis added.] Thus, as used by Dover, "pick up" and "duplicate" would appear to be synonymous.

pick ups. We also note that Tuscarawas' AM station in Uhrichsville operates daytime only. Tuscarawas proposes to duplicate the programming of that station, necessarily daytime only, during 64.50% of its broadcast week. Thus, on the face of the applications, it can be seen that the alleged special circumstance justifying waiver does not, in fact, exist.

12. In regard to the Review Board's January 22, 1965 Memorandum Opinion and Order herein, on the basis of our consideration of Dover's application for review and the pleadings responsive thereto, we have determined to deny review.

Accordingly, IT IS ORDERED, This 12th day of May, 1965, that the application for review filed January 22, 1965 by Dover Broadcasting Company, Inc. of the Review Board's Memorandum Opinion and Order, FCC 64R–564 (Corrected), released December 23, 1964, IS GRANTED to the limited extent indicated herein. In all other respects, it IS DENIED;

IT IS FURTHER ORDERED, That the application for review filed February 23, 1965 by Dover Broadcasting Company, Inc. of the Review Board's Memorandum Opinion and Order, FCC 64R–22, released January 22, 1965, IS DENIED.

IT IS FURTHER ORDERED, That the Memorandum Opinion and Order (FCC 64R–564) (Corrected) of the Review Board, released December 23, 1964, IS AFFIRMED, as modified herein.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–425

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| SPANISH INTERNATIONAL TELEVISION CO., INC., PATERSON, N.J. | Docket No. 15089<br>File No. BPCT–3032 |
| BARTELL BROADCASTERS, INC., PATERSON, N.J. | Docket No. 15091<br>File No. BPCT–3103 |
| TRANS-TEL CORP., PATERSON, N.J. | Docket No. 15092 |
| For Construction Permits for New Television Broadcast Stations | File No. BPCT–3114 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSIONS COMMISSIONER COX DISSENTING.

1. The Commission has before it for consideration (a) a joint petition filed on January 6, 1965, by Trans-Tel Corp. (hereinafter Trans-Tel), Spanish International Television Company, Inc. (hereinafter SITC) and Bartell Broadcasters, Inc. (hereinafter Bartell), applicants for a permit to construct a new UHF television station at Paterson, New Jersey, requesting: (1) reconsideration, (2) approval of agreement resolving conflicts, (3) dismissal of the SITC and Bartell applications, and (4) grant of the Trans-Tel application; (b) an opposition to such joint petition, filed by the Broadcast Bureau on January 29, 1965; (c) separate replies [1] filed by SITC and Trans-Tel on February 17, 1965; and (d) a joint response to the Commission's Order, FCC 65–202, released March 19, 1965, filed by Trans-Tel and SITC on April 19, 1965.

2. We will first consider petitioners' request that we approve the settlement agreement entered into on December 31, 1964, between SITC, Bartell and Trans-Tel. Pursuant to the terms of this agreement, SITC and Bartell shall (and do herein) request dismissal of their respective applications. Following such dismissal, Trans-Tel will continue to prosecute its application in order to obtain a construction permit for the contemplated station at Paterson, New Jersey. Affidavits attached to this agreement and submitted to us in compliance with Section 1.525(a) of the Commission's Rules and Section 311(c) of the Communications Act of 1934, as amended, reveal that no consideration has either been paid to or promised Bartell in connection with the dismissal of its application. The consideration between Trans-Tel and SITC is spelled out in paragraph 4 of the settlement agreement, as follows:

[1] The pleadings herein were filed pursuant to Section 1.111 of the Commission's Rules which limits replies to 10 double-spaced typewritten pages. The Trans-Tel reply consists of 29 pages; the SITC reply, 17 pages. In view of the complex nature of this proceeding, the page limitations of Section 1.111 will be waived.

4. In the event that (1) this Agreement is approved by the FCC as contemplated by paragraph 5 hereof, (2) the SITC and Bartell applications are dismissed as contemplated by paragraph 1 hereof, and (3) the FCC enters a Final Order granting the Trans-Tel application, then, upon request in writing from SITC to Trans-Tel made within thirty (30) days from the date upon which the FCC enters a Final Order granting the Trans-Tel application, SITC and Trans-Tel will enter into a joint venture (Venture) in accordance with the form of joint venture agreement (together with guarantees as provided for therein) attached attached hereto as Appendix B, the effectiveness of the Venture to be subject to the prior approval of the FCC. Promptly thereafter, SITC and Trans-Tel will join in an application for FCC consent to the assignment of construction permit for the new television station at Paterson, New Jersey, to the Venture, as more particularly provided for in paragraph 2 of the joint venture agreement (Appendix B). "Final Order" as used in this paragraph means an Order of the FCC as to which the time for exception to, reconsideration or re-hearing of, Commission review of, or judicial appeal from has expired.

Although petitioners have submitted to us for information purposes a copy of the agreement pursuant to which the joint venture will be effectuated, we note that the effectuation of such agreement is not involved in this proceeding. Rather, we will exercise our judgment thereon when the application is filed with us seeking our consent to the assignment of construction permit from Trans-Tel to the joint venture in which Trans-Tel and SITC will each hold a 50% interest.

3. We find that petitioners have complied with the requirements of Section 1.525(a) of our Rules and Section 311(c) of the Act in that their joint petition is adequately supported by facts relevant to the nature of the consideration involved and the history of the negotiations between the parties. We further find the agreement to be in the public interest in that its approval will permit the early institution of a new specialized television service for Paterson, New Jersey, and its environs. Accordingly, petitioners' joint request for approval of their settlement agreement is hereby approved.

4. Petitioners next request us to reconsider our order of designation herein, FCC 63–490, released May 27, 1963, so that we may resolve by non-hearing procedures the issues which will remain after the contemplated dismissal of the SITC and Bartell applications. These issues are as follows:

1. To determine, in view of the specialized nature of the programming proposed by each of the applicants, whether there is a need for such programming in the area proposed to be served, including the principal community.

2. To determine what steps were taken and the efforts made by each of the applicants to ascertain the needs for such specialized programming in the proposed service area.

3. To determine, in the event a need for the proposed programming is established, whether the program proposals of each of the applicants are designed to, and would be expected to meet the needs of the proposed service area.

6. To determine, in view of the antenna location proposed by Trans-Tel Corp., whether a grant of its application would be consistent with Section 307(b) of the Communications Act and the purposes and policies of Sections 3.606 and 3.607(a) of the Rules.

5. Petitioners Trans-Tel and SITC have submitted [2] copies of

[2] As a result of our initial consideration of the joint petition herein, we released an order on March 19, 1963, FCC 65–202, indicating that it appeared to us that although petitioners relied upon exhibits depicting Trans-Tel's proposed programming in support of their request for recon-

*Continued on next page*

certain of the written exhibits offered into evidence [3] at the hearing which was commenced in this proceeding. These exhibits purport to resolve the matters raised by issues 1, 2 and 3. Additionally, petitioners assert that we may draw upon our general knowledge as to the existence of large ethnic groups in the Northern New Jersey-New York area to support a finding that there is a need for a station at Paterson, New Jersey, which will emphasize programming of the type proposed by Trans-Tel and SITC.

6. In their joint response to our March 19, 1965 request for further information (see footnote 2, *supra*), Trans-Tel and SITC further advise that although the joint venture's proposed program schedule will not be made final until their assignment application is prepared, they contemplate that their joint programming proposal will consist of a blending of both parties' original program proposals, taking into account pertinent changes in the area to be served and in the availability of television service since the formulation of their respective program proposals. Trans-Tel and SITC particularly refer to the fact that WNJU–TV, Channel 47, which is expected to commence operation at nearby Linden, New Jersey, in the very near future,[4] has proposed programming designed to serve various ethnic groups including Greek, Irish, Italian, Jewish and Spanish. Accordingly, Trans-Tel and SITC advise that the programming to be carried by their joint venture will be directed predominantly toward the needs of the Spanish speaking community in Paterson and the Northeastern New Jersey-New York Urbanized Area, since they believe this to be the largest ethnic group in the area needing program attention. Trans-Tel and SITC emphasize that the Spanish language programming which they propose "will utilize the best possible product available from Puerto Rico and other Spanish speaking areas, as well as locally produced programming. The availability of Mexican product is, of course, an asset, but the product actually used will be the best available material for the audience to be served. In this regard, we note that the dominance of the Puerto Rican segment of the Spanish language audience is likely to preclude predominant reli-

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*Continued from preceeding page*

sideration of the unresolved programming issues, in fact, the real consideration for the proposed settlement agreement between Trans-Tel and SITC appeared to be a contemplated merger between them under the terms of a joint venture agreement. The joint venture proposed to carry substantially all Spanish language programming of the nature of that proposed in the SITC application rather than that spelled out in the Trans-Tel application. In view of this, we directed, as a necessary prerequisite to our determination of petitioners' request for reconsideration, that Trans-Tel and SITC file with us "a statement setting forth the program policies which they contemplate will be put into effect under their operation of the station as joint venturers . . ." The facts contained in this Memorandum Opinion and Order are based upon the representations made to us in the original joint petition, as well as in the joint response of Trans-Tel and SITC to our March 19 order.

[3] Submitted to us are Trans-Tel Exhibits 1 through 7, 18, 19, and 21 through 28. Exhibit 1 is a demographic study of the area. Exhibits 2 through 6 are affidavits attesting to the need for Spanish language programming in the Northern New Jersey area. Exhibit 7 is an affidavit attesting to the communications needs of the Italian-speaking community in New York City and Northern New Jersey. Exhibit 18 depicts Trans-Tel's preparation and planning. Exhibit 19 is a program contact report. Exhibits 21 and 22 contain the Trans-Tel program schedule and its analysis. Exhibits 23 through 28 are summaries of Trans-Tel's proposed entertainment, religious, educational, news, discussion and talk programs. SITC has submitted to us its Exhibits 4 and 5D, reflecting an extensive survey of the programming needs of the Paterson-New York City area upon the basis of which SITC formulated its program schedule. It has also submitted SITC Exhibit 3, containing a statement outlining SITC's proposed policy governing programming. These exhibits were merely identified on the hearing record. They were neither accepted by the Examiner nor subjected to cross-examination in view of the postponement of further hearing pending resolution of the joint petition presently before us.

[4] On May 14, 1965, WNJU-TV was authorized to commence program tests.

ance on Mexican-produced programming." (Joint Response, Paragraph 8, Page 7).

7. Trans-Tel and SITC further advise that the Venture's proposed predominantly Spanish-language format will be supplemented by such English language programming as shall meet the general needs of the Paterson area for locally originated programming. This would include, for example, "editorializing in both English and Spanish, news, community wrap-up programs directed to Paterson and surrounding area problems and happenings, special bulletins, and programs designed to achieve better understanding between the English speaking and Spanish speaking communities." (Joint Response, Paragraph 6, Page 5).

8. Petitioners contend that issue 6 has, in effect, been rendered moot by our recent action [5] authorizing WNJU–TV, Channel 47, to locate its transmitter on top of the Empire State Building despite the fact that the channel is assigned to Linden, New Jersey. We agree with petitioners' contention. In that case, we stated, at page 264, "The fact that applicant's transmitter would be located in New York City rather than in New Jersey does not constitute it a New York station," and, further, at page 265, "It is generally agreed among engineers that the Empire State Building represents the best location for an antenna system to provide coverage to Northern New Jersey."

9. Based upon the exhibit material offered to us by Trans-Tel and SITC and the representations contained in the pleadings presently before us, we find that: (1) there is a need in the area proposed to be served for the substantially all-Spanish language programming proposed by Trans-Tel and SITC, (2) Trans-Tel and SITC have each taken adequate steps to ascertain these needs, and (3) the programming proposed by Trans-Tel and SITC is designed to and can be expected to meet such needs. Insofar as issue 6 is concerned, we declare it moot by virtue of our decision in the above-quoted *New Jersey Television* case. Hence, all of the hearing issues having been resolved, we grant petitioners' request that we reconsider and set aside our May 27, 1963, action designating these applications for hearing. As a direct result of such reconsideration, coupled with our prior determination that Trans-Tel is in all other respects legally, technically and financially qualified to construct, own and operate the proposed television broadcast station, we find the public interest will be served by an immediate grant of the Trans-Tel application and the dismissal, pursuant to the request of the respective applicants, of the SITC and Bartell applications.

In view of the foregoing, IT IS ORDERED, This 19th day of May, 1965, That the joint petition of Trans-Tel, SITC and Bartell IS GRANTED in all respects;

IT IS FURTHER ORDERED, (1) That our Memorandum Opinion and Order, released herein on May 27, 1963 (FCC 63–490) designating these applications for hearing in a consolidated proceeding IS SET ASIDE; (2) That, pursuant to Section 1.525 of our Rules, the settlement agreement between the parties IS

[5] *New Jersey Television Broadcasting Corp.*, 2 Pike & Fischer, R.R. 2d 263 (1964).

APPROVED; (3) That, at the request of the applicants, the applications of Spanish International Television Company, Inc. and of Bartell Broadcasters, Inc., for a construction permit for a new television station at Paterson, New Jersey, ARE DISMISSED; and (4) That the application of Trans-Tel Corp. for a construction permit for a new television station to operate on Channel 41 [6] at Paterson, New Jersey IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[6] On May 18, the Commission released "Supplement No. 3 to the Third Report and Order" in Docket No. 14229 (FCC 65-412), which, *interalia*, allocated Channel 41 to Paterson, New Jersey, in lieu of Channel 66.

F.C.C. 65–379

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>TELEVISION BROADCASTERS, INC. (KBMT), BEAUMONT, TEX.<br>For Construction Permit | Docket No. 16001<br>File No. BPCT–3266 |
| TELEVISION BROADCASTERS, INC. (KBMT), BEAUMONT, TEX. | Docket No. 16003<br>File No. BRCT–560 |
| TEXAS GOLDCOAST TELEVISION, INC. (KPAC-TV), PORT ARTHUR, TEX.<br>For Renewal of Licenses | Docket No. 16002<br>File No. BRCT–389 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT; COMMISSIONER LEE CONCURRING AND ISSUING A STATEMENT; COMMISSIONER COX CONCURRING.

1. The Commission has before it for consideration a Petition for Reconsideration filed February 8, 1965, by KSLA–TV, Inc., licensee of Television Broadcast Station KSLA–TV, Channel 12, Shreveport, Louisiana, a Petition for Reconsideration filed February 8, 1965, by Texas Goldcoast Television, Inc., licensee of Television Broadcast Station KPAC–TV, Channel 4, Port Arthur, Texas, and various pleadings filed in connection therewith.[1] By Memorandum Opinion and Order released January 8, 1965 (FCC 65–15, 4 RR 2d 119), the Commission granted without hearing the above-captioned application of Television Broadcasters, Inc., licensee of Television Broadcast Station KBMT, Channel 12, Beaumont, Texas, which requested a construction permit to make certain changes in the facilities of that station. The Commission considered the pleadings filed in connection with the application and found that the public interest, convenience and necessity would be served by a grant of the application and that no substantial and material questions of fact had been raised warranting designation of the application for hearing. The Commission waived Section 73.610 of its Rules to permit operation at short-spacing to the co-channel station in Shreveport, Louisiana, and the grant was conditioned to require the applicant to provide "equivalent protection" to the co-channel station in accordance with applicant's representations to the Commission. We are now asked to reconsider our action and to desig-

[1] The Commission also has before it for consideration: (a) Opposition filed March 16, 1965, by applicant against both Petitions for Reconsideration, and (b) Reply filed April 19, 1965, by Texas Goldcoast Television, Inc., to (a), above. The parties requested and were granted extensions of time within which to file their various pleadings. The Petition for Reconsideration filed by Texas Goldcoast was originally captioned "Petition for Reconsideration and Stay", but was subsequently corrected to delete the words "any Stay" in order to conform to Section 1.42(e) of the Commission's Rules.

nate the application for hearing on issues requested by the petitioner Texas Goldcoast Television, Inc. (hereinafter KPAC). Petitioner KSLA–TV, Inc. (hereinafter KSLA) also requests reconsideration on the basis that the conditions attached to the grant do not, in fact, assure that the applicant will provide the "equivalent protection" which it has undertaken to provide. KSLA requests that if the Commission does not reconsider and designate the application for hearing, the conditions should nevertheless be modified to assure the "equivalent protection" which was promised. The applicant has indicated that it would be agreeable to such modification. Accordingly, in view of our disposition of this matter, we believe that it would be appropriate to provide for the additional conditions requested by KSLA.

2. Petitioner KPAC requests reconsideration on the basis of four principal questions which it alleges that the Commission resolved erroneously. First, KPAC states that the Commission erred in its determination that the grant to KMBT would, *inter alia*, improve ABC's competitive position in the market *vis-a-vis* the other two national networks because circumstances have so changed since the application and original pleadings were filed that the basis for the Commission's determination of competitive imbalance no longer exists. Second, KPAC contends that while the Commission discussed television services available in the two areas in which applicant's Grade B signal would be lost in the event of a grant, the Commission did not consider the television services available in the gain area. Third, petitioner alleges that the Commission accepted at face value the allegations of applicant's aeronautical consultant with respect to the possibilities of locating a tower at any site other than that which it has selected and the likelihood of securing clearance from the Federal Aviation Agency for any other site. Finally, petitioner attacks the validity of the programming survey made by the applicant pursuant to the Commission's letter to the applicant of July 29, 1964. Petitioner also complains that it was never served by the applicant with a copy of the programming survey.

3. KPAC argues that the Commission discussed the television services available in the areas which would lose KMBT's Grade B signal in the event of a grant of the application, but that it did not discuss the television services available in the gain area. Thus, KPAC argues, no consideration was given to whether there is a need for the proposed new service. Petitioner now comes in, for the first time, with a showing of the television services available in the gain area and suggests that these figures demonstrate that there is no need for the new service proposed. Using petitioner's own computations, it appears that there are between two and six other television broadcast services available in the Grade B gain area. Approximately one-third of this area, however, has but two services available and applicant's improved signal would bring the third television service and the first ABC signal to this area. In the remainder of the gain area, there appears to be one or two other ABC signals available. No part of the two loss areas, however, is without at least one ABC Grade B signal in addition to that presently provided by applicant. On the basis of petitioner's figures,

the area which will receive a first ABC Grade B service consists of 28,187 persons in an area of 1,462 square miles. In the western loss area, the bulk of the area consists of the waters of Galveston Bay and East Bay and the loss of populated land area is, therefore, insignificant. On balance, consideration of these facts does not lead us to a result different from that which we reached in our original deliberations.

4. Prior to a grant of the application, applicant had submitted an affidavit by its aeronautical consultant which expressed the opinion that, for various reasons, a proposal to locate applicant's transmitter at any site which would meet the spacing requirements and still enable it to achieve its objectives would meet with objections by the Federal Aviation Agency. KPAC has now submitted an affidavit from its own aeronautical consultant which, in most respects, disputes the opinion of the applicant's expert. It seems to us, however, that petitioner could have secured its expert's affidavit and submitted it in timely fashion consistent with Section 1.106(c) of the Commission's Rules. Petitioner made no effort in the two-month period between February 20, 1964, when applicant's aeronautical consultant's affidavit was filed, and April 30, 1964, when petitioner filed its reply, to dispute the opinion of applicant's expert. More important, however, is the fact that petioner made no attempt to sho wthat a site other than the chosen by the applicant was available to the applicant which would meet the spacing requirements, meet air safety criteria, and permit applicant to achieve its objectives. The Commission, however, had before it a letter from the Federal Aviation Agency dated July 14, 1964, in which that agency stated:

> The KPAC–TV petition is reported as suggesting an increase of height of the existing KBMT–TV (sic) antenna. The antenna is at the maximum height now which would not have an adverse effect on air navigation. Another suggestion offered by KPAC–TV in its petition, according to the region [FAA's Southwest Regional Offive], is that there is another area to which KBMT–TV could move. The region advises that the site selected by KBMT–TV is in an area between two other 1049-foot towers and, therefore, is in the most acceptable location from an aeronautical standpoint. The region further advises the site would be in an area conforming to the antenna farm area concept.

It is apparent, from the foregoing, that the Federal Aviation Agency strongly supported the proposed site and this support was recognized in our Memorandum Opinion and Order granting the application. In the light of these facts, we are not persuaded that petitioner's showing warrants reversal of our prior decision.

5. KPAC attacks the validity of the survey made by the applicant pursuant to the Commission's letter of July 29, 1964. Petitioner makes the grave charge that the "purported KBMT survey is not only manifestly superficial and contrived—it is of highly questionable veracity." Petitioner suggests that the survey was fraudulent because, based on a "check survey" conducted by KPAC subsequent to applicant's survey, many of the persons allegedly interviewed categorically denied having been contacted by KBMT. In many instances, KPAC shows that the responses made by interviewees differ substantially from those reported by KBMT. Applicant, however, has furnished affidavits from these same people

in which they deny that they were ever contacted by KPAC or that they said what KPAC reported them as having said. In effect, these affidavits purport to demonstrate that the KPAC "check survey", and not the KBMT survey, was contrived and fraudulent. KPAC has not furnished affidavits from its interviewees and, in fact, only furnished affidavits from its interviewers in response to KBMT's pleadings. The Commission is gravely concerned where, as here, it appears that one or both of the Commission's licensees may have attempted to deceive and mislead the Commission. We have before us conflicting claims, charges, and countercharges which we cannot resolve on the basis of the pleadings alone. We will, therefore, designate this matter for hearing on issues related to the facts and circumstances surrounding the conduct and content of the surveys made by KBMT and KPAC and the basis for the representations made by the parties to the Commission. Moreover, we believe that the applications for renewal of the licenses of Stations KBMT and KPAC–TV should also be designated for hearing in a consolidated proceeding with KBMT's application for a construction permit. We will provide for a field hearing in Beaumont, Texas, and will order an erpedited proceeding. We recognize that, in order to permit immediate consideration of the renewal applications, it will be necessary to waive Section 1.580(b) of our Rules and our Order so provides. Processing of the renewal applications has not been completed and it is possible that the parties may wish to request enlargement of the issues in this proceeding to enable the Hearing Examiner to consider such additional questions as may be raised as a result of the normal processing of the renewal applications.

6. The basic thrust of KPAC's request for reconsideration is its contention that, since the filing of the application and the pleadings filed in connection therewith, the competitive position of ABC *vis-a-vis* the other national networks has changed to the extent that ABC is now at least equal to the other networks nationally and, in some respects, leads the other networks. At the outset, we note that the material furnished by the petitioner to support this proposition consists of excerpts from articles contained in various trade publications and newspapers. More important, however, is the fact that the material which the petitioner has offered in support of its contentions is related to the national position of the networks and does not refute the Commission's findings that, in the Beaumont-Port Arthur market, ABC has competitively inferior facilities available to it. The Commission's decision was based upon findings, supported by the pleadings, that *in the Beaumont-Port Arthur market,* the facilities available to ABC were inferior to those available to the other national networks, resulting in a significant competitive imbalance in that market. Assuming, arguendo, that the petitioner made a *prima facie* showing that ABC is on a par nationally with the other networks, it would not follow that ABC has the opportunity to be competitive in the Beaumont-Port Arthur market. The petitioner must make a *prima facie* showing that equal opportunities to be competitive exist in the Beaumont-Port Arthur market for all of the networks. With respect to this narrow issue, petitioner has alleged nothing which has not already

been considered by the Commission in reaching its original decision. We stated, in our original opinion, that it was neither our purpose nor function to assure competitive equality in any given market, but that it *was* our duty to provide, when possible and feasible, the *opportunity* for effective competition among the networks. When we have done that, we have done all that we can under the present statutory scheme in promoting a more effective competitive climate.

7. Finally, KPAC attacks the Commission's action of July 29, 1964, by which the Commission sent a letter to the applicant requiring the applicant to furnish additional information in the form of a programming submission and affording the applicant an opportunity to make any necessary surveys and changes in its programming proposal to reflect its efforts to accommodate the needs and interests of the people in the new area which it proposed to serve. Petitioner characterizes this action by the Commission as an "effort by the Commission in an adversary situation, to assist the applicant, in meeting his burden of proof . . ." and "an apparent disposition on the part of the Commission to assist the applicant in meeting its burden of proof and in making a case for waiver." Such assertions can only be the result of a lack of knowledge and understanding of the Commission's purpose and functions. Such action by the Commission is neither unique nor unprecedented. *KTBS, Inc.*, FCC 63-359, 25 RR 301. It is well within the authority of the Commission to require additional information from applicants[2] and the Commission's Rules contemplate that the Commission may require an applicant to amend its application, even in an adversary proceeding.[3] KPAC further complains that it was not served by applicant with a copy of the survey results and states that there is serious question as to whether the survey does not violate Sections 1.65, 1.513(d) and 1.522 of the Commission's Rules.[4] The Commission's Rules, however, do not require the applicant to serve upon petitioners copies of information furnished in response to the Commission's request. Petitioners were served with copies of the Commission's letter to applicant and were on notice of the date by which the information had to be furnished. Applicant's response was submitted on September 28, 1964, and the application was granted in January 1965, but at no time during that three-month period during which the information was on file as a matter of public record did the petitioner express any objection to lack of service or complain that it was not aware of the contents of the amendment. Moreover, with respect to Section 1.65 of the Rules, we need only point out that the section became effective December 22, 1964, after the survey was submitted. Petitioner's allegations with respect to possible violation of Section 1.513(d) have been discussed in paragraph 5, *supra*.

[2] Section 308(b) of the Communications Act of 1934, as amended.

[3] Section 1.514(b) of the Commission's Rules. See also Sections 1.566(b) and 1.568(b) of the Rules.

[4] Section 1.65 of the Commission's Rules is concerned with an applicant's responsibility for the continuing completeness and accuracy of information contained in an appliation pending before the Commission. It has no relavance to the matter now pending.

Section 1.522 of the Rules pertains to the amendment of applications after designation for hearing and is therefore totally inapplicable to this matter.

Section 1.513(d) of the Rules pertains to sanctions and criminal penalties for willful false statements made to the Commission.

8. In connection with petitioner's lack of diligence in the matter of the affidavit of its aeronautical consultant as well as with respect to the matters of its failure to complain about not having been served with a copy of applicant's survey and its failure to furnish information as to other television services available in the proposed gain area, we think that the language of the Court of Appeals in *Colorado Radio Corp.* v. *Federal Communications Commission,* 73 U.S. App. D.C. 225, 118 F. 2d 24, is relevant:[5]

[w]e cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence.

9. We have considered carefully the matters set forth in the request for reconsideration and the pleadings filed in connection therewith. We have stated that petitioner's allegations of ABC's competitive equality or superiority nationally, even if proved, would be insufficient to show that ABC has available to it in the Beaumont-Port Arthur market a reasonably competitive facility. We have again weighed the losses against the gains and we have considered other television broadcast services available in the gain and loss areas and we have found, on balance, that the substantial public benefit to be derived from increased Grade A and Grade B coverage and the improvement of signal strength to a vast number of persons, in our judgment, far outweigh the detriment suffered as the result of the loss of applicant's signal to a comparatively small number of persons. Moreover, we have no doubt that the elimination of the waste of a significant portion of applicant's signal over water areas results in a more efficient use of the frequency within the intent and meaning of Section 307(b) of the Communications Act. No challenge has been offered to this proposition. In the light of the facts of this case, we conclude that, except with respect to matters pertaining to the surveys conducted by KBMT and KPAC, no substantial and material questions of fact have been raised by the petitioners sufficient to warrant a hearing. We will provide, in this Order, that if our grant, which we here set aside, is reinstated as a result of the hearing, it shall be subject to conditions set forth in the Appendix hereto. These conditions will be imposed in lieu of those originally imposed and are intended to assure that KMBT will provide the "equivalent protection" to KSLA which it has undertaken to provide.

10. The Commission, having determined to reconsider its action granting without hearing the above-captioned application of Television Broadcasters, Inc., to the extent indicated herein and for the reasons set forth herein, is unable to make the statutory finding that a grant of the application would serve the public interest, convenience and necessity, and is of the opinion that the grant must be set aside and the application designated for hearing on the issues set forth below. In reconsidering our said action, however, we reaffirm our finding that, except as indicated by the issues set forth below, the applicant is legally, technically and financially qualified to construct and operate as proposed.

Accordingly, IT IS ORDERED, That the Petitions for Recon-

[5] See also *Springfield Television Broadcasting Corporation* v. *Federal Communications Commission,* 117 U.S. App. D.C. 214, 328 F. 2d 186, 1 RR 2d 2083.

sideration filed herein by KSLA–TV, Inc., and Texas Goldcoast Television, Inc., ARE GRANTED to the extent indicated herein and are otherwise DENIED, and, pursuant to Section 1.106(k) (3) of the Commission's Rules, the grant of the application (BPCT–3266) of Television Broadcasters, Inc., for a construction permit, made by the Commission by Memorandum Opinion and Order released January 8, 1965 (FCC 65–15, 4 RR 3d 119) IS HEREBY SET ASIDE.

IT IS FURTHER ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications of Television Broadcasters, Inc., for a constructionpe rmit (BPCT–3266) and for renewal of license (BRCT–560) and Texas Goldcoast Television, Inc., for renewal of license (BRCT–389) ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held in Beaumont, Texas, at a time to be specified in a subsequent Order, upon the following issues:

1. To determine the facts and circumstances surrounding the programming survey made by Television Broadcasters, Inc., and the "check survey" made by Texas Goldcoast Television, Inc., and the preparation and submission of the results thereof to the Commission.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issue, whether the principals, agents, employees, or representatives of Television Broadcasters, Inc., or Texas Goldcoast Television, Inc., have made misrepresentations to the Commission or have, in any manner, attempted to deceive or mislead the Commission.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether the applicants have the requisite qualifications to be broadcast licensees.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application of Television Broadcasters, Inc., for renewal of license would serve the public interest, convenience and necessity.

5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application of Television Broadcasters, Inc., for a construction permit would serve the public interest, convenience, and necessity.

6. To determine, in the light of the evidence adduced pursuant to Issues 1, 2, and 3, above, whether a grant of the application of Texas Goldcoast Television, Inc., for renewal of license would serve the public interest, convenience, and necessity.

IT IS FURTHER ORDERED, That, pursuant to Section 1.3 of the Commission's Rules, and upon the Commission's own motion, Section 1.580(b) of the Commission's Rules IS HEREBY WAIVED.

IT IS FURTHER ORDERED, That the Hearing Examiner shall expedite the hearing and shall make full use of his authority to utilize, among other procedures, pre-hearing conferences, the filing of stipulations of facts and issues, incorporation by reference, and such other devices as may be necessary and proper to expedite the hearing.

IT IS FURTHER ORDERED, That, in the event that it is determined, as a result of the hearing hereby ordered, that the renewal application of Television Broadcasters, Inc., should be granted and that the Commission's grant of the application of Television Broadcasters, Inc., for a construction permit should be reinstated, such reinstated grant shall be made subject to the conditions set forth in the Appendix attached hereto, in lieu of those conditions originally imposed.

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

IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594(a) of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the pub-

Adopted May 5, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

I concur but would have preferred to add an issue to determine whether a waiver of the minimum spacings is warranted.

APPENDIX

Subject to the following conditions:

1. The horizontal effective radiated visual power in the direction of Station KSLA–TV, Shreveport, Louisiana, shall not exceed 15.7 dbk (37.1 kw).

2. An appropriate reference antenna shall be installed on the main antenna structure for the purpose of making ratio field intensity measurements with the transmitting antenna in the direction of station KSLA–TV at the time of initial operation and subsequent periodic checks during regular operation. The reference antenna shall be installed in a manner to minimize coupling to the main antenna elements, the tower structure, and guy wires. Provisions shall be made for coupling the transmitter output either to the reference antenna or to the main transmitting antenna and suitable means shall be available for accurately determining and maintaining the relative power inputs to the main and refereece antennas.

3. Monitoring locations shall be selected for the purpose of obtaining relative field intensity measurements between the reference and main antenna to establish that the limited radiation specified above in the direction of KSLA–TV is not exceeded. At least two monitoring locations on the radial connecting the KBMT transmitting antenna and Station KSLA–TV shall be selected. Comparative radiation measurements of the KBMT transmitting antenna shall be made during equipment tests and at least once each 90 days at the selected monitoring locations. Records of such measurements shall be maintained and made available to the Commission upon request.

4. The application for license shall include the following:

(a) Horizontal plane radiation pattern obtained from measurements performed by the manufacturer for the transmitting antenna prior to its installation.

(b) Vertical radiation patterns obtained from measurements by the manu-

facturer for the transmitting antenna prior to its installation for at least the azimuths toward Station KSLA–TV.

(c) An affidavit by a qualified and licensed surveyor that the proper azimuthal orientation of the transmitting antenna to achieve the radiation limitations prescribed above for Station KSLA–TV was established at the time of the antenna installation.

(d) Description of the reference antenna installation with appropriate measured radiation patterns.

(e) Description of monitoring locations on the radial connecting the KBMT transmitting antenna and Station KSLA–TV.

(f) Comparative field intensity measurements obtained during equipment tests between the reference and main antenna at the selected monitoring points together with a description of equipment and technique employed.

(g) Description of means employed to monitor power input to the reference and main transmitting antennas during field measurements required in (f), above.

F.C.C. 65R–176

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| INTEGRATED COMMUNICATIONS SYSTEMS, INC. OF MASSACHUSETTS, BOSTON, MASS. | Docket No. 15323<br>File No. BPCT–3167 |
| UNITED ARTISTS BROADCASTING, INC., BOSTON, MASS. | Docket No. 15324<br>File No. EPCT–3169 |
| For Construction Permit for New Television Broadcast Station | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The above-captioned applications for new UHF television stations in Boston, Massachusetts, were designated for consolidated hearing by Commission Order FCC 64–96, released February 12, 1964. On March 29, 1965, the applicants filed a "Joint Request for Approval of Agreement providing for Withdrawal of the Application of United Artists Broadcasting, Inc."[1] The agreement between the parties provides that integrated Communications Systems, Inc. of Massachusetts (Integrated) will reimburse United Artists Broadcasting, Inc. in the amount of $15,000; that United Artists Broadcasting will in turn dismiss its application for a new UHF television station on Channel 25 in Boston. The proposed agreement is supported by affidavits of the parties, as required by Section 1.525(a) of the Commission's Rules and Regulations. The affidavit of one Richard H. Yamin of United Artists Broadcasting states that he is fully familiar with the expenses incurred with the application of United Artists Broadcasting, Inc. for its UHF television station in Boston, and that the expenses set forth in the attached tabulation were legitimately and prudently made. The attached tabulation is an accountant's report submitted by Peat, Marwick, Mitchell & Co. of New York, which sets forth in detail the expenses incurred. This tabulation is in turn supported by the affidavits of Harry M. Plotkin, counsel for United Artists Broadcasting, and Robert E. L. Kennedy, engineering consultant.

2. The largest single item of expense is $8,664.84 for legal fees. At or about the same time as United Artists Broadcasting filed its application for a new station in Boston, it filed applications for Houston, Texas, and Cleveland, Ohio. The Cleveland, Ohio appli-

[1] The Board also has for consideration, an Opposition of Broadcast Bureau to "Joint Request for Approval of Agreement", filed April 20, 1965; Reply to "Opposition of Broadcast Bureau to 'Joint Request for Approval of Agreement' ", filed April 28, 1965, by Integrated Communication Systems, Inc. of Massachusetts; Reply of United Artists Broadcasting, Inc., filed April 29, 1965; and Petition to Dismiss Application, filed March 31, 1965, by United Artists Broadcasting, Inc.

cation was subsequently amended to specify Lorain, Ohio. The figure for legal fees was arrived at by taking one-third of the total billing for legal service in connection with all three applications. The Broadcast Bureau in its opposition argued that this figure was not properly identified with costs in connection with the preparation and prosecution of United Artists Broadcasting's Boston application. United Artists Broadcasting submitted a second affidavit from counsel with its reply, which alleged that the time records had been searched and that one-third of the total costs was a proper allocation, and that the figure $8,664.84 had in fact been expended in connection with the Boston application.

3. The Bureau also challenged certain expenses charged to the applicant by the United Artists Corporation, the parent corporation. These expenses consist of certain items insurred by the Office of the Secretary of United Artists Corporation in connection with the incorporation of United Artists Broadcasting, Inc. and certain accounting services rendered by the parent corporation. As in the case of the legal services rendered, the actual amount charged to the Boston application was arrived at by taking one-third of the total cost of work performed by the Office of the Secretary and by the Accounting Department in connection with the affairs of United Artists Broadcasting, Inc. United Artists Corporation also allocated $100 per week of its administrative salary, and other overhead expenses, to the affairs of United Artists Broadcasting, Inc. One-third of this total, which amounted to $4,000, was charged to the Boston television application. The Bureau has objected to this procedure on two grounds; the first being that to allow recovery of expenses incurred by the parent corporation on behalf of its wholly-owned subsidiary is contra to the intent and purpose of the statute and the rules; and secondly, on the ground that the one-third allocation procedure used by United Artists Corporation here does not properly relate the charges to the Boston television application.

4. In response to the Bureau's position, United Artists Broadcasting, Inc. argues that the services performed by the Office of the Secretary of the parent corporation are the same services for which an individual or a group of individuals would pay an attorney, and that there is no valid basis for treating a corporate applicant differently from a private individual. With respect to the accounting charges and charges for administrative supervision and parent corporation overhead, the petitioner argues that the situation is not comparable to the *Martin* case since here the corporation actually expended money for salaries and for expenses, where in that case an individual applicant sought to collect for his personal time spent in the preparation of his application. Moreover, petitioner argues the statement of expenses was submitted by an independent CPA firm and that they, therefore, are entitled to some special consideration.

5. With respect to the showing concerning legal fees, the Board is persuaded that the distribution of charges submitted by United Artists Broadcasting, Inc., supported by the affidavits of Messrs. Plotkin & Bechtel, is appropriate. With respect to the other chal-

lenged expenditures, we must conclude on the basis of the showing presently before us that these expenditures cannot properly be allowed. It is our view that the philosophy set forth by the Board in its Memorandum Opinion and Order in re *Robert J. Martin,* FCC 65R–77, released March 2, 1965, is controlling in this case. We are unable to distinguish a situation where a parent corporation performs services for a wholly-owned subsidiary from a situation where an individual performs services for himself and then seeks to remover for his time spent in performing those services. In the terms of the statute:

> The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. * * * the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.[2]

We cannot find that funds paid by United Artists Broadcasting, Inc., a wholly-owned subsidiary to United Artists Corporation, the parent corporation, constitute funds legally and prudently expended by United Artists Broadcasting, Inc. in connection with preparing, filing, and advocating the granting of its application. Rather it appears to us to be an accounting transaction which merely changes the corporate funds involved from one "pocket" to another. Moreover, even if we were to conclude that United Artists Corporation might properly be reimbursed for the services rendered by the parent corporation to its wholly-owned subsidiary, the showing before us does not relate the administrative services for which the charges have been made to the Boston television application.[3]

6. In view of these circumstances, we are unable to approve expenditures as follows:

| | *Amount* |
|---|---|
| Office of the Secretary of United Artists Corp.—incorporation and corporate matters and legal services rendered to United Artists Broadcasting, Inc. (total $1,500.00, ⅓ allocable to Boston application) | $5.00.00 |
| Accounting Department of United Artists Television, Inc. (a wholly owned subsidiary of United Artists Corporation), for accounting services rendered to United Artists Broadcasting, Inc. (total $150.00; ⅓ allocable to Boston application) | 50.00 |
| Administrative salary expenses and other overhead costs of United Artists Television, Inc., relating to United Artists Broadcasting, Inc. (total computed on the basis of $100.00 per week; ⅓ allocable to Boston application) | 4,000.0 |

Thus the Board finds that the total amount which has been legtimately and prudently expended by United Artists Broadcasting in connection with preparing, filing, and advocating the granting of its application is $12,104.00.

7. The withdrawal of United Artists Broadcasting, Inc.'s application should substantially shorten the hearing in this proceeding.

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[2] Section 311(c)(3) of the Communications Act of 1934, as amended.
[3] *Dirigo Broadcasting, Inc.,* FCC 65R–29, 4 RR 2d 273 (1965).

This is in accordance with the Commission's policy to encourage the development of UHF TV and otherwise is in the public interest. The Board will, therefore, approve the agreement for reimbursement to United Artists Broadcasting, Inc. to the extent that United Artists Broadcasting, Inc. may be reimbursed in the amount of $12,104.00, and its application dismissed. Action on United Artists Broadcasting, Inc.'s petition to dismiss will be held in abeyance for five days from the release date of this Memorandum Opinion and Order. Should the parties be unwilling to proceed with the agreement in these circumstances, the Board must be notified within the five-day period.

Accordingly, IT IS ORDERED, This 17th day of May, 1965, That the Joint Request for Approval of Agreement Providing for Withdrawal of the Application of United Artists Broadcasting, Inc,. filed March 29, 1965, IS GRANTED to the extent that United Artists Broadcasting, Inc. may be reimbursed for funds "legitimately and prudently expended" in preparing, filing and prosecuting its application for a new UHF TV station at Boston, Massachusetts, in the amount of $12,104.00; and

IT IS FURTHER ORDERED, That if, in view of this circumstance, the parties wish to proceed with the hearing, they shall so advise the Review Board within five days of the repease of this Memorandum Opinion and Order. Otherwise, the application of United Artists Broadcasting, Inc. for a new UHF TV station at Boston, Massachusetts, will then be dismissed.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–179

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of<br>DWIGHT L. BROWN, TRADING AS BROWN RADIO & TELEVISION CO. (WBVL), BARBOURVILLE, KY.<br>For Renewal of License | Docket No. 15769<br>File No. BR–3228 |
| BARBOURVILLE-COMMUNITY BROADCASTING CO., BARBOURVILLE, KY.<br>For Construction Permit | Docket No. 15770<br>File No. BP–16297 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER SLONE DISSENTING AND ISSUING A STATEMENT IN WHICH BOARD NEMBER BERKEMEYER JOINS.

1. The Review Board has before it for consideration a petition to enlarge issues filed by Barbourville-Community Broadcasting Co. (Barbourville),[1] an applicant for the facilities now operated by Dwight L. Brown, tr/as Brown Radio & Television Company (WBVL) (Brown).[2] Barbourville, whose application was consolidated for hearing on the standard comparative issue with Brown's mutually exclusive application for renewal of license of Station WBVL (FCC 64–1198, released December 31, 1964), requests addition of the following issues against Brown:

(1) To determine whether or not, and if so the extent thereof, Dwight L. Brown has violated any Federal law or regulation with particular respect to (a) the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.) in the manufacturing, selling and distribution of Pi-Ron-Ite, and (b) the Federal Fair Labor Standards Act (29 U.S.C. 201 et seq.) in connection with the hiring and compensation of employees of Station WBPL.

(2) To determine whether or not Dwight L. Brown has made or caused erroneous, improper or false entries to be made in the program logs for Station WBVL, contrary to the requirements of Section 73.112 of the Commission's Rules and Regulations.

(3) To determine in light of evidence adduced under the foregoing issues whether Dwight L. Brown has the requisite

[1] Pleadings before the Review Board include: petition to enlarge issues with respect to applicant Brown (WBVL), filed January 21, 1965, by Barbourville; Broadcast Bureau's comments, filed February 9, 1965; Barbourville's reply to Broadcast Bureau's comments, filed February 17, 1965; Brown's opposition and request for acceptance and consideration, filed February 23, 1965; and Barbourville's reply, filed April 6, 1965.

[2] On December 27, 1962, application was made by Golden East Broadcasting Company, Inc. (BP–15827) for a second standard broadcast station in Barbourville on 1490 kc. Final action has not been taken on the application pending disposition of a petition to deny filed by Brown.

character qualifications to be a licensee of this Commission.

(4) To determine the extent to which Dwight L. Brown has utilized his position as licensee and owner of radio Station WBVL to promote his other business activities, and whether such utilization results in placing the other business enterprises of Barbourville, Kentucky in an unequal or unfair competitive position vis-a-vis Dwight L. Brown, and if so whether a grant of Brown's application for renewal of license of WBVL would be contrary to the public interest, convenience and necessity.

2. Barbourville's first requested issue concerns the effect of possible violations of federal laws and regulations upon Brown's qualifications. According to a libel dated December 11, 1962, a copy of which is attached to the Barbourville petition, the United States attorney petitioned the United States District Court for the Eastern District of Dentucky to seize and condemn, in accordance with the provisions of the Federal Food, Drug & Cosmetic Act, a shipment of a drug called Vi-Ron-Ite, which was owned and distributed by Dwight L. Brown Enterprises. Petitioner requests official notice to the effect that: files of the United States District Court for the Eastern District of Kentucky show that the shipment, which was in Brown's possession in Barbourville, was seized on December 15, 1962; the Government charged that the drug was misbranded, and that statements on the carton, the label and the leaflet concerning the drug's effectiveness were false and misleading since Vi-Ron-Ite was not effective as claimed and the statements were otherwise contrary to fact; Brown did not challenge the Government's charges; and a default judgment was entered and a decree of condemnation passed on March 7, 1963.

3. Barbourville's first request also alleges violation of wage hour provisions of the Fair Labor Standards Act in connection with one Walter Powell, a discharged employee of WBVL,[3] whose subsequent application for unemployment compensation was contested by Brown. Statements by Powell and other WBVL employees in connection with the application for compensation to the effect that Powell had frequently worked 70 hours per week and more, led to an investigation of WBVL by the Kentucky Regional Office of tse United States Department of Labor, Wage and Hour and Public Contracts Division. The Regional Office concluded that Brown owed Powell for previously uncompensated overtime hours.

4. In his opposition pleading,[4] which is accompanied by an extensive affidavit concerning the matters in the Barbourville petition, Brown concedes the truth of Barbourville's factual allegations. With respect to the matter of the Vi-Ron-Ite shipment, he

[3] For information concerning Powell's employment and discharge Barbourville refers to Golden East's opposition to Brown's petition to deny (see footnote 2, *supra*) and attachments thereto. Copies of statements in the Commission's files in reply to Brown's arguments contesting Powell's claim are attached to Barbourville's petition. One of these statements is a letter written by Powell which he offers to put in affidavit form. However, as noted by the Bureau, the substance of the letter is verified by one of the affidavits attached to the opposition to Brown's motion to deny the Golden East application. A copy of that affidavit isa lso filed with Barbourville's petition to enlarge.

[4] Brown's opposition, which was late filed, included a request for acceptance and consideration in view of the breadth of the issues; the "difficulty of adducing the relevant facts," particularly in view of Barbourville's distance from Washington; and concurrent efforts to file other pleadings in the same proceeding. On the basis of this showing, the late filed pleading will be considered by the Board.

further states that: the seizure was based on his own report to FDA agents that the supply of drugs in question had been on his shelves for 1½ years and was reportedly subject to deterioration; subsequent analysis of samples indicated that such deterioration had, in fact, occurred; Brown willingly acceded to seizure and disposal of the remainder of the shipment; and Brown is no longer in the drug business. Brown's statement that the incident was both isolated and innocent is not contradicted by the petitioner. As to the overtime payment, Brown's affidavit states that his alleged liability (settlement was reached without litigation) was based on his understanding that his employees could be paid on a weekly rather than an hourly rate and that the additional hours were therefore not compensable "overtime."

5. As is indicated in *Report on Uniform Policy as to Violation by Applicant of Laws of United States,* 1 RR (Part 3), 91:495, 91:497, released April 4, 1951, not every violation of law is of such a nature as to call into question the basic qualification of the applicant involved. The mere fact of an admitted violation of a regulation does not of necessity carry with it implication derogatory to the character of the violator which would detract from his ability to meet the standards of qualification required by the Commission for its licensees. It is not the violation itself, but the nature of the conduct constituting that violation, which concerns the Commission. In determining whether conduct is of a nature to warrant addition of a disqualifying issue, consideration must be given to such factors enumerated in the Commission's *Report on Uniform Policy, supra,* as: whether the conduct was deliberate, willful or in gross disregard of responsibility; whether the conduct represented a pattern of violation as opposed to an isolated incident; whether the violation was of a serious nature; and whether the type of conduct involved is sufficiently connected with those matters entrusted to the Commission to be of decisional significance. None of the foregoing factors is alleged to be present in the instant case; thus the violations do not warrant addition of a disqualifying issue against Brown.[5]

6. Petitioner's request for an issue as to "erroneous, improper or false" log entries by Brown between 1958 and 1960 is based on pleadings filed with respect to the *Golden East* application (see footnote 2, *supra*). In his motion to deny said application, Brown had challenged the applicant's character qualifications because of alleged improper program logging practices followed by Powell (a principal of Golden East) during his tenure as an employee at WBVL. In opposing said charge, Powell does not deny the improper log revisions but contends that Brown instructed him to make them. In support of its petition in the matter before us, Barbourville has attached statements from Powell and Mr. & Mrs. Mardis *prepared in August, 1960.*[6] Brown denies categori-

[5] This is not to say, of course, that violations of law too remote from the question of basic qualification to warrant addition of specific issues can never be considered if they are found by the Examiner to bear upon the comparative qualifications of competing applicants. See *Spanish International Television Company, Inc.,* FCC 64R–239, 2 RR 2d 853.

[6] The verified statements of Mr. & Mrs. Mardis, former employees of Brown, both dated *August 30, 1960,* repeating the alleged improper log entries, are addressed to "Hearing Examiner —Dept. of Economic Security—Division of Unemployment Insurance—For Use Date of Hearing September 2, 1960." (See footnote 7, *infra.*)

cally that he was responsible for the alleged improper log entries and contends that Powell is a disgruntled employee "who is dedicated 'to get even' with affiant for firing him."

7. The pleadings herein and the Commission's public records (of which we take official notice) contain the following information relating to and bearing on the request for a program log issue: On *August 8, 1960,* Powell sent a letter to the Commission in which he stated, in pertinent part, that he had been dismissed from Station WBVL by Brown on June 14, 1960; that Brown had accused him, among other things, of falsifying the station's logs; that, on the contrary, in connection with his 1958 renewal application, Brown had instructed Powell and another employee, Bob Locksart to "log all spots as 30-seconds"; and that rather than risk dismissal, they followed the alleged instructions and signed the logs. By letter dated September 16, 1960, the Commission requested additional details from Powell. Neither petitioner nor the Broadcast Bureau deny the allegations in Brown's affidavit that the Commission investigated Powell's charges, that its representatives interviewed Lockhart in Oakland, California, and that "Lockhart emphatically told the investigators that there was no truth to the allegations that affiant [Brown] ordered Powell to make improper entries in WBVL's logs or to violate any of the FCC's Rules and Regulations."[7] Neither the pleadings nor the public records indicate whether Lawson (a co-worker mentioned in Powell's letter) or the Mardises were also interviewed, and if so, whether they denied or confirmed Powell's charges.

8. On June 5, 1961, Brown filed his application for renewal of license of WBVL.[8] With his application, he submitted the program logs called for therein. The Commission had before it for consideration, among others, the documents and information and on *April 30, 1963* granted Brown's application for renewal of license. Thereafter, on June 10, 1964, Brown filed his renewal application for the ensuing license period, which application became mutually exclusive with the application for the same facilities filed by petitioner herein on July 24, 1964.[9] The Commission was thus afforded another opportunity to consider Powell's charges and explore theme in a hearing. Nevertheless, on December 24, 1964, it designated said applicant for hearing without putting in issue any of Powell's charges.

9. We have given the most careful consideration to all of the foregoing matters, particularly to the Mardis 1960 statements. As

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[7] While not despositive of the program log issue, it is noted that attached to Brown's opposition pleading is a copy of a notice dated August 5, 1960, issued by the Division of Unemployment Insurance, Kentucky, disqualifying Powell from receiving benefits on the basis of the following "Findings":

"The claimant worked for this employer 4½ years. He was discharged for failure to perform the work as directed, excessive tardiness and misuse of the business phone. Therefore, the claimant was discharged for misconduct connected with the work."

[8] Public notice of the pending application was broadcast over WBVL for four days commencing August 9, 1961; notices likewise appeared in the Barbourville weekly newspaper on August 10, 17 and 24. 1961; in response to these public requests that interested persons bring relevant information to the Commission's attention, it is noteworthy that WBVL's license file reveals no complaints by any of the persons supporting the Barbourville petition—or by any other person.

[9] As in the case of his previous application for renewal, Brown provided public notice of the filing of his 1964 application by printing a notice in the local newspaper and by broadcasting the fact over WBVL. The Commission's application file does not contain any communication from any of the persons whose statements are attached to Barbourville's petition.

against these statements, we have weighed the fact, among others, that the program log information contained in said statements were known to the Commission via Powell's letter in August, 1960; that Brown's program logs were filed with his renewal applications and were available to the Commission; that the Commission investigated the charges against Brown and interviewed Lockhart, the person named by *Powell* in his letter, who could corroborate Powell's charges; that, on the contrary, Lockhart disputed said charges; that in 1963, with full knowledge of the charges, the Commission found that the public interest would be served by renewing Brown's license; that again, with full knowledge of said charges, *the Commission did not frame a program log issue* when it designated Brown's and Barbourville's applications for hearing in December, 1964; and that many years have passed since the above charges were first brought to the Commission's attention. On the basis of all of the above, we are of the view that the requested program log issue is not, at this stage of the proceedings, warranted. As is clearly indicated above, in reaching this conclusion we have weighed *all* the facts herein *de novo*, including the fact of negative action by the Commission based on almost five years of knowledge of the charges involved.[10]

10. Barbourville's fourth requested issue is based on its alleged belief that Brown employs WBVL (Barbourville's only radio station) unfairly for the promotion of his own outside business interests to the detriment of competing businesses.[11] Petitioner states that according to logs filed with this and his most recent prior renewal application, Brown devoted more than 10% of WBVL's commercial spot announcement time to promotion of Brown's Furniture Store, Brown's Radio & TV, and Brown Enterprises (which distributed Vi-Ron-Ite). Competing stores could not afford to match this advertising without raising prices, yet Brown, with no such costs, can and does discount his goods. Petitioner further alleges that Brown operates WBVL to the detriment of the community in refusing to carry even public service announcements which would involve mention of businesses which do not advertise on WBVL—e.g., a church food sale to take place on the premises of a non-advertising concern. Brown's motion to deny the Golden East application for a second station in Barbourville is interpreted as an attempt by Brown "to maintain his monopoly position."

11. The Bureau would not add the requested issue in view of the isolated complaints cited in support of the broad issue requested. The Review Board agrees with this position. Moreover, much of what Barbourville alleges, even if true, is not of such a nature as to affect Brown's basic qualification. In view of the fact that only about 10% of the spot announcements concern Brown's

[10] *Cf. re Howard W. Davis*, 36 FCC 507 (1964) where the Commission granted a renewal application, after a hearing on misrepresentation charges, on the additional ground of "the protracted time period which has occurred since the matters in question took place (1953 and 1954)". The misrepresentation issue in the *Davis* case had been designated for hearing in 1959.

[11] According to one affidavit attached to the Barbourville petition, Brown's entry into the furniture retailing business came shortly after his statement to affiant "That if the furniture dealers in the city of Barbourville did not advertise with him (WBVL), he would put up his own store and run them out of business by advertising with his radio station."

own business interests, no systematic pattern of exclusion of other advertisers is demonstrated. A disqualifying issue, such as issue 4 requested by the petitioner, will accordingly not be added. To the extent that these matters are relevant to Brown's broadcast record, they may be examined under the comparative issue.

Accordingly, IT IS ORDERED, This 18th day of May, 1965, That the petition to enlarge issues, filed January 21, 1965, by Barbourville-Community Broadcasting Co., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

STATEMENT OF BOARD MEMBER SLONE, DISSENTING IN PART

I would add a log falsification issue against Brown. As I understand the majority's position, its refusal to add the issue is based upon the fact that the Chief of the Broadcast Bureau, acting pursuant to delegated authority, renewed the license of Station WBVL notwithstanding the fact that Powell's charges against Brown were a matter of record before the Commission at the time. The second basis for the majority's position is that the Commission in subsequently designating the applications in this proceeding for hearing, did not specify a log falsification issue against Station WBVL. The third basis for the majority's position is its view that on the basis of the facts alleged in the pleadings, an evidentiary hearing with respect to those facts is not required.

Subsequent to the renewal of the license of Station WBVL and the Commission's adoption of the designation Order in the instant proceeding, corroboration of Powell's charges has been offered by the petitioner in the form of affidavits submitted by two former employees of Brown. These affidavits are referred to in footnote 6 of the majority's opinion. Thus, the Board is confronted with a situation in which Brown and Powell have made diametrically opposing statements regarding log falsification at Station WBVL, and, in addition, copies of affidavits of two former employees corroborating Powell's statement have for the first time been submitted in connection with a timely petition to enlarge issues. A clear issue of fact bearing upon a vital public interest consideration is thus presented, and such an issue can be resolved only in an evidentiary hearing. See *Television Broadcasters, Inc. (KBMT)*, FCC 65–379, released May 10, 1965 (Docket No. 16001). In *Howard W. Davis* cited in the majority's opinion, controverted issues of fact were resolved only *after* an evidentiary hearing was held.[1]

The fact that the Chief of the Broadcast Bureau, pursuant to delegated authority, renewed Station WBVL's license notwithstanding Powell's charges does not resolve the factual issue before us. The Chief of the Broadcast Bureau now supports the petitioner's request for a log falsification issue. Nor does the fact, in

[1] In the *Davis* case, "the protracted time period" referred to by the majority was onyl a secondary basis for the Commission's ultimate decision. The principal basis of the Commission's decision was that the "entire picture of Davis' conduct . . . falls short of establishing misrepresentation. . . ."

my opinion, that the Commission did not specify a log falsification issue against the renewal application of Station WBVL foreclose enlargement of the issues to add such an issue in response to pleadings which present a factual question; Section 309 of the Communications Act contemplates that issues may be enlarged, as does Section 1.229 of the Rules, where, as here, properly supported issues of fact bearing on the public interest are raised. Moreover, in my opinion, the resolution of a factual controversy in connection with an earlier non-adjudicatory determination is not conclusive as to the same factual controversy in a subsequent adjudicatory proceeding. It is clear that such prior determination cannot have this effect, for it serves to deprive parties to the adjudicatory proceeding of their right to pursue in the adjudicatory proceeding all matters which affect the public interest. *Cf. FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 9 RR 2008 (1940). Moreover, the logic of the view that such prior determination is conclusive in this proceeding would lead to the conclusion that it would likewise be conclusive in any adjudicatory proceeding involving the application of Golden East Broadcasting Co., Inc., BP–15827, filed December 27, 1962, in which Powell is a principal. Such conclusion would, of course, clearly violate Powell's right to a full hearing guaranteed by Section 309 of the Act.[2]

There is an additional fact which reaffirms my view that the Broadcast Bureau should be given a full opportunity to explore at an evidentiary hearing the log falsification question. In a prior Board Decision, FCC 65R–115, released March 30, 1965, the Board denied the request made by the two applicants in this proceeding for with withdrawal of their respective petitions to enlarge issues; the reason for their request was that they had negotiated an agreement looking to the dismissal of Brown's application, the grant of Barbourville-Community's application, and the transfer of Brown's Station WBVL to Barbourville-Community.

In a recent decision,[3] the Court of Appeals stated that: "When . . . adversary parties reconcile their differences by contract, the Commission must make its own search rather than let the parties control the flow of information to it." Moreover, as the Court stated in that same case, "The end of private litigation [which the applicants to this proceeding are attempting to arrange] hardly overrides a major public interest." In the matter before us, the Chief of the Broadcast Bureau has indicated, by his support of the request for the addition of a log falsification issue, that the Bureau is desirous of making "its own search," under hearing conditions. I would not deprive it of this opportunity.

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[2] The majority suggests that the matter is also settled as to Powell in citing (see fn. 7) a 1960 Division of Unemployment Referee's finding that Powell was discharged "for misconduct connected with work." However, this finding by the Referee did not in fact include any determination whatsoever on the question of log falsification at WBVL, and no other questions connected with Powell's tenure at WBVL are here before us. Moreover, this suggestion is inconsistent with the Board's failure to give full weight to certain properly attested affidavits tendered with Barbourville-Community's petition on the grounds that they were first prepared in 1960. Needless to say it cannot be inferred that time will alter the content of such sworn statements; and in any case they were offered to the Board not as proof of facts but as grounds for adjudication of the facts alleged.

[3] *Citizens TV Protest Committee* v. *FCC,* No. 18738, decided May 7, 1965. (D.C. Cir.)

F.C.C. 65R–177

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of<br>CENTRAL BROADCASTING CORP., WARE, MASS. | Docket No. 15419<br>File No. BPH–4243 |
| WCRB, INC., SPRINGFIELD, MASS.<br>For Construction Permits | Docket No. 15420<br>File No. BPH–4319 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSTAINING.

1. By Memorandum Opinion and Order, FCC 65R–26, released January 26, 1965, the Review Board held in abeyance action on a joint petition for approval of agreement between the above-captioned parties, for dismissal of the application of Central Broadcasting Corporation, and for grant of the WCRB, Inc., application. Petitioners were allowed 30 days within which to file supporting information as to the value of certain non-monetary items specified in the joint agreement, or to submit a new agreement in conformity with the requirements of Section 311 of the Communications Act of 1934, as amended, and the Commission's Rules promulgated thereunder. In the same Opinion the Review Board indicated for the reasons stated therein, that in the event the joint petition was approved, publication of local notice pursuant to the provisions of Section 1.525(b) of the Rules would be required. On February 26, 1965, Central and WCRB filed a supplement containing additional information in support of their original request.

2. The subject agreement provides that, in consideration of Central's dismissal, WCRB will make partial reimbursement of out-of-pocket expenses incurred by Central in prosecuting its application in the amount of $2,250. Central includes affidavits in support of its itemization of aggregate expenses incurred to the extent of $2,757.40. In addition to such payment, the agreement provides that Central or Allen W. Roberts, the sole stockholder of Central, will have the right to purchase 15 shares (15%) of WCRB, Inc.'s stock from Charles River Broadcasting Company (sole stockholder and owner of 100 shares of WCRB, Inc.) at $10 per share, the cost to Charles River. The right to one directorship, inspection of books, and various voting and other provisions would accompany such stock purchase. These include mutual rights of first refusal by either party to the joint agreement as to the sale of WCRB, Inc., stock at a price equal to a bona fide offer or, in the event the Roberts family ceases to hold majority control of Central, at the "fair market value." Roberts would also be retained by WCRB for a one year period as a consultant and advisor, working for not more than

ten hours per month, without pay but with mileage and similar expenses to be reimbursed.

3. In their supplement, petitioners again contend that the $150 price for the 15% interest in WCRB, Inc., represents the current or market value of such stock. In support thereof, petitioners have submitted a joint affidavit of Roberts and Theodore Jones, the principal officer of WCRB, Inc., which states that WCRB is not now a going concern; there is no public market in its stock; there have been no previous sales of its stock other than the original issue at $100 per share; that WCRB has no fixed assets; that instead, because of accrued expenses, the book value of the stock is considerably less than $10 per share; that it expects only to break even during the first year of operations (as indicated by the estimates of anticipated costs and revenues in its application); and that independent FM stations in similarly sized markets, according to the Commission's AM–FM Broadcast Financial Data—1963 (FCC Public Notice 58084), are generally losing money.[1] Petitioners further contend that the services which Roberts will render as a consultant to WCRB may reasonably be evaluated at $10 per hour and that the total compensation to which he would be entitled, if any were to be paid, would amount to $1,200, which in turn should reduce the net monetary value of the consideration Roberts is to receive for dismissal of the Central application by that amount. As to the directorship in WCRB, Inc., which Roberts would be allowed; the right of first refusal on sale of WCRB, Inc., stock; the right to inspection of books; and other miscellaneous agreements, petitioners contend that these are normal incidents of ownership of stock in a closely held corporation and have no monetary value.

4. As the Board views the subject agreement, it is essentially in two parts, the first relating to reimbursement of out-of-pocket expenses by payment of a cash sum of money, and the second in effect, a proposed merger. Since we have no question that Roberts has reasonably and prudently expended a sum somewhat in excess of $2,250 in the preparation and prosecution of Central's application, we will allow such cash reimbursement to be made to him. Based on the information now before us, however, we cannot find that the proposed merger with its accompanying provisions,[2] (particularly that by which Roberts or Central will have an option to purchase 15 shares of WCRB stock at $10.00 per share, the cost to Charles River) does not involve a consideration in excess of the legitimate and prudent expenses incurred by Roberts in the prosecution of the application. The mere statement that WCRB has no fixed assets and its only assets of any nature are the money paid in to date, does not, as contended by petitioners, establish that at most $150 is the current or market value of such 15 shares of stock to be purchased by Roberts. It is elementary that current or mar-

[1] The cited data refer to communities with three or more FM stations operated by "non-AM licensees." WCRB proposes the first non-educational independent FM station for Springfield. Thus, the attempted comparison is of questionable value.

[2] It is noted that in the application for assignment of AM station WARE, Ware, Massachusetts (BAL–497, effective November 7, 1963) to Central, Roberts represented that he would devote *full time* to the operation of WARE, and be the active manager of it. Were Roberts to be retained by WCRB for a one year period as a consultant and advisor working for not more than 10 hours per month (without pay) a question might arise as to the continued bona fides of these representations as well as those relating to the proposed merger.

ket value of stock is not established by these meager facts, standing alone, and without regard to (a) WCRB's financial condition after giving effect to the issuance of the construction permit (which would establish, among other factors, the amount of pre-operating expenses or costs which under normal accounting practices are considered as a capital item, as well as the value of the leasehold rights to equipment, land, studio, buildings, etc.) and (b) offers to persons other than Roberts to purchase such a 15% interest.

5. In view of the foregoing, we will allow the provisions of the agreement for cash reimbursement of Roberts' substantiated expenses to the extent of $2,250. However, since the information submitted relating to the remaining provisions of the agreement by which Roberts or Central will be given an option to purchase 15 shares of WCRB stock for $150, plus accompanying rights including the employment of Roberts as a consultant, does not meet the requirements of Rule 1.525(a),[3] these latter provisions of the agreement will be disallowed. If this meets with the petitioners' approval, the publication ordered below shall be effected; upon a showing of compliance with the publication requirement, the agreement will be approved to the extent indicated herein, and the application of Central Broadccasting Corporation will be dismissed. Whether the application of WCRB, Inc., will be granted is dependent upon whether any application is filed for the community of Ware in response to the publication required herein. Should petitioners not be willing to accept the foregoing disposition, they are to inform the Board of their decision within five days after release of this opinion. If the parties choose to withdraw the agreement and proceed with the hearing, compliance with the ordering clause below relative to publication of local notice will not be necessary.

Accordingly, IT IS ORDERED, This 18th day of May, 1965, That further opportunity BE AFFORDED for other persons to apply for the facilities specified in the application of Central Broadcasting Corporation; and that Central Broadcasting Corporation WILL therefore COMPLY with the provisions of Rule 1.525(b), unless the Review Board is notified otherwise in accordance with this opinion.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[3] Subsections (1) and (5) of Rule 1.525(a) require that the supporting affidavits contain information as to "The exact nature of any consideration (including an agreement for merger of interests) promised or paid;" and "A statement fully explaining and justifying any consideration paid or promised."

F.C.C. 64-114

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of<br>WEAT-TV, INC. (WEAT-TV), WEST PALM BEACH, FLA. | Docket No. 15136<br>File No. BPCT-2916 |
| AND | |
| SCRIPPS-HOWARD BROADCASTING CO. (WPTV), WEST PALM BEACH, FLA. | Docket No. 15137<br>File No. BPCT-2921 |
| For Construction Permits To Change Transmitter Location, To Increase Antenna Height, and To Make Other Changes | |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS COX AND LOEVINGER ABSENT.

1. The Commission has under consideration: (a) Order, July 24, 1963 (FCC 63-717; 28 FR 7961); (b) Petition to Terminate Proceeding and Grant Application, filed by WEAT-TV, Inc., (WEAT-TV) November 21, 1963; (c) Petition for Reconsideration and Grant, filed by Scripps-Howard Broadcasting Company (WPTV), November 27, 1963; (d) Reply of Broadcast Bureau, filed December 10, 1963.

2. This proceeding resulted from the action of the Commission in permitting WEAT-TV and WPTV to change transmitter sites and the concurrent denial of a petition to deny filed by Wometco Enterprises, Inc. (licensee of WTVJ, Miami, Florida).[1] Upon appeal by Wometco, the Court of Appeals held that Wometco had presented "substantial" issues, set aside the grants and remanded for evidentiary hearing.[2] We thereupon set the matter for hearing (par. 1(a), *supra*) on four factual issues and sub-issues and two conclusionary issues (exclusive of the ultimate issues). The burden under three of the foregoing was placed on the applicants and on the remaining three it was placed on Wometco.

3. It now appears (Tr. 17) that Wometco does not intend to participate in the proceeding and (Tr. 30) has failed to appear at pre-hearing conferences subsequent to such declaration. This had led to the filing of the petitions now under consideration. Petitioners maintain that, since Wometco has failed to proceed, the hearing is ripe for termination and reaffirmance of the grants. Such an argument is an over-simplification and we are not dis-

[1] Memorandum Opinion and Order (FCC 62-193), February 27, 1962; Memorandum Opinion and Order (FCC 62[226), February 27, 1962.

[2] *Wometco Enterprises, Inc. v. FCC* (C.A.-D.C.; 1963) 314 F.2d 266, 114 U.S. App. D.C. 261, 24 RR 2072.

posed to grant relief on such a summary basis and without first determining whether the facts now of record before us permit resolution of the issues.

4. Turning first to those issues on which Wometco had the burden of proof (Issues1,c and 3), Wometco is in default for failure to prosecute, we so hold, and Wometco is dismissed from further participation in this proceeding. These issues must likewise be summarily resolved in favor of the applicants.

5. As to those issues on which the burden was placed on the applicants (Issues 1,a; 1,b; and 2), a different problem is presented. It is the position of petitioners that there is adequate material in the record (augmented by a supplementary affidavit by WEAT–TV) to sustain resolution of the remaining issues in favor of petitioners without a hearing.

6. With this contention in mind, we examine first the questions raised by Issues 1,a and 2 to wit:

> 1. . . . .
> a. Any studies or surveys made by the applicants with respect to need, preferences, tastes, and desires for the proposed services.
> * * * * * * *
> 2. To determine the efforts made by [applicants] to ascertain the programming needs and interests of the area to be served and the manner in which [applicants] propose to meet such needs and interests.

Despite their separation into different numbered issues, it is apparent that Issue 1,a and the first part of Issue 2 are closely related facets of the same problem, to wit: what research was conducted by the applicant to ascertain program needs of its service area?

7. As to WPTV, it is contended [3] that the original application which was ordered into hearing contains a statement of programming research in Exhibit 1 of BPCT–2921. Examination thereof reveals an incorporation by reference of Exhibit A to BALCT–166.[4] The incorporated material says that the potential assignee (present applicant) "consulted residents in the area, businessmen, civic leaders and the heads of various local and regional organizations regarding . . . the civic, educational, cultural and business interests in the area." Thus, *prima facie*, a programming survey is shown.[5] We therefore find as a fact that WPTV made a survey of the needs, preferences, tastes and desires of its to-be-added service area.

8. In this connection, we have also reviewed Annex A (Description of Proposed New Local Programs) to Exhibit 3, BPCT–2921. We attach significant weight to the applicant's programming representation there set forth. The engineering portion of BPCT–2921indicates that the proposal will provide substantially improved coverage to cities other than the principal city. Against this background, applicant has proposed the programs "Here We Live" which is to be "devoted to . . . various cities within the WPTV coverage area"; "Farm Almanac" which "will feature

[3] Scripps-Howard Petition, par. 13.
[4] BPCT–2921, an application by John H. Phipps, was filed concurrently with and contingent upon BALCT–166 (assignment from Phipps to Scripps-Howard) and was interrelated with it.
[5] See 1960 Program Policy Statement (FCC 60–970; 20 RR 1901).

county . . . agents"; "Ten O'Clock Scholar" presented "in cooperation with school board officials of the towns within WPTV's area"; "Call the Doctor"—"in cooperation with area Medical Association"; "Impact"—"present[ing] individuals giving conflicting views on controversial subjects of public interest and importance"; "TV Bandstand" with "representative teen-agers from various [local] schools . . . selected with the help of school officials"; "Cartoon Carnival" with "educational material under the auspices of a local school"; "Senior Citizen"—"devoted to the activities of the area's senior citizens"; and "Local News" with an expanded news department including " 'stringers' in . . . Ft. Pierce, Jupiter, Boynton Beach, Delray Beach, Boca Raton, Pompano Beach and . . . Ft. Lauderdale". We, of course, interpret the above terms such as "local", "area", etc. as pertaining to the cities to receive the additional coverage and regard them as affirmative representations to this effect. On this basis, we conclude that WPTV surveyed the needs of its new area and has proposed programs to meet these needs.

9. Turning now to the sole remaining issue as to which the burden was placed on applicants, to wit:

> 1. . . . b. The areas which may be expected to gain or lose the proposed services . . . and the need for the proposed services in such areas and by such populations.

We note that no real question exists here, nor has it ever. The sole significance of the facts to have been adduced under this issue would have been to compare the additional service with that offered from an alternate site. Wometco having defaulted as to Issue 1,c there is no comparison to be made. As found in our original order in this matter [6] WPTV would expand its coverage; the proposed WPTV operation would serve an additional 800,000 or more persons not currently served by WPTV, including some 2400 persons receiving a first such service, and some 39,000 persons thus receiving their 2nd or 3rd such service. There being no loss of service, unlike *Television Corp. of Michigan* [7], we are not confronted with a balancing of gains or losses, and the conclusion is thus inescapable that a public benefit will result from service to additional persons. The question of area under such circumstances, there being no loss, becomes academic.

10. Insofar as WEAT–TV is concerned, we are faced under Issues 1,a and 2 (see par. 6, *supra*) with a slightly different situation. Admittedly WEAT–TV submitted no programming material in its application. However, it has supplemented the record now before us with an affidavit of Bertram Lebhar, Jr., Executive Vice President and General Manager.[8] Mr. Lebhar's affidavit indicates that WEAT–TV's staff considered that there were no fundamental differences between the people of the present service area and those to be added. However, it was realized that additional communities would be encompassed. It points out that a majority

[6] Memorandum Opinion and Order (FCC 62–193), February 27, 1962, pars. 6–7.
[7] *Television Corporation of Michigan* v. *FCC* (C.A.–D.C.; 1961) 111 U.S. App. D.C. 101, 294 F.2d 730, 21 RR 2107.
[8] Addendum A to WEAT–TV's Petition to Terminate.

stockholder of WEAT–TV is Rand Broadcasting (licensee of WINZ–AM, Miami, Florida) which is already well acquainted with the needs of Miami and its environs. "We spoke with various Chambers of Commerce, church groups, civic groups, with universities and other school groups, with women's clubs, newspapers, sports promoters and promoters of theater and other arts, with hotel men, and restauranteurs. I [Lebhar] personally fulfilled speaking engagements in a number of communities in the course of which I gained additional knowledge as to the needs and desires of these communities", and "We monitored the three Miami channels consistently, to ascertain what they were missing, and to what extent and in what areas we might better serve the public interest . . ." Based thereon, we find that applicant's familiarity with the needs of the area coupled with the survey of the existing program service of the three Miami stations, constitutes a survey of the needs, preference, tastes and desires of its to-be-added service area.

11. Moreover, we attach significant weight to the applicant's proposed program service to meet the needs of its increased service area. Mr. Lebhar's affidavit points out [9] that WEAT–TV initiated twenty-four hour programming in the area, has installed free telephone tielines from Miami and Ft. Lauderdale to solicit the views of the population of those areas on programming, has added two half hours per week devoted to public issues in towns in the added counties, has extended its "Roll Call" program dealing with local women's clubs to the additional counties, and now devotes 35% of its local news coverage to Broward County and 25% to Dade. Fishing reports have added check points in the new counties. The participating children's program, "Uncle Jim and Fuzzie" has been extended to groups in the added counties. Winter theater, panel shows, telethons, public service announcements, election returns, and sports events are all to be tailored to include the new service area. We note that WEAT–TV has mobile units and plans to send them to the various organization meetings in outlying areas to make tapes for airing from the studios. It would thus appear that WEAT–TV has likewise surveyed the needs of the additional areas and proposed a program service to meet those needs.

12. Insofar as the additional coverage to be gained by WEAT–TV is concerned, the findings and reasoning of paragraph 9, *supra, mutatis mutandis* are appropriate. It is to be noted that WPTV and WEAT–TV at their old locations had roughly similar contours. Further to be noted is that their new locations are at an antenna farm and, while their technical characteristics are not identical, the combination used by each (tower height, power, etc.) is such that the increased coverage accruing to both is essentially the same.

Accordingly, IT IS ORDERED, This 12th day of February, 1964, That Wometco BE and it hereby IS HELD IN DEFAULT; and

IT IS FURTHER ORDERED, That the Petition to Deny, filed

[9] Unlike WPTV's proposed programs *in futuro*, Lebhar's affidavit, the station having commenced operation on October 1, 1962, deals with programs in being and their adaptation to the new area.

by Wometco on October 17, 1961, IS DISMISSED; and

IT IS FURTHER ORDERED, That in light of the facts set forth in Paragraphs 7–11 above, (a) the proceeding herein IS TERMINATED, and (b) the grants of authority to modify construction permits [10] heretofore granted and subsequently set aside, ARE REAFFIRMED.

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

[10] Footnote 1, *supra.*

FEDERAL COMMUNICATIONS COMMISSION,
*Washington, D.C. May 19, 1965.*

Attention: David E. Winer, President
ELLENVILLE TELECABLE CORP.,
*177 Canal Street,*
*Ellenville, N.Y.*

GENTLEMEN: This refers to (a) your letter of January 11, 1965, in which you objected to the application (BPTTV–2436) of Capital Cities Broadcasting Corporation for a construction permit for a new television broadcast translator station to serve Schoharie and Middleburg, New York; and (b) Capital Cities Broadcasting Corporation's response of February 2, 1965.

In your objection, your urged that grant of this application would interfere with reception of Station WABC–TV, Channel 7, New York, New York. However, it appears that this translator would be approximately 64 miles from Ellenville, and that the intervening terrain rises more than 1000 feet between the proposed translator site and Ellenville. Accordingly, it does not appear that operation of this translator could cause interference to direct reception of Station WABC–TV in the Ellenville area.

In view of the foregoing, the Commission has this date granted Capital Cities Broadcasting Corporation's application, and your informal objections are herewith DENIED.

By direction of the Commission.

BEN F. WAPLE, *Secretary.*

F.C.C. 65–27

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Application of<br>DWIGHT L. BROWN, TRADING AS BROWN RADIO & TELEVISION CO. (WBVL), BARBOURVILLE, KY.<br>For Renewal of License | Docket No. 15769<br>File No. BR–3228 |
| BARBOURVILLE-COMMUNITY BROADCASTING CO., BARBOURVILLE, KY.<br>For Construction Permit | Docket No. 15770<br>File No. BP–16297 |

## MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Before the Review Board for consideration is a motion to enlarge issues, filed January 21, 1965, by Dwight L. Brown, tr/as Brown Radio & Television Company (Brown),[1] requesting addition of the following issues:

To determine whether the applicant, Barbourville-Community Broadcasting Company, is financially qualified to construct and operate its proposed facility.

To determine whether Barbourville-Community Broadcasting Company possesses the requisite character qualifications to be a licensee of the Commission.

2. By Order (FCC 64–1198) released December 31, 1964, the mutually exclusive applications of Brown (for renewal of license of AM broadcast station WBVL, Barbourville, Kentucky) and Barbourville-Community (for a construction permit for the same facility) were designated by the Commission for hearing on comparative issues. Each of the applicants was found by the Commission to be financially qualified.[2]

[1] Also before the Board are: Oppositions to the Motion to Enlarge issues filed February 9, 1965, by Community and the Broadcast Bureau (the date for filing responsive pleadings has been extended to and including February 9, 1965, by Order (FCC 65R–41) released February 1, 1965); a Reply thereto filed February 19, 1965, by Brown. A Motion Ne Recipiatur or To Strike Brown's (WBVL's) Motion To Enlarge Issues, was filed January 22, 1965, by Community alleging that Brown's motion (1) violates Rule 1.209, requiring the caption to indicate to whom the motion is addressed; (2) it violates Rule 1.44 (separate pleadings for different requests), since it raises questions both as to availability of funds and adequacy of funds. On January 25, 1965, Brown filed an Erratum amending the caption on his motion to include "TO THE REVIEW BOARD". On January 28, 1965, he filed his opposition to Community's Motion Ne Recipiatur, etc., stating that the omission was an oversight; Community was not misled; the delay caused was inconsequential as the Erratum cured the defect; his motion should be considered to be limited only to the question of availability of funds; and he intends to request the Examiner for a sufficiency of funds issue. For the reasons stated by Brown in his opposition, Community's "Motion Ne Recipiatur, etc.," will de denied.

[2] The Examiner was delegated authority to add the following issue on his own motion or on petition of the parties and upon sufficient allegations of fact in support thereof:

"To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

*Financial Qualifications*

3. Community's financial blueprint, as contained in its application, reveals the following cost estimates: $32,710 for constructing its proposed broadcast station,[3] and $60,000 for operating it for the first year. Initial operation for a reasonable period of time (three months) without revenues would therefore amount to $15,000. The corporation proposes to meet the $32,710 cost of construction and $15,000 cost of initial operation ($47,710) with the following sources of funds: (a) a loan commitment from the Union National Bank of Barbourville, Kentucky, to lend Community up to 50,000; and (b) $55,000 in stock subscriptions subscribed by Community's eleven 9%-stock subscribers, each agreeing to pay $5,000 for ten shares of stock, and each having paid thereon to the corporation the sum of $1,000 (except one stockholder who has available a $5,000 letter of credit from the foregoing bank), the balance of $4,000 on each subscription contract to be paid upon call of Community's Board of Directors. Individual financial statements and loan commitments from the foregoing bank (a $5,000 loan commitment to one stockholder is from the Farmer's National Bank of Williamsburg, Kentucky) have been submitted to show ability to pay the $4,000 balance on each subscription. Thus, Community will have a total of $105,000 to meet its $47,710 costs, or $57,290 in excess of Community's estimated needs for the purpose of establishing its financial qualifications. It was on this showing that the Commission found Community financially qualified.

4. Brown contends with respect to Community's original financial showing that the corporation has only 11,000 on hand for purposes of construction and initial operation, since the various bank commitments to Community and its stockholders are "clearly not legally obligatory or binding" and are insufficient because they are unverified; they fail to specify the terms of repayment, security or approval of the appropriate loan committee or other necessary authority; they are "suspect" since certain Community stockholders of the bank and therefore there is a "substantial possibility" that the bank loan commitments are merely "accommodation" commitments which are subject to revision, modification or termination; and, finally, the various balance sheets submitted for the most part do not show current liquid assets sufficient to meet current liabilities (including the loan commitments); fail to segregate receivables and payables to show the amounts due within one year and those due after one year; fail to show the manner in which "non-liquid" assets may be utilized to provide the necessary funds; the fixed assets recited are only "estimated" rather than actually evaluated; and qualified purchasers for these fixed assets are not shown. Thus, Brown argues, there is no support for Community's figures, and the data submitted in its amended application are "incomplete and uninformative", failing to meet the requirements of application Form 301.

5. The Broadcast Bureau opposes the request for a financial is-

[3] Consisting of the following: $5,500 for the transmitter, $4,200 for the antenna system, $1,450 for frequency and modulation monitors, $4,560 for studio technical equipment, $4,000 for land, $10,000 for construction of buildings, and $3,000 for other items, including initial legal and engineering expenses.

sue because Brown's allegations are unsupported and speculative; the original bank letters of credit are on file and therefore are not required to be verified; and it must be presumed that the banks have seen the security and found it satisfactory.[4] Community answers Brown's attack with six sworn Attachments, which for the most part supply the details which Brown complains are lacking. The Attachments at least confirm the banks' previous commitments and indicate that the commitments have been approved by the loan committees, and that they carry renewal privileges and bear the prevailing rate of interest. The loans to the stock subscribers are to be repaid after one year, and the first repayment installment on the loan to Community (to be made up to five years as desired) will be due four months after the radio station permit is granted. Community contends that Brown's request for a financial issue must be denied since its initial financial showing reveals that it will have more than enough available funds with which to construct and initially operate its proposed station. However, to insure its financial qualifications, Community shows it has a new and additional loan commitment for $50,000 from the Citizen's Bank and Trust of Glasgow, Kentucky, with similar terms as the loan commitment from the Union National Bank of Barbourville, Kentucky.

5. Under the circumstances, Brown's request for a financial issue with respect to Community will be denied. Brown alleges nothing new of substance bearing upon the financial qualifications of Community. Instead, he merely urges a different interpretation of the same facts that were before the Commission at the time of designation and on the basis of which the Commission found that Community is financially qualified. See *North Dakota Broadcasting Company, Inc.*, FCC 58–818, 17 RR 7166, 717 (1958), where a similar request for a financial issue was denied. Brown's motion fails to "contain specific allegations of fact sufficient to support the action requested." Moreover, the data contained in Community's Attachments to its opposition are appropriate for consideration and serve to reinforce the Commission's finding of financial qualification. Brown does not, in his reply pleading, challenge the supplemental data supplied by Community. Thus, no useful purpose would be served by recapitulating all of such additional information. *Sunbeam Television Corporation*, FCC 64R–27, released January 20, 1964.

6. Community's supplemental data conclusively demonstrate that its bank loan commitments are "firm". Loan commitments need not be "legally binding" agreements with recourse to the committors. *Triad Television Corporation*, 11 RR 1307, 1313 (1955).[5] Nor will the Commission inquire into the proper rate of interest and the specific periods of the extension of notes still to be established between the parties. *Radio Wisconsin, Inc.*, 10 RR 361, 370 (1954). In view of the fact that the security for the loans must be presumed to have been received and found satisfactory by the banks them-

[4] The Broadcast Bureau had no opportunity to consider either the supplemental data supplied by Community, which was appended to its opposition, or the data which Brown appended to his reply to the oppositions herein.

[5] Even a subscription agreement is not required to be legally binding. See *Liberty Television, Inc.*, FCC 59–596, 18 RR 673, 675 (1959).

selves, it is not necessary that it be listed in the commitments, especially where the commitments are firm. *Tri-Cities Broadcasting Co.*, FCC 65R–48, 4 RR 2d 516, 519 (1965). Brown's concern that the commitments do not identify the security is "merely speculative.' *Triad Stations, Inc.*, FCC 64R–540, 3 RR 2d 1066 (1964), and cases cited. As the Commission has stated in *Flower City Television Corporation*, FCC 62–578, 23 RR 795, 798 (1962): "However, since there is nothing to indicate that the bank commitment is not firm, we find it a reliable source to finance the proposed station", and, "We also find this true of the bank letters upon which the stock subscribers rely to meet their respective commitments to the applicant corporation." Brown has shown nothing which would indicate that the bank loan commitments to Community and its stock subscribers are not firm. Even his complaint that the commitments are not verified is without substance since the Commission does not require verification of original undertakings or agreements which are on file. *Meredith Colon Johnson* (*WECP*), FCC 64–11, released January 12, 1964.

7. Nor can we agree with Brown's mere speculation that the bank commitments are merely "accommodation" letters of credit which may be revised, modified, or even terminated because certain of Community's stock subscribers are also stockholders of the Union National Bank of Barbourville, which made most of the Commitments. *Sunbeam Television Corporation, supra,* involved a somewhat similar situation. There, the director of the bank which made the loan commitment to the applicant was also a stockholder in the applicant. This relationship, under a Florida statute, limited the loan so that it was necessary that other banks participate in the commitment. No showing was made of the existence here of a similar statute. The relationship, without more, does not, in our opinion, invalidate the Union National Bank's $50,000 loan commitment to Community. In any event, o stockholder is alleged to be connected with the bank in Glasgow which has made an additional $50,000 loan commitment to Community. Thus, while we are of the view that Community's initial financial showing in its amended application was enough to establish its financial qualifications, Community's additional data resolve all possible questions on this matter.

*Character Qualifications*

8. Brown also questions whether Community is qualified to be a Commission licensee because one of its eleven 9%–stock subscribers (R. B. Williams), who is also a director but not an officer of the corporation applicant, was recently (on October 12, 1964) convicted on a five-count state indictment and assessed the minimum fine of $50 for failure to publish, as County Treasurer, Knox County's annual financial reports for the fiscal years 1958–1959 through 1962–1959 through 1962–1963. Brown's view is that this deliberate and willful violation was a serious breach of William's fiduciary trust as a public official (which cannot be measured by the minimum fine imposed) and that the judgment of conviction is final despite the pendency of Williams' appeal therefrom. Community, on the other hand, claims that the judgment is not final (in view of the

pending appeal) and that what is involved is merely a technical conviction for which the minimum fine was imposed. "Mitigating circumstances" are set forth in Williams' affidavit appended to Community's opposition. These circumstances, it is alleged, reveal that Williams was appointed County Treasurer of Knox County, Kentucky, in 1942, by the Fiscal Court composed of County Judge J. E. McDonald and the magistrates and has since held that position at the pleasure of that Court. Williams "understands" that he is subject to regulation by the Judge. Each year Williams followed the "routine" of preparing the annual reports and filing copies thereof with the County Judge, County Attorney and the County Clerk, but did not publish them in a county newspaper, as required by Kentucky's statute, on the instructions and advice of Judge McDonald since there were not sufficient funds in the County Treasury to pay for publication. Community argues further that Williams' conduct was the "antithesis" of moral turpitude and was more in keeping with good faith than bad faith inasmuch as Williams had followed the Judge's instructions. The Bureau would deny the requested issue for lack of specific factual allegations and movant's failure to submit a copy of the indictment (which was later appended to the Reply).

9. A careful consideration of the pleadings convinces us that the requested issue should be denied. We cannot agree with Brown that Community's responsibility to be a licensee has been impaired by Williams' conviction. Brown has not shown that the omissions were anything more than technical. A conviction of crime based on an indictment does not *per se* warrant a qualification issue, for "the conduct of the applicant is determinative" [7] (*Report on Uniform Policy as To Violations by Applicants of Laws of the United States*, FCC 51–317, released March 29, 1951, 1 RR 91 : 495 (1951)). Also determinative is whether the conduct has some relationship to the ability to operate a broadcast station in the public interest. See *Rockland Broadcasting Company*, FCC 62R–152, 24 RR 739 (1962). While the Commission's Report states, in pertinent part, that violations raise sufficient question regarding character to merit consideration, it also points out that this question as to character "may be overcome by countervailing circumstances"; that "this is not to say that a single violation . . . or even a number of them necessarily makes the offender ineligible for a radio grant"; that may be facts which are in extenuation of the violation of law"; that ". . . there may be other favorable facts and considerations that outweigh the record of unlawful conduct and qualify an applicant to operate a station in the public interest"; that "in all such cases, a matter of prime concern is whether the violation was committed inadvertently or wilfully"; and finally, that "innocent violations are not as serious as deliberate ones." We are not unmindful of our statement in *Rockland, supra*, that "the pendency of a criminal indictment is of sufficiently serious import to require by the Commission in the matter" and that "the fact that these mat-

[7] See Spanish *International Television Company, Inc.*, FCC 64R–239, 2 RR 2d 853 (1964), where the Board refused to add an issue and indicated that the conduct of the applicant was the relevant factor.

ters may be explored under the contingent standard comparative issue is not a reason for not adding a specific issue". However, the applicant's (Fox's) unlawful conduct in *Rockland*, as compared with that of Williams' in the instant case, was of a much more serious nature, involving a high degree of moral turpitude.

10. Brown contends that the conviction indicates "that Williams alone was responsible for his unlawful actions", and, by inference, that the jury did not believe that Williams was an innocent victim of circumstances who was "betrayed by a judge." Brown overlooks the equally, if not more reasonable, inference, drawn from the minimum penalty of $50 assessed against Williams by the jury (see verdict attached to Brown's Reply) that it did *not* believe that Williams alone was responsible for his actions and that it *did* believe that he was an innocent victim of circumstances, especially in the fact of a five-count indictment. The penalty would seem to indicate that the jury considered Williams' omissions merely technical rather than substantial violations of law. This view is reinforced by the established fact that Williams in no way sought to conceal the financial status of the county, but, in fact, prepared the annual reports for each year and filed them with the County Judge, County Attorney and County Clerk. While the filing with the County Clerk fell short of publication, the reports, nevertheless, became public records and were available for public inspection in the County Court House. Moreover, nowhere in his pleadings does Brown deny that Williams followed this routine of preparing and filing the reports, nor does he even deny that there were not sufficient funds in the County Treasury to pay for publication. Thus, circumstances herein do not warrant Brown's conclusion that Williams' omissions are of serious import and that, whether they were deliberate or inadvertent, an issue is required to develop fully the facts, including the matter of mitigation.

11. Movant has shown only one conviction for a misdemeanor. The Commission, in the foregoing report (par. 12) has stated in pertinent part that "A single transgression of law, particularly if advertently committed, might raise little question with regard to qualifications, whereas a continuing and callous disregard for laws may justify the conclusion that the applicant cannot be expected in the future to demonstrate a responsible attitude toward his obligations as a broadcast licensee." [8] While we do not consider Williams' omissions as inadvertent, neither do we consider them, in the light of attending mitigating circumstances, as willful or deliberate conduct evincing a "callous" disregard for laws.

Accordingly, IT IS ORDERED, This 5th day of May, 1965, That

[8] In *Las Vegas Television, Inc.* (*KLAS-TV*), 14 RR 1273 (1957), the Commission granted acquisition of control of KLAS–TV by Greenspun despite his conviction and admitted violations of the Neutrality Act in shipping a load of arms from California to Mexico with the destination as Isreal, and a $10,000 fine, entailing a loss of civil rights (but not citizenship). In *WREC Broadcasting Service et al*, 10 RR 1323 1352 (1955), an applicant was not disqualified to be a television licensee because its parent company had been the object of legal actions by the Food and Drug Administration some ten years earlier or because it had entered into stipulations with the Federal Trade Commission. While we recognize that Williams' violations are more recent, the evidence in *WREC* established that the parent company customarily sought agency advice and evinced an apparent co-operativeness in the matters. Williams evidently was both advised and instructed by the County Judge, a fact which Brown failed to counter with rebuttal allegations, outside of referring to the matter critically as a "betrayal by a judge." The back of the indictment indicates that the County Judge was one of the two witnesses who appeared before the session of the Grand Jury which voted the indictment.

the Motion to Enlarge Issues, filed by Dwight L. Brown, tr/as Brown Radio & Television Company (KBVL), on January 21, 1965, IS DENIED in all respects;

IT IS FURTHER ORDERED, That the Motion Ne Recipiatur Or To Strike Brown's (WBVL's) Motion To Enlarge Issues, filed by Barbourville-Community Broadcasting Company, on January 22, 1965, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–182

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of WMOZ, INC., MOBILE, ALA. For Renewal of License of Station WMOZ, Mobile, Ala. | Docket No. 14208 File No. BR–2797 |
| Revocation of License of EDWIN H. ESTES FOR STANDARD BROADCAST STATION WPFA PENSACOLA, FLA. | Docket No. 14228 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBERS SLONE AND PINCOCK DISSENTING.

1. By Memorandum Opinion and Order, FCC 65–296, released April 9, 1965, the Commission reopened the record in this proceeding and remanded this case to the Hearing Examiner for the taking of additional testimony and the issuance of an Initial Report and Recommendation. On April 28, 1965, the Hearing Examiner released a Statement and Order After Further Prehearing Conference, FCC 65M–529, directing that the hearing previously scheduled for June 15 be advanced to June 1, 1965. The above-described applicant-respondent has now moved to vacate the Hearing Examiner's Order.[1] The petitioners and the Bureau agree that the "motion" is, in reality, an appeal from the presiding officer's adverse ruling (see Rule 1.301), properly filed with the Review Board pursuant to Section 0.365 (c) of the Commission's Rules.

2. This proceeding has a somewhat protracted history and we need only mention the highlights in order to place the petition in perspective. The application of WMOZ, Inc., for renewal of license of Station WMOZ, Mobile, Alabama, and an order of revocation of the license of Edwin H. Estes for Station WPFA, Pensacola, Florida (Estes is president and 99% stockholder of WMOZ) were designated for hearing on July 26, 1961. An Initial Decision looking toward denial of the WMOZ renewal application and revocation of the WPFA license was adopted by the Hearing Examiner on May 24, 1962. 36 FCC 250, 22 RR 811. On November 13, 1962, and April 19, 1963, petitioners submitted, in support of a petition to reopen the record, affidavits alleging that Estes was the victim of conspiratorial competitors and others who sought to drive Estes out of business in order that they might acquire his radio properties. By Decision, released February 4, 1964, the Commission denied the petition to reopen the record to permit the

[1] Before the Board for consideration are a Motion to Vacate the Hearing Examiner's Order Scheduling Hearings for June 1, 1965, filed by WMOZ, Inc., and Edwin H. Estes on May 5, 1965; the Broadcast Bureau's opposition, filed on May 7, 1965; and a reply, filed May 18, 1965, by WMOZ and Estes.

submission of the above-described affidavits and affirmed the result of the Initial Decision. WMOZ and Estes appealed to the Court of Appeals for the District of Columbia Circuit, which heard argument on February 5, 1965, and remanded the proceeding to the Commission for further evidentiary hearing on February 25, 1965. *WMOU, Inc.* v. *FCC*, Case No. 18472, 4 RR 2d 2004. The proceeding was remanded to the Examiner by the Commission by Memorandum Opinion and Order, FCC 65–296, released April 9, 1965.

3. The first prehearing conference was held on April 22, 1965, and the hearing was scheduled for June 15, 1965. Subsequent to the conference, petitioners' counsel remembered that he is obligated to the U.S. Air Force Reserve for two weeks training duty during the period from June 12 to June 26. A further prehearing conference was held on April 27, 1965, and a new hearing date, June 1, 1965, was set. Petitioners now assert that the new hearing date does not leave sufficient time to prepare for hearing and that a hearing date between June 28 and July 13 would not unduly delay the proceeding.

4. The arguments made by petitioners in support of their appeal are that a late June or early July hearing would not extend the hearing into the August recess and would not interfere with the schedule of counsel for the proposed intervenor; that petitioners' present counsel did not conduct the original phase of the hearing but has worked only on preparation of the petition for reconsideration and the court appeal; that petitioners have the burden of going forward with the evidence; and that this proceeding involves "a penalty of unprecedented severity."

5. Section 1.243 (f) of the Rules confers upon the presiding officer the authority to regulate the course of the hearing. Such authority includes, of course, such matters as scheduling of conferences and hearing sessions. The Examiner's discretion in such matters is not to be disturbed unless its evercise is arbitrary, capricious or an abuse of discretion. *WGAL, Inc.*, 9 RR 395 (1953); *Travelers Broadcasting Service Corp.*, 10 RR 153 (1954); *Progress Broadcasting Corporation (WHOM)*, FCC 63R–124, 25 RR 120; *Magic City Broadcasting Corp.*, FCC 63R–199, 25 RR 393, review denied FCC 63–693, 25 RR 394a; *Lompoc Valley Cable TV, Inc.*, FCC 64R–351, 3 RR 2d 523. Under the circumstances presented here, petitioners have not established that the Examiner has been arbitrary, capricious, or has abused his discretion. Therefore, the motion to vacate the Examiner's Order will be denied. The conclusion reached herein does not, of course, preclude petitioners from filing a new request with the Hearing Examiner for a continuance on the basis of a showing that notwithstanding due diligence on their part they are, in fact, unable to complete their preparation by the hearing date fixed by the Hearing Examiner.

Accordingly, IT IS ORDERED, This 19th day of May, 1965, That the Motion to Vacate the Hearing Examiner's Order Scheduling Hearings for June 1, 1965, filed by WMOZ, Inc., and Edwin H. Estes on May 5, 1965, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–437

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>JEROME B. ZIMMER AND LIONEL D. SPEIDEL D.B.A. MISSOURI-ILLINOIS BROADCASTING CO. (KZYM), CAPE GIRARDEAU, MO.<br>Has CP: 1220 kc., 250 kc., Day, Class II<br>For Construction Permit | Docket No. 16017<br>File No. BP–15057 |
| KGMO RADIO-TELEVISION, INC. (KGMO), CAPE GIRARDEAU, MO.<br>Has License: 1550 kc., 5 kw., DA–D, Class II<br>For Renewal of License | Docket No. 16019<br>File No. BR–2704 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY NOT PARTICIPATING.

1. The Commission has before it for consideration (a) the decision in the case of *KGMO Radio-Television, Inc.* v. *F.C.C.* 336 F.2d 920, 2 RR 2d 2057, decided May 22, 1964 by the United States Court of Appeals for the District of Columbia Circuit remanding the *Missouri-Illinois Broadcasting Co.* case, 1 R.R. 2d 1 (1963) to the Commission for further proceedings; (b) the Commission's action, on remand, in the *Missouri-Illinois Broadcasting Co.* case, F.C.C. 64–748, 3 R.R. 2d 232, adopted July 29, 1964, affording KGMO Radio-Television, Inc., licensee of Station KGMO, Cape Girardeau, Missouri, an opportunity to amend and amplify its Petition for Reconsideration, filed on April 12, 1963 (this latter petition, also before the Commission, is directed against the Commission's action of March 13, 1963 in granting, without a hearing, the application, File No. BP–15057); (c) the "Amendment to and Amplification of Petition for Reconsideration", filed on October 5, 1964, by KGMO; (d) the "Response to the Amendment to and Amplification of Petition for Reconsideration", filed on December 7, 1964, by Missouri-Illinois Broadcasting Co. (KZYM); and (e) the "Reply to Response of KZYM", filed on January 4, 1965, by KGMO. The Commission also has before it for consideration: (a) the above-captioned and described renewal application of Station KGMO, Cape Girardeau, Missouri; (b) the "Petition to Designate for Hearing and for Other Relief", filed on December 29, 1964, by KZYM; and (c) the "Opposition to Petition to Designate for Hearing and for Other Relief", filed on January 11, 1965, by KGMO.

2. KGMO Radio Television, Inc., licensee of standard broadcast station KGMO, Cape Girardeau, Missouri, appealed from the Commission's decision in the *Missouri-Illinois Broadcasting Co.* case, 1

R.R. 2d 1 (1963) in which the Commission denied, without a hearing, its petition for reconsideration of the Commission's action in granting, also without a hearing, a construction permit to Missouri-Illinois Broadcasting Co. KGMO's petition for reconsideration was based on the grounds that the economic effect of another station in the area would be detrimental to the public interest. The Court of Appeals for the District of Columbia Circuit, in the case of *KGMO Radio-Television, Inc.* v. *F.C.C.* 336 F.2d 920, 2 R.R. 2d 2057 (1964), affirmed the principle set forth in the case of *Carroll Broadcasting Company* v. *F.C.C.* 258 F.2d 440, 17 R.R. 2066 (1958) to the extent that the Commission may inquire into the question of whether the economic effect of another broadcast station in the area would be to damage or destroy service to an extent inconsistent with the public interest. However, the Court of Appeals remanded the *Missouri-Illinois Broadcasting Co.* case, *supra,* to the Commission with instructions to give KGMO an opportunity to amend and amplify its allegations in support of its request for a *Carroll* issue, on the grounds that KGMO did not have notice of the new pleading requirements which were set forth in the Commission's decision as necessary to support a *Carroll* issue. The Commission's action on the remand is contained in the *Missouri-Illinois Broadcasting Co.* case, FCC 64–748, 3 R.R. 2d 232 (1964). In the latter case, the Commission afforded KGMO an opportunity to amend its petition for reconsideration and also set forth the questions that had to be answered to enable it to determine whether KGMO has raised substantial and material questions of fact that would require an evidentiary hearing on the *Carroll* issue. The Commission now has before it the additional information submitted by KGMO in support of its request for a *Carroll* issue and other related pleadings filed by KGMO and KZYM.

3. The Commission has considered the contentions of the parties and is of the opinion that KGMO has met the burden of pleading to the extent required by *Missouri-Illinois Broadcasting Co.* 3 RR 232 (1964), and, therefore, the *Carroll* issue will be specified. In its detailed response to the Commission inquiries, KGMO alleged specific facts and drew conclusions which were reasonably related to these factual allegations. In sum, KGMO has offered to prove that the economic effect of a new station in Cape Girardeau would be detrimental to the public interest because it would result in a diminution of the existing quantity and quality of standard broadcast service to the area. Although the burden of proof on KGMO is heavy, it was not required to prove its case prior to hearing. The Commission is of the view that KGMO has raised substantial and material questions of fact concerning the ability of the Cape Girardeau market to support another broadcast station without net loss or degradation of service to the community. These questions can only be resolved in an evidentiary hearing. The burden of proof and proceeding with the introduction of evidence will be placed on KGMO.

4. KZYM, in its petition to designate for hearing, contends that, should a hearing be required on the *Carroll* issue, the KGMO re-

newal application should be designated for hearing in a consolidated proceeding with the KZYM application. KZYM alleges that it has standing on the grounds that, in the event that it is determined that the revenues are not adequate to support another station without a net loss or degradation of service, a grant of the KGMO renewal application would be tantamount to a denial of the KZYM application without a full and fair hearing. KGMO, in its opposition, contests KZYM's standing to file a petition directed against its renewal application. KGMO alleges that such consolidation is not required or called for under the Commission's procedures. It further alleges that such consolidation would violate the Court's decision in the *KGMO Radio-Television, Inc.* v. *F.C.C.* case, *supra,* since no such proceeding was contemplated therein. The Commission has held that, in the event it is determined that a community can not economically support another station, the losing applicant can file at the existing licensee's next renewal period and then it will be entitled to comparative consideration with the existing licensee in order to determine which party would better serve the public interest. *John Self* 24 R.R. 1177 (1963) ; *Bigbee Broadcasting Co.* 25 R.R. 88 (1963) ; see also *William L. Ross* 25 R.R. 360 (1963). In these cases the Commission refused to advance the existing licensee's dates for filing their applications. However, it did indicate that the Commission would permit the applicant for the new station to file its application at the termination of the existing stations normal licensing period in order to receive comparative consideration with such licensee. Here, KGMO's normal licensing period has lapsed and since its renewal application is pending, KGMO is presently operating its station pursuant to Section 9(b) of the Administrative Procedure Act and Section 307(b) of the Communications Act of 1934, as amended. The purpose of the economic issue is "not . . . to protect a licensee against competition but to protect the public." *F.C.C.* v. *Sanders Brothers Radio Station* 309 U.S. 470, 475 (1940). If it should be found that this area can not support another licensee without a net loss of service to the public, it is important that the Commission determine that the limited broadcasting facilities available are being operated by the party who will better serve the public interest. Having alleged that Cape Girardeau can not support another station, and assuming that it can successfully establish this at hearing, KGMO will not be heard to object to the Commission fulfilling its obligation to the public by making the further determination in a comparative hearing of whether KGMO or KZYM would better serve the public interest. Accordingly, the KGMO renewal application will be designated for hearing in a consolidated proceeding with the KZYM application, specifying a contingent comparative issue,[1] so that a full comparison of the parties can be made in the record in the event that the record shows that the public would suffer if both were authorized to operate at Cape Girardeau. In remanding the case to the Commission, the Court of Appeals indicated that the Commission

[1] In view of the substantial difference in operating powers, a contingent comparative coverage issue will also be specified.

could in its discretion consider and act upon any of its rules. The Court in no way precluded the Commission from pursuing its present course of action. The Commission is of the opinion that the public interest will best be served by the action taken herein.

5. Except as indicated by the issues specified below, KGMO Radio-Television, Inc. (KGMO) is legally, technically, financially and otherwise qualified to operate as proposed and Missouri-Illinois Broadcasting Co. (KZYM) is legally, technically, financially and otherwise qualified to construct and operate as proposed. However, the Commission is unable to make the statutory finding that a grant of the applications would serve the public interest, convenience and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below.

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

1. To determine whether there are adequate revenues to support more than two standard broadcast stations in the area proposed to be served by the Missouri-Illinois Broadcasting Company (BP–15057) proposal without loss or degradation of standard broadcast service to such area.

2. In the event that Issue No. 1 is answered in the negative, to determine the areas and populations which would receive primary service from each of the applicants and the availability of other primary service to such areas and populations.

3. In the event that Issue No. 1 is answered in the negative, to determine, on a comparative basis, which of the proposals would better serve the public interest, convenience, and necessity in light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:

(a) The background and experience of each having a bearing on the applicant's ability to own and operate its proposed station.

(b) The proposals of each of the applicants with respect to the management and operation of the proposed station.

(c) The programming service proposed in each of the said applications.

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

IT IS FURTHER ORDERED, That the Petition for Reconsideration, filed by KGMO Radio-Television, Inc. IS GRANTED.

IT IS FURTHER ORDERED, That the Petition to Designate for Hearing and for Other Relief, filed by Missouri-Illinois Broadcasting Co. (KZYM) IS GRANTED to the extent indicated above.

IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to Issue No. 1 ARE HEREBY PLACED on KGMO Radio-Television, Inc.

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

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

Adopted May 19, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–440

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

In Re Application of
KXA, INC., SEATTLE, WASH.
Has: 770 kc., 1 kw., DA, L–WABC
Requests: 770 kc., 10 kw., DA, L–L–WABC
For Construction Permit

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: CHAIRMAN HENRY ABSTAINING FROM VOTING; COMMISSIONER WADSWORTH ABSENT.

1. The Commission has before it for consideration (a) the above-captioned application tendered August 12, 1964, accompanied by a Petition for waiver of Sections 73.25 and 1.569 of the Commission's Rules to the extent necessary to permit acceptance of the application for filing; (b) an Opposition to Petition For Acceptance of Application For Filing, tendered September 11, 1964, by Suburban Broadcasters; (c) a Supplement to Petition For Acceptance of Application For Filing, tendered November 25, 1964 by KXA, Inc.; (d) a Petition to Deny, tendered December 17, 1964 by Hubbard Broadcasting, Inc., licensee of Station KOB, Albuquerque, New Mexico; and (e), a Reply to Opposition tendered January 7, 1965 by KXA, Inc.

2. KXA, Inc., points out that KXA's antenna is located on the roof of an office building which is to be razed and that, accordingly, for reasons beyond the applicant's control, KXA must change site and increase power to continue adequate coverage of Seattle. KXA, Inc., further contends that regardless of the label (Class I–A) affixed to the frequency 770 kilocycles, as a practical matter the present and contemplated usage of the channel is that found on Class I–B channels and, accordingly, a daytime-only application on 770kc should be accorded treatment equivalent to an application filed on a Class I–B channel. Further, the applicant submits studies designed to establish that Class II–A operations in areas generally southeast of KXA would not be feasible due to certain engineering factors; that accordingly, the proposed increase in power could not prejudice possible future Class II–A operations on the channel. The applicant also noted that this proposed operation by KXA could not possibly prejudice any possible future consideration of super-power by Class I–A stations since the Class I–A stations within 30 kilocycles are located in Atlanta, Georgia; Detroit, Michigan; New York City and Chicago, Illinois.

3. Basic to the Clear Channel Decision of September 13, 1961

(FCC 61–1106) is the Commission's desire that the Class I–A channels be utilized for unlimited-time operations. The Commission's views concerning this matter are, of course, outlined in the decision, and particular attention is invited to paragraphs 54, 55 and 56 of the document. Our decision to preclude additional daytime-only facilities on Class I–A channels for the foreseeable future includes consideration of the fact that each new station or increase in power on a channel tends to degrade the channel to some degree and, of course, the cumulative effects of many daytime-only stations on Class I–A channels could be expected to seriously prejudice our first objective of using the channels for unlimited-time operations. This fact is true regardless of whether or not interference, as calculated according to our rules, is indicated. Moreover, as pointed out in our decision, one of our basic objectives is to authorize unlimited-time operations on a controlled basis which will provide service to underserved areas. It would appear quite consistent with our objectives, therefore, if additional daytime-only facilities were eventually considered on the Class I–A channels, to authorize such operations on a controlled basis as we have proceeded to do with regard to nighttime allocations. However, any such consideration must, of course, follow our first objective of preserving the channels for unlimited-time stations in view of the paucity of nighttime AM service. Since any consideration of additional daytime-only facilities on Class I–A channels will not be in the foreseeable future, it would serve no useful purpose to accept the KXA applications for filing. On the contrary, our return of the application clearly calls attention to the basic policy consideration reached with regard to the Class I–A channels and, in effect, places applicants and prospective applicants on notice that other than Class I–A channels should be proposed for new daytime-only stations or increases in the facilities of daytime stations presently on these channels.

4. With regard to the applicant's contention that the present and contemplated usage of the channel, 770 kilocycles renders it in effect a Class I–B channel must be rejected. This frequency is listed as a Class I–A channel in the Bilateral Agreement with Mexico and the North American Regional Broadcasting Agreement. In addition, the special circumstances existing with regard to the assignment of Station KOB, Albuquerque, New Mexico to this channel, as pointed out in our Clear Channel Decision of September 14, 1961, FCC 61–1106, make it necessary that we not grant any additional facilities on 770 kilocycles at this time and that the channel be considered as Class I–A.

5. Upon careful consideration of the matters brought forth in KXA's request for waiver of our rules, the Commission finds that the basic policy considerations underlying our decision to preclude the acceptance and favorable consideration of new proposals for additional daytime-only facilities on Class I–A channels are of such paramount importance as to override the grounds presented in support of the request. Thus, we feel constrained to dismiss the pleadings here under consideration and, because of the importance of the policy considerations related to this matter, we will do so on the Commission's own motion. The petitions filed against the KXA

proposal by Suburban Broadcasters and Hubbard Broadcasting, Inc., will, therefore, be dismissed as moot.

Accordingly, IT IS ORDERED, That, the KXA petition IS HEREBY DISMISSED, the applicant's proposal will be returned and the pleadings by Suburban Broadcasters and Hubbard Broadcasting, Inc., ARE HEREBY DISMISSED as moot.

Adopted May 19, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–448

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>CAPITAL CITIES BROADCASTING CORP.<br>(WKBW–TV), BUFFALO, N.Y.<br>For Construction Permit | File No. BPCT–3495 |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission has before it for consideration the above-captioned application of Capital Cities Broadcasting Corporation, licensee of Television Broadcast Station WKBW–TV, Channel 7, Buffalo, New York, and various pleadings filed in connection therewith.[1] The applicant is authorized to operate with average effective radiated visual power in the horizontal plane of 90.5 kw (100 kw maximum at 0.75 degrees below horizontal plane) with antenna height above average terrain of 1,420 feet. The applicant requests a construction permit to increase average effective radiated visual power in the horizontal plane to 257 kw (316 kw maximum at 0.75 degrees below horizontal plane) and to decrease antenna height above average terrain to 1,200 feet. The applicant is presently operating at the maximum power, with this antenna height, limitations imposed by Section 73.614(b) (1) of the Commission's Rules.[2] The proposal is, therefore, inconsistent with the power-height limitations of the Commission's Rules and the applicant has requested a waiver of these rules.

2. The basis for the applicant's request for waiver appears to be a desire to improve its facilities so that they will be "more nearly equivalent" to those of its competitor in Buffalo, Television Broadcast Station WBEN–TV, Channel 4. The applicant has not explained the meaning of "more nearly equivalent", nor has it shown that its facilities are inferior to those of its competitors in Buffalo.

[1] The Commission also has before it for consideration: (a) Petition to Reconsider Acceptance of Application and to Dismiss filed February 12, 1965, by Veterans Broadcasting Company, Inc., licensee of Television Broadcast Station WROC–TV, Channel 8, Rochester, New York; (b) Opposition filed February 25, 1965, by applicant against (a), above; (c) Petition to Deny filed February 26, 1965, by Veterans Broadcasting Company, Inc.; (d) Reply filed March 3, 1965, by Veterans Broadcasting Company, Inc., to (b). above; (e) Objections filed March 8, 1965, by The Association of Maximum Service Telecasters, Inc. (MST), pursuant to Section 1.587 of the Commission's Rules; (f) Opposition filed April 7, 1965, by applicant to (c) and (e), above; (g) Reply filed April 14, 1965, by Rust Craft Broadcasting of New York, Inc., successor to Veterans Broadcasting Company, Inc., to (f), above; and (h) Reply filed April 28, 1965, by MST to (f), above. The parties requested, and were granted, extensions of time within which to file their various pleadings.

[2] Section 73.614(b) (1) of the Commission's Rules provides:

"In Zone I, on Channels 2–13, inclusive, the maximum powers specified above [Channels 2–6, 100 kw] for these channels may be used only with antenna heights not in excess of 1,000 feet above average terrain. Where antenna heights exceeding 1,000 feet above average terrain are used on Channels 2–13 . . ., the maximum power shall be based on the chart designated as Figure 3 of Section 73.699."

The facts indicate that the applicant provides a predicted principal city signal and a Grade A signal to a larger area than does Station WBEN–TV, and it is not alleged that applicant's facilities are inferior to those of Station WGR–TV, Channel 2, Buffalo, New York. The desire for improved facilities is apparently predicated solely on the fact that Station WBEN–TV is operating with facilities in excess of those permitted by Section 73.614(b) (1) of the Rules by virtue of the exception to the rule which is contained in the note to the rule.

3. An applicant who seeks a waiver of the Commission's Rules must, under the doctrine of the *Storer* case,[3] "set forth reasons, sufficient if true, to justify a change or waiver of the Rules." The applicant apparently equates improvement of its facilities with benefit to the public interest, but it has not shown that the public interest would benefit by expansion of its service contours at the expense of adjacent channel stations in the area. To the extent that there would be increased adjacent channel interference, the areas and populations which would receive applicant's signals for the first time would lose the signals presently being provided by adjacent channel stations in the area of increased interference. This is so because, as applicant concedes, adjacent channel interference results in a substitution of service. The total increase of population which applicant expects to realize within its proposed Grade B contour is approximately 1.45% and the applicant has not attempted to show that this population is now receiving inadequate service. Applicant does not contend that its programming is of such a character that the public interest demands that it replace that offered by adjacent channel stations in the increased interference area. It cannot be seriously contended that the small increase in population which would receive applicant's Grade B signal justifies operation in derogation of the Rules and the applicant has stated, in its application, that "The station's Grade B service contour will be extended only slightly." Clearly, this minimal gain cannot be the overriding public interest considerations which the applicant must show in order to justify a waiver of the Rules.

4. The applicant refers to "competitive imbalance" in the Buffalo, New York, market, but the total absence of any facts to support this assertion is, in our judgment, a significant omission. Applicant also characterizes its signal in the outlying rural areas of Buffalo as "competitively inadequate", but here again it has failed to allege any supporting facts. This lack of factual support for applicant's bare assertions constitutes a major reason for our conclusion that the applicant has failed to justify a waiver of the Rules. We are not persuaded that the applicant's desire to secure "more nearly equivalent" facilities constitutes "reasons sufficient if true" to justify a waiver of the Rules. The reasons which justified grant of authority to Station WBEN–TV to operate pursuant to an exception to the Rules embodied in a footnote were unique. We need not review those reasons here, but certainly the mere desire to secure similar facilities is not a sufficient reason far waiver. This

[3] *United States et al. v. Storer Broadcasting Company*, 351 U.S. 192, 76 S. Ct. 763, 13 RR 2161; *Oregon Radio, Inc.*, FCC 56–1183, 14 RR 742.

is particularly true where, as here, there has been no allegation of economic hardship nor is there any indication that the public interest would suffer by a refusal to grant the application. As in *Television Wisconsin, Inc.*, decided this date, we are convinced that the detrimental effects of a waiver of the power-height limitations on the public interest would outweigh whatever advantages may be expected to accrue as the result of a waiver in this case. It is the proliferation of precisely this type of *ad hoc* exception to the Rules which the Commission is determined to avoid. This view is reinforced by the clear indication in the application that if the waiver request is granted, a similar request will be forthcoming from Station WGR–TV, Channel 2, Buffalo, New York, for "comparable facilities". In this connection, we think that our language in *American Broadcasting-Paramount Theatres, Inc.* (FCC 62–582, 23 RR 827) is appropriate:

> The Commission has carefully considered your proposal. However, it does not believe that the potential benefit which might result from your proposed operation would outweight the disadvantages which would result from the proposal. These disadvantages are the impetus which would be furnished other stations to request similar waivers, which could result in an erosion of the Rules, and the creation of competitive imbalance of facilities which would adversely affect other VHF and UHF stations in Zone I.

5. Finally, applicant argues that, although the application is inconsistent with the Rules, it may not be dismissed solely on that basis because it is accompanied by a request for waiver. We concede the validity of this proposition which is articulated in Section 1.566(a) of the Rules. We also agree with the applicant that where good cause is shown for waiver of the power-height rules, a waiver may be granted. In the matter now before us, we have considered applicant's waiver request on its merits and we have found that the applicant has failed to justify a waiver. Applicant further argues, however, that it is at least entitled to a hearing under the *Storer* doctrine, Footnote 3, *supra*. It is well established that not all requests for waiver require the holding of a hearing. Only those which set forth allegations of fact sufficient, if true, to justify waivers need be accorded such treatment. *WJMC, Incorporated*, FCC 65–184, and *Richard F. Lewis, Jr., Inc. of Mount Jackson*, FCC 65–183, both released March 12, 1965. In *Storer*, the Supreme Court said:

> . . . Congress [did not intend] the Commission to waste time on applications that do not state a valid basis for hearing.

We find that, on the facts of this particular case, the holding of a hearing on applicant's request for waiver is not appropriate, for the reasons set forth in preceding paragraphs hereof.

Accordingly, IT IS ORDERED, That the request for waiver of Section 73.614 of the Commission's Rules, filed herein by Capital Cities Broadcasting Corporation, IS DENIED, and the application (BPCT–3495) IS DISMISSED, pursuant to Sections 73.614(b) and 1.564(b) of the Commission's Rules.

IT IS FURTHER ORDERED, That the Petition to Reconsider Acceptance of Application and to Dismiss, filed herein by Veterans

Broadcasting Company, Inc., predecessor to Rust Craft Broadcasting of New York, Inc., and the pleadings filed in connection therewith, ARE DISMISSED as moot.

Adopted May 19, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–83

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of<br>ILLIANA TELECASTING CORP., TERRE HAUTE, IND. | File No. BPCT–3294 |
| FORT HARRISON TELECASTING CORP., TERRE HAUTE, IND. | File No. BPCT–3296 |
| For Construction Permit for New Television Broadcast Station | |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LEE ABSENT.

1. The Commission has before it for consideration the above-captioned applications of Illiana Telecasting Corp. and Fort Harrison Telecasting Corporation, each requesting a construction permit for a new television broadcast station to operate on Channel 2, Terre Haute, Indiana, and a "Joint Request for Approval of Agreement", filed jointly by the applicants, requesting the Commission's approval of their agreement to merge.[1]

2. Illiana and Fort Harrison entered into an agreement on December 1, 1964, whereby the applicants would merge and, upon approval by the Commission of their said agreement, the Fort Harrison application would be withdrawn. The agreement was timely filed with the Commission, pursuant to Section 1.525(a) of the Commission's Rules, and on December 9, 1964, an amendment was tendered for filing in connection with the Illiana application reflecting the changes which the merger would effect.

3. The merger agreement recites that it was entered into for the purposes of reducing the number of existing competitive applications, eliminating the necessity for a comparative hearing, shortening the time within which a station can be placed in operation on the channel, and forming a single applicant possessing the best possible qualifications for meeting the television needs of the area proposed to be served. It is stated that the stockholders of Fort Harrison Telecasting Corporation will be entitled to subscribe in the aggregate to 60% of the authorized stock of the new entity and the stockholders of Illiana will be entitled to subscribe to the remaining 40%. One-third of the stock to which the Fort Harrison stockholders will be entitled to subscribe in the aggre-

[1] In February 1964 there were three mutually exclusive applications on file for Channel 2 Terre Haute: the two present applicants and Livesay Broadcasting Co., Inc. By Memorandum Opinion and Order released June 5, 1964 (FCC 64–514, 2 RR 2d 1088), the Commission approved the merger of Fort Harrison and Livesay and the Livesay application (BPCT–3295) was subsequently dismissed at the applicant's request. The merger left the two present applicants as the only competitors for the channel.

gate will be allotted to the former stockholders of Livesay Broadcasting Co., who are now stockholders of Fort Harrison as a result of the merger of Fort Harrison and Livesay. The agreement further recites that no consideration has been paid, promised or received by, or paid or promised to, any stockholder of either applicant for the withdrawal of the Fort Harrison application, nor has any consideration been paid, promised or received in connection with the release of stock subscriptions, except for the repayment, without interest, of actual cash paid in by any stockholder. The agreement is accompanied by a joint request for approval and the affidavits required by Section 1.525(a) of the Commission's Rules, setting forth the history of the merger negotiations.

4. The amendment tendered for filing by Illiana presents, in effect, a new application, with new stockholders, officers and directors, a new financial proposal, a new programming proposal, and other significant changes. A review of the proposal discloses that the new entity will, indeed, be a strong, more representative applicant possessing the best features of the two individual applicants. No objection has been filed in connection with the proposed merger. The history of the efforts to provide a second VHF television broadcast service to the people of the Terre Haute area is a long and involved one. Our approval of the agreement and a grant of the application, as amended, would enable the applicant to bring to Terre Haute this second television service at an early date.

5. On the basis of information contained in the merger agreement, request for approval thereof, the affidavits, we find that no consideration has been paid, promised or received in connection with the proposed merger and withdrawal of the Fort Harrison application, other than the repayment to former stockholders of their stock purchase money, without interest. We find that our approval of the merger agreement would be consistent with the public interest, convenience and necessity, and that the merger agreement, request for approval, and affidavits comply with all of the requirements of Section 311(c) of the Communications Act of 1934, as amended, and Section 1.525 of the Commission's Rules.

6. On the basis of information contained in the tendered amendment, the affidavits, the merger agreement, and the request for approval thereof, we find that the applicant is legally, financially, technically and otherwise qualified to construct, own and operate the proposed television broadcast station and that a grant of the application, as amended, would serve the public interest, convenience and necessity.

7. The applicant proposes to locate its transmitter at a site which does not meet the spacing requirements of Section 73.610 of the Commission's Rules because it will be less than the required 170 miles from the co-channel station at St. Louis, Missouri.[2] The applicant, however, has requested a waiver of the separation requirements of the Rules on the basis that the proposed transmitter site will be located within the triangular area designated as an

[2] The shortage involved is 2.5 miles.

"antenna farm" for Terre Haute, Indiana, more particularly described in the Declaratory Ruling issued by the Commission on April 4, 1958 (FCC 58–290, 16 RR 1015). The Commission, in the Declaratory Ruling, indicated that it would waive the requirements of Section 73.610 of the Rules to permit the short-spaced operation proposed. We will, therefore, grant the waiver requested.

Accordingly, IT IS ORDERED, That the merger agreement submitted jointly by Illiana Telecasting Corp. and Fort Harrison Telecasting Corporation IS APPROVED; that the amendment to the application of Illiana Telecasting Corp., tendered for filing December 9, 1964, IS ACCEPTED; that Section 73.610 of the Commission's Rules IS HEREBY WAIVED; and that the application (BPCT–3294) of Illiana Telecasting Corp., as amended, IS GRANTED, in accordance with specifications to be issued.

Adopted February 3, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–81

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Application of EFFINGHAM BROADCASTING CO., LICENSEE OF RADIO STATION WCRA, EFFINGHAM, ILL. For License To Cover Construction Permit for Power Increase | Docket No. 15822 File No. BL–10634 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LEE ABSENT.

1. The Commission has before it for consideration (a) "Petition for Reconsideration" filed November 13, 1964 on behalf of KAAY, Inc., licensee of Radio Station KAAY ("KAAY" herein), directed against the Commission's action of October 9, 1964, granting the above-captioned application by Radio Station WCRA ("WCRA" herein) for license to cover an authorized increase in daytime power; KAAY's "Supplement to Petition for Reconsideration" filed December 2, 1964; WCRA's "Opposition" of December 31, 1964; KAAY's "Reply to Opposition" filed January 25, 1965; and related motions and correspondence.

2. Radio Station WCRA is a Class II daytime-only standard broadcast station operating non-directionally on the frequency 1090 kc/s; KAAY is a Class 1–B Clear Channel station operating from Little Rock, Arkansas, on the same channel. On August 13, 1959, WCRA applied for a construction permit to increase power from 250 watts to one kilowatt (BP–13407). Action on this application was initially delayed because of Clear Channel considerations. Later, our preliminary examination of the application suggested that, operating as proposed, WCRA would cause objectionable interference to KAAY. WCRA was therefore requested to furnish certain field measurement data. Measurement data received in response to this request indicated the soil conductivity along portions of the transmission path to be lower than the 8 mmhos/m value depicted on our M–3 conductivity map. Taking this conductivity data and apparent terrain features into account, we concluded that no interference would occur. On this assumption, was granted February 19, 1964. KAAY entered no objection to the grant of the permit at that time. On May 28, 1964, WCRA received program test authority for one kilowatt operation, and the covering (above-captioned) license was granted October 9, 1964.

3. KAAY now alleges that co-channel interference is being caused within its protected 0.1 mv/m contour affecting 3,132 square miles and a population of 50,623; that the existence of this interference

was only recently discovered by its engineering consultant while preparing a coverage map to be used for promotional purposes; that the interference complained of affects 3.3% of KAAY's protected daytime service area; and that interference of this magnitude jeopardizes its Clear Channel mission and constitutes a modification of license without hearing. Accordingly, KAAY asks that we vacate both our grant of the above-captioned license application and the underlying construction permit, and that the matter be designated for evidentiary hearing.

4. In its opposition brief, WCRA contends that KAAY's pleadings are untimely in that neither a Petition to Deny nor a Petition for Reconsideration was filed at the construction permit stage; that the measurement data offered by KAAY in support of the claimed interference, as well as the engineering methods by which they were derived, are deficient and/or inconclusive when judged under Section 73.186 of the Rules; and, in any event, that since WCRA completed construction in accordance with the terms of its permit, the Commission's role in processing the license application was, and is, under Section 319(c) of the Communications Act "almost ministerial"; hence, WCRA argues, the license was properly granted and the earlier finding of no interference should remain undisturbed.

5. WCRA places heavy reliance on *Benton Broadcasting Service*, 9RR 586 (1953), in which we declined to designate a license application for hearing where interference affecting 117.6 square miles (0.8% of the complainant's normally protected daytime service area) was belatedly brought to our attention.

6. We agree that the grant of an application for station license normally follows almost automatically from the issuance of a construction permit and the completion of construction in accordance therewith—*House Report on the Communications Act Amendments of 1952*, 1 RR 10:311& and that to reach a different result in the context of a license application requires an affirmative finding that a grant thereof would be *against* the public interest on the basis of matters first coming to our attention after grant of the construction permit—Section 319(c).

7. In the interest of administrative finality, we are reluctant to order hearings on license applications. But, as was also observed in *Benton, supra*, "we would not hesitate to order such a hearing on our own if the public interest so required . . ." Our discretion to order hearings in such circumstances is thus clearly established by the very case on which WCRA relies—see also *Radio Skokie Valley*, FCC 62–1261 (1962); *Drexel Hill Associates*, FCC 63–986 (1963); FCC 64–129 (1964).

8. The exercise of this discretion here turns in part upon whether KAAY has made out a *prima facie* case of unauthorized interference and, if so, the magnitude thereof. Although the measurement data first submitted by KAAY was deficient under Section 73.186 of the Rules, the deficiency has been cured by the submission of additional engineering material by KAAY in its Reply brief. Specifically, more comprehensive measurements of WCRA's one kilowatt signal on two radials in the direction of KAAY establish

that along the transmission path measured, soil conductivity is actually *greater* than that depicted in M-3. Using M-3 conductivities for the remainder of the transmission path, it appears that objectionable interference is being caused within KAAY's protected daytime service area, and that the magnitude of the interference approximates that alleged by KAAY. In this connection, the amount of interference appears to be greater than that considered in *Benton, supra.*

9. Admittedly, KAAY filed neither a pre-grant objection nor a petition for reconsideration in connection with our February 19, 1964 grant of a construction permit to WCRA authorizing the power increase. That action worked a modification of KAAY's license which is now beyond challenge under Section 316 of the Act —*CBS of California v. FCC,* 211 F.2d 644; 10 RR 2021 at 2024 (1954). In this sense, WCRA's contention as to untimeliness is correct. However KAAY was never officially apprised of the possibility of this interference and, as indicated above, we later resolved the matter in WCRA's favor, without hearing, on the basis of supplemental information provided by its engineering consultant. The facts now relied upon by KAAY could not, through the use of ordinary diligence, have been ascertained and presented to the Commission at an earlier time. Under these circumstances, we have, under Section 319(c) of the Act and 1.106(c) of the Rules, discretionary authority to entertain KAAY's Petition for Reconsideration.

10. We conclude that the new information coming to our attention for the first time calls for setting aside our grant of the above-captioned license—*Benton, Drexel,* and *CBS, supra.* Further, we conclude that the public interest would be served by designating the license application for evidentiary hearing on appropriate issues and, in view of the apparent magnitude of the interference, by ordering a reduction in WCRA's power to the formerly authorized level of 250 watts pending outcome of the hearing.

In view of the foregoing, IT IS ORDERED, That KAAY's Petition for Reconsideration IS GRANTED to the extent indicated above, and in all other respects IS DENIED.

IT IS FURTHER ORDERED, That our action of October 9, 1964, granting the above-captioned application, IS SET ASIDE.

IT IS FURTHER ORDERED, That pursuant to Section 319(c) of the Communications Act of 1934, as amended, the above-captioned application IS DESIGNATED FOR HEARING at a time and place to be specified by subsequent Order, upon the following issues:

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Radio Station WCRA, and the availability of other primary service to such areas and populations.

2. To determine whether, operating as proposed, WCRA would cause objectionable interference to Radio Station KAAY, Little Rock, Arkansas, or to any other existing standard broadcast station, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

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

IT IS FURTHER ORDERED, That KAAY, Inc., licensee of Radio Station KAAY, IS MADE A PARTY to this proceeding.

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

IT IS FURTHER ORDERED, That in lieu of appearing and participating in this proceeding WCRA may, within 20 days of the mailing of this Order, amend the above-captioned application to specify its former daytime power of 250 watts.

IT IS FURTHER ORDERED, That the program test authority issued to WCRA on May 28, 1964, IS REINSTATED AND MODIFIED in the following particulars: Power, *250 watts*; Antenna current, *1.98 amperes*.

IT IS FURTHER ORDERED, That this document (or photocopy thereof) be posted by WCRA in accordance with the provisions of Section 73.92 of the Rules.

Adopted February 3, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

F.C.C. 65M–152

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| FREDERICK B. LIVINGSTON AND THOMAS L. DAVIS D.B.A. CHICAGOLAND TV CO., CHICAGO, ILL. | Docket No. 15668<br>File No. BPCT–3116 |
| WARNER BROS. PICTURES, INC., CHICAGO, ILL. | Docket No. 15669<br>File No. BPCT–3271 |
| CHICAGO FEDERATION OF LABOR AND INDUSTRIAL UNION COUNCIL, CHICAGO, ILL. | Docket No. 15708<br>File No. BPCT–3439 |
| For Construction Permit for New Television Broadcast Station (Channel 38) | |

MEMORANDUM OPINION AND ORDER

BY CHESTER F. NAUMOWICZ, JR., HEARING EXAMINER:

1. By Order released January 22, 1965, the Review Board added the following issue to this proceeding:

> To determine whether the program proposal of Frederick B. Livingston and Thomas L. Davis, d/b as Chicagoland TV Company, is specifically designed and would be expected to serve a specialized programming need and/or interest which is not being met by an existing station.

At a prehearing conference held on January 27, 1965, relative to the added issue, Chicagoland indicated an intention to adduce a portion of its evidence through deposition testimony, and Chicago Federation of Labor and Industrial Union Council (Federation) indicated an intention to oppose the taking of such depositions.

2. In order to expedite the resolution of this conflict, the parties agreed that Chicagoland would file a Notice to Take Depositions pursuant to Rule 1.312 on February 3, 1965, and that any objections thereto would be voiced at an oral argument on February 5, 1965. The pleading was filed and the argument heard as scheduled.

3. In addition to Rule 1.313, the Hearing Examiner has the guidance of two recent cases on the subject of deposition practice: *Abacoa Radio Corp.*, 1 RR 2.d 736, and *La Fiesta Broadcasting Company*, FCC 64R–521, released December 17, 1963. The wording of the Review Board's Order in *Abacoa* might, if removed from context, indicate an extremely stringent Commission policy disfavoring depositions. Indeed, the possibility of this interpretation occasioned the Chairman of the Board to accompanying the opinion with a statement disclaiming such intent. However, the *Abacoa* opinion might also be construed as doing no more than sustaining a Hearing Examiner's exercise of discretion, and, while so doing, reciting the permissible theory of law which that Hearing Examiner had applied.

4. The latter interpretation of *Abacoa* appears more probable

since the release of the Board's order in *La Fiesta*. In this more recent case, the Board again sustained a Hearing Examiner's order with respect to depositions,[1] and by so doing approved an extremely liberal application of the Commission's deposition rules. Reading the two cases in conjunction, the Hearing Examiner construes them as holding that matters relating to depositions are best decided by the presiding officer who is familiar with the case and its nuances, and who is most likely to be aware of the evidentiary techniques best calculated to produce a complete and reliable record. It is this construction of the cited precedents which has governed the preparation of this opinion.

5. To meet the requirement of Rule 1.312(b) (4) that each notice of deposition shall contain "a statement of reasons supporting the need for eliciting testimony upon such matters by deposition rather than by direct testimony," Chicagoland states that bringing its enumerated witnesses to Washington would entail unreasonable expense to it and unreasonable inconveniece to the witnesses. If any reason were apparent why it would be desirable for the Hearing Examiner to be present while these witnesses, or any of them, testified Chicagoland's averments would be insufficient. However, there is nothing to suggest that any of these witnesses are other than residents of the Chicago area unconnected with any of the applicants, and there is no indicated likelihood that observation of their demeanor would greatly assist in evaulating their testimony. Nor is it shown that there is any probable necessity to protect them embarrassment or harassment in the course of their examination. Under such circumstances the public interest does not require that these citizens suffer the inconvenience of being absent from their homes for an indeterminate time or that an entity seeking a franchis from the Commission should be required to undertake the substantial expense incident to the presentation of such witnesses in Washington.

6. The instant "Notice" is not altogether free of ambiguity with respect to the requirement of Rule 1.312(b) (5) for "a statement of reasons (where depositions on a single matter are to be taken from more than one person) for taking multiple depositions to establish the facts in question." Chicagoland states that "while many of the witnesses will testify about similar matters . . . each will also testify as to different matters." Such language might be construed as expressing an intention to take multiple depositions with respect to certain unspecified phases of the subject issue. However, it is not clear that Chicagoland in fact intends to do so, and no presumption of an intention to act as if ignorant of the Rules is warranted. It is deemed sufficient to admonish Chicagoland to avoid the taking of multiple depositions on any single evidentiary fact.

7. In the course of the oral argument Federation adverted to Rule 1.313(d) (1), and suggested that the competence of certain of Chicagoland's listed witnesses had not been established satisfactorily. While Federation conceded that Rule 1.312 does not require the party giving notice of depositions to establish the competence of its witnesses, and did not offer any evidence discrediting

[1] In *La Fiesta* the deposition were to be taken in the form of written interrogatories.

the competence of the Chicagoland witnesses, it suggested that it is appropriate for the Hearing Examiner to take cognizance of a lack of competence apparent on the face of the notice. This argument is not without force and appears pertinent to the instant factual situation.

8. Eighteen of the nineteen listed witnesses are scheduled to testify, in part, as to "the programming of existing broadcast stations in the community," but it is not shown that they are in the possession of the records of those stations, or properly computed independent records, which would enable them to give fair and complete evidence as to existing programming. There is no presumption that a resident of a large city knows, of his own knowledge, the details of the programming of local broadcast stations. Thus, absent some threshold showing, the "competency" of such persons on the subject of existing programming has not been established. If their testimony were to be limited to the subject of existing programming, a grant of the Federation motion to quash the notice of their depositions would be appropriate. However, each of these witnesses is also scheduled to testify as to the program needs of minority groups with which they are purportedly familiar, and the availability of talent for the production of such programs. In that no lack of competence on these subjects is to be presumed from the face of Chicagoland's Notice, no good cause is shown for the quashing of the Notice as to the testimony the listed witnesses may give on these subjects. Under these circumstances, the Hearing Examiner deems it more conducive to the orderly presentation of evidence herein to refrain from limiting Chicagoland's depositions at this time, and to defer consideration of questions as to the competency of the deponents in certain areas until such time as the depositions are offered into evidence.

9. There remains for consideration the Broadcast Bureau's request, voiced at the oral argument of February 5, 1965, that the date specified in the Notice for commencement of depositions, as well as the hearing date, be continued for one week. In that it does not appear that the continuance would delay the ultimate resolution of this proceeding, or unduly inconvenience any party, the requested relief will be granted.

Accordingly, IT IS ORDERED, this 8th day of February, 1965, that the oral motion to quash the Notice of Depositions filed by Chicagoland TV Company on February 3, 1965, IS DENIED.

IT IS FURTHER ORDERED, that the date for commencement of depositions specified in the Chicagoland Notice IS CONTINUED to February 23, 1965; that the date for exchange of exhibits on all of the issues herein except Issues 3, 4 and 5, IS CONTINUED from February 18, 1965 to February 25, 1965; and the date for commencement of hearing on the said issues IS CONTINUED from March 4, 1965 to March 11, 1965, commencing at 10:00 AM in the offices of the Commission at Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,

CHESTER F. NAUMOWICZ, JR., *Hearing Examiner.*

BEN F. WAPLE, *Secretary.*

F.C.C. 65-98

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

| | |
|---|---|
| In Re Applications of | |
| CHRONICLE PUBLISHING CO. (KRON–TV), SAN FRANCISCO, CALIF. | Docket No. 12865<br>File No. BPCT–2168 |
| AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. (KGO–TV), SAN FRANCISCO, CALIF. | Docket No. 12866<br>File No. BPCT–2401 |
| For Construction Permits To Increase Antenna Height | |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX NOT PARTICIPATING.

1. The Commission has for consideration three sets of pleadings concerning the above-captioned proceedings. One group of pleadings relates to an application by Chronicle Publishing Company (KRON–TV) for review of a Memorandum Opinion and Order of the Commission's Review Board released on June 4, 1964 (FCC 64R–309); another group concerns a second application for review by Chronicle of a second Memorandum Opinion and Order by the Review Board released on August 5, 1964 (FCC 64R–389); and the final group of pleadings revolves around a petition filed on August 18, 1964, by American Broadcasting-Paramount Theatres, Inc. (KGO–TV) for reconsideration and grant of its application without hearing.[1]

2. The following are the pertinent background facts of this proceeding. Chronicle Publishing Company is the licensee of television Station KRON–TV on Channel 4, San Franco, California. By an application filed on July 23, 1956, and amended in 1957, Chronicle sought permission to increase the height of its antenna, located at San Bruno Peak, from 1480 to 2049 feet above mean sea level.[2] American Broadcasting-Paramount Theatres, Inc. is the license of television Station KGO–TV (hereinafter referred to as KGO–TV), Channel 7, San Francisco. On September 16, 1957, KGO–TV filed an application for construction permit to increase the overall height above mean sea level of its antenna, located on Mt. Sutor, from 1348 to 1811 feet.[3] Both proposals were submitted to, and hearings were conducted before, the Washington Airspace Panel of the Air Coordinating Committee for consideration of possible hazards

[1] To each of these inaugural pleadings, oppositions and comments have been filed by other parties herein. Those parties which have filed pleadings are: Airline Pilots Association, International (ALPA); Air Transport Association of America (ATA); Westinghouse Broadcasting Company; Miami Valley Broadcasting Corp.; and the Broadcast Bureau.

[2] The structure would be increased from 203 feet above the ground to a height of 734 feet.

[3] The height of the structure above the ground would be increased from 517 to 980 feet.

to air navigation by the construction of the taller towers. On September 26, 1957, the Airspace Panel approved Chronicle's proposal and disapproved KGO–TV's. In conveying this information to the Commission, the Panel stated: "At the outset, the Panel was of the unanimous opinion that only one of the two proposals could be tolerated from an aeronautical standpoint." It further commented that from an aeronautical standpoint neither site was desirable; that insofar as instrument operations were concerned, there was little choice between the proposals but that from the standpoint of visual operations, Chronicle's San Bruno site was preferred to that of KGO–TV's site on Mt. Sutro. Although San Bruno is closer to the San Francisco Municipal Airport, the Panel found that "the mountain peak itself is already a prominent obstruction, which has been and is being avoided by pilots arriving and departing from the area" and that "the possibility of aircraft over-flying the Sutro tower site is much greater than Bruno." The Army member opposed the erection of any new tower in the area for military reasons but favored the San Bruno site "from strictly an aeronautical viewpoint." By Order released May 4, 1959 (FCC 59–407), the Commission designated the applications for hearing to determine whether a grant of either or both proposals would have an adverse effect upon national defense or would constitute a hazard to air navigation. In addition, a contingent comparative issue was included to determine which application would better serve the public interest in the event that only one of the two applications could be granted.[4]

3. In 1961, the Federal Aviation Agency, which had assumed the responsibilities of the Air Coordinating Committee, declared that the previous studies were obsolete and that new aeronautical studies were required. The Airspace Utilization Division of FAA ruled that both proposals would constitute hazards to air navigation, but the parties petitioned for public hearings and these petitions were granted. Hearings before this Commission were held in abeyance pending a hearing by the FAA into air hazard questions posed by the proposals.

4. Before the FAA decided the matter, Chronicle, KGO–TV and other parties herein filed with the Review Board motions to modify the issues originally designated by the Commission. As a result of these motions and responsive pleadings, the Review Board modified the issues to read as follows:

1. To determine whether the antenna system and site proposed by Chronicle Publishing Company (KRON–TV) would constitute a menace to air navigation.
2. To determine whether the antenna system and site proposed by American Broadcasting-Paramount Theatres, Inc. (KGO–TV) would constitute a menace to air navigation.
3. To determine, in the light of the foregoing issues, which of the applications, if either, should be granted.

5. The Review Board declined to include Chronicle's requested issues: (1) to determine on a comparative basis which of the proposed sites would better serve as a location for the towers on the basis of (a) availability, (b) suitability, including ability to ac-

[4] Disposition of the applications was delayed by reason of objections interposed by the Department of the Army on grounds of national defense. These objections have since been withdrawn.

commodate all present and future tower needs of the area, and (c) the terms and conditions under which each site would be made available to other licensees; and (2) to determine whether air navigation procedures can be revised to accommodate the proposal preferred, on the basis of the above considerations, to fulfill the broadcast needs for an antenna farm. The Review Board held that the former circumstances which had warranted inclusion of a comparative issue no longer existed [5] and that "none of the parties in the pleadings before us alleges any facts suggesting the likelihood that either site, but not both sites, would be approved." Chronicle has appealed to the Commission from the Review Board's ruling by an application for review.

6. By separate decisions released June 4, 1964,[5a] the FAA held that KGO–TV's proposal would not constitute a hazard to air navigation but that Chronicle's would. On the basis of these decisions, Chronicle renewed its request to the Review Board to include a comparative issue. The Review Board denied the request on the ground that the FAA decisions did not indicate that either, but not both, of the sites could be approved. On August 12, 1964, Chronicle filed an application for review of the latter ruling of the Board. In addition, KGO–TV now seeks reconsideration and grant of its application without hearing on the grounds that no basis exists for comparative consideration of the two proposals and that, in view of the favorable FAA determination, no hearing before the Commission on the KGO–TV application is necessary. We shall consider first the Chronicle applications for review.

7. Chronicle insists that any tall tower authorized must be located on an antenna farm and that there may be only one antenna farm for the San Francisco area. On August 4, 1964, Chronicle filed a petition for rule making to establish an antenna farm area for San Francisco. However, we find no sufficient basis in the pleadings before us to justify converting this adjudicatory proceeding into a rule making one for the establishment of an antenna farm or to hold this long-pending proceeding in abeyance until the conclusion of such rule making.

8. With respect to the argument that comparative consideration of the two proposals is required, the first question to be determined is whether Chronicle's pleadings meet the standards necessary to obtain the requested relief. Section 1.229 of the Commission's Rules requires that a motion to enlarge issues "shall contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof". If both applications could be granted except for the fact that the presence of tall towers at two sites would increase the hazards to air navigation to an unacceptable level, or the adjustment of flight procedures necessary to accommodate one would preclude further adjustments to accommodate the other, a comparison of the two proposals would be required in

[5] The Board had reference to the fact that the Army no longer opposed either proposal of the Airspace PaPnel's 1957 recommendation based upon a comparative consideration of the two proposals had been withdrawn.

[5a] 29 F.R. 7296 and 29 F.R. 7298.

order to determine which would better serve the overall public interest.[6] However, the Review Board held that no party had alleged any facts suggesting that either of the sites, but not both, would be acceptable from an air hazard standpoint and that, absent such a showing, the addition of a comparative issue is not warranted. Unless prejudicial error was committed by the Review Board, review is not warranted. Section 1.115 of the Rules. We find no such error in the Review Board's refusal to add a comparative issue.

9. As we have stated, the addition of a comparative issue is not warranted unless specific facts are alleged and supported by affidavits of persons with personal knowledge thereof that tall towers at either but not both sites could be tolerated from an air safety standpoint, either because the erection of both towers would increase the hazards to air navigation to an unacceptable level or because the adjustment of flight procedures necessary to accommodate one would preclude further adjustments to accommodate the other. Since the air hazard question has been the subject of extensive hearings before the FAA, it may be assumed that Chronicle's pleadings contain all available allegations of fact and that the affidavits and extracts of testimony before the FAA attached thereto constitute the strongest support available for its contention that a comparative hearing is required.

10. In the petition for modification of issues filed by Chronicle on April 3, 1964, no facts were alleged concerning the need for a comparative hearing. Chronicle merely commented that "KGO–TV has contended, and the Commission has agreed, that the two applications are mutually exclusive". It then proceeded on the assumption that a comparative hearing would be held. The main thrust of its argument was that the KGO–TV site on Mt. Sutro was not available to reason of zoning restrictions, that a comparative issue on site availability and suitability should be added, and that unless KGO–TV established site availability, no comparative hearing as to other matters was warranted.[7] In fact, in its opposition to KGO–TV's petition, filed March 27, 1964, for addition of a contingent comparative issue in the event it was determined that either but not both of the applications could be granted without causing an unacceptable air hazard, Chronicle stated: "the question of whether a tower constitutes a menace to air navigation is not a comparative factor." These pleadings were filed prior to the release of the FAA decision in June, 1964. In Chronicle's application for review of the Review Board's first Memorandum Opinion and Order (FCC 64R–309), filed June 11, 1964, it argued, *inter alia*,[8] that the Commission must first determine which location would best meet the broadcasting industry's needs, then determine whether the preferred broadcast site will constitute a menace to air navigation, and only if the Commission concludes that "no compromise can be reached [as to revision

[6] The FAA made no express findings concerning this aspect of the controversy.

[7] The Review Board denied the request for the addition of a site availability issue. This matter is discussed further in connection with KGO–TV's petition for reconsideration and grant without heading, para, 20, *infra*.

[8] Chronicle also urged as error the refusal of the Review Board to include an issue on the availability and suitability of the proposed sites for an antenna farm.

of aeronautical procedures] and this site does constitute a menace" should consideration be given to the second site. The argument is premised on the assumption that either proposal is acceptable but that a grant of one application will preclude a grant of the other. However, no facts are alleged in support of this assumption.[9]

11. In a renewed request to the Review Board for modification of issues, filed on June 19, 1964, in the light of the FAA decisions, Chronicle relie dupon the allegations in its prior pleadings with respect to the necessity for a comparative hearing. It stated concerning the decisions of the FAA: "Although the FAA approved one site, it did so upon aviation considerations alone. No consideration was given to broadcast needs of the area or to which site would better meet these needs. Nor was any consideration given to whether the public interest required a compromise between the needs of broadcasting and aviation. However, since such consideration is a statutory responsibility of the Commission, a comparison of the proposals must be made to determine which will best meet the needs of the area." Chronicle further asserted that the right of the parties to a comparative hearing exists now as much as it di din 1919, when the applications were first designated for hearing. Agai nno facts were alleged to support the presumption that a grant of one application would preclude a grant of the other by reason of air safety considerations or that the applications were otherwise mutually exclusive.[10] Those matters were discussed for the first time by Chronicle in its reply to oppositions, filed July 9, 1964, and the pertinent allegations will now be considered in detail.[11]

12. The first allegation is that one group of aeronautical experts reached one conclusion in 1937 and another group of such experts reached a different conclusion in 1964, and this conflict of opinions is enough to require a comparative issue. Several years have elapsed since the original study, and the FAA has declared it to be obsolete. In the absence of any allegations of fact, supported by appropriate affidavits, that aeronautical considerations in 1957 were substantially similar to those in 1964, there is no basis for assuming that the opinions are in conflict or that, under circumstances as they presently exist, either but not both sites can be tolerated insofar as air safety is concerned.

13. Chronicle quotes from an October 1, 1957 affidavit of Mr. Robert E. L. Kennedy, KGO–TV's consulting engineer, to the effect that "construction of both of the towers proposed would be contrary to the antenna farm principle and would result in an unnecessary

[9] We also point out that Chronicle's request for the above issues is inappropriate, since it would make broadcast needs the almost overriding consideration. See *Streets Electronics, Inc., (KGEO-TV)*, 12 Pike & Fischer, R.R. 1117, 1155 (1956). In determining whether there is a hazard to air navigation under the standard hazard issue, consideration is, of course, given to the relative needs of broadcasters and of the aeronautical industry, and the degree of accommodation which each should be called upon to make in order to achieve a solution which will be fair to both and which will best serve the public interest. In short, where an air hazard question is presented, an evaluation must be made of the effect of the proposal upon the use of navigable air space and the dislocation of flight procedures which would result from a grant of the proposal, as well as of the benefits to broadcasting.

[10] The 1959 designation order resulted from a 1957 aeronautical study which indicated that either but not both proposals could be tolerated from an air safety standpoint. That study is obsolete and the recent FAA determinations are based on new studies.

[11] No new factual allegations are contained in Chronicle's application, filed August 12, 1964, for review of the Review Board's second decision.

and therefore unacceptable air hazard." We are not here concerned with the general "antenna farm principle" but with the specific issue of whether in the San Francisco area a grant of one of the two pending proposals for increased tower height will preclude a grant of the other. Moreover, even with respect to antenna farms, there is no basis for the assumption that only one antenna farm will be established for a community, but such determinations are made on a case-by-case basis. Chronicle also relies on statements by representatives of the Aircraft Owners and Pilots Association (AOPA) in 1957 and in 1961 favoring the San Bruno site. However, we are not concerned with which site is preferable, unless the applications are mutually exclusive so that a comparison is required. Nothing is either of the AOPA statements provides any factual support for the claim of mutual exclusivity. We also note that Ernest W. Burton, an aeronautical expert and pilot who appeared before the FAA on behalf of Chronicle, testified that he still agreed with the OAPA 1957 statement and the 1957 decision of the Airspace Panel of the Air Coordinating Committee. Yet this testimony adds nothing to the statements which, as we have found, raise no relevant issue of fact. Burton's further testimony that in his opinion no changes had occurred which would justify a modification of the 1957 decision is a general conclusionary statement which can be given no weight in the absence of any statement of the facts upon which he relied in reaching this conclusion.

14. The strongest support for Chronicle's position is the affidavit of Lowell R. Wright, an aeronautical consultant, executed July 6, 1964, (Exhibit A to reply to oppositions). In his affidavit, Mr. Wright asserts that the two proposals are directly related and that a determination as to whether either would constitute a menace to air navigation cannot be made without full consideration of both; that there is only a minor difference in the effects either tower would have on IFR (Instrument Flight Rule) operations and that this was the reason the Airspace Panel in 1957 combined the proposals for comparative consideration; that construction of the proposed KGO–TV tower will materially decrease the possibility that the Chronicle tower can be constructed without creating an unreasonable air hazard since "the existence of two tall towers in the same community, but not in the same vicinity, obviously creates more of an air hazard, irrespective of the merits of either, than would the existence of only one." He further alleged that under the present policy of the aviation air space users it will be practically impossible to get two locations approved for antenna farms and that the "practical fact is that approval and construction of either the KRON–TV or KGO–TV proposed towers will, from an aeronautical viewpoint, require that the same site be selected as the antenna farm;" that in his opinion the 1957 conclusion of the Airspace Panel of the Air Coordinating Committee is as valid today as it was at that time; and that there have been no changes in airways, routes, criteria or operational requirements to justify upsetting the 1957 Airspace Panel decision.

15. Assuming Mr. Wright's qualifications as an aeronautical expert, his conclusionary statements nevertheless do not constitute

the "specific allegations of fact" required by the Rules. The question here is not whether two tall towers will "obviously" increase the hazards to air navigation. Our concern is with the lack of specific facts which would tend to support the proposition urged by Chronicle; i.e., while the costruction of either tower alone would not create a menace to air navigation, the erection of one would preclude the construction of the second because two tall towers in this particular area would increase the hazard to air navigation to an unacceptable level.[12] The decisions of the FAA demonstrate the type of facts which must be considered in order to determine whether any reasonable basis exists for considering the applications as mutually exclusive. Thus, in its deliberations, the FAA took into account the distance of the proposed San Bruna tower from one of the runways at the airport, the number of departures from that runway, the changes in flight patterns which would be required by reason of the increase in tower height, the effect upon aircraft experiencing an emergency necessitating a rturn to the airport, the increase in the radar vector altitude within three miles of the tower site which would result in the loss of valuable airspace approximately two miles from the end of the runway, the fact that the erection of the proposed tower would remove navigable airspace in the precise areas where it is most needed (specifying the areas) and would restrict radar control, and the further fact that the use of radar in the San Francisco area has increased to the extent that virtually all departures are handled by radar. From its analysis of these specific facts of record, the FAA concluded that Chronicle's proposed antenna structure would constitute a hazard to air navigation. The FAA then discussed and analyzed several proposals for changes in flight procedures to determine whether revision could be effected to accommodate the proposed tower. It found that no proposal had been offered "which would alleviate or reduce to an acceptable level the adverse effect which would result from the loss of the airspace in the immediate vicinity of the San Francisco airport and in a major radar vectoring area," and concluded that aeronautical procedures and operations could not be revised to accommodate a taller tower at San Bruno without derogating to an unacceptable degree the safety of aircraft and efficient use of the navigable air space.

16. Chronicle has alleged no facts concerning flight patterns, arrivals and departures, the effect of the increased tower height upon radar control of airplanes, specific proposals for revisions of flight procedures, or other facts which, if proven, would establish that its proposal would constitute a hazard to air navigation only if KGO–TV's application is also granted. Neither did it submit any proposals or ellege any facts to indicate that a revision of aeronautical procedures and operations to accommodate Chronicle's proposed tower could be effected except for the proposed increase of tower height on Mt. Sutro.[13] Only on the basis of such factual

[12] Chronicle presently has a tower on San Bruno and KGO–TV on Mt. Sutro, but neither was found to be a hazard to air navigation.

[13] Since the Review Board designated for hearing an air hazard issue as to Chronicle's proposal, Chronicle will be able to challenge the validity of the FAA conclusion that its proposal constitutes a hazard to air navigation. We are concerned here only with whether comparative consideration is required.

submissions may it be determined that there exists a reasonable likelihood of mutual exclusivity requiring comparative consideration. The Review Board was therefore correct in its determination that insufficient facts had been alleged which would warrant the addition of a comparative issue and Chronicle's two applications for review of the Review Board's decisions must be denied.

17. We shall next consider KGO–TV's petition for reconsideration and grant without hearing. KGO–TV contends that, in view of the FAA determination of no hazard to air navigation with respect to its Mt. Sutro proposal, a hearing before the Commission is unnecessary since the "Commission has never refused a grant on air hazard grounds where the recognized aeronautical authorities have issued a favorable recommendation." Chronicle opposes the petition principally on the ground that its proposal is entitled to comparative consideration with that of KGO–TV.[14] For the reasons set forth above, we conclude that no sufficient facts have been alleged which would warrant a comparative evaluation of the two proposals. Additionally, we note that neither Chronicle nor any other party claims that KGO–TV's proposal would create a hazard to air navigation irrespective of whether Chronicle's proposed tower is or is not built. Thus we have before us no allegations raising a substantial and material question of fact concerning KGO–TV's application from an air safety standpoint.

18. Chronicle further asserts that no commitment is made on the cost of the proposed tower, that no details are given concerning construction plans and the size and capacity of the tower, that no provision is made for future television stations that may be authorized in the area, and that a hearing or rule-making is essential in order to protect the public interest. Miami Valley Broadcasting Corporation, licensee of television station KTVU, Oakland, California, which now has its tower on Mt. San Bruno, requests that grant of the KGO–TV application without hearing be withheld until the terms and conditions for the common use of the proposed Mt. Sutro site by other stations in the area have been determined. In a reply, filed September 28, 1964, KGO–TV reasserts its view that no comparative consideration with Chronicle's proposal is warranted since the applications are not mutually exclusive. With respect to Miami Valley's comments, KGO–TV points out that it has agreed to make the Mt. Sutro site available to all who desire to use it on a fair and equitable basis. It also expresses a willingness to accept a grant subject to the condition that construction not be undertaken until plans with respect to the joint use of the site have been submitted to and approved by the Commission.

19. Chronicle's general allegations cocerning the sufficiency and availability of the Mt. Sutro site for use by other stations raise no material and substantial questions of fact which would justify a hearing on KGO–TV's application. KGO–TV asserts that it will make the proposed tower available to all who desire to use it on a fair and equitable basis and no party has alleged any facts which would indicate that KGO–TV cannot or will not do so. Some pro-

[14] In comments filed September 16, 1964, the Broadcast Bureau opposed a grant without hearing because of its view that an unresolved question exists as to whether a grant of one application would preclude a grant of the other on air hazard grounds.

tection to potential users is provided by Section 73.635 of the Rules. In addition, we are attaching conditions to a grant of the KGO–TV application which will insure the availability of the proposed tower for use by other broadcasters in the area on terms and conditions which are just and reasonable.

20. Throughout the proceedings, Chronicle has insisted that a hearing is necessary on the availability of KGO–TV's site because of zoning restrictions. Although this contention was not advanced in its opposition to KGO–TV's petition for reconsideration and grant without hearing, we shall nevertheless dispose of this argument. KGO–TV obtained approval for its existing tower from the appropriate zoning authorities, and the Review Board found that there was reasonable assurance of approval for the proposed structure. We find an insufficient basis in the pleadings before us to disturb the Review Board's finding. This is particularly true in view of the fact that no comparative consideration of the KGO–TV and Chronicle proposals is required. Chronicle's principal argument in support of a requested issue on the availability of the KGO–TV site from a zoning standpoint is that it would be unfair to subject its (Chronicle's) proposal to a comparative hearing with that of another applicant whose proposed site might never receive zoning approval. That argument is no longer applicable. Should it later appear that the Mt. Sutro site is not available, we can then consider what action is necessary or appropriate.

21. KGO–TV contends that effectuation of its proposal would enable it to provide improved television service to the San Francisco area. The contention is not challenged by any of the other parties to this proceeding and we conclude that a grant of the KGO–TV application would serve the public interest.

Accordingly, IT IS ORDERED, This 10th day of February, 1965, That the applications for review filed by Chronicle Publishing Company on June 11, 1964 and on August 12, 1964, ARE DENIED;

IT IS FURTHER ORDERED, That the petition for reconsideration and grant without hearing filed by American Broadcasting-Paramount Theatres, Inc. (KGO–TV) on August 18, 1964, IS GRANTED; and

IT IS FURTHER ORDERED, That the application filed by American Broadcasting-Paramount Theatres, Inc. (KGO–TV) on September 16, 1957, for a permit to increase antenna height IS GRANTED on condition that the antenna structure be made available for use by present and future permittees and licensees of broadcast facilities in the San Francisco area who make request therefor on a fair and equitable basis, and on the further condition that within 60 days after release of this Memorandum Opinion and Order the applicant file with the Commission the terms and conditions under which the proposed structure will be made available to potential users.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–185

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of CHARLES W. JOBBINS, COSTA MESA-NEWPORT BEACH, CALIF., ET AL. For Construction Permits | Docket No. 15752 through 15766 File No. BP–16157 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. The Review Board has before it for consideration two petitions to enlarge issues, both filed on January 22, 1965, one by California Regional Broadcasting Corporation (Regional)[1] and the other by Storer Broadcasting Company (Storer).[2] Regional requests addition of ten issues which fall into four categories: (1) a 10% Rule issue as to the proposals of Orange Radio, Inc. (Orange) and Pacific Fine Music, Inc. (Pacific); (2) 2 and 25 mv/m overlap issues as to Pacific and Western Broadcasting Corporation (Western)[3]; (3) issues as to whether Topanga is a "community" pursuant to Rule 73.30(a) and whether Topanga-Malibu Broadcasting Company's (Topanga's) proposal would constitute an efficient use of the channel; and (4) issues concerning Storer's legal qualifications, its compliance with the multiple ownership rules and a Section 307(b) issue as to the "broadcast needs of Los Angeles *vis-a-vis* Pasadena".[4] The Review Board will consider the requested issues in order. The above-captioned applications were designated for comparative hearing by Commission Order, FCC 64–1195, released December 31, 1964.

2. *Separate Community and 19% Rule Issues*—Regional requests the addition of the following issues as to Orange and Pacific:

To determine whether the application of Orange Radio, Inc. [and/or Pacific Fine Music, Inc.] should be considered as a Fullerton [or Whittier] proposal or as a Los Angeles or Pasadena proposal for the purpose of applying Section 73.28(d)(3) of the Commission's Rules;

To determine, in the event it is determined pursuant to the foregoing issues that the proposal of Orange Radio, Inc. [and/or Pacific Fine Music, Inc.] should

[1] Pleadings before the Board include: petition to enlarge issues, filed January 22, 1965, by Regional; opposition, filed February 12, 1965, by Pacific; partial opposition, filed February 12, 1965, by the Broadcast Bureau; partial opposition, filed February 15, 1965, by Orange; opposition, filed February 15, 1965, by Topanga; opposition, filed February 15, by Storer; opposition, filed February 15, 1965, by Western; reply, filed March 1, 1965, by Regional; request for leave to file comments and comments, filed March 1, 1965, by Orange; and opposition to Orange's request to file comments and to comments, filed March 12, 1965, by Regional.

[2] Pleadings filed in connection with the petition to enlarge issues filed by Storer are: opposition, filed February 12, 1965, by Pacific; comments in support, filed February 12, 1965, by Broadcast Bureau; and opposition, filed February 15, 1965, by Western.

[3] These issues are also requested by Storer. See paragraph 13, *infra*.

[4] References to specific sections of the Commission's Rules are to the Rules as in force prior to the adoption of the amended Rules in the Commission's Report and Order, adopted July 1, 1964 (FCC 64–609. See FCC 64–473, released August 6, 1964.

be treated as a Los Angeles or Pasadena proposal, whether the interference which would be received by such proposal would affect more than ten percent of the population within its normally-protected primary service area in contravention of Section 73.28(d)(3) of the Commission's Rules, and, if so, whether circumstances exist which would warrant a waiver of said Section.

Regional contends that while the applications of Orange and Pacific specify Fullerton and Whittier, California, as the respective principal communities to be served, both proposals would provide primary service to virtually the entire Los Angeles Urbanized Area (including the cities of Los Angeles and Pasadena). In light of this fact, petitioner requests an issue to determine whether these proposals should be treated as proposals for the specified communities or as proposals for Los Angeles and its urbanized area for purpose of applying Section 73.28(d)(3) of the Commission's Rules (10% Rule). In support of its request petitioner states that in *Northern Indiana Broadcasters, Inc.*, FCC 64R–407, 3 RR 2d 266, the Board added such an issue in a similar factual situation. If this separate community issue is added, petitioner requests a second issue to determine whether the interference received by the Orange and Pacific proposals would affect more than 10% of the population within their normally-protected primary service areas in contravention of Rule 73.28(d)(3). In support of its second request, Regional states that the Orange and Pacific proposals will receive nighttime interference affecting 16% and 22.5%, respectively, of the populations within their normally-protected (2.5 mv/m) contours. The Broadcast Bureau supports the petitioner's request for both issues.

3. Orange and Pacific oppose Regional's request. Pacific contends that *Northern Indiana Broadcasters, Inc., supra,* is not dispositive because in that case there was "testimony in the record by a principal of the applicant that he was primarily interested in coverage of the nearby larger city," [5] whereas Pacific is primarily interested in serving Whittier, as reflected in the non-entertainment portion of its program proposal. Pacific argues that the Commission's statement in the Order of designation (FCC 64–1195, released December 31, 1964), that the non-Pasadena applications" . . . represent applications for a first local AM station in each of such communities . . .," is controlling,[6] and that Pacific's proposal accordingly meets the first local nighttime transmission facility exception to the 10% Rule. Orange's opposition is predicated on the following: Fullerton, Orange's specified principal community, is located in the Anaheim-Santa Ana-Garden Grove Standard Metropolitan Statistical Area (SMSA), which was newly formed in 1963; since Fullerton is not in the Los Angeles SMSA, it cannot be part of the Los Angeles Urbanized Area; Orange's application for Fullerton cannot therefore be treated as a proposal for Los Angeles;

[5] To no extent did the Board rely on this "testimony" (later withdrawn) in enlarging the issues in *Northern Indiana.*

[6] Contrary to the position of Orange and Pacific, the Commission has not made a final determination that these applications propose a first local service transmission for Section 73.28(d)(3) purposes. In the designation Order, *supra,* where the Commission referred to the non-Pasadena applicants as applicants for a first local transmission for purposes of waiving the AM "freeze", it made the more pertinent statement that "this waiver . . . does not constitute a pre-judgment on their merits of any of the issues specified as to any of the applications." The Commission indicated that the Section 307(b) inquiry will probably not be conclusive and for comparative purposes the applicants will be treated as proposals for the central city, Los Angeles.

and *Northern Indiana Broadcasters, Inc., supra,* is inapposite. Orange also asks that the following facts be considered: the population of Orange County, within which Fullerton is situated, increased 225.6% during the 1950-1960 census period to 704,000 and is presently over 1 million; and only two standard broadcast stations are presently located within Orange County.

4. Regional makes the following arguments in reply: the urbanized area, not the SMSA, is the criterion used to determine the existence of a separate community for purposes of applying Rule 73.28(d)(3) and Fullerton is part of the Los Angeles Urbanized Area regardless of whether or not it is within the Los Angeles SMSA; and even if the SMSA is determinative, an issue should be added in view of the primary service which Orange's proposal will broadcast station of its own.

5. Orange Radio (the Fullerton applicant) must, as Regional contends, be considered as specifying a city within the Los Anglees Urbanized Area as its principal community. "Urbanized Areas" are designated by the Census Bureau every ten years on the basis of the latest Census; the current designations were based on the 1960 Census. The urbanized area designations are not adjusted during the interim period between censuses. Therefore, Orange County and the city of Fullerton must be considered at this time as part of the Los Angeles Urbanized Area. SMSA's are delineated by the Bureau of the Budget as they become necessary, and are drawn along county lines automatically including all communities located within the county. Fullerton is within Orange County which is the central county of the Anaheim-Santa Ana-Garden Grove SMSA. Although central cities of an SMSA have been determined by the Bureau of the Budget to have "integrated economic and social system(s)," no such judgment has been made as to the non-central communities located within the central county of an SMSA.[7] Thus, Fullerton cannot claim the benefit of a determination made for a central city. Moreover, neither the SMSA nor the urbanized area concept is in itself determinative of the realistic relationship of the communities for purposes of applying this Commission's Rules or policies. At best, these concepts merely indicate the need for further evidence of the realistic relationship.

6. The Orange and Pacific proposals specifying Fullerton and Whittier will concededly receive nighttime interference affecting in excess of 10% of the populations within their nighttime normally-protected contours. In waiving the AM "freeze" (Memorandum Opinion and Order, FCC 64–763, released August 6, 1964) the Commission specifically stated that Rule 73.28(d)(3), as it was applied to applications accepted for filing prior to July 13, 1964, would govern this proceeding. Thus, proposals for first local transmission services may claim the advantage of an exception to the 10% Rule only if it is first determined that their specified principal communities are "separate communities" for purposes of Section 73.28(d)(3).

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[7] U.S. Department of Commerce, Technical Studies, Series P-23, No. 10, (December 5, 1963). *Jefferson Standard Broadcasting Company,* FCC 62–1011, 24 RR 319.

7. Proposals which are realistically designed to provide multiple services to a large community while ostensibly providing a first local transmission service to a nearby suburb or smaller community have been of long standing concern to the Commissioi and the Board.[8] Applicants for such proposals have sought to gain a competitive advantage under Section 307(b)[9] and to claim the benefit of the "first local transmission" exception to the 10% Rule.[10] The Commission's consistent aim has been "to encourage new stations which will provide a genuine local service to growing suburban communities", and "to discourage new suburban facilities which are merely substandard big city stations." *Notice of Proposed Rulemaking,* note 7, *supra.* The Commission has endeavored to implement the policy articulated in the Notice of Proposed Rulemaking on a case to case basis. See *Report and Order,* FCC 64–609, 2 RR 2d 1658.

8. In *Huntington Broadcasting Co., supra,* the Commission indicated that every proposal must be considered in the context of the type of operation proposed; the frequency requested; the position of the smaller city in relation to the larger city; and the nature of the programming proposed. Later, in *Radio Crawfordsville, supra,* the Commission made it clear that:

> the so-called 'separate community" question is not whether the suburban community is politically, geographically, economically or culturally independent from another city. Rather, it is whether in view of the proposal before us—with particular concern for its class, frequency, power, and coverage—the needs of the suburban community are to be considered apart from those of its nearby principal city or the urbanized area as a whole.

In *Speidel Broadcasting Corp. of Ohio,* 35 FCC 74, 25 RR 723; aff'd per curiam July 3, 1963, Case No. 18318 (D.C. Cir.), an applicant whose proposal would have provided 100% coverage of the central city and only 60% coverage of the specified principal community was not given Section 307(b) advantage over a mutually exclusive applicant for a different specified community. In *Monroeville Broadcasting Co.,* 35 FCC 657, 1 RR 2d 607 (1963), the Commission used the same criteria to decide a "separate community" issue; the Commission asks ". . . Is the particular proposal realistically one to serve the smaller suburb or one to serve the metropolitan complex–" See also *Massillon Broadcasting Co.,* 36 FCC 809, 2 RR 2d 409 (1964). The Review Board, in *Pinellas Radio Co.,* 36 FCC 1099, 2 RR 2d 155 (1964), held that a realistic evaluation of the particular proposal presented required that the needs of the suburban community be considered apart from those of the urbanized area which would also receive the applicant's signal. Recently, in *Jupiter Associates, Inc.,* 38 FCC 321 (1965), the Board held that where the population of the specified city was substantially in excess of 50,000 and where there were no allegations that the applicant's proposal was engineered to secure maximum coverage of the larger city or that the proposed programming was geared to

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[8] *Notice of Proposed Rulemaking,* FCC 63–468, 25 RR 1615. See *Radio Crawfordsville,* FCC 63–480, 25 RR 533; *Huntington Broadcasting Co.* v. *FCC* 192 F.2d 33, 7 RR 2080; *Huntington Broadcasting Co.,* 5 RR 721 (1950); *Northern Indiana Broadcasters, Inc.,* FCC 64R–407, 3 RR 2d 266.

[9] See *e.g., Monroeville Broadcasting Co.,* 35 FCC 657, 1 RR 2d 607 (1963).

[10] See *e.g., Denver Area Broadcasters,* 38 FCC 583 (1965).

the needs and interests of the larger city, the Board would not question the "separateness" of the specified principal community. In each of the above cited cases, the decision was based upon a realistic interpretation of the particular facts in the record. The extent of the evidentiary showing varied fro mcase to case depending upon the complexity of the circumstances involved.

9. Considerations leading to determination of "separate community" issues for Section 307(b) and Rule 73.28(d)(3) purposes are generally the same. In the instant case Regional's major thesis is that because the proposals of Orange and Pacific contemplate coverage of a major portion of the Los Angeles Urbanized Area, "separate community" and 10% Rule issues should be added. The bare allegation of substantial coverage of a larger city or urbanized area is not determinative of whether a proposal is realistically one to serve the larger community. This question must be decided on the basis of all the evidence presented by the parties in hearing; although a properly documented, uncontroverted allegation of coverage can be sufficient to raise an issue. Considerations of class, frequency, power and coverage are, of course, relevant, but they do not constitute the only factors to be weighed. The inquiry to determine realistically which community an applicant intends to serve is a complex one. Relevant to this determination are factors which are realistically considered by an applicant in applying for a station license. A relevant factor in the determination of the "separate community" question is the likely source of the proposed station's revenue. Other relevant considerations are the size and nature of the communities, the relationship of the economic, geographic, cultural, and governmental functions of the specified principal community to those of the larger community. This determines whether the specified principal community represents needs and interests separate from the needs and interests separate from the needs and interests of the nearby larger city or urban area to which the applicant's proposal will also provide a primary signal. Once the unique needs and interests of the specified principal community are shown to exist, the second aspect of the inquiry is to determine whether the applicant's proposal is realistically geared to serve these unique needs and interests. To this nd all aspects of an applicant's proposal as they relate to the area itself and the needs and interests of the area are relevant subjects of evidentiary presentation. It can be readily seen from the above that "separate community" is a term of art which, at the very least, does not refer to the geographic separateness or mere existence of a station location to which Rule 73.30(a) is directed; rather, it is a broad term directed toward the determination of an applicant's intent to realistically serve a given city or area, and the applicant's proposed programming as it relates to the needs and interests of the community sought to be served.

10. In view of the broad scope of inquiry permitte dunder a "separate community" issue, such an issue should be added only upon a convincing threshold showing of decisional significance. In the instant case both applicants propose Class II operations at 50 kilowatts day and 10 kilowatts night power and virtually the same

coverage of nearly the entire Los Angeles Urbanized Area. Under these facts the Board can not now conclude that the proposals of Orange and Pacific qualify for the "first local transmission" exception to the 10% Rule. "Separate community" and 10% Rule issues will accordingly be added against Orange and Pacific to permit full development of the evidence pertaining to these questions in hearing.

11. *2 and 25 mv/m Overlap*—Regional and Storer request the addition of an issue to determine whether the 2 mv/m contour of Station KSDO, San Diego, California, and the proposed 25 mv/m contours of Western and Pacific will overlap in violation of Rule 73.37. Regional states that an overlap issue has been designated against all other applicants in this proceeding. As to three of these applicants, whose applications did not show overlap, the Commission said that the measurement data available as to the location of KSDO's 2 mv/m contour are insufficient to insure that no overlap would occur and directed the applicants to take additional field intensity measurements on KSDO's contour and from the applicants' proposed sites. Regional asserts that although the applications of Western and Pacific purport to show no such overlap, it is possible that the additional measurements taken by Regional and the other applicants will show that Western and Pacific have incorrectly placed the KSDO 2 mv/m contour. In addition to its request for an overlap issue, Regional asks that Western and Pacific be directed to take field intensity measurements from their proposed sites to determine the location of their 25 mv/m contours. In the opinion of the Broadcast Bureau, Regional has not made a proper showing, either through engineering data or affidavits, to support its request.

12. Western and Pacific oppose the instant request as not warranted at this time. In support of its opposition, Western has submitted rechecked data supported by an affidavit of its engineers affirming a minimum separation of 4½ miles between the contours in question and a 3½ mile minimum separation using Western's MEOV's. Pacific contends that the information relied upon by Regional in seeking to add an overlap issue was before the Commission at the time the issue was designated against the other applicants in this proceeding. The addition of overlap issues against Western and Pacific on the basis of Regional's allegations is not warranted. Regional has presented only a bare request with no supporting affidavits or engineering statements as required by Rule 1.229.

13. Storer's petition is accompanied by an engineering statement, which quotes the following portion of paragraph 15–I–C(5) of the designation Order herein, concerning the application of California Regional Broadcasting Corporation:

> According to the applicant's showing, the proposed 25 mv/m contour is separated from the 2 mv/m contour of KSDO by approximately 2 miles. It appears that some measurement data is available on KSDO in connection with KSDO's proof of performance. However, these measurements are not sufficient to definitely establish the extent of KSDO's 2 mv/m contour. Accordingly, additional field intensity measurements made on KSDO and from the proposed site [are] required to insure that no overlap of these contours would occur in contravention of Section 73.37 of the Rules,

and states that a comparable KSDO overlap situation exists for Pacific and for Western. Storer notes that Figure 12–C of the Pacific application depicts the separation between Pacific's proposed 25 mv/m (MEOV) contour and the KSDO 2 mv/m contour at the closest point as being 1 mile, and compares this to the 2 mile separation noted for the California Regional application in the above quoted paragraph.[11] Pacific opposes addition of the issue; the Broadcast Bureau supports Storer's petition. The Pacific application has been examined in conjunction with a reading of paragraph 15–I–C(5), which clearly states that the measurement data relied upon by California Regional were not sufficient to establish the location of the KSDO 2 mv/m contour. Although there are other differences between the applications which may have entered into the judgments upon which the designation Order is based,[12] the closeness of the Pacific 25 mv/m and KSDO 2 mv/m contours as depicted on Figure 12–C of the engineering exhibit to Pacific's application, File No. BP–16161, raises questions as to the separation of those contours which should be considered in the hearing in this proceeding. Therefore, an issue will be added to determine whether Pacific's 25 mv/m contour overlaps the 2 mv/m contour of Station KSDO. Storer also would add a similar issue as to Western, alleging that the location of the KSDO 2 mv/m contour is not correctly depicted on Western's Exhibit No. E–17, File No. BP–16173, and that the depiction of Western's 25 mv/m contour does not take into account the maximum expected operating values (MEOV's) of radiation shown on the Western daytime horizontal pattern. Storer notes that Western shown approximately a 5 mile separation between the Western 25 mv/m contour and the 2 mv/m contour of KSDO. Western opposes addition of the issue. The Broadcast Bureau, in a pleading filed prior to receipt of Western's opposition, supports Storer's petition. Western's opposition includes an engineering showing which, as noted above, establishes that, using MEOV values, the minimum separation between its 25 mv/m contour and the 2 mv/m contour of KSDO is approximately 3½ miles. Western's engineering affidavit also states that calculations of the location of Western's 25 mv/m contour using MEOV's of radiation and a conductivity of 15 mmhos/m for the entire path still does not show overlap with the KSDO 2 mv/m contour (Figure M–3 shows about half the path as having a conductivity of 8 mmhos/m, the balance being shown as 15 mmhos/m). Since the available data does not support Storer's contention, the requested issue will not be added as to Western at this time. Western's engineering data, using its MEOV's, reflects a minimum separation of the contours in question of 3½ miles; this figure is substantially greater than the minimum separation claimed by petitioners for their proposals. To the extent that petitioners have requested the addition of an issue on the basis of data which *may* become available at some future time (KSDO measurement data), the request must be denied.

[11] Pacific's Figure 12–A depicts the separation of the same contours as approximately 2 miles at the closest point.

[12] Among other things, California Regional locates the KSDO contour closer to the seacoast (and to KSDO) than does Pacific, and California Regional's 25 mv/m contour is located closer to the seacoast than is Pacific's 25 mv/m contour.

For the foregoing reasons, the Board can find no merit in petitioners' request at this juncture.

14. *Requested Issues Against Topanga*—In its application Topanga-Malibu Broadcasting Company has specified Topanga as its principal community. Regional requests enlargement of the issues to determine: (1) whether Topanga is a "particular city, town, political sub-division or community" within the meaning of Section 73.30(a) of the Rules and for purposes of Sections 307(b) of the Act and 73.28(d) (3) of the Rules; (2) if it is not deemed a "community", whether the Topanga proposal would violate the 10% Rule and if so whether circumstances exist which warrant a waiver of Section 73.28(d) (3) of the Rules; and (3) if Topanga is found to be a "community", whether it "would suffer interference to such an extent that its service would be reduced to an unsatisfactory degree" in violation of Section 73.24(b) of the Rules and if so whether circumstances exist which warrant a waiver thereof. To support its request Regional makes the following allegations: the 1960 Census does not list "Topanga", "Malibu" or "Topanga-Malibu" as a community; the Topanga applicant has inadequately defined the "Topanga Community" as the area served by the Topanga Post Office; and the only indication of Topanga's population is a statement by the Postmaster at the Topanga Post Office that the population is approximately 4,000 persons. Regional further asserts that by virtue of interference received the Topanga proposal would not serve 86.6% of the population within its normally-protected contour; it would not serve any white or gray area; and the proposal is violative of Section 73.24(b) of the Rules, which is a basic, not a comparative, consideration. The Broadcast Bureau states that Regional has presented no facts which were not before the Commission at the time of designation pertaining to Rule 73.30 (a) or Rule 73.28(d) (3). The Bureau does, however, support the addition of a Rule 73.24(b) issue.

15. Topanga opposes each of the three requested issues.[13] With respect to the existence of the "Topanga Community" the applicant asserts that Regional's request is deficient in that it does not allege that the location or population claimed as that of "Topanga" is an integral part of or more logically associated with some other location; it has had a second-class post office of its own since 1908; and it possesses many of the attributes normally associated with communities, e.g., a Chamber of Commerce, five churches, seven real estate concerns, two weekly newspapers, and twelve civic associations. As to the requested 10% Rule issue Topanga states that 97% of the Topanga community is wholly outside the Los Angeles-Long Beach Urbanized Area; its 500 watt proposal will not provide primary service to either Los Angeles or Pasadena; Topanga's proposal would serve less than 16% of the Los Angeles Urbanized Area daytime and less than 2% nighttime; service would be directed toward the "underserve darea northwest of Los Angeles"; and the

[13] Orange has filed an additional pleading in response to Topanga's opposition alleging that by virtue of facts alleged therein Orange will be "seriously aggrieved". Under Rule 1.45 Orange's pleading is unauthorized in the absence of a request by the Board or a request granted by the Board. Those portions of Topanga's opposition pleading which refer to Orange are not germane and will be disregarded. Accordingly, the Board will strike Orange's comments as unauthorized and Regional's opposition thereto will be dismissed as moot.

coverage factors relied upon by the Board in *Northern Indiana Broadcasters, Inc., supra,* are not present in Topanga's proposal. Opposition to a Rule 73.24(b) issue is predicated on the following: the Commission considered a petition filed by Western raising the same question concerning Topanga's compliance with Rule 73.24(b) and did not designate such an issue; and problems underlying alleged inefficiency in the use of a frequency are part of the over-all Section 307(b) determination and the Commission has said that they would be so considered (citing *Kent-Ravenna Broadcasting Co.,* FCC 61–1350, 22 RR 605).

16. Regional contends that Topanga's opposition claims have not been submitted under oath, as required by Section 1.229 of the Rules. Petitioner also presents an affidavit by Stanley L. Hahn, a California attorney, stating that Topanga relies upon Los Angeles County for police protection and "other public services" and is a part of the Los Angeles Unified School District. With respect to the requested 10% Rule issue, the petitioner argues that if Topanga is not a community for purposes of Section 73.30(a), then the Topanga applicant cannot claim the first local transmission service exception to the 10% Rule. Finally, Regional asserts that in *Burlington Broadcasting Co.,* 34 FCC 1135, 25 RR 633, reconsideration denied 35 FCC 456, 1 RR 2d 297 (1963), a comparative 307(b) case, the Commission recognized that Rule 73.24(b) is a matter of basic rather than comparative qualification:

> Before turning to the 307(b) and standard comparative issues, one further question of basic qualification remains . . . (whether), by virtue of the extreme nighttime interference to be suffered by these proposals, [the applicants] would satisfy the requirements of section 3.24 [now 73.24(b)] of the rules.

17. The fact that a station location is an unincorporated place and is not listed by the Census Bureau does not require specification of an issue as to compliance with Section 73.30(a) of the Rules. Topanga has met even the rigid test the Commission applied in *Five Cities Broadcasting Co., Inc.,* 35 FCC 501, 1 RR 2d 279 (1963), as to whether the population grouping or land area claimed for the specified community is more logically associated with another location, which the Commission abandoned in *Seven Locks Broadcasting Co.,* 37 FCC 82, 3 RR 2d 177 (1964). In the absence of allegations sustaining at least the *Five Cities* test the Board will not add a Rule 73.30(a) issue.

18. Regional's request for "separate community" and 10% Rule issues is premised on the assertion that if Topanga is not a community for Rule 73.30(a) purposes, the Topanga applicant could not claim the benefit of the first local transmission exception of the 10% Rule. In view of our denial of the requested Rule 73.30(a) issue and in the absence of any pertinent allegations the request for "separate community" and 10% Rule issues will also be denied.

19. Under existing Commission policy a proposal which comes within an exception to the 10% Rule (providing a first nighttime transmission service) may, under certain circumstances, still be evaluated in light of Rule 73.24(b).[14] By virtue of received inter-

[14] Rule 73.24(b) authorizes assignment of a new standard broadcast station only if "the proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree."

ference the Topanga applicant would not serve 86.6% of the population within its normally protected contour. An applicant who must rely upon an exception to the 10% Rule "may be granted only if the populations affected by the received interference are not so large that his service would be 'reduced to an unsatisfactory degree'." *Strafford Broadcasting Corp. (WWNH)*, 34 FCC 142, 24 RR 835 (1963). On the basis of the facts presented by the parties an issue to determine whether Topanga's proposal would comply with Section 73.24(b) of the Rules will be added.[15] See *Trans America Broadcasting Corp.*, 37 FCC 183, 2 RR 2d 1053 (1964); *1360 Broadcasting Co., Inc.*, 36 FCC 1478, 2 RR 2d 824 (1964); *North Atlanta Broadcasting Co.*, 36 FCC 1513, 2 RR 2d 769 (1964).

20. *Legal Qualifications Issue*—Regional's request for this issue is based on the contention that on the basis of the information on file it is not possible to ascertain whether holders of 1% or more of Storer's stock meet the Commission's legal requirements with respect to: citizenship; anti-trust proceedings; outstanding judgments; and the extent of other broadcast interests. In the absence of such information, Regional asserts, it cannot be concluded that Storer is legally qualified to be a licensee of the Commission. Petitioner reports that information on file indicates that approximately 50% of Storer's stock is held by persons owning less than 1% of the outstanding stock and no evidence as to their citizenship has been offered; that the beneficial owners of 2.88% (63,126 shares) of Storer's stock have not been revealed and the legal title to these shares resides in three "street names" (brokerage houses); that 8.14% of Storer's stock is legally held by four other "street names" for the benefit of four mutual funds; and that there has been no information filed relating to ownership of other broadcast stock by these mutual funds.

21. Storer's opposition is predicated upon the following: Storer has consistently submitted fully detailed ownership reports as called for by the Commission's Rules; FCC Form 323 does not require disclosure of information concerning stockholders owning less than 1%, even where they collectively own approximately 50%; and its transfer agent, National Bank of Detroit, has submitted an affidavit showing that by actual count all holders of Storer Class B common stock are United States citizens and that only 0.6% (7,630 shares) of Storer's common stock is held by non-citizens.

22. Regional in its reply pleading asserts that Storer has not satisfactorily answered questions pertaining to the percent of alien ownership because, in addition to the 7,630 shares owned by aliens, the beneficial ownership of 63,126 shares (2.88%) held in "street names" is still undisclosed.

23. Petitioner has not presented allegations sufficient to add a legal qualifications issue. Regional's conclusion that Storer's failure to disclose all beneficial owners of its stock makes it impossible to determine Storer's compliance with Section 310(a)(4) of the

[15] Topanga's contention that the Commission refused substantially the same request in the designation Order, *supra*, in response to a petition for reconsideration filed on September 8, 1964, by Western Broadcasting Corporation is erroneous. The Commission in dismissing Western's petition did not reach this question.

Communications Act is erroneous. Even assuming that all of the undisclosed beneficial owners are aliens, the percentage of aliens holding Storer stock would represent only 3% of Storer's outstanding stock[16]; this figure is far below the 20% permitted by Section 310(a)(4). Regional questions the lack of information regarding only shareholders of less than 3%; under the rules, Storer is under no obligation to supply information concerning anti-trust proceedings or outstanding judgments as to shareholders of less than 3%. The only showing Storer must make concerning persons holding individually less than 1% of its stock is that of citizenship; this showing has been satisfactorily made. However, as to persons legally or beneficially holding in excess of 1% and less than 3% of its stock, Storer must supply names and addresses and proof of citizenship, and disclose all other broadcast interests of such persons in excess of 1%. The last of these requirements will be discussed in paragraph 25, *infra*. Storer has failed to submit the names and addresses of the beneficial owners of stock held by three "nominees". Accordingly, the Board will add an issue to ascertain the identity of the beneficial owners of Storer stock held by three "nominees", Invesco and Co., Incfund and Co., and Goldman and Sachs and Co.

24. *Multiple Ownership Issue*—Regional's request for this issue is based on a two-fold argument: first, under the facts alleged in paragraph 20, *supra*, we cannot determine whether the mutual funds, each holding in excess of 1% of Storer's outstanding stock, hold stock in any other broadcast facilities, thus, whether Storer complies with Section 73.35(b) of the Commission's Rules; second, petitioner argues that Storer is presently the licensee of seven standard broadcast stations and that four of these stations, including the Los Angeles station, are 50 kilowatt stations. Regional contends that a grant of Storer's application in the instant proceeding in which Storer seeks to change its Los Angeles station to 1110 kc in Pasadena, would "end to solidify its concentration of control of the limited number of major market 50 kw fulltime facilities" in violation of Rule 73.35(b). Moreover, the petitioner suggests that the Review Board explore the advisability of extending the Commission's "top fifty" VHF television policy to 50 kw standard broadcast proceedings, in view of their economic equivalence. The Bureau supports petitioner's request. Storer did not direct its opposition to the above arguments, but discussed one particular "street name" which has divested itself of Storer stock in excess of 1%

25. The failure of Storer to submit information relating to other broadcast interests in excess of 1% held by or for various mutual funds, bank "nominees" and "street names" holding in excess of 1% of Storer stock requires the addition of an issue to determine whether Storer complies with Rule 73.35(b). See *TVue Associates, Inc.*, FCC 64R-89, 2 RR 2d 1. However, the fact that Storer

[16] Assuming all of the undisclosed holders of Storer's stock are aliens, a total of 70,756 shares would be alien-owned (63,126 shares held by undisclosed holders plus 7,630 shares held by known aliens). Of the 2,512,400 shares of Storer stock issued, 2,035,200 are outstanding. If all 70,756 shares are held by aliens the percentage of Storer stock held by aliens would equal approximately 3%.

is presently the licensee of seven standard broadcast stations does not result in a violation of Rule 73.35(b) since a grant in this proceeding would not increase Storer's total number of stations. In Public Notice No. 60894, FCC–1171, released December 18, 1964, the Commission stated that the "top fifty" concept is an interim policy for VHF "pending the formulation of more comprehensive proposals" concerning the entire problem of concentration of control. Therefore, petitioner's suggestion that the Board extend this interim VHF policy to 50 kw standard broadcast stations is inappropriate. However, Storer's other broadcast interests can be considered under the standard comparative issue, as they relate to the factor of diversification of media of mass communication.

26. *Needs of Los Angeles* v. *Pasadena*—The third issue Regional requests against Storer is:

> To determine the comparative needs for broadcast service of the areas now served by Station KGBS, including the City of Los Angeles, California, and the areas to be served by Station KGBS operating as proposed, including Pasadena, California, and, in view thereof, whether a grant of the KGBS application would be in accordance with Section 307(b) of the Communications Act of 1934, as amended.

In support thereof Regional asserts that such an issue was included by the Commission with respect to KFOX, Inc. (KFOX) sought to move from Long Beach to Pasadena [17] and Storer's proposal to move KGBS from Los Angeles to Pasadena should be similarly explored. The exploration, petitioner argues, is particularly relevant because if an application other than Storer's is granted Los Angeles "need not be denied any local service". Storer does not oppose the addition of this issue, but the Bureau argues that it is unnecessary as these considerations are already encompassed within the Section 307(b) issue.

27. Storer's situation is quite different from that of KFOX, which proposed to leave Long Beach if its application for 1110 kc were approved. While the Commission designated an issue similar to the one requested here against the KFOX application, grant of that application would have deprived Long Beach of one of its two services; grant of the Storer application, on the other hand, would deprive the city of Los Angeles of one of 12 standard broadcast transmission services. Accordingly, the Commission's action in designating such an issue against KFOX was entirely consistent with its determination not to include such an issue as to Storer's proposal and will not now be disturbed by the addition of the requested issue.

Accordingly, IT IS ORDERED, This 21st day of May, 1965, That the petition to enlarge issues, filed on January 22, 1965, by California Regional Broadcasting Corporation IS GRANTED to the extent indicated below and IS DENIED in all other respects; and that the issues in this proceeding ARE ENLARGED by addition of the following:

> To determine, in light of the nature of the communities specified, whether Fullerton and/or Whittier, California, are

[17] KFOX's application has been dismissed by the Hearing Examiner's Order, FCC 65M-596 released May 12, 1965.

"separate communities" for purposes of applying Section 73.28(d) (3) of the Commission's Rules;

To determine, in light of the evidence adduced pursuant to the foregoing issue and the coverage characteristics of each proposal, economic base of operation, programming and other relevant factors, whether the proposals of Orange Radio, Inc. and/or Pacific Fine Music, Inc. are realistically proposals to serve Fullerton and Whittier, California, respectively.

To determine, in the event it is determined pursuant to the foregoing issue that the proposal of Orange Radio, Inc. or the proposal of Pacifica Fine Music, Inc. should be treated as an application for a community already having a first local transmission service, whether the interference which would be received by such proposal would affect more than ten percent of the population within its normally-protected primary service area in contravention of Section 73.28(d) (3) of the Commission's Rules, and, if so, whether circumstances exist which would warrant a waiver thereof;

To determine whether, because of interference received, the proposal of Topanga-Malibu Broadcasting Company would be consistent with the requirements of Section 73.24(b) of the Commission's Rules;

To determine the names and addresses of the legal and/or beneficial holders in excess of 1% and less than 3% of the stock of Storer Broadcasting Company, as required by Form 323;

To determine whether a grant of the application of Storer Broadcasting Company would be consistent with the provisions of Section 73.35(b) of the Commission's Rules;

and

IT IS FURTHER ORDERED, That the petition to enlarge issues, filed on January 22, 1965, by Storer Broadcasting Company, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and that Issue No. 13 herein is modified to be made applicable to the application of Pacific Fine Music, Inc., by the addition of the following notations to that issue

| *File Number* | *Applicant* |
|---|---|
| BP–16161 | Pacific Fine Music, Inc.; |

and

IT IS FURTHER ORDERED, That the request for leave to file comments and comments in response to Topanga Malibu Broadcasting Company's opposition to petition to enlarge issues, filed on March 1, 1965, by Orange Radio, Inc. IS STRICKEN and the pleadings related thereto ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–449

**BEFORE THE**

**FEDERAL COMMUNCATIONS COMMISSION**

**WASHINGTON, D.C.**

| | |
|---|---|
| In Re Application of TELEVISION WISCONSIN, INC. (WISC–TV), MADISON, WIS. | File No. BPCT–3014 |

**MEMORANDUM OPINION AND ORDER**

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission has before it for consideration the above-captioned application of Television Wisconsin, Inc., licensee of Television Broadcast Station WISC–TV, Channel 3, Madison, Wisconsin, and a petition for waiver of Section 73.614 (b) of the Commission's Rules, and various pleadings filed in connection therewith.[1] The applicant is authorized to operate with effective radiated visual power of 56.2 kw and antenna height above average terrain of 1,190 feet. With this antenna height, the applicant is operating at the maximum power permitted in Zone I, in which the station is located, within the limitations imposed by Section 73.614 (b) (1) of the Commission's Rules.[2] The applicant requests a construction permit to increase effective radiated visual power to 100 kw, but no change in antenna height is proposed. The applicant has, accordingly, requested a waiver of Section 73.614 (b) (1) of the Rules.

2. Petitioners allege standing in this proceeding on the basis that a grant of the application would result in increased interference (co-channel interference with respect to Station KGLO–TV and adjacent channel interference with respect to the others) which would constitute a modification of their licenses. Petitioners, accordingly, allege that the application must be designated for hearing pursuant to Section 316 of the Communications Act of 1934, as amended, or, in the alternative, dismissed. Applicant does not dispute the standing of the petitioners and we find that the petitioners have standing. *Federal Communications Commission* v.

[1] The Commission also has before it for consideration: (a) Objections filed April 13, 1962, by The Association of Maximum Service Telecasters, Inc. (MST), pursuant to Section 1.587 of the Commission's Rules; (b) Petition to Deny filed April 13, 1962, by WMT-TV, Inc., licensee of Television Broadcast Station WMT-TV, Channel 2, Cedar Rapids, Iowa; (c) Petition to Deny filed April 13, 1962, by Lee Broadcasting Corporation (formerly Lee Radio, Incorporated), licensee of Television Broadcast Station KGLO-TV, Channel 3, Mason City, Iowa; (d) Petition to Deny filed April 13, 1962, by The Journal Company, licensee of Television Broadcast Station WTMJ-TV, Channel 4, Milwaukee, Wisconsin; (e) Opposition filed May 7, 1962, by the applicant against (a), (b), (c), and (d), above; (f) Petition to Designate for Hearing or Dismiss filed May 15, 1962, by Rock Island Broadcasting Company, licensee of Television Broadcast Station WHBF-TV, Channel 4, Rock Island, Illinois; and g) Reply filed May 15, 1962, by Lee Broadcasting Corporation to (e), above.

[2] Section 73.614(b)(1) of the Commission's Rules provides as follows:

"In Zone I, on Channels 2–13, inclusive, the maximum powers specified above [Channels 2–6, 100 kw] for these channels may be used only with antenna heights not in excess of 1,000 feet above average terrain. Where antenna heights exceeding 1,000 feet above average terrain are used on Channels 2–13 . . ., the maximum power shall be based on the chart designated as Figure 3 of Section 73.699."

*National Broadcasting Co., Inc. (KOA), et al.*, 319 U.S. 239, 63 S.Ct. 1035. MST does not allege standing as a "party in interest" in this proceeding, but only claims status as an objector pursuant to the provisions of Section 1.587 of the Commission's Rules.

3. In support of its request for waiver of Section 73.614 of the Commission's Rules, the applicant states that although Madison and Station WISC–TV are located in Zone I, as defined by Section 73.609(a)(1) and Figure 1, Section 73.699 of the Commission's Rules, the distance to the boundary of Zones I and II is less than 30 miles. Applicant states that most of its Grade B coverage area is in Zone II and that the entire region, including Madison, possesses the characteristics generally found in Zone II rather than in Zone I. If it were located in Zone II, the applicant could, within the limits imposed by Section 73.614(b)(2) of the Commission's Rules, operate with effective radiated visual power of 100 kw, using an antenna height above average terrain of up to 2,000 feet. The substance of applicant's argument is its assertion that:

> . . . there is no inherent substantive basis for the Commission's designation of the Zone I boundary to include rather than exclude Madison, other than the arbitrary use of certain longitudes and latitudes without any specific reference to the particular characteristics of the area.
>
> In light of the compelling facts that Madison and its outlying areas more properly reflect the service and population characteristics of nearby Zone II and only lie in Zone I by reasons of happenstance and an arbitrary drawing of zone boundaries, it is submitted that the public interest would be served by removing the artificial limitation on WISC–TV's power imposed solely by virtue of its Zone I location. . . .

4. In order to justify an *ad hoc* exception to a rule, it is incumbent upon the party seeking the exception to show that there are public interest considerations which override those public interest considerations implicit in the promulgation of the rule. The applicant's assertion that the Commission's delineation of zone boundaries [3] resulted from "happenstance" or "arbitrary drawing of zone boundaries" does not constitute such a showing. The Commission promulgated the power-height rules and zone boundaries only after careful consideration of the facts and circumstances as they existed at the time, and it was the Commission's best judgment that the proposed rules were in the public interest.[4] At the same time, the Commission recognized that if circumstances were ultimately to change, appropriate changes in the Rules would be considered. We have, on at least two previous occasions, considered a change in the power-height limitations in Zone I (Docket Nos. 11181 and 11532, FCC 55–1198), both of which were Rule Making proceedings conducted subsequent to the "Sixth Report and Order", and on each such occasion we rejected the proposed changes on the basis that no sufficient justification had been shown. We later reaffirmed our determination not to change the power-height limitations (Docket No. 11532, FCC 56–587). More recently, the Commission had occasion to consider a request for waiver of the power-height limitations in Zone I in circumstances quite similar to this one.[5] The Commission there refused to waive the Rules because the Commis-

[3] Sixth Report and Order, FCC 52–294.
[4] See Paragraph 119, Sixth Report and Order.
[5] *American Broadcasting-Paramount Theatres, Inc.*, FCC 62–582, 23 RR 827.

sion believed that the potential benefit to be derived from the proposed operation would not outweigh the disadvantages resulting from the impetus which would be furnished to other stations to request similar waivers, with consequent erosion of the Rules and the creation of competitive imbalance.

5. The applicant has generally indicated that a grant of its application would increase its "interference-free area". It appears, however, that any such increase would create interferenc which does not now exist, at the expense of co-channel and adjacent channel stations. The applicant, nevertheless, asserts that since it is now operating at a separation greater than the minimum allowed under the Rules, the interference which the other stations would receive from the proposed operation would be no greater than that which thy would be required to receive if the applicant were operating with maximum permissible facilities at minimum permissible separation. If the applicant means that every station must operate subject to a certain amount of interference, the argument demonstrates a misunderstanding of the purposes of the mileage separations requirements. These requirements represent a minimum standard and the public interest does not require that every co-channel and adjacent channel station receive an amount of interference equivalet to that which it would be required to receive if the applicant were operating with maximum facilities at minimum separation.

6. Applicant's proposal appears to be basically one for improvement of its competitive position and we believe that a waiver on this basis would inevitably produce counter-pressures on competitors to increase facilities in order to permit them to maintain *their* competitive positions. The result might very well be the proliferation of similar demands for comparable facilities and the consequent erosion of the Commission's Rules which we have stated that we sought to avoid in the ABC case, footnote 5, *supra.*

7. Finally, a party who seeks a waiver of the Commission's Rules must, under the doctrine of the *Storer* case,[6] "set fourth reasons, sufficient if true, to justify a change or waiver of the Rules." In the matter now before us, we are not persuaded that the applicant has shown the existence of public interest considerations favoring a waiver which would override those public interest considerations which militate against operation in derogation of the Rules. The facts which the applicant has alleged do not demonstrate that the public interest would benefit by a waiver, but we think that it is apparent that the disadvantages which we have discussed are substantial and entitled to great weight. In our view, the applicant has not met the burden of showing good cause for the waiver which it has requested.

Accordingly, IT IS ORDERED, That the request for waiver of Section 73.614 of the Commission's Rules, filed herein by Television Wisconsin, Inc., IS DENIED; that the Petitions to Deny filed herein by WMT–TV, Inc., Lee Broadcasting Corporation, The Journal Company, and Rock Island Broadcasting Company, and the infor-

[6] *United States et al.* v. *Storer Broadcasting Company*, 351 U.S. 192, 76 S. Ct. 763, 13 RR 2161; *Oregon Radio, Inc.*, FCC 56–1133, 14 RR 742.

mal objections filed herein by The Association of Maximum Service Telecasters, Inc., to the extent that they request dismissal of the application ARE GRANTED, and are otherwise DENIED.

IT IS FURTHER ORDERED, That the application (BPCT–3014) of Television Wisconsin, Inc., IS DISMISSED, pursuant to Sections 73.614(b) and 1.564(b) of the Commission's Rules.

Adopted May 19, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–443

BEFORE THE

**FEDERAL COMMUNCATIONS COMMISSION**

WASHINGTON, D.C.

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| In Re Application of<br>M. R. LANKFORD, TRADING AS M. R. LANKFORD BROADCASTING CO., NEW ALBANY, IND.<br>Requests: 1290 kc., 500 w., DA–Day, Class III<br>For Construction Permit | File No. BP–15106 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission has before it for consideration (a) the above-captioned and described application; and (b) letters, and accompanying material, from Electocast, Inc., and Kentuckiana Broadcasting, Inc., licensees respectively of standard broadcast Stations WXVW, Jeffersonville, and WNUW, New Albany, Indiana, objecting to a grant of the application. Pursuant to Section 1.587 of the Commission's Rules, Electocast's and Kentuckiana's letters will be treated as informal objections.

2. Electocast contended in its letter, dated November 24, 1964, (a) that the area which the applicant proposes to serve cannot support another station, that the economic impact of another station on the two existing Indiana stations in the area would cause them to curtail certain operations and to lay off personnel, and that a grant of the application would therefore be detrimental to the public interest; (b) that a new station is not needed in the area since its Station WXVW allows ample free time for discussion of public issues and since the area now receives broadcast service from two local Indiana stations and eight stations in Louisville, Kentucky, on the other side of the Ohio River; and (c) that the establishment of a new, unneeded station in New Albany might, at some later time, interfere with the establishment of a needed new station in some other community.

3. Kentuckiana also, in its letters of January 25 and February 25, 1965, contended that because of economic conditions in the area, the number of stations now serving New Albany and environs, and "the known limited number of advertising dollars available" in the market, a grant of the Lankford application would not be in the public interest. This view was supported by an accompanying copy of a letter to Kentuckiana from A. Neil York, executive vice president of the New Albany Chamber of Commerce.

4. In addition, in its letters of January 27 and 29, and February 25, 1965, Kentuckiana objected to the material submitted by the

applicant, M. R. Lankford, as proof of his efforts to determine the programming needs and interests of the area to be served. Specifically, Kentuckiana contended (a) that many of the interviewees cited by Lankford never gave permission for summaries of their remarks to be made part of the public record; (b) that any statements actually made which were "detrimental" to Kentuckiana's Station WNUW, New Albany, were rendered moot by the fact that subsequently, on Labor Day, 1964, WNUW "dropped a music policy of rock and roll and turned to good music"; and (c) that in any event many of those interviewed deny making certain statements attributed to them by Lankford.

5. Electocast's first two contentions are rejected on the ground that they are unsupported by any specific allegations of fact other than a recitation of the number of stations now serving the area and a general reference to the public service programming now offered by its station, WXVW (and presumably other stations in the area). As indicated in paragraph 3 *supra*, Electocast's first contention (inferentially, a request for designation of the application for hearing on a *Carroll* issue)[1] is also made by Kentuckiana. However, Kentuckiana has submitted no specific allegations of fact (either in its own letters or in material accompanying them) in support of that contention, other than a general expression of opinion, endorsed by a local chamber of commerce official, that the facts are on its side, and an invitation to the Commission to gather the needed data itself via consultation with local officials. These materials filed by Electocast and Kentuckiana fall far short of the burden of pleadings indicated in *Missouri-Illinois Broadcasting Co. (KZIM)*, 3 R.R. 2d 232 (1964), as necessary to support a *Carroll* issue. With respect to Electocast's second contention, the above-described specific allegations of fact are hardly sufficient to offset the reasonable expectation that the needs of the community and area to be served would be more effectively met than at present through the widened range of program choice that would result from the establishment of an additional station. Electocast's third contention is quite speculative in nature and totally unsupported.

6. Turning now to Kentuckiana's contentions regarding Lankford's report to the Commission on his efforts to determine the program needs and interests of the area to be served (see paragraph 4 *supra*):

(a) The Commission finds Kentuckiana's allegation that persons interviewed by Lankford did not give permission for their comments to be made part of the public record to be entirely immaterial.

(b) Kentuckiana's claim that any reported statements which reflected adeversely on its New Albany station, WNUW, were rendered moot by the fact that on Labor Day, 1964, (approximately two weeks after the Lankford survey report was filed), WNUW "dropped a policy of rock and roll and turned to good music," is also rejected—first, because the lack of "good music" on WNUW was not the only New Albany program service deficiency noted by those interviewed; and, second, because Lank-

[1] *Carroll Broadcasting Co.* v. *F.C.C.*, 258 F.2d 440, 17 R.R. 2066 (U.S. App. D.C. 1958).

ford's report amply demonstrates that he has made reasonable efforts to ascertain the community's programming needs and interests. (It would hardly be equitable to require him to conduct a new series of interviews simply because Kentuckiana, in evident response to the results of the Lankford survey, overhauled its programming immediately after the report was filed.)

(c) With respect to Kentuckiana's allegation concerning the accuracy and honesty of the report, it is noted, first, that in its January 19 letter Kentuckiana stated—". . . we have found great conflict between statements quoted and the trues, have discovered that many—or most—of the interviewees . . . deny making certain statements that are attributed to them in Exhibit 3 [the report]. We are currently compiling documentation of proof of the above-mentioned. . . . We will supply the complete and accurate refutation of Exhibit 3 upon your reply to this letter"—and limited itself in that letter to summarizing alleged denials by the Mayor of New Albany and the local circuit judge that they had said that a new broadcast station was needed; second, that on January 27 the Commission staff advised Kentuckiana by mail that any information it desired to have considered by the Commission should be filed as soon as possible; third, that further action on the application was deliberately postponed by the Commission until now in order to give Kentuckiana an opportunity to submit such further information; and, fourth, that despite the Commission's reply and postponement of action, Kentuckiana has come forth with very little to support its allegations. For these reasons, Kentuckiana's charges of inaccuracy and dishonesty must also be rejected.

7. The only "documentation" submitted by Kentuckiana consisted of two letters: one from W. I. Fender, a local hospital administrator, to the general manager of WNUW; the other from A. Neil York of the local chamber of commerce to Kentuckiana's president (see paragraph 3 *supra*).

8. Kentuckiana, in its letter of January 25, 1965, introduced the Fender letter with the words, "Bear in mind that he is quoted in the Lankford application supplement as stating that New Albany is in need of another radio station." In his letter, Fender stated: "If I am on record as stating that we should have another radio station in the community, then this is definitely untrue. . . . I at no time stated that I believed that another radio station should be established here." The only thing wrong with this item of "documentation" is that Lankford never claimed that Fender had said that a new station was needed. On the contrary, Lankford's summary of the interview with Fender reads, in its entirety, as follows: "Local news will be provided by the hospital and cooperation may be expected in this regard. With regard to programs he expressed a desire for good music."

9. The letter to Kentuckiana's president from A. Neil York said, in pertinent part:

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[1] *Carroll Broadcasting Co.* v. *F.C.C.*, 258 F.2d 440, 17 R.R. 2066 (U.S. App. D.C. 1958).

. . . You also mentioned to me that this company [the applicant] said they had letters and verbal commitments from the Mayor of New Albany and from our Circuit Judge, as well as the School Superintendent and many others saying a new radio station was needed in this area. . . .

. . . I have conferred with the Mayor and the Judge and Superintendent of Schools and a number of others and find they did not say we needed another radio station here in town.

In commenting on that statement, it must be noted that, throughout the applicant's survey report, the burden of the comments reported was not the need for an additional station, but rather the need for more programming geared to the particular interests of the locality, and for more "good music." The applicant's summaries of the comments made by the mayor and judge did not differ materially —in their emphasis on the need for an improvement in the local radio listening diet, and in particular a need for greater local orientation in programming—from the summaries of comments made by other persons interviewed. Although the Mayor was described as saying that "a local type station would be desirable" and the judge as saying that "An outlet for local news is needed," it is clear from the rest of the comments attributed to those two officials that their primary concern was not with the number of local stations but rather with the over-all nature and quality of program service available to listeners in the community. As for the superintendent of schools, the only interview comments attributed to him in Lankford's report were as follows: "A local orientation in broadcasting is needed. Discussion to promote the school system viewpoint is needed. New Albany needs a 'hometown type service.'" On the other hand, a letter from that school official to the applicant (included in Lankford's report) stated, in pertinent part:

It certainly was a pleasure to talk with you and Mr. Alexander and Mr. Myers relative to the possibility of your organization establishing and operating a new radio station in New Albany to serve this community. Indeed it seems to me that such would be quite appropriate. . . .

. . . Therefore, please accept this letter as one of sincere encouragement. . . .

10. In sum, the Commission is satisfied that the whole point and purpose of the applicant's community survey (which was conducted only after Kentuckiana filed objections to its absence) was not to demonstrate that community leaders were clamoring for the establishment of a new station, but merely to ascertain the community's needs, interest, and desires as a guide to the applicant in formulating and/or justifying his proposed program schedule. We find, moreover, that Kentuckiana has failed to supply the Commission with anything substantial that would justify designation of the application for hearing on an issue of misrepresentation, willful or otherwise, in the program survey report.[2]

11. Finally, the Commission finds that the applicant is legally, technically, financially, and otherwise qualified to construct and operate as proposed, and that a grant of the subject application would serve the public interest, convenience, and necessity.

[2] In Television Broadcasters, Inc. (KBMT), FCC 65-379 (1965), another case in which an objector challenged the veracity of the applicant's community survey, the Commission, faced with conflicting affidavits, designated the application for hearing. In the matter now before us, however, no problem of conflicting affidavits exists; rather we are confronted here with a dearth of substantial evidence in support of the objecting party's allegations.

Accordingly, IT IS ORDERED, That the above-captioned and described application IS GRANTED, and that the informal objection filed by Electocast, Inc., and Kentuckiana Broadcasting, Inc., ARE DENIED.

Adopted May 19, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–186

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of<br>DIRIGO BROADCASTING, INC., BANGOR, MAINE | Docket No. 15485<br>File No. BPCT–2911 |
| DOWNEAST TELEVISION, INC., BANGOR, MAINE | Docket No. 15486<br>File No. BPCT–2952 |
| For a Construction Permit for New Television Broadcast Station | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD MEMBER NELSON NOT PARTICIPATING; BOARD MEMBER PINCOCK CONCURRING AND ISSUING STATEMENT.

1. The Review Board has before it a joint petition for reconsideration or for other relief, filed February 8, 1965, by the above-captioned applicants and pleadings ancillary thereto.[1]

2. The relevant background information relating to the instant proceeding is set forth in a Memorandum Opinion and Order, FCC 65R–29, released January 28, 1965, in which the Review Board denied a joint petition for approval of an agreement looking toward dismissal of the Dirigo application and grant of the Downeast application. Dirigo and Downeast now request the Review Board to reconsider the prior Opinion and Order or, in the alternative, to consider their instant petition and the attached modified agreement as an original request for approval of a new agreement. Sections 1.102(b) (2) and 1.106(a) of the Rules specifically provide that petitions requesting reconsideration of an interlocutory ruling made by the Review Board will not be entertained. In view of the new facts presented by the instant petition, however, we conclude that said joint petition warrants consideration as a request for approval of a new agreement. In addition, Dirigo and Downeast requested an informal conference with the Review Board pursuant to the provisions of Section 0.365(b) (2) of the Rules, which request was supported by the Broadcast Bureau. Such informal conference was held on April 6, 1965.

3. In its Memorandum Opinion and Order denying the original agreement, the Review Board noted that the expenses allegedly incurred in prosecuting Dirigo's application were not clearly segregated from those incurred in its efforts to have a television

[1] Other pleadings before the Review Board are: (1) opposition to aforesaid joint petition, filed February 18, 1965, by the Broadcast Bureau; (2) reply, filed February 26, 1965, by Downeast; (3) reply, filed February 26, 1965, by Dirigo; and (4) Broadcast Bureau's reply concerning the request for informal conference pursuant to Section 0.365(b) (2), filed March 2, 1965.

channel allocated to Bangor, Maine; however, the merits of this question were not reached, due to numerous deficiencies in Dirigo's showing warranting a denial of the joint petition. In the instant petition, Leon P. Gorman, Jr., principal of Dirigo, states by affidavit that because Channel 7 was first allocated to Bangor on April 24, 1961, he was selected May 1, 1961, as a "dividing date," and has labelled all expenses incurred before the latter date (an alleged $9,133.69) as allocable to rule-making, and those incurred after said date (an alleged $25,515.30) as attributable to the application itself.

4. Section 311(c) of the Communications Act of 1934, as amended, provides that an agreement for withdrawal of a competing application is consistent with the public interest only if the consideration for such withdrawal is not in excess of the aggregate amount expended "in connection with preparing, filing, and advocating the granting of his application." See also Section 1.525 of the Commission's Rules. This limitation, in our view, precludes reimbursement to a withdrawing applicant of any expenses incurred in rule-making activities as opposed to activities related specifically and exclusively to the preparation, filing and advocating the grant of an application. We have accepted Gorman's suggestion that May 1, 1961, be considered a dividing date and expenses incurred prior to that date are considered allocable to the Bangor rule-making proceeding; therefore, reimbursement of such expenses will not be approved.

5. There remains only the question whether, in the presentation made before the Board, expenses claimed to have been incurred subsequent to May 1, 1961, have been sufficiently itemized and detailed to permit the Board to determine whether such amounts were legitimately and prudently expended. The following itemized, out-of-pocket expenses have been clearly related to the prosecution of Dirigo's application and are concluded to have been legitimately and prudently expended: legal fees—$5,497.07 to Washington counsel; $2,600.00 to Boston counsel; and $1,000.00 to Lewiston, Maine counsel; engineering fees—$1,177.33; advertising and related expenses—$156.09; stationery and supplies expenses—$1,641.42; and incorporation fee—$150.00. No payment for other post-May 1, 1961, expenses can be permitted since a sufficient showing was not made of the relationship of such other expenses to *specific* activities performed in connection with the prosecution of the application. We will therefore approve the agreement to the extent that Downeast may reimburse Dirigo in the amount of $12,221.91, the total of the sums described above as having been adequately substantiated as legitimate and prudent expenses incurred in the prosecution of Dirigo's application.

6. In its designation Order herein, FCC–470, released May 25, 1964, the Commission found Downeast to be legally, financially, and technically qualified to construct, own and operate the proposed television broadcast station. Dismissal of Dirigo's application will moot the only hearing issue pertaining to Downeast (the standard comparative issue). In view of these facts, dismissal of the Dirigo application and grant of the Downeast application

would terminate this proceeding and permit the earlier institution of the proposed television service in Bangor. Therefore, approval of this agreement to the extent indicated herein would serve the public interest, convenience and necessity.

7. Finally, Dirigo requests that its application be dismissed without prejudice. Section 1.568(c) of the Rules states that requests for dismissal of an application without prejudice after designation for hearing will be granted only for good cause shown. The decision to dismiss herein is purely a business judgment, and does not arise from circumstances over which the applicant had no control. Since a showing of "good cause" is absent herein, Dirigo's application will be dismissed with prejudice. *KTAG Associates*, FCC 61–1172, 22 RR 184.

Accordingly, IT IS ORDERED, This 25th day of May, 1965, That the joint petition for reconsideration or for other relief seeking approval of the revised agreement to dismiss, filed February 8, 1965, IS GRANTED; that said agreement IS APPROVED in conformity with the views expressed above; that the application of Dirigo Broadcasting, Inc. (File No. BPCT–2911) IS DISMISSED, and that the application of Downeast Television, Inc. (BPCT–2952) for a construction permit for a new VHF television broadcast station to operate on Channel 7 at Bangor, Maine, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF DEE W. PINCOCK

I agree with the majority's action dismissing the application of Dirigo Broadcasting, Inc. and granting the application of Downeast Television, Inc. However, I would not have disallowed those sums of money which the applicant, Dirigo, expended in the rule making proceeding which resulted in the allocation of Channel 7 to Bangor, Maine. It appears to me that the language in Section 311(c) of the Communications Act of 1934, as amended, is broad enough to permit reimbursement for funds expended in a proceeding designed to make available to a particular community a frequency which would not otherwise be available for application in that community. These preliminary steps are a necessary part of the preparation of an application for a station utilizing that frequency. I am unable to distinguish this preliminary activity from the efforts and funds expended in conducting an engineering study in preparation of an AM application. This being so, I would have allowed funds legitimately and prudently expended in connection with the rule making proceeding.

F.C.C. 65R–191

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
|---|---|
| JOHN N. TRAXLER AND ALVERA M. TRAXLER, HUSBAND AND WIFE, DELRAY BEACH, FLA. | Docket No. 15803<br>File No. BPH–3485 |
| SUNSHINE BROADCASTING CO., DELRAY BEACH, FLA. | Docket No. 15804<br>File No. BPH–4174 |
| WLOD, INC., POMPANO BEACH, FLA. | Docket No. 15805<br>File No. BPH–4253 |
| BOCA BROADCASTERS, INC., POMPANO BEACH, FLA. | Docket No. 15806<br>File No. BPH–4605 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBERS NELSON AND KESSLER ABSTAINING.

1. Boca Broadcasters, Inc., requests the addition of several issues against John N. Traxler and Alvera M. Traxler, hereinafter referred to as the Traxlers.[1]

*Financial Qualifications Issue*

2. The petitioner's first request is for the addition of a financial qualifications issue against the Traxlers. As is so frequently the case in pleadings relating to a request for a financial qualifications issue, the ellagations made by the parties are fragmentary and inaccurate. The application, as amended on April 16, 1962, and again on April 15, 1965 (see the Hearing Examiner's Order released April 15, 1965, FCC 65M–464), shows estimated construction costs of $40,749.[2] According to the April 16, 1962, amendment, first year operating costs are estimated at $33,514.74; hence, a total of $8,378.65 is needed to operate Traxler's proposed station for three months. The total construction and initial operating costs thus amount to $49,127.65. In their application, as amended, the Traxlers claim that they have available the following assets to finance their proposal: (a) a $14,000 loan from George I. Etling and Elizabeth Etling; (b) a loan commitment in the sum of $7,000 from the Boca Raton National Bank, of Boca Raton, Florida; (c)

[1] Before the Review Board for consideration are: (1) a petition to enlarge issues, filed February 17, 1965; (2) comments of the Broadcast Bureau, filed March 3, 1965; and (3) an opposition to the petition, filed March 22, 1965, by John N. Traxler and Alvera M. Traxler.

[2] The application, as amended, states that the total construction costs amount to $39,450.00. This is in error; the following construction costs are listed in the April 16, 1962, amendment: transmitter and tubes, $12,950.00; antenna system, $9,190.00; frequency and modulation monitors, $1,649.00; studio technical equipment, $3,360.00; land acquisition, $5,100.00; building, $7,000; other items, $1,500. These figures total $40,749. The applicant's total for these figures in its April 16, 1962, amendment was $39,450.

equipment credit, in the amount of $22,100 from Collins Radio Company; (d) a lease arrangement for land worth $5,100, with an option to purchase the land; and (e) $7,291 to be furnished by the Traxlers. If all of these figures could be accepted at their face value, the Traxlers have $55,491 available in the form of cash and credit to finance their construction and initial operating costs of $49,127.65.

3. The bank letter from the Boca Raton National Bank provides that its $7,000 loan shall be secured by a first mortgage on the land and improvements thereon. Hence, the Traxlers cannot claim as a credit the $5,100 worth of land which they would lease with an option to buy. Thus, if, on the one hand, they do not own the land, the bank loan would not be available; if, on the other hand, they purchase the land, they can no longer claim $5,100 in credit for land acquisition. The $7,291.00 which the Traxlers propose to furnish in the way of capital cannot be accepted at face value. Their balance sheet, which was submitted with the amendment which was accepted by the Examiner on April 15, 1965, shows cash in the amount of $950; equity in stock, listed on major exchanges, in the amount of $738.86; equity, in "automobiles" valued at $1,739.00; an equity of $1,909.64 in business machinery; and household and office furnishings valued at $3,500. Of these items, only the $950.00 in cash and $738.86 in stock are clearly allowable, a total of $1,688.86. This sum, when added to the two loans (which in the aggregate total $21,000) and the $22,100.00 in equipment credit, leaves the Traxlers with a total of $44,788.86, against cash requirements of $49,127.65, or a total of $4,340.79 less than is required. It cannot be assumed that non-liquid assets (the equity in automobiles, business machines, and household and business furnishings) which the Traxlers themselves value at no more than $7,148.64, will yield as much as $4,340.79.[3] The only alleged asset not considered in the above analysis is $3,000 held in escrow by the Chapman Company; however, tthe Traxlers have not shown that this sum is available to finance their proposed operation, and hence it cannot be relied upon as a source of funds.

4. In view of the factual analysis made above, an issue will be added to determine whether the Traxlers are financially qualified to construct their proposed station and operate it for a reasonable period of time without revenue.

*Site Availability*

5. With their application, the Traxlers submitted a "lease with Option to Purchase" their proposed transmitter site. This agreement was entered into by the Traxlers with Herbert L. Turner and his wife Florence A. Turner. Because this agreement has expired, the petitioner requests a site availability issue. In their opposition to this requested issue, the Traxlers state that "Mrs. Turner, who holds title to the land proposed by Traxler as transmitter

[3] Only when the value of non-liquid assets is several times greater than the cash they are relied upon to yield may such assets be taken into account in determining, in connection with a petition to enlarge issues, an applicant's financial qualifications. See *Martin Karig*, 30 FCC 557, 21 RR 439 (1961); *KWEN Broadcasting Company*, FCC 64R-37; *Massillon Broadcasting Co., Inc.*, FCC 61-1164, 22 RR 218; *Springfield Television Corp.*, FCC 64R-243, 2 RR 2d 843.

site, is still ill following the sudden death of her husband", but that Mrs. Turner has notified the Traxlers by telephone that the site is still available. The Traxlers contend that it is not essential that a new agreement be filed, and that the petitioner has the burden of supporting its request for a site availability issue with a statement from the owner of the land that the site is no longer available.

6. It is not necessary that an applicant have a binding agreement with the owner of a proposed site in order to establish its availability for the purposes proposed. See *Suburban Broadcasting, Inc.*, FCC 60–169, 19 RR 956a; *Beacon Broadcasting System, Inc.*, FCC 61–684, 21 RR 727; *Eastside Broadcasting Company*, FCC 63R–528, 1 RR 2d 763. However, the death of Herbert L. Turner presents questions which cannot readily be resolved by a mere statement that his widow owns the property and is willing to make it available to the Traxlers upon the terms originally agreed upon. Thus, apparently Mr. Turner died in February of 1965, and no information has been presented as to whether the administration of his estate has been completed. Under the circumstances, it is the Board's view that the assertion that Mrs. Turner now holds title to the property must be supported by something more than the Traxlers' statement to that effect. Accordingly, a site availability issue will be added.

*Suburban Issue*

7. The Traxlers' original application specific Boca Raton, Florida, as the station location. They subsequently amended their application to specify Delray Beach as the station location, but did not make any corresponding amendment to their programming proposal. For this reason, the petitioner requests the addition of a suburban issue. The Broadcast Bureau supports petitioner's request for this issue.

8. The Traxlers oppose the addition of a Suburban issue. They state that Boca Raton and Delray Beach are less than ten miles apart, that the proposed signal would encompass both communities, that it was always their intention to serve the entire south Palm Beach County area, that the transmitter site is nearer to Delray Beach than to Boca Raton, and that John Traxler is familiar with the Delray Beach area. In support of this last contention, the Traxlers submit a letter from the executive editor of Jalm Beach newspapers stating that John Traxler, as a free-lance writer, has written "many articles" for these newspapers concerning "various Palm Beach County areas and activities" since 1963, that these articles include "articles covering Delray Beach and the surrounding south county area", and that his articles have shown "a good understanding and concern for that area and its people." Also submitted is a letter from an associate county agricultural agent to the effect that he has had contact with John Traxler "on several occasions regarding news articles concerning the agriculture industry in and around Delray Beach area." Also attached to the opposition is an affidavit by John Traxler in which he states that (a) he and his wife have been residents of the south Palm Beach

County area since 1963; (b) they "studied" Delray Beach and the surrounding area "closely"; (c) since 1961, when they began searching for a location for a radio station, they began "familiarizing" themselves with "Delray Beach and Boca Raton and their general area that has a great deal in common as an important agricultural center"; (d( they have had children enrolled in Boca Raton high school and now have a child enrolled in a high school in Delray Beach; (e) they live within six miles of Delray Beach; (f) John Traxler's work as a writer brought him into close association with "officials having responsibility in the area", e.g., County Agricultural Agent's Office, Sheriff's Department, Florida Highway Patrol, the Central and Southern Flood Control District, and "individual business owners." Traxler concludes his affidavit by stating that "previous study and constant attention to Delray Beach, county areas, plans and goals for the new schools coming into being gave him sound basis for his proposed programming and verified it even more strongly for Delray Beach," which in 1964 had a population of 15,200 and a trade area with a population of 50,000 persons.

9. In *Lindsay Broadcasting Co.*, 61–1497, 22 RR 805, the Commission stated that identity of programming proposals for different communities raises a substantial question as to "whether, or the extent to which programming proposals have been tailored to meet the needs of an area proposed to be served." In essence, it appears to be the Traxlers' position that they are familiar with Delray Beach and the area they propose to serve. They have not, however, alleged that the specific needs of Delray Beach would be met by appropriate changes in the content of any of the specific programs which they proposed in their application for Boca Raton. In this connection, see *Community Services Broadcasters, Inc.*, FCC 62–15, 22 RR 814. Nor have the Traxlers made an adequate showing to support their generalized assertion that the communities of Delray Beach and Boca Raton are similar communities, so that identical programming would adequately meet the needs of either community. In the absence of such a showing, together with the fact that at the time the program proposals were originally filed the station location was Boca Raton and not Delray Beach [4], it is, in the Board's judgment, necessary to add a Suburban issue.

*Staff Issue*

10. The petitioner requests the addition of an issue to determine the adequacy of the Traxlers' staffing proposal. In support of this request, petitioner alleges that the Traxlers propose approximately 12% live programming, and propose a staff of only four persons.

[4] The factual allegations before us in this proceeding are substantially different from those made in *Bootheel Broadcasting Company*, 62R–47, 24 RR 292. In *Bootheel*, substantially the same programming was proposed as had previously been proposed for another community. However, the programming proposals in *Bootheel* were made upon the basis of area familiarity and contacts in the community, and the applicant concluded that the community needs would be met by programming like that proposed in the earlier application for another community. In the instant proceeding, however, it appears that the programming proposed for Delray Beach was not decided upon after a careful weighing of Delray Beach's needs, but was, instead, carried over to Delray Beach when the application was amended to specify Delray Beach as the principal community.

The Bureau supports the request. In opposition, the Traxlers indicate that in addition to the two staff members, they would likewise participate in the operation of the station. They also state that in presenting live programming, they will utilize the contacts made by them during their residency in the Delray Beach area.

11. The requested staff issue will be added. The Traxlers propose to broadcast 105 hours per week, of which 12% will be live programming. This raises serious questions as to the ability of the Traxlers to effectuate their programming proposal. See *John E Grant*, FCC 62–409, 23 RR 461.

Accordingly, IT IS ORDERED, This 26th day of May, 1965, That the petition to enlarge issues, filed February 17, 1965, by Boca Broadcasters, Inc., IS GRANTED, and that the issues in this proceeding ARE ENLARGED by the addition of the following issues:

1. To determine whether the applicant, John N. Traxler and Alvera M. Traxler, is financially qualified to construct and operate its proposed station for a reasonable period of time without revenue;

2. To determine whether the applicant, John N. Traxler and Alvera M. Traxler, has reasonable assurance of being able to secure its proposed transmitter site;

3. To determine what efforts have been made by the applicant, John N. Traxler and Alvera M. Traxler, to determine the programming needs of the community and area it proposes to serve and the manner in which it proposes to meet such needs.

4. To determine whether the staff proposed by John N. Traxler and Alvera M. Traxler would be adequate to operate their station as proposed in their application.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–192

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON. D.C.

| | |
|---|---|
| In Re Applications of | |
| WEPA–TV, INC. (WEPA–TV), ERIE, PA. For Modification of Construction Permit | Docket No. 15844 File No. BMPCT–5953 |
| THE JET BROADCASTING CO., INC., ERIE, PA. For Construction Permit for New Television Broadcast Station | Docket No. 15845 File No. BPCT–3324 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW MOARD: BOARD MEMBER PINCOCK CONCURRING AND ISSUING A STATEMENT IN WHICH BOARD MEMBER NELSON JOINS.

1. The Review Board has before it a Joint Petition for Approval of Agreement, Dismissal of WEPA–TV, Inc. Application and Grant of The Jet Broadcasting Co., Inc. Application, filed March 29, 1965, by WEPA–TV, Inc. and The Jet Broadcasting Co., Inc., together with related pleadings.[1] The joint petition seeks approval of an agreement whereby The Jet Broadcasting Co. would partially reimburse WEPA–TV, Inc. for funds legitimately and prudently expended in preparing, filing and advocating the grant of its application in the amount of $17,260.34, or such lesser sum as the Board might approve.

2. WEPA–TV, Inc. is the successor in interest of Alfred E. Anscombe, who held a construction permit for a new UHF television station on Channel 66 in Erie, Pennsylvania. After he received his construction permit for Channel 66, Mr. Anscombe sought network contracts for the operation of his proposed station in Erie, Pennsylvania. He was advised that the high UHF channels were not satisfactory for network purposes. Thereupon on May 29, 1961, he filed a petition for rule making which sought to have Channel 66 deleted from Erie and Channel 24 substituted therefor. At the same time, he requested the commission to issue an order to show cause why his construction permit for Channel 66 should not be changed to Channel 24 at Erie, Pennsylvania.[2] During the course of this rule making proceeding, a number of comments were filed

[1] The Board also has before it a Supplement to Joint Petition for Approval of Agreement, Dismissal of WEPA–TV, Inc. Application and Grant of The Jet Broadcasting Co., Inc. Application, filed April 7, 1965, by WEPA–TV, Inc.; Broadcast Bureau's Opposition to Joint Petition for Approval of Agreement, Dismissal of WEPA–TV, Inc. Application and Grant of The Jet Broadcasting Co., Inc. Application, filed April 7, 1965; Reply to Opposition of The Broadcast Bureau. filed May 3, 1965 by WEPA–TV, Inc.; and Reply of The Jet Broadcasting Co., Inc. to Broadcast Bureau's Opposition to Joint Petition, filed May 3, 1965.

[2] On October 10, 1961. the Commission approved the assignment of the construction permit for a new UHF television station on Channel 66 from Mr. Anscombe to WEPA–TV, Inc.

and counter-proposals were made. On March 8, 1963, the Commission released a Report and Order assigning Channel 24 to Erie, Pennsylvania. Channel 66 was left in Erie, and the Commission declined to issue an order to show cause transferring WEPA–TV, Inc.'s construction permit from Channel 66 to Channel 24. It was noted, however, that should WEPA–TV, Inc. wish to do so, it could apply for Channel 24. On March 16, 1964, WEPA–TV, Inc. filed its application for a new station on Channel 24 in Erie, Pennsylvania, and on April 24, 1964, The Jet Broadcasting Co. filed its application for Channel 24.

3. Attached to the joint petition for approval of agreement was a schedule of expenses which totaled $32,672. At least part of those expenses were admittedly incurred in connection with the rule making proceeding. The Bureau opposed approval of the agreement on two basic grounds: the first being that the schedule of expenses submitted with the petition for approval did not provide sufficient supporting data to enable the Board to determine that those expenses were legitimately and prudently expended in connection with the preparation and prosecution of WEPA–TV, Inc.'s application for Channel 24 at Erie, Pennsylvania; and secondly, that it was impossible to determine what portion of those expenses was incurred in connection with the rule making proceeding. The Broadcast Bureau has taken the position that funds expended in connection with the rule making proceeding for the purpose of allocating Channel 24 to Erie do not come within the terms of the statute and are, therefore, not properly subject to reimbursement.

4. The supplement to the joint petition provided substantial data as to the expenditures of the various sums set forth in the schedule attached to the original petition. The required affidavits of legal and engineering counsel, as well as those of the certified public accounting firm which had audited the books of WEPA-TV, support the sums set forth in the schedule. The petitioners have provided the factual information required by Section 1.525(a) of the Commission's Rules. They have argued that funds expended in connection with the rule making proceeding which resulted in the assignment of Channel 24 to Erie, Pennsylvania, are properly expended as an integral part of the proceeding on the application for a station utilizing Channel 24 in Erie.

5. The Board concludes that expenses incurred in connection with rule making proceedings designed to secure the assignment of a particular channel to a community for which an applicant subsequently applies cannot properly be allowed. Section 311(c) of the Communications Act of 1934, as amended, does not permit the interpretation advanced by the petitioners here.[3] Nor have we been able to find in the legislative history of Section 311(c) of the Communications Act that such expenditures were properly to be considered in avaluating requests for approval of agreements. Accordingly, those funds which were expended in connection with the rule making proceeding may not be allowed.

[3] ". . . the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application."

6. We have endeavored to ascertain which sums of money were expended in connection with the application for Channel 24 in Erie, Pennsylvania. The largest single item of expense was legal fees. Based upon the affidavits of Mr. James E. Greeley, counsel for WEPA–TV, Inc., we have concluded that $3,435 of that sum may be allowed. With respect to other expenditures for which the necessary information was supplied, we have allowed the sums expended after March 8, 1963—the release date of the Memorandum Opinion and Order which made Channel 24 available for use in Erie, Pennsylvania. As to the item carried on the schedule as travel, office supplies, and incidentals, while it is broken down into its various component parts in the affidavit of Raymond Mason, WEPA's accountant, attached to the supplement to the joint petition, we have been unable to determine whether several of these items of expense occurred before the March 8, 1963 date or after that date. This is not so with respect to travel, however, and we have therefore allowed $897 of that item which appeared to be for travel clearly related to the Channel 24 application. Thus the Board will approve a reimbursement to WEPA–TV, Inc. in the total amount of $16,541 (see Appendix A). Approval of this agreement will facilitate an immediate grant of the application of The Jet Broadcasting Co., Inc., thus making a third commercial station available to Erie, Pennsylvania. The public interest will thus be served.

Accordingly, IT IS ORDERED, This 26th day of May, 1965, That the Joint Petition for Approval of Agreement, Dismissal of WEPA–TV, Inc. Application and Grant of The Jet Broadcasting Co., Inc. Application, filed March 29, 1965, by WEPA–TV, Inc. and The Jet Broadcasting Co., Inc., IS GRANTED to the extent that WEPA–TV, Inc. may be reimbursed in the amount of $16,541; and

IT IS FURTHER ORDERED, That the application of WEPA–TV, Inc. IS DISMISSED; and

IT IS FURTHER ORDERED, That the application of The Jet Broadcasting Co., Inc. for a new UHF television station on Channel 24 at Erie, Pennsylvania, IS GRANTED subject to the following condition:

> The construction of the proposed station shall not affect the operation of Standard Radio Broadcast Station WWRN, and a skeleton proof of performance (consisting of at least five field intensity measurements made on each of the eight equally spaced radials about Station WWYN) shall be made before and after said construction to establish that the television tower has been detuned.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

## APPENDIX A

*Expenditures claimed by WEPA–TV, Inc., in connection with rulemaking and Application for Channel 24 in Erie, Pa.*

| | |
|---|---|
| Legal | $10,022 |
| Engineering | 302 |
| Telephone | 797 |
| Travel, office supplies, and incidentals | 4,538 |
| Salaries ' | 1,840 |
| Auditing* | 1,450 |
| Commitment fee* | 350 |
| Life insurance premiums on Anscombe* | 3,684 |
| Interest* | 8,554 |
| Rent | 1,125 |
| Total | 32,672 |

*Expenditures found by the Board to hae been legitimately and prudently expended by WEPA–TV, in preparing, filing, and prosecuting its application for a new UHF TV station on Channel 24 in Erie, Pa.*

| | |
|---|---|
| Legal | $3,435 |
| Engineering | 302 |
| Telephone | 554 |
| Travel, office supplies, and incidentals | 897 |
| Salaries ' | 1,840 |
| Auditing* | 470 |
| Commitment fee* | 350 |
| Life insurance premiums on Anscombe* | 3,112 |
| Interest* | 4,961 |
| Rent | 620 |
| Total | 16,541 |

* These items were shown to be necessary expenses incidental to the WEPA-TV, Inc. plan for financing its station. We have allowed that portion expended after Channel 24 was assigned to Erie, Pennsylvania.

## Concurring Statement of Dee W. Pincock

I agree with the majority of the Board that WEPA–TV, Inc. should be reimbursed in the amount of $16,541 for funds legitimately and prudently expended in the preparation and prosecution of its application for a UHF television station on Channel 24 in Erie, Pennsylvania. I would, however, go further and allow the sum of $17,260.34 requested by the petitioners. It appears to me that the language of Section 311(c) is broad enough to permit reimbursement for funds expended in a proceeding designed to make available to a particular community a frequency which would not otherwise be available for application in that community. These preliminary steps are a necessary part of the preparation of an actual application for a station utilizing that frequency. This being so, I would approve the entire amount requested by the petitioners.

F.C.C. 65M–645

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of
REQUEST BY RKO PHONEVISION CO. FOR EXTENSION OF AUTHORIZATION TO CONDUCT TRIAL SUBSCRIPTION TELEVISION OPERATIONS OVER STATION WHCT, HARTFORD, CONNECTICUT.

ORDER

The Commission, by its Subscription Television Committee, has under consideration (1) a "Request by RKO Phonevision Company For Extension of Authorization to Conduct Trial Subscription Television Operations over Station WHCT, Hartford, Connecticut," filed by the RKO Phonevision Company (RKO) on March 10, 1965;[1] (2) an "Opposition to Request of RKO Phonevision Company for Extension of its Trial Pay TV Operation of Station WHCT, Hartford, Connecticut," filed on May 13, 1965, by the Connecticut Committee Against Pay TV (the Connecticut Committee); and (3) a letter filed by RKO May 18, 1965, indicating that it intends to file no reply to the opposition of the Connecticut Committee.

The present authorization of RKO was granted in a Report and Decision in Docket No. 13814 (30 F.C.C. 301, 20 Pike & Fischer, R.R. 754) adopted February 23, 1961, by the terms of which the authorization was to run for a period of three years from the date of the first transmission of subscription programs to subscribers. In an order (FCC 61–871) adopted July 6, 1961, RKO was given util July 1, 1962, to commence subscription programming, and actually began such programming on June 29, 1962. Thus its present authorization expires on June 28, 1965.

The authorization for the trial operation was granted pursuant to the provisions of the Third Report in Docket No. 11279 (26 F.C.C. 265, 16 Pike & Fischer, R.R. 1540a), a proceeding which was commenced in 1955 for the purpose of determining whether to adopt rules permitting subscription television operations over television stations, and is intended to provide information to aid in making a decision in that proceeding.

RKO requests that its authorization be extended for another three years or until such time as the Commission might terminate the pending rule making proceeding in Docket No. 11279, which-

[1] Public notice of the acceptance for filing of this request was issued April 13. 1965 (Mimeo 66458).

ever date is earlier. In support of its request, RKO urges that while paragraph 27 of the Third Report states that trial subscription television operations are not renewable as such, it also states that "If, however, at the time of their expiration the Commission requires additional time to complete the hearings contemplated in paragraph 92 of the First Report herein, or to reach a decision, it may, if it finds it would be in the public interest to do so, permit the filing of applications for continued subscription television operations, under the same or other conditions as may be found desirable, and for such limited periods as may be appropriate in the circumstances."

Paragraph 92 of the First Report in Docket No. 11279 (23 F.C.C. 532, 16 Pike & Fischer, R.R. 1509) reads as follows:

> The Commission will, when it finds that sufficient meaningful data are available from trial subscription television operations, conduct a public hearing at which all interested parties will have full opportunity to submit information, data and views concerning . . . questions . . . to be answered in reaching a decision as to whether the authorization of a subscription television service on some extended or continuing basis would serve the public interest.

On March 10, 1965, the date on which RKO filed its request for extension of its authorization, the Zenith Radio Corporation and Teco, Inc., filed a joint petition for further rule making to authorize subscription television.[2] RKO urges that the Commission cannot complete the hearing contemplated in paragraph 92 of the First Report by June 28, 1965, especially in view of the fact that it must give consideration to the Zenith-Teco joint petition. It states that if the Commission should take further action, pursuant to the Third Report, leading to continued or extended authorization of subscription television it would work a hardship on RKO and Hartford subscribers to terminate the operation and then to have it attempt to commence again. In addition, it argues that to permit the trial to continue will serve the public interest because such additional operation would supplement and expand the information about pay TV produced by the trial up to this time. At the end of the second year of the Hartford trial, RKO limited the number of subscribers to 5000 "since it did not appear to be prudent from a business viewpoint or fair to the Hartford public to further expand during the third and last year without any assurance that the Commission would permit subscription operations beyond that period." If permitted to continue operation, RKO states that it will experiment further with the type of subscription programming which it believes to be in the public interest, and will expand the number of subscribers.

The Connecticut Committee (which represents a number of motion picture theatre owners and others in the Hartford area, and which has previously participated in the proceeding in Docket No. 11279, and as a party respondent in Docket No. 13814) raises various arguments against granting the requested extension prominent among which are the following.

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[2] The Zenith-Teco joint petition was accompanied by comments containing, among other things, detailed information about the Hartford trial to date. These detailed comments are incorporated by reference into the instant RKO application for extension of its authorization. The Zenith-Teco petition was filed in Docket No. 11279).

It is urged that the request should not be granted because RKO has failed to submit information required by the Third Report, such as, for example, information as to the approximate number of subscribers that will be served, the range of charges to the public, and information about commitments obtained and negotiations underway for the provision of programming. RKO, it is stated, represents only that it will expand the experiment without showing the scope of the expansion.

It is further argued that to grant the extension would be to permit RKO by stages to establish such a broad-scale operation as to act as a pre-judgment of the ultimate issue since the Commission would be faced with a *fait accompli* which would be hard to undo, and which the Commission wished to avoid by placing a three-year limitation on the original trial. The Connecticut Committee also points out that RKO argument about hardship on subscribers and RKO that would be caused by discontinuing the trial and then possibly recommencing it at a later date has no merit since the Commission made it clear to RKO that no ordinary license was being granted renewable every three years, and the Report and Decision granting the original authorization stated that "Every effort should be made to apprise the public, especially the subscribers of the service, that a trial—and only a trial—for a three-year period is involved." (30 F.C.C. 301, 320, 20 Pike & Fischer, R.R. 754, 776.

Still another argument is that the scope of the trial is too small to yield meaningful information, and that the mere fact that an extension would yield more information is not enough. The burden of proof, it is urged, is on RKO to show that the additional information that will result will be in the public interest and justify the extension.

We are of the opinion that in view of the complicated nature of the proceeding, a decision cannot be reached in Docket No. 11279 by June 28, 1965, and that the information to be obtained from further experimentation with subscription programming and expansion of the present trial at Hartford would supply the Commission with further material that would be helpful in arriving at final decisions in that docket. For this reason we believe that it is in the public interest to extend the authorization of the Hartford trial subscription television operation for another three years, or (if it occurs earlier) until such time as the Commission terminates the pending rule making proceeding in Docket No. 11279 and enters an order with respect to this authorization.

Our decision is based not on alleged hardship to present subscribers or to RKO if the authorization is not extended, but on the fact that we believe it to be in the public interest to obtain further information from an expanded trial operation as an aid in arriving at ultimate decisions on the rule making problems involved in Docket No. 11279. The Commission examined minutely all aspects of the trial operation before the original grant was made, and it would serve no useful purpose to repeat such a procedure by requiring the sort of detailed application originally submitted (nor is there any requirement in the Third Report that such details be

submitted in the case of a request for an extension of authorization) for it is clear that RKO intends to continue with the operation on the same basis as the original grant with the exception that it now commits itself to expand it and to experiment further with programming. Valuable information has already been developed (see footnote 2). However, we believe that additional helpful data may be developed with an extended and expanded operation. In this connection, we note, for example, that the Hartford trial may have been hampered during the first two years of the operation by a shortage of programs caused by the refusal of two major motion picture producers to provide any films (see p. 12 of the comments mentioned in footnote 2 above). These two producers began to provide films at the same time that a decision was made to limit the trial to 5000 subscribers. It would be useful to know if the additional films now available might be a factor that would substantially increase the number of subscribers.

The argument that RKO has not met the burden of proving that additional information that may be forthcoming from an extended trial would be in the public interest is without merit. There is here no question of who has the burden of proof as there might be in a formal hearing. We have examined the application and the opposition thereto and find no substantial or material questions of fact, and find that it would be in the public interest to grant the extension.

In arguing that the Commission will be faced with a *fait accompli* if the Hartford extension is granted, the Connecticut Committee quotes from the Third Report stating that the Commission recognized the danger that experimental operations might lead to "premature establishment of a broadscale subscription television service prior to final decision, to be reserved until after trial, as to whether and in what circumstances it may be in the public interest." It then goes on to speak of the extended Hartford trial as possibly resulting in a broadscale pay TV operation, the very thing that the Commission wished to avoid. It should be pointed out that the quotation used was made in connection with the Commission's decision to limit the trial of one system to one market. It is certainly not applicable to the instant situation. In any event, we shall, as in the case of the original grant, closely supervise the operation and shall, under the conditions of the original and the instant grant, reserve the right to terminate the operation upon due notice and hearing prior to the expiration time.

Accordingly, IT IS ORDERED, This 21st day of May, 1965, that, based on the representations made therein, the request of the RKO Phonevision Company for an extension of its authorization to conduct trial subscription television operations over Station WHCT, Hartford, Connecticut, IS GRANTED, subject to the same terms and conditions specified in its initial three-year authorization WITH THE EXCEPTION that the instant authorization is to commence June 29, 1965, that it is for a period of three years or (if it occurs sooner) until such time as the Commission terminates the rule making proceeding in Docket No. 11279 and enters an order with respect to this authorization, and that wherever the

terms and conditions of the original authorization specified a 3-year period, the terms and conditions shall be understood to specify the aforementioned period of the instant authorization

By the Subscription Television Committee.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–472

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS TO RAISE THE NIGHTTIME POWER LIMITATION OF CLASS IV STANDARD BROADCAST STATIONS | RM–683 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONERS HYDE AND LOEVINGER ABSENT.

1. The Commission has before it for consideration a petition for rule making, filed November 9, 1964, by Community Broadcasters Association, Inc. (CBA), an organization of Class IV standard broadcast station licensees, which looks toward raising the nighttime power ceiling of Class IV stations on local channels from 250 watts to 1 kilowatt (the daytime power ceiling for such stations) to permit them, when operating daytime with power over 250 watts and up to 1 kilowatt, to operate nighttime with the same higher power. Implementation of the proposal on an across-the-board basis is urged.

2. Some ninety supporting statements and letters were received. Five statements opposing rule making on the proposal at this time were also received. Most of the submissions were from Class IV licensees.[1] CBA filed replies to the opposing statements of the Association on Broadcasting Standards, Inc., which represents standard broadcast licensees, and of Broadmoor Broadcasting Corporation, San Diego, California (KSON).

3. On January 10, 1964, the Commission denied another CBA petition (RM–349) requesting rule making on a Class IV nighttime power increase proposal identical to the proposal in the petition before us.[2] The instant petition also presents substantially the same arguments in support of the proposal as were advanced in the petition we denied last year. The new matter consists primarily of reports on an updated analysis and a new survey which CBA had made to determine the number of Class IV stations which are operating, or have applied to operate, with 1 kilowatt power daytime, and the interest in higher power of those Class IV licensees which do not operate with daytime power over 250 watts.

4. CBA's report on its analysis of Class IV stations operating

[1] Many of the submissions were untimely filed. Nevertheless, in the absence of CBA objection and in the interest of full evaluation of its petition, they have also been considered and evaluated.

[2] Memorandum Opinion and Order (FCC 64–196). released January 10, 1964. 1 Pike & Fischer R.R. 2d 1596.

with I kilowatt daytime power, updated to September 15, 1964, indicates that of 989 authorized Class IV stations, 783 stations (about 80% of all such stations) were operating or had applied for I kilowatt daytime power; 2 applications for new Class IV 1 kilowatt stations were on file; and 206 stations (about 20% of all Class IV stations) were not operating with daytime power over 250 watts. The total populations of cities designated as the principal communities for the 783 Class IV stations now operating or requesting 1 kilowatt daytime power are 45,988,942 (88.13% of total populations served by all Class IV stations). The total populations of all cities designated as the principal communities for the 206 stations operating with daytime power not over 250 watts are 6,192,180 (11.8% of the total population served by all Class IV stations). Its report on responses received to a questionnaire sent to 195 of the 206 Class IV licensees not now operating with daytime power over 250 watts reveals that of the 151 Class IV licensees responding (54 did not respond ), 60 licensees reported that they expected to apply for I kilowatt daytime in the near future; 40 licensees reported they would apply for 1 kilowatt daytime in the indefinite future; 81 licensees reported an interest in 1 kilowatt operation day and night; 4 licensees reported no need for higher power; 9 licensees reported higher power not justified from a cost standpoint; and 37 licensees reported interest in higher power if treaty restrictions could be removed.

5. The principal argument again advanced by CBA and others for a nighttime power increase is that Class IV stations need stronger signals to override electrical noise and other sources of man-made interference and to provide a more competitive and effective service within their nighttime service areas, and that, if they all increase power simultaneously, it is engineeringly feasible for them to provide stronger signals within their nighttime service areas without increasing mutual co-channel interference or creating adjacent channel interference problems.

6. True, the ratio of signal to electrical noise levels would be improved by a concurrent power increase. However, with the RSS nighttime limitation of most Class IV stations 15.0 mv/m, or higher, we adhere to the view that no technical basis exists for an assumption that the nighttime signal strengths of most Class IV stations are of insufficient magnitude to overcome noise and provide effective service or that a substantial and urgent need exists for stronger signals within their nighttime service areas. The Association on Broadcasting Standards also questions CBA's assumption that the nighttime power increase could be achieved without creating adjacent channel interference problems with other standard broadcast stations, urging deferral of rule making on the proposal pending the submission of data to resolve the question. We are satisfied, however, that Class IV stations, operating with 1 kilowatt nighttime, would not be able to radiate a signal causing adjacent channel interference, as calculated on the basis of the ratio applicable to Class I standard broadcast stations in Section 73.182(w) of the rules which, in our view, is also a reasonable ratio to apply to other classes of stations.

7. CBA recognizes that a concurrent power increase would not increase the total nighttime areas individually served by Class IV stations. Many of the commenting Class IV licensees, however, express belief that it would. On the contrary, since the ratios of desired to undesired signals would not change if all stations increase power simultaneously, as a general proposition, no gain or loss in nighttime service area would accrue to individual stations. While adoption of the 1 kilowatt daytime power ceiling has enabled most Class IV stations increasing daytime power to gain in area and populations served without causing significant co-channel interference, this resulted because their daytime service areas are only limited generally by co-channel interference along certain azimuths. A similar result could not be expected from raising the nighttime power ceiling. The nighttime service areas of Class IV stations are, in general, severely limited along all azimuths by co-channel interference. Because of nighttime propogation conditions, any gain in nighttime coverage area or populations served accruing to stations increasing nighttime power could be expected only at the inordinate cost of serious, substantial, and far-extending increased interference to co-channel stations not increasing power and of unwarranted destruction of their nighttime service areas.

8. Some Class IV licensees urge that a nighttime power increase is needed because of the interference received for short periods during the transitional hours around sunrise and sunset, due to different sunset and sunrise times at different locations and the present need of co-channel stations to switch at varying times from daytime I kilowatt operation to nighttime 250 watts operation at sunset, and, vice versa, at sunrise. They contend that their normal nighttime interference-free service areas are reduced during these transitional periods when their service to the public is most important. No showing is made, however, as to the extent that the interference received during the transitional hours impairs their normal nighttime operations. While the mentioned interference problem during these transitional periods is an unavoidable result of raising the daytime power ceiling and making possible an expanded and improved local daytime service to the public, its elimination would be desirable. Nevertheless, we could not conclude that the public interest would be served by authorizing higher nighttime power to reduce co-channel interference during the relatively short sunrise and sunset transitional periods where such operation would cause serious interference during nighttime hours to stations not operating with increased nighttime power.

9. Broadmoor Broadcasting Corporation, whose San Diego station (KSON) has been unable to increase daytime power to 1 kilowatt because of limitations of the U.S./Mexican Agreement on Radio Broadcasting in the Standard Broadcast Band, opposes nighttime power increases for Class IV stations until international agreements have been modified to permit them all to increase nighttime power simultaneously. Noting that the U.S./Mexican Agreement and the North American Regional Broadcasting Agree-

ment (NARBA) constitute bars to a 1 kilowatt Class IV nighttime power ceiling, it argues that, even assuming that the CBA proposal could be legally adopted in other parts of the country, there is no reason to suppose that treaty restrictions along the Mexican border or in Florida, which were not relaxed for relatively minor daytime purposes, would be relaxed for far-reaching nighttime interference, and that it would have serious consequences for border stations, such as its own, limited to 250 watts nighttime. It also argues that it cannot be assumed that NARBA countries would agree to the CBA proposal, as they did to daytime power increases, considering that the nighttime limits of stations within hundreds of miles of the United States would increase. In reply, CBA agrees that modification of international agreements are in order and that Station KSON's problem requires solution. It urges, however, that rule making or an inquiry with respect to its proposal is warranted in light of the interest of Class IV licensees in it and its benefits to the majority of them. In addition to rule making to ascertain the industry's viewpoint on the proposal, it requests us to take steps necessary for its implimentation and to assist stations such as Station KSON.

CONCLUSION

10. We found no compelling reasons in our decision of last year for holding rule making on the CBA nighttime power increase proposal. We find none now from its reappraisal in light of the instant showing of CBA and others. We still believe that a concurrent increase in nighttime signal strengths of all Class IV stations would have some limited potential for improving local nighttime service but that the claimed great and pressing need of local stations for stronger signals within their nighttime service areas lacks technical support. We also hold to the view that, because of nighttime interference conditions, the proposal has a great potential for destroying existing local nighttime service areas unless a concurrent power increase by all Class IV stations is possible. The present showing of CBA and others, like the prior one, falls far short of persuading us that a concurrent nighttime Class IV power increase would be possible, feasible, or in the public interest in light of foreign and domestic interference considerations and limitations of NARBA and the U.S./Mexican Agreement. While we do not close the door to the possibility of rule making on the proposal for all time, we remain of the view that it would serve no useful purpose to do so until at least such time as we have a reasonable basis for concluding that the proposal would not be incompatible with our international commitments and could still be accomplished without a deleterious impact upon existing local nighttime service.[3]

[3] On May 19, 1965, CBA requested the Commission to withhold action on their petition until a field analysis could be made to determine if man-made interference is an important source of degradation of radio service within the nighttime interference-free contours of Class IV stations. If the preliminary study indicates such is the case CBA intends to ask the Commission for authority to conduct further experiments. The Commission is desirous of collecting technical data on this subject, and will be glad to consider any data submitted by CBA in the future. However, we do not believe this consideration warrants postponement of final action on this petition.

11. In view of the foregoing, IT IS ORDERED, This 26th day of May, 1965, That the petition of Community Broadcasters Association, Inc., for rule making looking toward authorization of a higher nighttime power ceiling for Class IV radio broadcast stations IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–455

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| POLICY STATEMENT CONCERNING THE HEIGHT OF RADIO AND TELEVISION ANTENNA TOWERS | Public Notice |

BY THE COMMISSION: COMMISSIONER HYDE ABSENT.

Considerable concern has recently been evidenced over the steady trend to taller and taller television and FM radio antnna towers, and the impact of this trend on the safety of air navigation. This concern is illustrated by the fact that in 1955 Congressional hearings were held on a resolution (H. J. Res. 138, 84th Cong.) designed, in effect, to halt the proliferation of antenna towers with heights of more than 1,000 feet above ground. Today there is under consideration a virtually identical resolution (H.J.Res. 261, 89th Cong.) except that it is now concerned with towers over 2,000 feet. We note also that there is now pending before Congress a bill which would prohibit the Commission from accepting for filing any application proposing an antenna more than 2,000 feet above ground (H.R. 7428, 89th Congress).

Antenna towers of adequate height are necessary to attain maximum use of radio in the public interest. However, it is essential that use of such towers be compatible with the requirements of public safety in air transportation.

The Commission believes that the public interest in both broadcast service and air safety can and must be accommodated. Over the years, this goal has been substantially accomplished through close cooperation between the Commission and the Federal Aviation Agency and its predecessor agencies, and we are confident that continuing joint efforts will bring the goal closer to full realization. For example, we have today issued a Notice of Proposed Rule Making (Docket No. 16030) looking toward the adoption of procedures for the establishment of antenna farm areas. Such areas are designed to group, insofar as possible and consistent with the public interest, antenna towers of broadcast stations serving the same community.

In addition to the steps already being taken, we believe special consideration should be given to the question of antenna tower heights. The needs of the television and FM radio services for antenna towers of adequate height, particularly with respect to the growing number of UHF television stations, can and should be realized within the limits of a realistic general height limitation on antenna towers.

We have concluded that this objective can best be achieved by adopting the following policy: Applications for antenna towers

higher than 2,000 feet above ground will be presumed to be inconsistent with the public interest, and the applicant will have a burden of overcoming that strong presumption. The applicant must accompany its application with a detailed showing directed to meeting this burden. Only in the exceptional case, where the Commission concludes that a clear and compelling showing has been made that there are public interest reasons requiring a tower higher than 2,000 feet above ground, and after the parties have complied with applicable FAA procedures, and full Commission coordination with FAA on the question of menace to air navigation, will a grant be made. Applicants and parties in interest will, of course, be afforded their statutory hearing rights.

Adoption of this policy should result in several benefits. First, it should effectively arrest the steady increase in the height of towers, an increase which has not been controlled by a strictly case-by-case consideration of antenna tower applications. Second, spelling out the Commission's policy should assist prospective applicants in making realistic antenna tower plans, thus hopefully avoiding many lengthy and costly administrative proceedings before both the Federal Aviation Agency and the Commission. Finally, the policy provides sufficient flexibility, by recognizing that there may be compelling public interest reasons in an exceptional case for an antenna tower higher than 2,000 feet above ground.

We recognize that there are arguments against any specific ceiling on antenna heights. An antenna tower of any height may constitute a menace to air navigation, depending on its proximity to airports and busy airways as well as other factors. However, the public interest in broadcast service may in some instances call for an antenna tower higher than any particular maximum imposed. We are nevertheless convinced that the public interest requires a specific ceiling to halt the upward trend in antenna tower heights, and that 2,000 feet above ground is both realistic and appropriate.

We believe that, in general, antenna heights over 2,000 feet are not necessary to provide adequate broadcast service. In this connection, we note that our rules have long provided that any television broadcast station with an antenna exceeding 2,000 feet above average terrain must operate with less than maximum power.[1] Moreover, there is currently but one antenna tower over 2,000 feet above ground which is in operation, and construction permits are outstanding for only two additional such towers. Thus, the 2,000 feet height accords, in general, with the current maximum antenna tower height, and minimizes any question of competitive advantage resulting from higher towers already authorized.

We wish to emphasize that the policy we are adopting is applicable solely to towers over 2,000 feet above ground. It indicates no intention to grant all applications proposing towers of less than 2,000 feet above ground. Such applications will continue to be examined on a case-by-case basis in accordance with established

[1] Television broadcast stations in Zone I on Channels 2–13 must use less than maximum power if they employ antennas exceeding 1,000 feet above average terrain.

procedures and criteria to determine whether a proposed tower constitutes a menace to air navigation.

The Commission has coordinated this public notice with the Federal Aviation Agency, and that agency is in full accord with its issuance.

Adopted May 26, 1965.

FEDERAL COMMUNICATIONS COMMISSION.

F.C.C. 65R–199

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of CHARLES W. JOBBINS, COSTA MESA-NEWPORT BEACH, CALIF., ET AL. For Construction Permits | Docket No. 15752 through 15766 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. Before the Review Board for consideration is a motion to enlarge, change and delete issues, filed January 22, 1965, by Crown City Broadcasting Company (Crown).[1] Crown seeks deletion of a financial qualifications issue and five engineering issues, which were designated against all applicants for the existing KRLA facilities (Pasadena applicants) insofar as they apply to its application.[2] The engineering issues relate to objectionable nighttime interference to Station KFAB, Omaha, Nebraska; objectionable nighttime interference to Station KBND, Bend, Oregon; whether Crown will be able to adjust and maintain the directional antenna system it proposes; whether conditions exist in the vicinity of the antenna system which would distort Crown's proposed antenna radiation pattern; and whether the proposal would involve 2 mv/m and 25 mv/m overlap with Station KSDO, San Diego, California. Crown also asks the Board to add the following three issues:

To determine whether a grant of the application of Storer Broadcasting Company would reduce the number of services available and deprive the city of Los Angeles and its surrounding area of a broadcast service on 1020 kc which may not under the Rules of the Commission be granted again for a similar operation in Los Angeles.

To determine whether or not the proposed operation of Pasadena Broadcasting Company will adversely affect the operations and testing conducted at the El Monte, California, plant of Space General, a Division of Aerojet-General Corporation.

To determine the nature and extent of existing standard broadcast programming rendered by stations licensed to Pasadena, California, and to determine whether such programming fully meets the needs of Pasadena.

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[1] The pleadings before the Board for consideration are listed in the attached Appendix. The Board notes that the number of separate pleadings filed in response to Crown's motion is far in excess of the number contemplated by the Rules. Contrary to the provisions of Rule 1.45(b), which states explicitly that "separate replies to individual oppositions shall not be filed," Crown filed eight separate replies, instead of one reply, to the various oppositions; moreover, most of the replies contain no original matter but merely refer to other replies. Also burdening the record are three separate responses to Crown's motion filed by Storer. No valid reason appears to warrant such a procedure. This proceeding is an unusually complicated one; the parties are advised not to make it more complex than it is.

[2] In its reply to the Bureau's opposition, Crown withdrew a request for modification of an ordering clause. in light of the Bureau's explanation of the clause.

2. In support of its request for deletion of the first four of the engineering issues, Crown relies on engineering exhibits offered with its application which allegedly substantiate Crown's assertion that none of the issues is needed. Petitioner further relies upon the skeleton proof of performance filed with the Commission on November 18, 1964, by Oak Knoll Broadcasting Corporation, the interim operator of the KRLA facilities, and on a January 8, 1965, letter from KFAB to the Commission commenting on Oak Knoll's skeleton proof. Crown states that since its proposal, in relevant part, is similar to the Oak Knoll operation, KFAB's acceptance of the skeleton proof indicates that KFAB could have no valid objection to the proposed Crown operation.

3. However, KFAB does oppose deletion of the three issues which concern it, stating that its limited comments on Oak Knoll's skeleton proof of performance do not concede that Oak Knoll's pattern would remain in adjustment, or that KFAB would not expect a more convincing showing of non-interference and non-distortion from a new and permanent operation. Oppositions to deletion of all four issues were filed by the Broadcast Bureau, Orange Radio, Inc. (Orange), and Western Broadcasting Corporation (Western); Storer Broadcasting Company (Storer) opposes deletion of the issue as to interference to KFAB, the antenna issue, and the distortion issue; and KBND opposes deletion of the issue as to interference to its operation. In its reply to the Broadcast Bureau's opposition, Crown asks that the Board hold the petition for deletion of these four issues in abeyance pending acceptance by the Hearing Examiner of an amendment to Crown's application. This request is supported by a joint statement from the other Pasadena applicants (Goodson-Todman, Inc.; KFOX, Inc.; Pasadena Community Station, Inc.; and The Bible Institute of Los Angeles, Inc.), who propose similar amendments.[3] Neither the arguments advanced by Crown in the moving petition, nor the cited amendments, obviate the need for an evidentiary hearing for resolution of the interference, directional antenna adjustment and antenna site problems designated in this proceeding. Except in unusual circumstances, not here present, petitions to delete issues on the basis of material contained in pleadings or amendments will be denied; the hearing is the proper forum for the introduction of evidence. See *United Artists Broadcasting, Inc.*, FCC 64R–161, 2 RR 2d 295; *L. B. Wilson, Incorporated*, FCC 63R–58, 24 RR 1019.

4. Crown's request for deletion of the overlap issue is likewise based on the engineering exhibits submitted with its application. Crown argues that the Commission acted improperly in designating the issue as to overlap of its 25 mv/m contour with the 2 mv/m contour of Station KSDO because the engineering data submitted by Crown's engineer demonstrates that no overlap would exist between Crown and KSDO. Crown asserts that the overlap issue was erroneously applied to its proposal on the basis of engineering

[3] These amendments, insofar as amendment of the nighttime directional proposals is involved, were accepted by Order of the Hearing Examiner, FCC 65M–449, released April 14, 1965. KFOX, Inc., is no longer a party to this proceeding, its application having been dismissed by Order of the Hearing Examiner (FCC 65M–596), released May 12, 1965.

statements of other Pasadena applicants which indicated that their proposals would involve slight overlap. Crown concedes that the Commission gave specific consideration to the engineering data relied upon here, but argues that the Commission went on to question the validity of Crown's showing simply because the engineering of some of the other applicants showed slight overlap. Crown contends that the Commission may not add an issue "based on an arbitrary assumption that Crown City is proposing the same type of operation as any other applicant in this proceeding." The issue could be applied to its proposal, argues petitioner, only on some independent showing that it is specifically required; since the Pasadena applications reveal differences in radiation, coverage and other factors bearing on the overlap issue, it is arbitrary to "lump all of the proposals together" for purposes of the overlap issue.

5. Deletion of the overlap issue is opposed by Orange, Western and the Broadcast Bureau, because the engineering statement upon which Crown now relies was before the Commission at the time of designation. Orange opposes "unilateral by-passing" of this issue in hearing, particularly in view of the complex engineering designs and arrays proposed by the various applicants, and points out that joint measurements to determine the location of KSDO's 2 mv/m contour which are being undertaken by the Pasadena applicants pursuant to the Hearing Order (FCC 64–1195, released December 31, 1964) may have significant bearing on the overlap question. Western argues that the issue was added for good and sufficient reasons set forth in the designation Order and, due to the absence of new allegations, the petition does not satisfy Section 1.229 of the Commission's Rules. The Bureau rejects Crown's argument that a separate, independent showing as to each applicant was a prerequisite to the Commission's inclusion of this public interest issue.

6. Crown's assertion that there is no basis for inclusion of an overlap issue as to its proposal must be rejected in view of the following statements of the Commission, after specific consideration of all the facts now before the Board, in paragraph 15, I–B, (6) of its designation Order:

> The applicant [Crown] indicates that this application is for essentially the same facilities formerly authorized to KRLA. However, the applicant sets forth the following exceptions and variations from the former KRLA operation: . . . (c) No overlap of the proposed 25 mv/m contour with the KSDO 2.0 mv/m contour is shown, but they are indicated to be tangent; . . .
>
> In light of our findings pertaining to the suitability of the proposed antenna site and the feasibility of adjusting and maintaining the proposed antenna systems of *all* the applcations specifying the facilities formerly authorized to KRLA . . . substantial questions exist with respect to the claims of Crown City [concerning *inter alia*, the lack of overlap with Station KSDO]. (Emphasis added.)

As the Commission's comments and Exhibit E–7 to Crown's application demonstrate, petitioner's assertions oversimplify the situation. The Commission's hearing Order states, *inter alia*, that in light of site suitability and adjustment problems as to Crown's application, a substantial question exists as to its claims concern-

ing the location of its 25 mv/m contour and the 2 mv/m contour of Station KSDO.[4] Under the circumstances, there is no justification for deletion of the issue. See *L. B. Wilson, Incorporated, supra; Marion Moore,* FCC 65R–53, released February 8, 1965.

7. The Review Board is also asked to delete the financial issue designated against Crown. Crown alleges that the issue was based on "erroneous assumptions and clear inconsistencies with the Crown City application" and that the petition sufficiently clarifies the matter to permit a finding of financial qualification by the Board. Cited as error are the following assumptions: that ffi ;$1,426,784 would be required for construction and three months' operation since acquisition of the present KRLA site and equipment would require $1 million in cash, whereas in fact it would involve a maximum down payment of $250,000, the balance to be spread over a period of years; that no definite arrangement had been made to procure the site, whereas in fact KRLA is committed to make the site available to any successful Pasadena applicant, in view of which no contract of sale in favor of any applicant is possible at this time; that $50,000 financing is available from the Crown partners, whereas in fact $500,000 was shown available on the application; that no partnership agreement is in force, whereas in fact such an agreement is in force; and that the $1 million loan commitment to the partnership must be personally endorsed by each of the eleven applicants, which is allegedly a "particularly unnecessary and inappropriate" requirement.

8. Crown's request for deletion of the financial issue, which is opposed by Western, Storer and the Broadcast Bureau, must be denied. No change of circumstances has occurred since the issue was designated and crown has not shown that the Commission was acting under a misapprehension of the facts at that time. See *Marion Moore, supra; Community Radio of Saratoga Springs, New York, Inc.,* FCC 64R–459, 2 RR 2d 644. Crown challenges the Commission's finding that site acquisition will cost $1 million; however, letters in support of its petition merely indicate a down payment of "not less than $100,000". The Commission was thus unable to isolate the sum initially involved and accordingly charged Crown with the full amount. To meet this commitment, it was necessary that Crown be credited with the $1 million bank loan cited in its application. Again, however, the Commission was unable to make the requested finding because the loan was conditioned upon the personal endorsement of each of the eleven partners but no assurance was given that such endorsements would in fact be made.[5] In requesting deletion Crown merely charges that these two findings, upon which its financial qualification depends, were improper. However, this is not the proper forum for petitioner to urge, initially, its interpretation of the facts. The issue was designated in order that such matters could be clarified and resolved through the hearing process. In the

[4] In a recent amendment, see footnote 3 above, Crown states that field intensity measurements are being made to establish the exact location of the KSDO 2 mv/m contour. Engineering statement to Amendment, page 2.

[5] The designation Order did not, as alleged by Crown, state that the commitment would not be considered binding absent the actual endorsements, which would naturally not be made before the loan is consummated.

absence of a clear showing that the Commission was acting under a misapprehension of the facts when it designated the issue, a motion to delete will not be entertained. See *Cleveland Broadcasting, Inc.*, FCC 63R–519, 1 RR 2d 676.

9. Crown's first request for addition of an issue would inquire into the effect on the use of 1020 kc if Storer's application for 1110 kc is granted. Crown argues that an issue is required because grant of Storer's 1110 kc application would result in loss of the 1020 kc operation to Los Angeles; permanent loss of the frequency to California under Rule 73.22(a); and permanent loss of the frequency anywhere for a limited time operation under Rule 72.23(b). In opposing addition of the issue as to Storer, the Bureau cites the failure to offer supporting allegations and argues that the Section 307(b) issue will permit consideration of the loss of frequency question insofar as relevant. Storer does not challenge the relevance of inquiry into the respective needs of Los Angeles and Pasadena but opposes Crown's wording of the issue. In its reply pleading, Crown indicates that its request was based on the assumption that the matters raised would not be subsumed under the 307(b) issue and, apparently in reliance of the Board's adoption of the position taken by the Bureau, conditionally withdraws its request.

10. A similar request, supported by like allegations, was made by California Regional Broadcasting Corporation in a petition to enlarge issues filed on January 22, 1965. In a Memorandum Opinion and Order (FCC 65R–185), released May 24, 1965, the Review Board declined to add the issue. Crown's request for an issue will likewise be denied for the reasons stated in our earlier opinion.

11. In requesting an issue to determine whether Pasadena's proposal would adversely affect operation of the Space General plant, Crown originally alleged that the close proximity of a high powered AM facility to "the sensitive devices and testing operations carried on at Space General will be a severe burden on the latter, and will impair its ability to continue existing electronic test operations at the plant." The only support for Crown's request was the affidavit of one of its principals, Donald C. McBain, stating that Pasadena's proposed transmitter site is within ¼ mile of Space General; that McBain has investigated the area and Space General's operations; that Space General "carries on extensive electronic testing and development, much of which is classified;" that KRLA's present operation is "coordinated with the Space General test operations;" and that any operation within ¼ mile will "cause excessively high voltages at the test site of Space General."

12. Pasadena would have this portion of Crown's pleading summarily rejected as lacking the specificity and probably also the personal knoweldge required by Rule 1.229; there is no statement of what operations would be impeded; and it is not shown whether McBain is an engineer or whether he has clearance to check Space General's operations, which he himself describes as highly classified. The Bureau dismisses Crown's allegations as pure hearsay;

points out that Space General itself has made no objection; and reiterates that McBain has established neither his credentials nor the basis of his knowledge.

13. Crown's reply to the oppositions alleges that since the oppositions do not deny potential disruption of Space General's operations they must be held to have admitted it; that they rely on the technicalities of Rule 1.229 which Crown has in fact satisfied; and that Pasadena is improperly requiring Crown to plead evidence in proof of allegations. The reply also raises several new matters, based on affidavits of its consulting engineer, the Research and Education Director of Space General, the explosive coordinator for Space General, the Director of Electronic Engineering for Space General, and two employees of Hoffman Electronics, whose operations Crown now alleges would also be affected, requiring modification of the requested issue to relate to Hoffman as well as Space General. These affidavits constitute wholly new matter and the reply will accordingly be stricken.[6] See *Smackover Radio, Inc.*, FCC 62–81, 22 RR 865. However, because of the serious nature of the allegations made by Crown, the Review Board, on its own motion, has considered these new matters on the merits. We find that the affidavits indicate potential adverse effects upon the operations of Space General from the proposed operation, although by the very nature of the services involved—electronic research, development and experimental design work on antennas, control servo devices, and telemetry using frequencies ranging from audio to ultra microwave—it is difficult to determine which aspect of the services would be affected and whether the adverse effects would be of recurring types. Space General has, moreover, been permitted by the Examiner (FCC 65M–636), released May 21, 1965), to intervene as a party in this proceeding contingent upon addition of this issue and for the limited purpose of adducing evidence relevant thereto. Due to the complexity of the problem involved and the classified nature of the work performed, the issues will be enlarged to allow Space General to bring forward evidence which it is in the best position to present. For these same reasons it would be appropriate to place the burden of proceeding with the introduction of evidence on this issue upon Space General.

14. With respect to Hoffman Electronics similar, but less adequately supported questions are raised. No petition to intervene has been filed by Hoffman, and, in the circumstances, the factual showing before the Board as to Hoffman does not warrant enlargement of the issues.

15. Crown's final request is for an issue as to the nature and extent of the programming of existing Pasadena standard broadcast stations and whether such programming meets the community needs. The request is based on the Commission's statement in its opinion authorizing interim operation of the KRLA facilities by

[6] On March 22, 1965, Pasadena filed a motion to strike Crown City's reply or, alternatively, accept responsive pleading of Pasadena Broadcasting Company. In view of our ruling as to Crown's reply pleading, Pasadena's motion to strike and its concurrently filed response to Crown City's reply which is not authorized by the rules, as well as Crown's opposition to motion to strike, filed March 31, 1965, will be dismissed as moot.

Oak Knoll Broadcasting Corp., FCC 64–665, 2 RR 2d 1011, 1017, that the four existing transmission services "are of specialized types only partially satisfying the total needs and interests of the populations involved. . . ." This request is opposed by Orange, Topanga-Malibu Broadcasting Company (Topanga) and the Bureau. The Bureau takes the position that Crown's petition should be denied for lack of specificity as to the objectives of the issue, and failure to articulate its relevance to the ultimate public interest determination. Orange and Topanga argue that Crown has failed to make a threshold showing of facts of decisional significance; that the petition relies upon conclusionary statements and fails even to satisfy the basic requirements of Rule 1.229(c); that information derived from the interim proceeding does not relieve the parties here of any obligations of proof since conclusions reached in that proceeding were limited to the interim grant and might well be without significance to this decision; and that the Pasadena applications must in any case be treated as applications for Los Angeles.

16. The requested issue will not be added. Neither the petition nor the reply pleading does more than make the conclusionary assertion that an issue is required. Crown's reliance upon isolated statements in the *Oak Knoll* opinion, *supra,* is misplaced. The decisive factor in the interim grant to Oak Knoll was Oak Knoll's status as the only party not an applicant for a regular license for the KRLA facilities. The issue requested by Crown is also not supported by a sufficient showing of facts of decisional significance. See *Service Broadcasting Corp.,* FCC 63R–234, 25 RR 445; and *Cookeville Broadcasting Company,* FCC 60–101, 19 RR 892.

Accordingly, IT IS ORDERED, This 28th day of May, 1965, That the motion to enlarge, change and delete issues, filed January 22, 1965, by Crown City Broadcasting Company, IS DENIED; and

IT IS FURTHER ORDERED, That those portions of the Reply to Opposition of Pasadena Broadcasting Company, filed March 1, 1965, by Crown City Broadcasting Company, which constitute new matter, ARE STRICKEN; and

IT IS FURTHER ORDERED, That the motion to strike Crown City's reply, or alternatively, accept response of Pasadena Broadcasting Company, filed March 22, 1965, by Pasadena Broadcasting Company; the response of Pasadena Broadcasting Company to Crown City's reply, filed March 22, 1965, by Pasadena Broadcasting Company; and the opposition to motion to strike, filed March 31, 1965, by Crown City Broadcasting Company, ARE DISMISSED as moot; and

IT IS FURTHER ORDERED, on the Review Board's own motion, that the issues in this proceeding ARE ENLARGED by addition of the following:

> To determine whether the proposed operation of Pasadena Broadcasting Company would adversely affect the operations conducted at the El Monte, California, plant of Space General, a Division of Aerojet-General Corporation; and

IT IS FURTHER ORDERED, That the burden of proceeding

with the introduction of evidence on the issue concerning operations of Space General IS PLACED on Space General.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

APPENDIX

1. Motion to enlarge, change and delete issues, filed January 22, 1965, by Crown City Broadcasting Company.
2. Opposition, filed February 11, 1965, by KFAB Broadcasting Company.
3. Opposition, filed February 15, 1965, by Central Oregon Broadcasting Company.
4. Opposition, filed February 15, 1965. by Orange Radio, Inc.
5. Opposition, filed February 15, 1965, by Pasadena Broadcasting Company.
6. Statement regarding petition to enlarge the issues, filed February 15, 1965, by Storer Broadcasting Company.
7. Opposition, filed February 15, 1965, by Topanga Malibu Broadcasting Company.
8. Opposition, filed February 15, 1965, by Western Broadcasting Corporation.
9. Opposition to petition to delete issues, filed February 15, 1965, by Storer.
10. Opposition to petition to delete the issue, filed February 15, 1965, by Storer.
11. Opposition, filed February 15, 1965, by the Broadcasting Bureau.
12. Reply to Central Oregon Opposition, filed March 1, 1965, by Crown.
13. Reply to Orange opposition, filed March 1, 1965, by Crown.
14. Reply to Toganga Malibu opposition, filed March 1, 1965, by Crown.
15. Reply to Bureau opposition, filed March 1, 1865, by Crown.
16. Reply to Pasadena opposition, filed March 1, 1965, by Crown.
17. Reply to oppositions of Storer, filed March 1, 1965, by Crown.
18. Reply to Western opposition, filed March 1, 1965, by Crown.
19. Reply to KFAB opposition, filed March 1, 1965, by Crown.
20. Joint statement with respect to the Broadcast Bureau's opposition, filed March 1, 1965, by Goodson-Todman Broadcasting, Inc., KFOX, Inc., Pasadena Community Station, Inc., and The Bible Institute of Los Angeles, Inc.
21. Motion to strike Crown City's reply or, alternatively, accept responsive pleading of Pasadena Broadcasting Company, filed March 22, 1965, by Pasadena.
22. Response of Pasadena Broadcasting Company to Crown City's reply, filed March 22, 1965, by Pasadena.
23. Opposition to motion to strike, filed March 31, 1965, by Crown.

F.C.C. 65R–205

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| JOE ZIMMERMANN, ARTHUR K. GREINER, GLENN W. WINTER, WILLIAM W. RANOW, ROBERT M. LESHER D.B.A. LEBANON VALLEY RADIO, LEBANON, PA. | Docket No. 15835<br>File No. BP–16098 |
| JOHN E. HEWITT, THOMAS A. EHRGOOD, CLIFFORD A. MINNICH, AND FITZGERALD C. SMITH D.B.A. CEDAR BROADCASTERS, LEBANON, PA. | Docket No. 15836<br>File No. BP–16103 |
| CATONSVILLE BROADCASTING CO., CATONSVILLE, MD. | Docket No. 15838<br>File No. BP–16105 |
| RADIO CATONSVILLE, INC., CATONSVILLE, MD. | Docket No. 15839<br>File No. BP–16106 |
| COMMERCIAL RADIO INSTITUTE, INC., CATONSVILLE, MD. | Docket No. 15840<br>File No. BP–16107 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSTAINING; BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it for consideration two petitions to enlarge issues,[1] filed by Cedar Broadcasters (Cedar) against Lebanon Valley Radio (Valley).[2] One requests an issue as to Valley's technical qualifications and the other requests an issue to Valley's financial qualifications.

2. Valley seeks an authorization to construct a standard broadcast station on 940 kc with 1 kw power, daytime only, at Lebanon, Pennsylvania. Along with other applications (of which only 5 remain), Valley's application was designated for hearing by Commission Order, FCC 65–102, released February 15, 1965. In the designation Order, the Commission stated that, except with respect to the issues specified, Valley is legally, technically, financially, and otherwise qualified to construct and operate as proposed.

[1] Under consideration are the following pleadings: (1) Petition to enlarge issues as to technical qualifications of Lebanon Valley Radio, filed March 5, 1965, by Cedar Broadcasters; (2) Broadcast Bureau's comments, filed March 29, 1965; (3) Opposition, filed March 29, 1965, by Lebanon Valley Radio; (4) Reply, filed April 14, 1965, by Cedar Broadcasters; (5) Petition to enlarge issues pertaining to financial qualifications; filed March 5, 1965, by Cedar Broadcasters; (6) Broadcast Bureau's Comments, filed March 29, 1965; (7) Opposition, filed March 29, 1965, by Lebanon Valley Radio; and (8) Reply, filed April 14, 1965, by Cedar Broadcasters.

[2] Included in the petition to enlarge issues pertaining to financial qualifications is the request for such an issue also against Lebanon Valley Broadcasting Company. Each request is rendered moot by the dismissal with prejudice of the Lebanon Valley Broadcasting Company application by Order, FCC 65M–348, released March 23, 1965.

*Technical Qualifications*

3. Cedar requests addition of an issue:

to determine whether the proposal of Lebanon Valley Radio would provide coverage of the city sought to be served, as required by Section 73.188(b) (1) of the Commission's Rules, and, if not, whether circumstances exist which would warrant waiver of that Section.[3]

In support of its request, Cedar attaches to its petition a statement by a registered consulting electronics engineer. The statement indicates that the engineer examined the application of Valley and found that Valley's transmitter site would be located almost four miles northeast of the center of Lebanon. The engineering statement also points out that Figure 1 to such application shows that, based upon the use of an antenna efficiency of 182.5 mv/m unattenuated at one mile, and a conductivity of four millimhos per meter as shown on the Commission's Map of Estimated Ground Conductivity (Figure M–3 of the Rules), the 25 mv/m field intensity contour of the Valley proposal extends beyond the main business district of Lebanon by a distance of 0.3 mile. The consultant then notes that if the ground conductivity between Valley's proposed antenna site and Lebanon were slightly less than is indicated by Figure M–3, the proposal (which, according to Figure 1 of Valley's application, complies with the provision of Section 73.188(b)(1) of the Rules) would no longer meet the requirements of the Rules. In support of this contention, reference is made to the Commission's designation Order in *Charlottesville Broadcasting Corporation* (*WINA*), FCC 65–147, released February 25, 1965.[4]

5. Both Valley and the Broadcast Bureau oppose addition of the requested issue. Valley states that petitioner does not suggest that any measurements ever made in the general area of Lebanon indicate that the conductivity would be less than that specified by Figure M–3. Further, Valley submits that its search of the Commission's files failed to reveal any measurements which would tend to indicate in any way that the conductivity between Valley's proposed site and the Lebanon business district is less than the value specified on Figure M–3. Valley further notes that such path involves flat terrain without features which might tend to diminish the average conductivity in the area. The Bureau, citing the li- the average conductivity in the area. The Bureau, citing the license file of Station WLBR, Lebanon, Pennsylvania, states that its analysis indicates that the conductivity values in the area, as

[3] Rule 73.188(b) provides that the site selected should meet the following condition (among others): (1) "A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city."

[4] Paragraph 9 b of *Charlottesville* states:

"WINA, in its application, indicates that, on the basis of Figure M-3 values of conductivity, the proposed operation complies with the coverage requirements of Section 73.188 of the Commission's Rules. It is noted, however, that if the values of conductivity from the proposed antenna site towards the city were slightly less than is indicated by Figure M-3, the proposal would not comply with Section 73.188(b) (1) of the Rules in that a minimum field intensity of 25 mv/m would not be obtained over the business or factory areas of the city during both daytime and nighttime operation. In addition, if the values of conductivity from the proposed antenna site were slightly less than is indicated by Figure M-3, the proposed nighttime limitation contour would not cover the city as required by Section 73.188(a) (1) of the Commission's Rules. Since Figure M-3 values on conductivity are not intended to accurately indicate the conductivity over short paths, as herein involved, the applicant will be required to submit field intensity measurement data made from the proposed antenna site in a direction towards the city so that a determination can be made as to whether or not the proposed operation would provide adequate coverage to the city as required byS ection 73.188(a) (1) and (b) (1) of the Commission's Rules."

shown by information on file with the Commission, in the main either equal or exceed the value specified on Figure M–3.[5]

6. The provisions governing the addition of issues to those previously designated are set forth in Section 1.229 of the Commission's Rules. Subsection (c) thereof [6] requires specific allegations of fact supported by affidavits of persons with personal knowledge thereof. Petitioner's engineering statement contains no supporting field intensity measurements or other data indicating that the ground conductivity between Valley's transmitter site and Lebanon is other than that indicated on Figure M–3. Nor does petitioner allege that the Commission acted under a misapprehension of the facts when it did not include the requested issue in its designation Order herein. In this connection, as the pertinent paragraph from *Charlottesville* cited in footnote 4 above establishes, possible rule violations other than those alleged here were considered by the Commission when designating the issue in *Charlottesville*. Thus, the Commission's exercise of its judgment that in the factual situation of *Charlottesville* such an issue should be designated does not constitute a basis for adding the issue here. The request for the addition of a Rule 73.188(b)(1) issue will, therefore, be denied.

*Financial Qualifications*

7. Valley is presently a partnership composed of the five above-captioned individuals. It proposes to incorporate in the event of grant. Each of the five equal partners would then have "the right to acquire his proportionate 20% interest in said corporation." And the parties agreed that the first roster of officers shall consist of: Zimmermann as President, Greiner as Treasurer, Winter as Vice-President and Secretary.

8. In support of its request for a financial issue against Valley, Cedar contends that all the principals of Valley have not shown their ability to meet their commitments to the applicant. Exhibit 7 to Valley's application indicates that $26,263 will be required to construct the station plus $15,000 to operate the station for three months, making a total of $41,263 required.[7] To meet this, Valley will have deferred equipment credit of $13,157 plus paid-in capital of $5,300. The remaining $22,806, Valley's application indicates, will be obtained through calls on its five principals for funds up to $7,500 from each of them, for a total of $37,500. This would be $14,694 more than is estimated by Valley as necessary. Cedar, in its petition, does not challenge the showing of two of the principals of Valley as to their ability to meet their commitments to the extent of $7,500 if required. These are Zimmermann and Rakow, who would, thus, supply $15,000, leaving a total of $7,806 still needed. Cedar's petition does question, however, the financial showing of the

[5] Measurement data filed on September 13, 1962, appears in the Station WLBR license file BL–9671, data filed on August 8, 1950 appears in file BL–4147.

[6] Section 1.229 Motions to enlarge, change or delete issues states:

"(c) Such motions, oppositions thereto, and replies to oppositions shall contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person having personal knowledge thereof."

[7] This sum includes approximately $6,000 more than is indicated in Section III of Valley's application and includes a reserve for unbudgeted expenses, pre-air expense and lease rental.

three remaining principals, Lesher, Winter, and Greiner.

9. Since Cedar in its reply further concedes that Lesher has the ability to meet his $7,500 commitment, the details as to the various contentions relating to Lesher's finances will not be described. Suffice it to say that Exhibit 10–e to the application, constituting Lesher's financial statement, shows a net worth of $229,216.75 with no liabilities. His liquid assets are in a checking account, a savings and loan institution, a mutual fund, and a listed security to the extent of over $75,000. With the $7,500 available from Lesher, Valley is still, according to Cedar's analysis, lacking in funds to meet its requirements by $306.

10. In the case of Winter a balance sheet as of January 1, 1964, was included as Exhibit 10–c to the Valley application. It shows total assets of $60,329, with liabilities consisting of a mortgage in the amount of $4,760 (and no current liabilities), giving a net worth of $55,569. Cash on hand or in a bank is listed at $1,750. In addition thereto, the Clarke Mortgage Company advised Winter it "would be able to grant you a new mortgage of $14,250." Since the present mortgage is $4,760, the bank stated that "from this transaction you would then realize cash flow of $9,470." Cedar contends that the financial capacity of the Clarke Mortgage Company is not established and, even if it were, this letter does not constitute a firm commitment.

11. Winter's financial statement shows unchallenged available cash of $1,750, not affected by any current liabilities. With such amount available to it, Valley will have in excess of the amount needed from him (namely, $306.00) to meet the requirements of construction and initial operation of its proposed station.

12. The Commission does not require an applicant for a standard broadcast facility to show the availability of more than sufficient funds to construct and initially operate the proposed facility. Since Valley has demonstrated its financial ability to the extent required,[8] we do not deem it necessary in these circumstances to order an evidentiary hearing to determine whether the applicant has the financial ability which it claims, but which is in excess of the requirements imposed by this Commission. The request for a financial issue against Valley will be denied.

Accordingly, IT IS ORDERED, This 2nd day of June 1965, That the petition to enlarge issues as to technical qualifications of Lebanon Valley Radio, filed March 5, 1965 by Cedar Broadcasters IS DENIED; and that the petition to enlarge issues pertaining to financial qualifications, filed March 5, 1965 by Cedar Broadcasters IS DISMISSED as moot to the extent indicated in this opinion and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[8] It is unnecessary to treat the contentions pertaining to the financial qualifications of the fifth principal, Greiner. The Commission has stated that whether certain stockholders can meet their stock commitments becomes irrelevant in determining the applicant's financial qualifications if funds are available from other sources sufficient to meet the projected costs and expenses. *Greater New Castle Broadcasting Corp.*, 8 RR 29 (1952); also compare *Oregon Television, Inc.*, 9 RR 1401 (1954).

F.C.C. 65R–200

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
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| JOE ZIMMERMANN, ARTHUR K. GREINER, GLENN W. WINTER, WILLIAM W. RANOW, ROBERT M. LESHER D.B.A. LEBANON VALLEY RADIO, LEBANON, PA. | Docket No. 15835<br>File No. BP–16098 |
| JOHN E. HEWITT, THOMAS A. EHRGOOD, CLIFFORD A. MINNICH, AND FITZGERALD C. SMITH D.B.A. CEDAR BROADCASTERS, LEBANON, PA. | Docket No. 15836<br>File No. BP–16103 |
| CATONSVILLE BROADCASTING CO., CATONSVILLE, MD. | Docket No. 15838<br>File No. BP–16105 |
| RADIO CATONSVILLE, INC., CATONSVILLE, MD. | Docket No. 15839<br>File No. BP–16106 |
| COMMERCIAL RADIO INSTITUTE, INC., CATONSVILLE, MD. | Docket No. 15840<br>File No. BP–16107 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. Before the Review Board for consideration is the petition of Cedar Broadcasters (Cedar) to enlarge the issues in this proceeding: [1]

To determine whether Lebanon Valley Radio, in view of its staff proposals and its proposed live newscasts, can fulfill its representations to the Commission.

The designation Order (FCC 65 102, released February 15, 1965) specified a contingent standard comparative issue in the event that the Lebanon proposals prevail under the Section 307(b) issue.

2. Cedar's petition alleges that Lebanon Valley Radio (Valley) proposes 18.8% live news programming; that Valley proposes no full-time newsman but will assign news reporting and copy writing as ancillary duty to its Program Director; and that, as shown by the attached affidavit of a "veteran newsman," this proposal "is incapable of execution."

3. The Broadcast Bureau states that the requested issue is not necessary because the staffing proposal of Valley will be explored under the contingent standard comparative issue. Valley would similarly rely on the existing issue for the adduction of staffing

* The competing application of Lebanon Valley Broadcasting Company was dismissed by Order (FCC 65M–348) released March 23, 1965.

[1] The following pleadings are before the Board: petition to enlarge issues as to programming representations, filed March 8, 1965, by Cedar Broadcasters; comments, filed March 29, 1965, by the Broadcast Bureau; opposition, filed March 29, 1965, by Lebanon Valley Radio; and reply to oppositions, filed April 14, 1965, by Cedar Broadcasters.

evidence. Valley further states that "Cedar assumes erroneously that it knows how Lebanon Valley will secure and prepare its live news;" that Cedar's assumptions as to number of personnel involved are likewise wrong; that Exhibit 12 to Valley's application shows that the "assistant manager will also be responsible for news programming in his capacity of public affairs direction;" that Cedar will have a full opportunity to investigate Valley's actual newscast proposals at hearing on the basis of actual plans then submitted by Valley; and that "the utter weakness of Cedar's position is shown by the fact that Cedar proposes to broadcast more live programming than Lebanon Valley with the same number of program staff (seven), and proposes to broadcast approximately the same amount of live news (17%)...."

4. In reply Cedar states that comparative consideration of Valley's staff proposal is not adequate because the proposal does not indicate a precise number of personnel who are allocated specific functions, and there are questions raised as to the novelty and complexity of the programming. Cedar contends that the failure of Valley and the Bureau to submit affidavits contradictory to the one attached to its petition "constitutes eloquent support for Valley's [sic] uncontradicted allegations." Cedar then replies to this "silence" by raising entirely new matter, not responsive to anything contained in the opposition pleadings, including a comparison of the Valley proposal with that of another station operated by one of Valley's principals. This material, which by Cedar's own admission is not responsive, will not be considered. See Rule 1.45(b). Cedar next argues that Valley's statement that Exhibit 12 to its application indicates a program staff of seven is incorrect, and that "if Valley had blocked out a chart of personnel functions as part of its application preparation, it could readily have submitted the chart to the Review Board unless the chart negated Valley's representations as to staff. If no such chart is extant, as seems to be the case," continues Cedar, "Valley's representations to the Commission and Review Board are deceitful." In any case, Cedar concludes, an issue must be added because Valley has not called attention to any station which "rewrites each and every news program beginning with a 6:30 A.M. newscast every weekday and ending 11½ hours later with a 5:00 P.M. newscast where the station does not have a fulltime newsman—has 36.8% live programming 52 weeks a year with an indefinite and unspecified number of fulltime employees on the programming department."

5. On the matters here raised there is very little difference between the two proposals: Valley would broadcast 81 hours a week, Cedar 84; Valley's programs woul dbe 36.6% live, Cedar's 39.8% live; Valley would broadcast 18.8% news, Cedar 19.75%; and the staffing proposals are likewise similar, although differently presented. Cedar lists its 12 proposed employees as: Administrative —1½; Technical—1½; Programming—7; and Sales—2. Valley has further broken down its 9 proposed employees as to specific functions, contrary to the allegations of Cedar: General Manager; Assistant Manager and Public Affairs Director; Sales Manager and Salesman; Salesman and copywriter; Chief Engineer—Maintenance an dRelief Shift Announcer; two Announcers; Program Di-

rector—News Reporter and Copywriter; and Bookkeeper—Traffic Clerk.

6. Cedar's petition, insofar as it relates exclusively to live news, is unsupported, because the affidavit filed with the petition is based on assumptions as to Valley's staff which do not accord with the facts. While it is true that Valley did not break down its staff proposal in the same categories as did Cedar, it is nevertheless also true that, as Valley stated in its opposition, the application form and Exhibit 12 thereto specifically identify two people as connected with news, and the titles and descriptions of a total of seven employees identify them with programming.[2] Thus, while Valley named no station conforming to the characteristics attributed to its proposal by Cedar, it could very well have cited Cedar's application as conforming to the characteristics of its actual proposal; and in neither case is the staffing proposal vague enough or the programming proposal complex enough to warrant consideration outside the context of the comparative issue on the basis of any prior case which has been cited or which we have been able to find. Both Valley and Cedar have given specific figures as to the total staff required to handle their similar proposals;[3] and in the light of previous cases no inadequacy is indicated. In the absence of further facts relevant to the actual proposal of Valley, tending to show the inadequacy of the proposed staff, addition of a staffing issue is not warranted. See *College Radio*, FCC 64R–515, released November 16, 1964. The cases cited by Cedar are not in point: *TVue Associates, Inc.*, FCC 64R–56, 1 RR 2d 2813, dealt with a television proposal which did not specify the total staff necessary to effectuate its 44% local live programming, stating that the given staff would be augmented as necessary with part time employees; *Semo Broadcasting Corp.*, FCC 62R–132, 24 RR 605, similarly involved addition of staffing issues against two applicants because one failed to "specify at least the minimum number of persons required to effectuate the operation as proposed;" the other applicant spoke of its "expected" staff and proposed inadequate engineering personnel. On the basis of the above, we conclude that Cedar's petition lacks sufficient factual allegations to warrant inclusion of an adequacy of staff issue against Valley.

Accordingly, IT IS ORDERED, This 28th day of May, 1965, That the petition to enlarge issues, filed March 8, 1965, by Cedar Broadcasters IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

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[2] Cedar's proposal, on the other hand, does not identify any of its program personnel, of whom there are also 7, with news as opposed to programming in general, a fact which is noteworthy in view of Cedar's suggestion that Valley's application is "deceitful" (see para. 4, *supra*) because it does not include a chart detailing program personnel functions.

[3] The fact that for similar proportions of live news and total live programming they have independently proposed the same size program staff suggests in itself that neither proposal is novel or unusual. See Spanish *International Television Company, Inc.*, FCC 64R–239, 2 RR 2d 853, where the fact that an applicant's staff proposal was much smaller than those of several other applicants was a factor in our decision to add an issue.

F.C.C. 65R–209

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of CHARLES W. JOBBINS, COSTA MESA-NEWPORT BEACH, CALIF., ET AL. For Construction Permits | Docket No. 15752 through 15766 File No. BP–16157 |

MEMORANDUM OPINION AND ORDER

BY THE REWIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Pasadena Broadcasting Company (Pasadena Broadcasting) and The Bible Institute of Los Angeles, Inc. (BIOLA) request enlargement of issues with respect to the application of California Regional Broadcasting Corporation (California Regional).[1] The Pasadena Broadcasting requested issues read as follows:

(1) To determine whether California Regional Broadcasting Corporation has reasonable assurance of being able to secure its proposed transmitter site.
(2) To determine whether California Regional Broadcasting Corporation has reasonable assurance of being able to obtain zoning approval for its proposed transmitter site.
(3) To determine whether the daytime and the nighttime proposals of California Regional Broadcasting Corporation will comply with Section 73.188(b)(1) of the Commission's Rules.
(4) To determine whether the maximum expected operating values specified for the directional antenna pattern of California Regional Broadcasting Corporation are those which can reasonably be expected to be achieved for the directional antenna array and power proposed.

The BIOLA requested issue reads as follows:

(1) To determine whether the antenna site proposed by California Regional Broadcasting Corporation is available for its proposed use.

*Availability of Site*

2. Pasadena Broadcasting's requested Issues 1 and 2 and BIOLA's requested issue are directed to whether California Regional has reasonable assurance of obtaining the use of the proposed site. Pasadena Broadcasting contends that the property on which California Regional proposes to locate its transmitter is owned by Home Savings and Loan Association and is located in West Covina;

[1] The Review Board has before it (a) petition of Pasadena Broadcasting Company to enlarge issues with respect to the application of California Regional Broadcasting Corporation, filed January 15, 1965; (b) petition to enlarge issues, filed January 22, 1965, by The Bible Institute of Los Angeles, Inc.; (c) Broadcast Bureau's opposition to Pasadena Broadcasting's petition, filed February 12, 1965; (d) Broadcast Bureau's opposition to BIOLA's petition, filed February 12, 1965; (e) opposition of California Regional, filed February 15, 1965; (f) joint reply by BIOLA and Pasadena Broadcasting, filed March 8, 1965; (g) motion to strike joint reply to oppositions, filed March 16, 1965, by California Regional; (h) supplement to motion to strike, filed March 22, 1965, by California Regional; and (i) opposition to motion to strike, filed March 23, 1965, by BIOLA.

that West Covina Planning Commission has published a booklet which indicates that every foot of the Home Savings and Loan holdings has been classified and incorporated into a comprehensive plan; that, other than the tower for police relay station, there is no indication of radio towers on the map prepared by Home Savings and Loan's architects or in the West Covina Planning Commission's booklet; and that, by superimposing the property specified by California Regional onto the map prepared by Home Savings and Loan architests, it is found that California Regional proposes to place eight radio towers, covering approximately 31 acres, on property which Home Savings and Loan has planned for such things as high-density housing, a special-use park and a highway. Pasadena Broadcasting thus argues that, after nine years of planning and with a required commencement date of January 26, 1965, it seems untenable that Home Savings and Loan would risk disruption and delay at this date by attempting to accommodate the eight radio towers of California Regional.

3. BIOLA contends that the property is surrounded by land zoned for light commercial and single residence dwellings; that an Unclassified Conditional Use Permit must be obtained before California Regional could utilize the specified land as transmitter site; and that, as of January 7, 1965, no such application had been filed with the West Covina City Planning Commission. It further contends that the land, upon which the proposed transmitter site is to be located, is a portion of a tract which is to become a large community, as prescribed in the General Use Plan now in effect in the city of West Covina and proposed in Comprehensive Property Plan, amendment number 5, submitted to the City of West Covina by the Home Savings and Loan Association; and that, when the construction by Home Savings is completed, the subject property will be completely surrounded by residential tracts, schools, parks, shopping centers and professional buildings. BIOLA contends that under California law California Regional has no reasonable assurance of receiving the required Conditional Use Permit, and that it therefore has no reasonable assurance of securing its proposed transmitter site, citing *Massillon Broadcasting Co., Inc.*, 22 RR 95 (1961); *Edina Corp.*, 24 RR 455 (1962). BIOLA further contends that there is evidence that the site is not available to California Regional due to the fact that West Covina Planning Commission has never been informed of the proposed transmitter site; and that such use would have a great impac tupon Home Savings' present plans to construct a complete community, citing *Lorenzo W. Milan and Jeremy D. Lansman*, FCC 65R–20, released January 18, 1965.

4. In opposition, California Regional submits a copy of a letter, dated March 26, 1964, from Home Savings and Loan Association, which granted California Regional a three-year option to lease a 50-acre tract within its presently undeveloped 3,500-acre holding, and an affidavit of Leonard R. Lockhart, Executive Vice-President of Home Savings and Loan Association, dated February 11, 1965, reaffirming the availability of the site and outlining the procedures to be followed to permit its use for a broadcast station transmitter site. The affidavit states that West Covina City Planning Commis-

sion has only approved a Precise Plan involving approximately a 218 acre tract, on or about January 27, 1965, and adopted a zoning ordinance for this tract; that the said tract is located some distance to the west of the site proposed by California Regional; and that the development of the remainder of the tract will take several years, depending upon the success in the development of the 218 acre increment. The Broadcast Bureau also opposes the petitions.

5. In reply to the oppositions, Pasadena Broadcasting and BIOLA filed a joint pleading wherein they presented an affidavit of a California attorney experienced in zoning problems. The affidavit outlines the difficulties California Regional may encounter in its effort to obtain a zoning approval for the proposed radio station at a specified site. California Regional filed a motion to strike the joint reply, contending that the joint reply contains new matter as to which it has not had an opportunity to respond and is violative of Section 1.45(b) of the Rules. California Regional also filed a supplement to its motion attaching an affidavit of the Planning Director of the City of West Covina in which the latter denied having stated to petitioner Pasadena Broadcasting that the planning staff's recommendation would be to deny and request by California Regional for the use of the site for its towers.

6. The requests for an issue as to whether California Regional has reasonable assurance of obtaining a transmitter site are based on petitioners' speculation as to the probable action of the zoning board on certain tract of land which is presently undeveloped. By noting the lack of correlation between the Comprehensive Property Plan before the West Covina City Planning Commissio nand the proposed use of certain tract of land for a radio station, petitioners assert that there is conflict in the planned use of the land. However, California Regional has shown that it has a three-year option to lease the land and that the proposed transmitter site is part of an area preliminarily planned for future development of the land holdings by Home Savings and Loan Association. Hence, there is no basis for adding a site availability issue. As to zoning, California Regional at this juncture has not filed an application for zoning action and the action of the zoning board remains to be seen. *KFOX, Inc.*, FCC 65R–139. While petitioners have made in some detail the extensive procedural steps which a request for appropriate zoning would entail, no showing has been made that the necessary zoning could not be obtained, instead, a difference of opinion concerning the probable action of the zoning authorities has been presented. This is an insufficient basis for adding an issue as to zoning. See *Eastside Broadcasting Co.*, FCC 63R–528, 1 RR 2d 765. To the extent that the reply pleadings rely upon factual allegations which go beyond rebutting the factual allegations in the oppositions, they will be stricken as unauthorized under the Commission's rules.

*Compliance With Section 73.188(b)(1)*

7. Referring to the provision of the Commission's hearing designation Order requiring California Regional to take field intensity measurements on Station KSDO and from California Regional's proposed site to insure that California Regional's 25 mv/m and

KSDO's 2 mv/m contours do not overlap,[2] Pasadena Broadcasting "concedes" that the Commission's action in requiring said measurements would appear to indicate the Commission's concern is that the conductivity between the measurement locations is higher than indicated by the Commission's Map of Estimated Ground Conductivity in the United States (Figure M–3 of the Rules), but contends, nevertheless, that the Commission's action indicates a reasonable doubt that its conductivity map correctly depicts the correct conductivities toward Station KSDO. After stating that its study of the proofs of performance of seven stations located in the vicinity of Crown City's site indicate variations in conductivity of from 3 to 10 millimhos per meter (mmhos/m) in the direction of Pasadena (the Conductivity Map indicates a value of 8 mmhos/m), petitioner concludes that a reasonable doubt exists as to the accuracy of the Commission's conductivity map in the vicinity of California Regional's site. Petitioner then speculates that if the conductivity between the proposed California Regional site and the business district ofg Pasadena were to drop from 8mmhos/m to a value of 5.657 mmhos/m, California Regional would fail to serve the business district of Pasadena with a 25 mv/m signal. Pasadena Broadcasting asserts that Rule 73.188 cautions the applicant about the importance of the soil or earth immediately around the site and between the site and the principal city to be served; that conductivities shown in Figure M–3 are only for general areas and over a particular path; and that the Commission, where deemed necessary, will request field intensity measurements to be made. California Regional opposes the enlargement of issues, contending that Pasadena Broadcasting has offered no factual basis for its request that an issue be added to determine California Regional's compliance with Section 73.188(b)(1) of the Rules, and that the petitioner has relied wholly upon the speculations of its consulting engineer. The Broadcast Bureau argues that California Regional is entitled to rely on the Figure M–3 conductivity. In its reply, Pasadena Broadcasting contends that, in *Charlottesville Broadcasting Corporation* (*WINA*), FCC 65–147, the Commission included an issue with respect to compliance with Section 73.188(b)(1), even though a determination of the location of 25 mv/m contour based on conductivity from Figure M–3 shows compliance with the rule.

8. Pasadena Broadcasting has failed to provide, as required by Section 1.229(c) of the Rules,[3] specific allegations of fact sufficient to support its request, therefore, its request for addition of this issue will be denied. Contrary to Pasadena Broadcasting's contention, the Commission's requirement herein that the lack of overlap of 2 mc/m and 25 mv/m contours be determined through the use of field intensity measurements, flows not from its lack of knowledge as to the accuracy of the map,[4] but from normal Commission practice in cases where its judgment indicates that meas-

[2] Issue No. 13 of the designation Order herein, FCC 64–1195, released December 31, 1964.

[3] Section 1.229(c) of the Rules provides that motions to enlarge, change or delete issues, oppositions thereto, and replies to oppositions shall contain specific allegations of fact sufficient to support the action requested.

[4] As Pasadena Broadcasting notes, the conductivity map was prepared by the Commission, and a staff member has published a paper dealing with the preparation and accuracy of the map.

urement data is desirable in insuring that such overlap is not present.[5] Overlap of 2 mv/m and 25 mv/m contours is prohibited by the Commission's Rules. The bare statement by Pasadena Broadcasting that it has studied the proof of performance data of seven stations, totally lacking supporting data, fails to meet the requirements of Section 1.299(c) of the Rules. Nor does the Commission action in *Charlottesville, supra,* serve as a basis for the addition of the issue requested here. There, an issue to determine whether an applicant would provide coverage of the city sought to be served was designated in circumstances where the Commission's map indicated a conductivity value 2 mmhos/m and an applicant would not provide the desired coverage if the conductivity from the proposed antenna site were "slightly less than is indicated by" the Commission's conductivity map. Here, petitioner states that the conductivity would have to drop from 8 mmhos/m to 5.657 mmhos/m before California Regional would fail to serve the business district of Pasadena with a 25 mv/m signal at night (Petition to Enlarge, Engineering Affidavit, pp. 6–7). *Charlottesville, supra,* merely reaffirms that the Commission, in its discretion and on the basis of the facts before it, may require an applicant to submit field intensity measurements. *Coastal Broadcasters, Inc.,* 25 RR 712, FCC 63R–252 (1963). In this instance, the Commission, in its discretion, did not add such an issue, nor has the petitioner advanced sufficient factual allegations warranting the Board to grant the petitioner's request.

*Maximum Expected Operating Values*

9. Petitioner alleged in the moving petition that the maximum expected operating values (MEOV) proposed by California Regional are not realistic because they bear no relationship to the proposed nighttime pattern, and that the applicant failed to specify MEOV's for its nighttime vertical pattern. Subsequently on February 23, 1965, California Regional filed a petition for leave to amend its application to correct and clarify its directional antenna proposal. By an Order (FCC 65M–318, released March 17, 1965), the Hearing Examiner granted the petition and accepted the amendment which specified MEOV's to the nighttime directional antenna pattern. Pasadena Broadcasting notes in the joint reply that California Regional's MEOV's ". . . now bears a relationship to the pattern." Thus, by the Examiner's acceptance of the amendment, the requested issue is rendered moot and will be dismissed.

Accordingly, IT IS ORDERED, This 2nd day of June, 1965, That the petition, filed January 22, 1965, by The Bible Institute of Los Angeles, Inc., to enlarge issues with respect to the application of California Regional Broadcasting Corporation IS DENIED; and that the petition, filed January 15, 1965, by Pasadena Broadcasting Company to enlarge issues with respect to the application of California Regional Broadcasting Corporation IS DENIED in part and IS DISMISSED in all other respects; and

IT IS FURTHER ORDERED, That the motion to strike joint

[5] *Jeanette Broadcasting Co.,* 29 FCC 44; 19 RR 480, 480b (196).

reply to oppositions, filed March 16, 1965, by California Regional Broadcasting Corporation IS GRANTED in part; and that the joint reply to oppositions, filed March 8, 1965, by The Bible Institute of Los Angeles, Inc., and Pasadena Broadcasting Company IS STRICKEN in part.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–479

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>E. O. RODEN TRADING AS BOONEVILLE BROADCASTING CO. (WBIP), BOONEVILLE, MASS.<br>Has: 1400 kc., 250 w., S.H., Class IV<br>Requests: 1400 kc., 250 w., 1 kw.-LS, S.H., Class IV<br>For Construction Permit | File No. BP–16358 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned application and a "Petition To Designate Application For Hearing", filed March 31, 1965 by Grenada Broadcasting Company, Inc., licensee of standard broadcast Station WNAG, Grenada, Mississippi. Counsel for WBIP opposed the WNAG petition by letter of April 14, 1965 principally on the procedural ground that the Commission, by Public Notice of January 7, 1965, announced that objections to WBIP application must be filed on or before February 16, 1965 and that, accordingly, the WNAG petition was not timely. On May 7, 1965, WNAG filed a reply to the letter of April 14 together with petition to accept the reply. The petition to accept the reply indicates that counsel for WNAG did not receive a copy of the letter and did not learn that such a letter had been filed until May 6, 1965.

2. WBIP's letter of opposition to the WNAG petition and WNAG's reply raise the preliminary question of whether the untimeliness of the WNAG petition renders it fatally defective or whether, as WNAG contends, the expected interference to the existing operation of WNAG would result in a modification of its license. WNAG urges that it is entitled to a hearing in view of the interference involved. In view of the fact that the operation of WBIP as proposed would effect a modification of the WNAG license, the Commission will waive the requirements of Section 1.580(i) providing that petitions directed against a pending standard broadcast application will not be accepted after a date specified in a public notice listing such application as available and ready for processing. The waiver will permit consideration of the WNAG petition on the merits.

3. In its petition Grenada states that WNAG and WBIP are Class IV stations operating on 1400 kilocycles; that WNAG's application (File No. BP–15864) for a power increase from 250 watts to 1 kilowatt was designated for hearing (Docket No. 15885)

on the ground that the WNAG proposal would cause interference to Station WDSK, Cleveland, Mississippi, a non-Class IV station; that WBIP operating as proposed would cause substantial objectionable interference to the existing 250 watt operation of WNAG, affecting 138 square miles of the area within WNAG's interference-free contour, which is approximately 10% of that area and 1,637 persons presently receiving primary service from WNAG which is approximately 4% of WNAG's primary service population; that the interference caused by WBIP together with the interference caused by a power increase of Class IV Station WJQS, Jackson, Mississippi [1] to the existing 250 watt operation of WNAG would affect 412 square miles of the area within WNAG's interference-free contour which is approximately 30% of that area and 7,455 persons presently receiving primary service from WNAG which is approximately 20% of WNAG's primary service population; and that the interference caused by WBIP and WJQS whether considered separately or collectively, is not *de minimis* but a modification of WNAG's license which raises public interest questions which cannot be resolved without a hearing. In support of this latter statement Grenada cites Grenada Broadcasting Company, Inc., Docket 15885, March 17, 1965.

4. The proposed operation of WBIP would cause interference to the existing and proposed operation of WNAG. However, WBIP's application was not timely filed for comparative consideration with the WNAG application. Moreover, as pointed out in the Commission's Report and Order, FCC 61-601, released May 4, 1961, the consolidation for hearing of proposals by Class IV stations for increased daytime power generally serves no useful purpose. Thus, the Commission will hold the above-captioned application without further action pending a final decision in the WNAG proceeding and, insofar as it requested that the two proposals be consolidated for hearing, the WNAG petition will be denied. If WNAG's application is not favorably considered, its petition will be further considered in connection with the above-captioned WBIP application. If, on the other hand, the WNAG application is granted, the authorization will be subject to the acceptance of interference from the WBIP proposal and no further consideration of petitioner's pleading will be necessary.

Accordingly, IT IS ORDERED, That, the petition tendered March 31, 1965 by the Grenada Broadcasting Company IS HEREBY DENIED insofar as indicated above and that the above-captioned application will be held without further action pending a final decision in the WNAG hearing proceeding, Docket No 15885.

Adopted June 2, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[1] The WJQS application (BP-15150) was granted by the Commission March 17, 1965.

F.C.C. 65R–223

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of FITZGERALD C. SMITH, TRADING AS SOUTHINGTON BROADCASTERS, SOUTHINGTON, CONN. | Docket No. 15871 File No. BP–16405 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Southington Broadcasters (Southington) appeals to the Review Board from the Hearing Examiner's Memorandum Opinion and Order, FCC 65M–574, released May 7, 1965, granting Meriden-Wallingford Radio, Inc.'s (WMMW) petition to intervene.[1]

2. This proceeding involves Southington's application for a construction permit for a new standard broadcast station in Southington, Connecticut. In a petition to intervene filed on April 18, 1965, WMMW sought intervention as a party under Section 309(e) of the Communications Act, and Section 1.223(a) of the Commission's Rules, claiming that it would suffer economic injury if the Southington application were granted. Southington opposed intervention on the grounds that WMMW was not an aggrieved party as the alleged economic injury was remote; and that WMMW's petition to intervene was defective in that the oath of the party in interest (required by Section 1.223(a) of the Commission's Rules) was now supplied. On May 6, 1965, the Hearing Examiner concluded that the oath of the party was not required by Section 1.223(a) of the Rules if the facts relied on are within counsel's personal knowledge. The Examiner allowed WMMW to intervene.

3. Southington's petition for review relies on the procedural defect of the missing oath by the party in interest and seeks reversal of the Examiner's action. In opposition, the Broadcast Bureau and WMMW contend that economic competition with WMMW is patent in Southington's application,[2] and that Section 1.223(a) does not require oath of the intervenor but only that of counsel if the facts alleged as the basis of the intervention are within his personal knowledge.

4. Section 1.223(a) of the Commission's Rules provides, in part, that "any person who qualifies as a party in interest . . . may ac-

[1] Before the Review Board are: (1) petition for review, filed May 14, 1965, by Southington; (2) opposition to petition for review, filed by WMMW on May 20, 1965; and (3) Broadcast Bureau's opposition to petition for review, filed May 25, 1965.

[2] Southington's engineering exhibits show that a 2 mv/m signal from its station would encompass Meriden, Connecticut, the station location of WMMW.

quire the status of a party by filing under oath . . . a petition for intervention showing the basis of its interest. . . ." The requirement that such person file "under oath" a petition to intervene should not be confused with Rule 1.52 (titled Subscription and Verification) which states that "The original of all petitions, motions, pleadings, briefs and other documents filed by *any party* represented by counsel, shall be signed by at least one attorney . . ." (emphasis added) and need not be verified unless specifically provided for. Rule 1.223(a) requires that one seeking to become a party submit the petition under oath. The provisions of Rule 1.52 refer to one who is already a party. Therefore, the oath of an officer of the corporation is required to support a petition to intervene, and the Examiner's holding to the contrary is erroneous. *Cf. Telemusic Co.*, FCC 58–953, 17 RR 754. However, inasmuch as there is no substantive challenge to WMMW's status as a party in interest, the Examiner's action allowing intervention will be affirmed. We will require that WMMW correct its petition *nunc pro tunc*. See *Johnston Broadcasting Co.* v. *FCC*, 175 F.2d 351, 4 RR 2138 (1949) and *Johnston Broadcasting Co.*, 5 RR 1320 (1950).

Accordingly, IT IS ORDERED, This 16th day of June, 1965, That the Petition for Review, filed by Southington Broadcasters on May 14, 1965, IS DENIED; and that the oath of an officer of Meriden-Wallingford Radio, Inc. (WMMW) to its petition to intervene filed on April 8, 1965, BE SUBMITTED to the Hearing Examiner, within 10 days of this Order.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

F.C.C. 65–477

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>VOICE OF DIXIE, INC. (WVOK), BIRMINGHAM, ALA.<br>Has: 690 kc., 50 kw., DA–D, Class II<br>Requests: 690 kc., 50 kw., D, Class II<br>For Construction Permit | File No. BP–8548 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration the above application and a petition filed April 5, 1965 by the applicant requesting a waiver of Section 73.35(a)[1] of the Commission's Rules and a grant of the application without hearing.

2. The ownership of WVOK and Station WBAM, Montgomery, Alabama is as follows:

| | *WVOK* % | *WBAM* % |
|---|---|---|
| William E. Benns, Sr. | 12.5 | — |
| Iralee W. Benns | 12.5 | — |
| C. M. Brennan | 50 | — |
| William E. Benns, Jr. | 25 | 45 |
| Barbara Benns | — | 5 |
| William J. Brennan | — | 45 |
| Frances V. Brennan | — | 5 |

The above individuals all serve as officers and/or directors of the respective licensee-corporations. William E. Benns, Sr. and Iralee W. Benns are husband and wife, and the parents of William E. Benns, Jr., the husband of Barbara Benns. C. M. Brennan is the father of William J. Brennan, the husband of Frances V. Brennan. In the absence of any assertion to the contrary, the Commission finds, because of the close family relationships, that the two stations are under common control. By the applicant's own admission, a grant of the application would result in an increase in the presently existing area of 1 mv/m overlap between the two stations. However, WVOK questions the applicability of the rules to its proposal reasoning that the change from directional to non-directional operation does not constitute a "major change" in its facilities.[2]

[1] Section 73.35(a) is as follows:
"No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:
"(a) Such party directly or indirectly owns, operates, or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations, computed in accordance with § 73.183 or § 73.186; . . ."

[2] Note 3 to Section 73.35 provides, *interalia*, that Section 73.35(a) shall apply only to applications for new stations, assignment or transfer cases, and applications for major changes in existing stations.

3. If the application is held to be one for a major change, WVOK contends that the circumstances described hereinafter warrant the granting of a waiver. WVOK's application would cause objectionable interference to the existing operation of Station WTIX, New Orleans, Louisiana. WTIX has pending a timely filed application (BP–14135) for increase in power from 5 to 10 kilowatts. This proposal would in turn cause objectionable interference to the existing operation of WVOK. The two applications involve mutual interference but, since the interference in each instance would not result in contravention of the "ten percent rule" (Section 73.28(d)(3)), the applications are not mutually exclusive and no consolidation is necessary. WVOK alleges that because of the interference which WVOK would receive, a simultaneous grant of both applications would reduce the net interference-free area of 0.5 mv/m contour overlap with WBAM by 670 square miles. The number of persons residing within the area of directional operation together with a "Petition For Leave To Amend Applicattion". On September 18, 1961, the hearing examiner released an Order (FCC 61M–1508) granting the petition, accepting the amendment, and returning the application to the processing line. On October 6, 1961 the application was assigned a new file number pursuant to Section 1.571(j)(1) [then Section 1.354(h)(1)] because of an increase in radiation toward WTIX. On November 13, 1961, WVOK filed a "Petition to Reinstate Old File Number". Subsequently, by letter of February 6, 1962 (FCC 62–153), the Commission found that the increased radiation toward WTIX would cause no "new interference problems" within the meaning of Section 1.571(j)(1) and reinstated the original file number. While the applicant did contest the assignment of a new file number, it did not question the fact that the requested authorization was a major change and, in fact, characterized the overlap would be reduced by 10,195. The applicant further asserts that both applications would have been granted long ago had it not been for a number of changes in the Rules and in the soil conductivity map which prejudiced their interests.

4. The Commission, consistent with past practices, finds that the WVOK proposal is a major change within the meaning of Section 1.571(a)(1) of the Rules [3] and is thus governed by the provisions of Section 73.35(a). The application as it now stands was filed as an amendment to the original WVOK application which was then in hearing. Prior to the applicant's request for omnidirectional operation, WVOK had sought a change in the directional antenna pattern and an increase in tower height. On August 30, 1961, the applicant filed the present request for omni- placing of the application on the processing line [4] as "desirable".[5]

5. Assuming WVOK's engineering data is accurate, the fact that a simultaneous grant of its application and the WTIX application

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[3] *Hubbard Broadcasting, Inc.* (*KSTP*), 2 RR 2d 569. See also Commission letters adopted October 10, 1962 (FCC 62–1064) and November 28, 1962 (FCC 62–1239) addressed to the licensees of Stations KDEY and WTHI, respectively.

[4] Under Section 1.571(f) only applications for new stations and major changes are placed on the processing line.

[5] Par. 2 of the "PPetition to Reinstate Old File Number".

would reduce the population within the WBAM–WVOK interference-free 0.5 mv/m overlap area is not of decisional significance. Prior to the adoption of the rule in its present form, Section 73.35(a) barred overlap of a substantial portion of service areas (0.5 mv/m contour) in the absence of a showing that a grant would better serve the public interest. The 0.5 mv/m contour standard was replaced by a 1 mv/m contour separation requirement because the Commission found that over the years many stations' 0.5 mv/m service areas had become eroded by interference from subsequent allocations. For that reason the Commission did not "propose to bar overlap of any portion of the normally protected service areas of two commonly owned stations but, instead, proposed to prohibit 1 mv/m overlap."[6] Thus, a reduction in both the number of persons residing within and the size of the WBAM–WVOK interference-free 0.5 mv/m overlap area in no way mitigates the fact that a grant of this application would expand the area[7] of 1 mv/m overlap in contravention of the rule.

6. With respect to WVOK's contention that rule changes have adversely affected its changes of a grant, it is sufficient to note that neither the Communications Act of 1934, as amended, nor the Commission's Rules prohibit the adoption of rules which affect pending applications, that WVOK was given an opportunity to participate in the rule making process, and the fact that WVOK's application was pending when new rules became effective entitled it to no better legal position by virtue of that fact than prospective applicants.[8]

In view of the foregoing, the petition for waiver IS DENIED and the above application IS DISMISSED.

Adopted June 2, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[6] Par. 19, In re *Amendment of Multiple Ownership Rules* (Docket 14711) FCC 64–445, 2 RR 2d 1588 (1964).

[7] While no data has been submitted, presumably, the population within the proposed 1 mv/m overlap area would also be greater.

[8] *Paramount Television Productions, Inc.*, 8 RR 459 (1952) at 463.

F.C.C. 65R–210

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of | |
| UNITED ARTISTS BROADCASTING, INC., LORAIN, OHIO | Docket No. 15248<br>File No. BPCT–3168 |
| OHIO RADIO, INC., LORAIN, OHIO | Docket No. 15626 |
| For Construction Permit for New Television Broadcast Station | File No. BPCT–3348 |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Before the Review Board for consideration is a joint request filed March 29, 1965, by United Artists Broadcasting, Inc. (United Artists) and Ohio Radio, Incorporated (Ohio Radio) for approval of agreement looking toward dismissal of the Ohio Radio application, grant of the United Artists application, and subsequent merger of these applicants in a new operating corporation to be found.[1] Both applicants seek permits to construct a new television broadcast station to operate on Channel 21, at Lorain, Ohio; their mutually exclusive applications were designated for hearing by the Commission (Order, FCC 64–860, released September 18, 1964).[2]

2. The subject merger agreement (dated March 25, 1965), in brief, provides as follows: Ohio Radio, in consideration of dismissal of its application, would be entitled to a minority stock interest in the operating corporation to be formed, the extent of such interest depending upon when Ohio Radio exercises on of three options, i.e., a ⅓ interest if exercised within 60 days from the date the station goes on the air (and terminating 60 days thereafter); a 1/5 interest if exercised within one year after the station goes on the air (and terminating 60 days thereafter); and a 1/10 interest if exercised within two years after the station goes on the air (and terminating 60 days thereafter). United Artists will seek a construction permit and hold the remaining interest in the operating corporation. Ohio Radio must purchase the stock at a price

[1] Also before the Review Board is an opposition, filed April 20, 1965, by the Broadcast Bureau, and a joint reply, filed April 29, 1965, by United Artists and Ohio Radio. On April 5, 1965, Ohio Radio filed a "Statement of Clarification", indicating that, in view of the number of applications in this consolidated proceeding (6 in all), it wished to clarify the fact that the joint request for approval of agreement (filed March 29, 1964) pertained only to its own application and that of United Artists with which it was consolidated for a comparative hearing (see footnote 2, *infra*).

[2] By Commission Order (FCC 64–860) released September 18, 1964, the United Artists and Ohio Radio applications were designed for comparative hearing on specified issues, i.e., in addition to the standard comparative and conclusionary issues: (with respect to United Artists) a character qualifications issue (anti-trust violations and convictions of parent company), compliance with Section 310(a)(5) of the Communications Act, and compliance with Rule 73.636; (with respect to Ohio Radio) a financial qualifications issue and compliance with Rule 73.613(a). By Order (FCC 64M–1042) released October 22, 1964, the Hearing Examiner added an issue as to the sufficiency of Ohio Radio's available funds. By Review Board Order (FCC 64R–565) released December 22, 1964, comparative coverage issues were added.

equal to its proportionate share of United Artists' total investment (loans and equity) in constructing and operating the station. Excluded from such computations are all funds expended either by United Artists or by Ohio Radio to the date of the subject agreement and such expenditures are not to be reflected in the cost of the stock or in the total investment. The agreement is silent as to restrictions on the possible purchase of Ohio Radio's option rights by United Artists. However, United Artists must begin station construction within 18 months and complete it within 36 months of grant of the application; failing to do so, the parties agree to file a joint "petition" for assignment to Ohio Radio of United Artists' construction permit, in which event Ohio Radio's option rights shall revert to United Artists.

3. The Bureau does not consider the arrangement in the public interest for the following reasons: (1) the arrangement is "speculative" and a "risk venture" rather than a merger, the extent of the risk depending upon the time the options are exercised; (2) while there would be no objection to an option exercisable at the time the station goes on the air (or shortly thereafter), in which case there would be no necessity of determining the true value of the stock at the time of its acquisition, the Bureau objects to an option which extends over into the initial period of station operation since "sconcurrent determination of the val ueof such option is impossible", and "there is no way to tell whether Ohio Radio will profit measurably from its dismissal"; (3) under the agreement, United Artists is free to purchase Ohio Radio's option rights "for a price that might be far in excess of any reasonable amount expended by Ohio Radio in the prosecution of its application"; (4) the assignment provision (see preceding paragraph) violates Rule 1.598, which requires station construction to begin within 60 days and be completed within 6 months from grant of the construction permit; (5) it cannot be determined from such provision whether United Artists or Ohio Radio will be the surviving applicant; (6) finally, Ohio Radio's financial qualifications are in issue (see footnote 2, *supra*) and, should the assignment provision become operative, there would be no assurance that Ohio Radio will be financially able to construct and operate the station.

4. The petitioners stress the fact that the Bureau does not cite Commission policy or precedent in support of its position. Moreover, they do not consider as valid the Bureau's objection to an option extending beynd the time the station goes on the air (or shortly thereafter) merely because "there is no way to tell whether Ohio Radio will profit measurably from its dismissal." Such objection, it is pointed out, would apply equally well to "the more immediate forms of merger" (to which the Bureau has no objection) for there, too, there would be no way to tell whether the dismissing applicant will profit measurably from its dismissal; nevertheless, the Commission has approved "compositions" on the basis of options as distinguished from more immediate merger arrangements. In any event, the movants argue, it is "highly unlikely" that the financial success or failure of the station will be 'proved' within the early period of operation covered by the term of the

extended option. The petitioners contend that *Music Productions, Inc.*, FCC 63–715, 1 RR 2d 30, cited by the Bureau, is not authority for disapproving the instant agreement on the ground that United Artists is free thereunder to purchase Ohio Radio's option rights for a price in excess of the latter's expenses incurred in advocating its application.[3] Movants do not consider the provisions for beginning and completing station construction as violative of Rule 1.598 as these are merely contractual provisions as between the parties; if permittee (United Artists) fails to complete construction within the time specified in the construction permit and Section 1.598 of the Rules, it may apply for an extension of time on a showing of good cause or else the permit will be cancelled. Nor do the movants find any uncertainty as to which party will eventually construct the station since, under the Rules, the holder of the construction permit is the party to whom the Commission looks for construction of the station. Finally, the petitioners do not consider the present financial issue against Ohio Radio as an argument against approval of agreement since, in the event the parties seek assignment of the permit to Ohio Radio, the latter would be required to establish its financial qualifications at that time. The petitioners therefore argue that the arrangement is in the public interest and that the petition should be granted.

5. The joint request will be granted for the reasons urged by movant. Basically, Rule 1.525 permits approval of reimbursement to the dismissing applicant of monies not in excess of expenses he has incurred in advocating his application. See *International Broacasting Corporation*, FCC 63R–267, released May 27, 1963; *Mineola Broadcasting Company*, FCC 63R–42, released January 23, 1963. However, the essence of the merger arrangement before us is not reimbursement but opportunity to Ohio Radio to invest new capital in the new operating corporation in return for dismissal of its application. Past expenses which United Artists and Ohio Radio have incurred in prosecuting their respective applications form no part of the investment. Ohio Radio's interest will depend on which option it exercises and the price it will pay for the stock in the new operating corporation will be equal to its proportionate share of United Artists' total investment (loans and equity) in constructing and operating the station. Under these circumstances, the Bureau's conclusion that the merger agreement is not in the public interest is unwarranted. The fact that Ohio Radio is free to sell its option rights to United Artists, or may acquire an interest in the venture, either of which event may yield monies in excess of its expenses incurred in prosecuting its application, is without merit. As for the Bureau's characterization of the arrangement as a "risk venture" rather than a merger, the same criticism could be made of all mergers and all new broadcast stations until they finally become economically established, but that

[3] The petitioners point out in their joint reply that in *Music Productions* the Commission had previously approved an option agreement and thereafter the option rights were purchased without seeking Commission approval of such purchases. The Commission ruled that the parties should have brought the purchase and sale of the option rights to it for approval. The petitioners indicate that, in the event circumstances should lead the parties to arrive at such a transaction, the matter would be submitted to the Commission in accordance with its policy set forth in the *Music Productions* case.

would not be a valid reason for considering the subject agreement to be contrary to the public interest. Finally, the Commission has in the past approved arrangements between competing applicants involving options which permit the dismissing applicant to obtain an interest in the surviving applicant or in a new corporation. See *Livesay Broadcasting Co., Inc.*, FCC 64–514, released June 5, 1964; *Radio Americana, Inc.*, FCC 63–1133, released December 16, 1963; *Putnam Broadcasting Corporation*, FCC 63R–258, released May 23, 1963; *York-Clover Broadcasting Company*, FCC 62R–105, 24 RR 504; FCC 63R–54, 24 RR 506.

6. Approval of the merger agreement would be consistent with the public interest, convenience and necessity, and the merger agreement, request for approval, and affidavits comply with all of the requirements of Rule 1.525. Although such approval will simplify the proceeding to the extent of mooting the standard comparative issue, dismissal of the Ohio Radio application will not, in view of the remaining issues specified (see footnote 2, *supra*), eliminate the necessity for a hearing. *Springfield Telecasting Company*, FCC 65R–34, released January 28, 1965. In the event these issues are resolved favorably to United Artists, a grant of its application would provide an earlier establishment of a new television station in the Lorain area. See *Spanish International Television Company, Inc.*, FCC 65–425, released May 21, 1965.[4]

Accordingly, IT IS ORDERED, This 3rd day of June, 1965, That the joint petition for approval of agreement filed March 29, 1965, by United Artists Broadcasting, Inc., and Ohio Radio, Incorporated, IS GRANTED, and that said agreement, dated March 25, 1965, IS APPROVED; and

IT IS FURTHER ORDERED, That the request of Ohio Radio, Incorporated, to dismiss its application, IS GRANTED, that the application (BPCT–3348) of Ohio Radio, Incorporated, for a construction permit for a new UHF television broadcast station at Lorain, Ohio, IS DISMISSED, and that the application (BPCT–3168) of United Artists Broadcasting, Inc. IS RETAINED in hearing status.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[4] As the Commission noted in *Spanish International Television Company, Inc., supra.* approval of an agreement such as this does not constitute a pre-judgment of any future assignment or transfer of control application or approval of acquisition of shares in the proposed corporation.

F.C.C. 65–481

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

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| In Re Applications of<br>GLADYS W. CAMPBELL, JOHN PARRY SHETTALL, AND JOHN H. BAILEY D.B.A. CAMPBELL & SHEFTALL, CLARKSVILLE, TENN.<br>Requests: 107.9 mc., #300, 28.5 kw., 159 f. | Docket No. 16037<br>File No. BPH–3770 |
| J. SHELBY MCCALLUM, GARY H. LATHAM, AND E. T. BREATHITT, JR., D.B.A. FORT CAMPBELL BROADCASTING CO., FORT CAMPBELL, KY.<br>Requests: 107.9 mc., #300, 38.9 kw., 156 f.<br>For Construction Permits | Docket No. 16038<br>File No. BPH–4209 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the above-captioned and described applications; (b) Petition for Waiver of Section [7]3.207 of the Commission's Rules filed by Campbell and Sheftall ("C & S" herein) on September 12, 1963; (c) Petition to Withhold Action on application of Fort Campbell Broadcasting Company in the Event of Denial of Campbell and Sheftall's Pending Petition for Waiver of Section [7]3.207 of the Commission's Rules filed by C & S on January 28, 1964; and (d) Answer to Petition to Withhold Action on Application of Fort Campbell Broadcasting Company in the Event of Denial of Campbell and Shaftall's Pending Petition for Waiver of Section [7]3.207 of the Commission's Rules filed by Fort Campbell Broadcasting Company (Fort Campbell) on February 12, 1964.

2. C & S's application when originally filed on May 11, 1962 requested use of Channel 233 in Clarksville. However, because of conflicts with other then-pending applications and later because of the FM allocation rule-making proceeding (Docket No. 14185) C & S's application remained in pending status. Ultimately, Channel 300 (but not Channel 233) was allocated to Clarksville and C & S tendered an amendment to specify Channel 300. This amendment has not been accepted because C & S proposed an operation on that channel from its AM site which would be short-spaced to Station WCOR–FM Lebanon, Tennessee on Channel 297. Along with its tendered amendment, C & S submitted a request for waiver of the minimum separations required by Section 73.207 of the Rules in which it points out that the proposed spacing would

be 64.05 miles, only 0.95 miles less than the 65 miles required. C & S argues that the only way it could avoid the short-spacing would be to operate at a site some distance from its standard broadcast station WJZM or to change the WJZM site so that an FM operation would meet the spacing requirements. Either course of action it feels, would create serious problems adversely affecting the public interest. According to C & S there are few FM receivers in the Clarksville area and until such time as the listening audience is developed FM revenues will be low. Thus, in its opinion, the economies [1] offered by operation in conjunction with WJZM are indispensable to the success of its proposed FM station. Likewise, C & S states that it cannot relocate WJZM to permit a joint operation from a site meeting the separation requirements because such a move would create new areas of AM interference with station WABD, Fort Campbell, Kentucky.

3. We have concluded that under these circumstances the 0.95 mile proposed short-spacing is justified and that waiver of Section 73.207 of the Rules to permit acceptance of the amendment is warranted.[2]

4. Section 1.580(b) of the Rules specifies that action will not be taken on an application as filed or amended until 30 days after public notice of the filing of the application or major amendment. Section 309(b) of the Communications Act of 1934, as amended, imposes a similar 30 days waiting period, but by its terms applies only to grant of the application. Thus, simultaneous acceptance of the amendment and designation of the application for hearing is in conflict with our Rules, but not with the Act. We have concluded that waiver of this provision on our motion is warranted. Our action designating this application and the mutually exclusive Fort Campbell proposal discussed infra will not operate to deprive interested parties of their opportunity to object, since interested parties may seek intervention pursuant to Section 1.223 of the Commission's Rules. Likewise, since the Fort Campbell application has been on file for almost as long, a party desiring to file a competing application was on notice that that application could have been acted upon immediately if C & S's waiver request had been denied and therefore had ample opportunity to file a competing application.

5. Fort Campbell's application, although mutually exclusive with that of C & S does not specify use of the channel 300 in Clarksville, instead they propose use of that channel in a different city. Rather, Fort Campbell's application is premised on Section 73.203(b), the "25-mile" Rule which permits applicants to specify a community not listed in the table if it is within 25 miles of the community to which the channel is assigned in the table. Because the applicants propose different cities, a 307(b) issue is required. In addition, since there is a significant difference in the populations to be served by the two proposals, a comparative 1 mv/m

[1] C & S has estimated that cnstruction costs would be $25,635 at the WJZM site and $44,635 elsewhere, and that operational costs of the first year would be increased from $12,000 to $15,900.

[2] Consequently, C & S's petition requesting us to withhold action on the Fort Campbell proposal in the event we deny their request, will be dismissed as moot.

coverage issue is required in the event the 307(b) issue is not determinative.

6. On November 7, 1962 the Commission granted Fort Campbell's application for a new standard broadcast station at Fort Campbell, and in so doing found it to be a community within the meaning of Section 73.30(a) of the Rules. The condition attached to that permit requiring that station identification must be made in a way to indicate the private character of the station is equally relevant here and will be attached to Fort Campbell's permit if its application is granted.

7. Except as indicated by the issues specified below, the applicants appear to be legally, technically, financially and otherwise qualified to operate as proposed; however, the Commission is unable to make the statutory finding that a grant of either of the above-captioned applications would serve the public interest, convenience and necessity and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues specified below:

Accordingly, IT IS ORDERED, This 2nd day of June 1965, That the provisions of Section 1.580(b) of the Commission's Rules ARE WAIVED on the Commission's own motion, that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposal of Fort Campbell Broadcasting Company would provide a signal strength of at least 3.16 mv/m to the entire Fort Campbell military reservation, as required by Section 73.210(d) and if not, whether circumstances exist which would warrant waiver of this section.

2. To determine, in the light of Section 307(b) of the Communicattions Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

3. To determine in the event it is concluded that a choice between the applications could not be based solely on considerations relating to Section 307(b) the populations within each of the proposed 1 mv/m contours and the availability of other FM services (at least 1 mv/m) to such populations.

4. To determine, in the event it is concluded that a choice between the applications would not be based solely on considerations relating to Section 307(b), which of the operations proposed in the above-captioned application would better serve the public interest, in light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:

(a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed FM broadcast station.

(b) The proposals of each of the applicants with respect

to the management and operation of the proposed stations.

(c) The programming services proposed in each of the applications.

5. To determine in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

IT IS FURTHER ORDERED, That the Petition for Waiver of Section [7]3.207 of the Commission's Rules filed by Campbell and Sheftall IS GRANTED and said Section of the Rules IS WAIVED.

IT IS FURTHER ORDERED, That Campbell and Sheftall's Petition to Withhold Action on Application of Fort Campbell Broadcasting Company in the Event of Denial of Campbell and Sheftall's Pending Petition for Waiver of Section [7]3.207 of the Commission's Rules and Fort Campbell Broadcasting Company's Answer to this Petition ARE DISMISSED at moot.

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

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

IT IS FURTHER ORDERED, That, the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

IT IS FURTHER ORDERED, That in the event of a grant of the Fort Campbell application, the construction permit shall contain the following condition:

The authority granted herein is subject to the condition that station identification must be made so as to indicate clearly that the radio station is a privately owned civilian activity which is in no way sponsored by or in any manner connected with the Department of the Army or other agency of the United States Government.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–501

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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|---|---|
| In Re Applications of<br>CHRONICLE PUBLISHING CO. (KRON–TV), SAN FRANCISCO, CALIF. | Docket No. 12865 |
| AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. (KGO–TV), SAN FRANCISCO, CALIF. | Docket No. 12866<br>File No. BPCT–2401 |
| For Construction Permits To Increase Antenna Height | |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX NOT PARTICIPATING.

1. By separate petitions filed on March 15, 1965, Chronicle Publishing Company, licensee of television Station KRON–TV, San Francisco, California, and Crocker Land Company, owner of the land upon which Chronicle proposes to construct an antenna tower, seek reconsideration of our Memorandum Opinion and Order, FCC 65–98, released February 11, 1965. Oppositions were filed on April 19, 1965 by the Air Transport Association of America; on April 16, 1965, by the Commission's Broadcast Bureau; and on April 21, 1965 by American Broadcasting-Paramount Theatres, Inc. A reply to oppositions was filed by Chronicle on May 3, 1965.

2. The history and background of these proceedings have been fully set forth in our Memorandum Opinion and Order. Briefly, both Chronicle and American Broadcasting-Paramount Theatres, Inc., licensee of television Station KGO–TV, seek to increase antenna height of their respective television stations. The tower of the former is located on Mt. San Bruno and of the latter on Mt. Sutro. In our Memorandum Opinion and Order, we denied Chronicle's request for review of the Review Board's refusal to modify the hearing issues and granted KGO–TV's petition for reconsideration and grant of its application to increase antenna height without hearing, but made the grant on condition that the antenna structure be made available to other broadcasters on a fair and equitable basis. Chronicle contends that approval of the KGO–TV application is not in the public interest; that a hearing is required to determine whether construction of KGO–TV's proposed tower would create an unacceptable hazard to air navigation irrespective of whether Chronicle's proposed tower is or is not constructed; and that a hearing on KGO–TV's application is necessary to determine whether the location of its proposed structure is available and suitable for an antenna farm and to determine the terms and conditions on which the structure will be made available to other users.

Finally, it reiterates its view that comparative consideration of the two applications is necessary.

3. Manifestly, Chronicle's challenge to our public interest determination is not intended to question the finding that improved television service to the San Francisco viewing public would result, since it concedes that "the proposed tower on Mt. Sutro will provide better coverage than the lower [existing] KRON–TV tower on Mt. San Bruno [so that] it will be necessary for Station KRON–TV ultimately to move to Sutro" if KGO–TV's application is granted and Chronicle's is not (Petition for Reconsideration, para. 25). Its objections go essentially to the question of whether the character of the area is appropriate for a tall tower or for use as an antenna farm, the availability of the site by reason of zoning restrictions, and whether the proposed tower will accommodate all present and prospective users in the San Francisco area.[1] To a large extent, the matters advanced by Chronicle concerning the character of the area are properly the subject of inquiry by the zoning authorities, and will undoubtedly be considered by them. We have already determined that the addition of a zoning issue is unwarranted and Chronicle has come forth with no additional factual allegations which would justify any change in our determination. Neither do we deem it necessary to hold a hearing to determine whether the proposed antenna structure will accommodate all present and prospective users in the San Francisco area. In these proceedings, we have taken into account the representations of the parties that the areas available for such structures to serve San Francisco are limited and their expressed willingness to make any tower constructed available for use by other television and FM stations. Presently under consideration by interested parties are the type of structure which will best meet the needs of area broadcasters and the terms and conditions under which the tower will be made available to those desiring to use it. Any intrusion by us at this preliminary stage into the negotiations of the parties would be unjustified.

4. With respect to Chronicle's further contentions that KGO–TV's proposed tower, in and of itself, would create a hazard to air navigation and that the two applications are mutually exclusive by reason of the air safety question, we deem it essential to first consider the very important procedural problems posed in these cases. Chronicle asserts that it did not petition the Review Board to add a comparative issue but that the issue was already in the proceeding, and the Commission therefore erred in holding the provisions of Section 1.229 of the Rules applicable to this situation. In our designation order, released May 4, 1959 (FCC 59–407), we did include a comparative issue contingent upon a showing that a grant of the Chronicle application would preclude a grant of the KGO–TV application on air hazard grounds. However, the factors upon which that order was based had substantially changed during the intervening period and, in its petition for modification of issues filed with the Review Board on April 3, 1964, Chronicle con-

[1] As we have heretofore held, Chronicle's contention that its proposed site is superior for an antenna farm is irrelevant unless the applications are mutually exclusive.

ceded that ". . . it was determined that, because of changed circumstances, the issues in the proceeding were no longer applicable. It was then agreed that it would be necessary to have the Commission modify the existing issues . . ." (para. 10). Moreover, in the renewed request for modification of issues, filed with the Review Board on June 19, 1964, Chronicle again asserted that "the issues it suggested in its original petition should be adopted to govern the conduct of this proceeding (para. 5). Manifestly, Chronicle is seeking to add issues, and we properly held that its motion should have contained "specific allegations of fact sufficient to support the action requested", as required by Section 1.229(c) of the Rules.[2]

5. The attempt by Chronicle to create a hearing issue by factual allegations presented for the first time in its petition for reconsideration, filed on March 15, 1965, comes much too late, and the request for hearing based on such allegations must be rejected. Section 1.106(c) of the Rules provides that a petition for reconsideration which relies on facts not previously presented to the Commission will be granted only if the facts relate to events which occurred since the last opportunity to present such matters or if they previously were unknown to the petitioner and could not have been ascertained through the exercise of ordinary diligence. Chronicle cannot meet either of these prerequisites.

6. The effect of the tall tower proposals upon air safety was the subject of extensive hearings before the FAA during 1962, as follows: on July 10–12; September 17–21; October 10–12; November 7–9, and 13; and December 12 and 13. On June 4, 1964, separate decisions were released by that Agency discussing in detail the relevant factors as to each proposal. It is inconceivable that any matters pertaining to flight procedures, revisions necessary to accommodate either or both proposed towers, or any other material facts which would support the claim of mutual exclusivity were not then known to Chronicle or could not have been ascertained by the exercise of reasonable diligence; and Chronicle does not assert lack of knowledge as an excuse for its belated action.[3] Neither is it contended that changed circumstances justified Chronicle's long delay before making known to the Commission these allegedly pertinent matters. On the contrary, it has been Chronicle's contention that the situation with respect to the two proposals from an aeronautical standpoint has remained unchanged since 1957.

7. Assuming that some justification may have existed for the failure to set forth the necessary factual allegations in support of its request for comparative consideration in the first petition for

[2] The FAA has found that construction of Chronicle's proposed tower would derogate to an unacceptable degree the safety of aircraft. Although the FAA determination is not conclusive upon the Commission, it may not therefore be disregarded. In our view, that Agency's adverse recommendation, reached after a full hearing at which witnesses were examined and cross-examined, raised a substantial and material question of fact and we designated the Cchronicle application for hearing on an air hazard issue. We express no opinion concerning the possible outcome of the hearing on that issue. Should it ultimately be established, however, that a grant of the Chronicle application, considered alone, would constitute a hazard to air navigation, no basis would exist for a comparative hearing with KGO–TV's application. *Simmons v. Federal Communications Commission*, 79 U.S. App. D.C. 264, 145 F.2d 578.

[3] The contention that the proposed KGO–TV tower on Mt. Sutro would create an unacceptable menace to air navigation regardless of the action taken on Chronicle's Mt. San Bruno proposal is not only untimely made, but it is inconsistent with the position which Chronicle has previously taken before the Commission; i.e., that either tower, but not both, could be tolerated from an air safety standpoint.

modification of issues, filed on April 3, 1964, no justification exists for its persistent refusal to do so in any of the numerous pleadings filed thereafter. In the decision released June 4, 1964 (FCC 64R-309), denying the petition for a comparative issue, the Review Board expressly called to Chronicle's attention that "None of the parties in the pleadings before us alleges any facts suggesting the likelihood that either site, but not both sites, would be approved. In the absence of any showing to that effect, the addition of a comparative issue is not warranted." Thereafter, Chronicle filed the following pleadings: on June 11, 1964, an application for review of the Review Board's ruling; on June 19, 1964, a renewed request for modification of issues; on July 9, 1964, a reply to the oppositions filed to the application for review, and a reply to the oppositions to Chronicle's renewed request for modification of issues; on August 12, 1964, a second application for review of the Review Board's denial of its renewed request for modification of issues; and on September 11, 1964, an opposition to KGO-TV's petition for reconsideration and grant without hearing. In none of these pleadings did Chronicle submit for the consideration of the Commission or the Review Board the factual allegations which the applicant claims in its March 15, 1965 pleading support the view that a tower at either site could be tolerated from an air safety standpoint but that the grant of one proposal would precuude a grant of the other so that the two proposals are mutually exclusive. We conclude that Chronicle's failure to plead earlier the factual allegations upon which it now relies and the absence of any satisfactory excuse for such failure renders its petition for reconsideration defective and subject to dismissal. *Valley Telecasting Co., Inc.* v. *Federal Communications Commission,* 118 U.S. App. D.C. 410, 336 F. 2d 914; *Springfield Television Broadcasting Corp.* v. *Federal Communications Commission,* 117 U.S. App. D.C. 214, 328 F. 2d 186.

8. Nor do we find here any overriding public interest considerations which would require us to review Chronicle's factual allegations despite the procedural deficiencies of its petition. On the contrary, we find that the public interest in administrative finality is an impelling reason not to disturb the conclusions reached in our February 11, 1965 Memorandum Opinion and Order. Unquestionably, the viewing public would be benefited by a grant of either or both applications and, if there were no air hazard question, a grant of both applications would, in all probability, be in the public interest. We do not believe that the television viewers of the San Francisco area should continue to be deprived of the benefits which KGO-TV's tower will bring to them merely because of Chronicle's laches. This is particularly true in this case where it is not only the viewers of KGO-TV who will receive improved service through authorization of the Mt. Sutro proposal. Other television stations and FM broadcasters who desire to place their antennas on one of the mountains have patiently awaited the outcome of these proceedings in order to determine whether either or both of the proposed towers would be available for their use. We would be rendering a disservice to permit further delay.

9. We have also examined the petition by Crocker Land Company for rehearing and reconsideration, filed on March 15, 1965. However, the contentions advanced therein have been fully answered by our comments set forth above with respect to Chronicle's petition and by our Memorandum Opinion and Order, FCC 65–98, released February 11, 1965, and further comment is unnecessary.

Accordingly, IT IS ORDERED, This 4th day of June, 1965, That the petitions for reconsideration, filed on March 15, 1965 by Chronicle Publishing Company and by Crocker Land Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–483

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
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| LEE CO. TV, INC., FORT MYERS, FLA. | File No. BPTT–1066 |
| LEE CO. TV, INC., FORT MYERS, FLA. | File No. BPTT–1067 |
| LEE CO. TV, INC., IMMOKALEE AND LEHIGH ACRES, FLA. | File No. BPTT–1068 |
| LEE CO. TV, INC., IMMOKALEE AND LEHIGH ACRES, FLA. | File No. BPTT–1069 |
| For Construction Permits for New UHF Television Broadcast Translator Stations | |

### MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN THE GRANT BUT DISSENTING TO THE IMPOSITION OF THE CONDITIONS; COMMISSIONER LOEVINGER CONCURRING IN THE GRANT BUT DISSENTING TO THE IMPOSITION OF THE CONDITIONS AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (a) the above-captioned applications filed by Lee Co. TV, Inc. (applicant); (b) a "Petition to Deny" filed August 12, 1964, by Ft. Myers Broadcasting Company (petitioner), licensee of Station WINK–TV, Channel 11 (CBS), Ft. Myers, Florida, directed against a grant of (a) above; an "Answer to Petition to Deny" filed October 16, 1964, by the applicant directed against (b) above[1]; and (d) a "Reply to 'Answer to Petition to Deny'" filed October 27, 1964, by the petitioner directed against (c) above. In addition, on October 28, 1964, the Commission wrote the petitioner and offered it the opportunity to supplement certain economic arguments it had advanced. In response, on December 2, 1964, the petitioner filed an "Amendment to Petition to Deny." On March 23, 1965, the applicant was asked to amend its applications to supply additional information regarding its ownership and financial situation. The requested amendment was filed April 13, 1965. A "Statement" was filed by the petitioner on May 6, 1965, and additional information requested from the petitioner was filed May 14 and May 17, 1965.

2. On July 2, 1964, the applicant filed the following applications for construction permits for new UHF television broadcast translator stations: (BPTT–1068) which proposes a 20 watt UHF

[1] Petitioner objects that this pleading was late filed under Section 1.45 of the Commission's Rules. However, in its discretion, the Commission believes it appropriate to waive this procedural rule.

translator to serve Immokalee and Lehigh Acres, Florida, by rebroadcasting Station WCKT–TV, Channel 7 (NBC), Miami, Florida, on Output Channel 77; (BPTT–1069) which proposes a 20 watt UHF translator to serve Immokalee and Lehigh Acres, Florida, by rebroadcasting Station WLBW–TV, Channel 10 (ABC), Miami, Florida, on Output Channel 79; (BPTT–1066) which proposes a 100 watt UHF translator to serve Fort Myers, Florida, by rebroadcasting the translator proposed in (BPTT–1068) on Output Channel 70; and (BPTT–1067) which proposes a 100 watt UHF translator to serve Ft. Myers, Florida, by rebroadcasting the translator proposed in (BPTT–1069) on Output Channel 73. Station WINK–TV furnishes a predicted principal city contour over Fort Myers, and is the only television broadcast station which furnishes a predicted signal to that community. Southern Cablevision, a community antenna system (CATV) located in Ft. Myers, supplies the programs of Station WFLA–TV, Channel 8 (NBC), Tampa, Florida; Station WSUN–TV, Channel 38 (ABC), St. Petersburg, Florida; Station WEDU, Channel 3 (educational), Tampa, Florida; and Station WINK–TV. According to the 1965 edition of *Television Factbook*, this CATV has approximately 800 subscribers. This system is commonly controlled by the same persons who control Station WINK–TV.

3. Petitioner alleges that the addition of the applicant's proposed UHF service to Ft. Myers would result in competitive injury to its station. Accordingly, it is clear that the petitioner has standing as a "party in interest" within the meaning of Section 309(d) of the Communications Act. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470. On the merits, petitioner claims that the proposed translators will have an adverse economic effect on it which will result in the deterioration or loss of programs designed to meet the specific needs and interests of the area; that the applicant failed to disclose information concerning its principals which was called for by the Commission's application form; that the applicant is not financially qualified to construct and operate the proposed translator stations; and that the Immokalee translators would violate Section 74.731(c) of the Commission's Rules [2] since their primary purpose is the relaying of signals.

4. Petitioner urges that operation of the proposed translator will cause it to lose listeners to the translators and that if it is required thus to share the limited audience available in the area its effectiveness as an advertising medium will be impaired. Thus, petitioner analogizes the translator competition to competition from a community antenna system (CATV) and argues that comparable fragmentation of its market would take place. Finally, petitioner urges that this fragmentation would have an adverse economic effect on it and adversely affect its ability to provide programs designed to meet local needs. However, petitioner's

[2] Section 74.731(c) of the Rules provides that,

"(c) The transmission of each television broadcast translator station shall be intended for direct reception by the general public and any other use shall be incidental thereto. A television broadcast translator station shall not be operated solely for the purpose of relaying signals to one or more fixed receiving points for retransmission, distribution, or further relaying."

arguments are not adequately supported by specific factual allegations so as to require designation of these applications for hearing. Even conceding *arguendo* that petitioner established that operation of the translators would have an indeterminate but adverse economic effect on it, no effort has been made to relate this loss to the unsupported claim that petitioner's programs designed to meet the needs and interests of the area might deteriorate or be lost as a result. In the absence of such a showing of deterioration of service, we do not believe a hearing is required. E.g. *Carroll Broadcasting Co.* v. *Federal Communications Commission,* 258 F 2d 440, 17 R.R. 2066.

5. Petitioner's next argument is that the applicant failed to supply the names of all parties who are either directors or officers in the applicant corporation, and that in legal effect this failure amounts to misrepresentation. This information has since been supplied. It appears that it was not filed earlier due to the applicant's belief that it was not required to be filed since, as it is a non-profit corporation, no one person has any more interest in the organization than any other and no one individual has any vested rights. While it is clear that an adequate disclosure was not made initially, no motive for the failure to list all officers or directors has been suggested which could reflect on the applicant. Consequently, the Commission does not believe that a hearing is required on this question.

6. Next, petitioner argues that the applicant is not financially qualified to construct and operate the proposed stations. This argument is based on a proposed strict construction of the authority to collect money granted the applicant in its articles of incorporation. However, on April 13, 1965, the applicant amended its applications to show that it has a "turnkey" contract which provides for installation of the translators at a cost of $63,463.71, and that the annual maintenance cost will be $1200-$1500 per year. The applicant has available the following funds: cash—$17,499.39; pleadges—$48,200 [3]; and donations—$3,600. Consequently, the Commission does not believe that a hearing is required on the question of the applicant's financial qualifications.

7. Finally, petitioner argues that the primary purpose of the Immokalee translators is the relaying of the signals of Stations WLBW–TV and WCKT–TV, and that, accordingly, these applications do not satisfy the requirements of Section 74.731(c) of the Rules. However, the proposed Immokalee stations would provide service to approximately 9,000 persons. Under these circumstances, the Commission finds that the proposed translators would be consistent with its rules. *Frontier Broadcasting Company,* FCC 63–760, 1 R.R. 2d 50.

8. On May 6, 1965, the petitioner filed a "Statement" in which it urges that as an alternative to designating the applications for hearing, the Commission should grant them subject to a fifteen day "before or after" non-duplication condition, citing *Frontier Broadcasting, Co., supra.* We are presently seeking information upon which to formulate a definitive policy on the matter. Pend-

[3] FCC Form 346 permits a showing of "pledges, if any."

ing the formulation of such a policy, we have, as shown by several past actions, adopted generally the practice of conditioning grants in these circumstances upon the outcome of Docket No. 15971 and, further, that the translator, upon the request of a television broadcast station within whose predicted Grade A contour the translator operates, will not duplicate simultaneously, or 15 days prior or subsequent thereto, a program broadcast by the television broadcast station. This policy is designed to insure operation in the public interest during the interim period and to maintain flexibility to take appropriate action at the conclusion of the proceedings in Docket No. 15971 [4]. We shall follow that interim policy in this case. Accordingly, the subject authorized translators will be subject to the condition that, upon request of Station WINK–TV, Fort Myers, they not duplicate, within the specified period, programs of that station.

9. In the present situation, the petitioner has not made substantial or material allegations of fact tending to show that operation of the proposed translators will be injurious to the public interest, convenience and necessity. Consequently, the petitioner has failed to show that a grant of these applications would be *prima facie* inconsistent with Section 309(d)(2) of the Communications Act of 1934, as amended. Further, the Commission finds that the applicant is legally, technically, financially, and otherwise qualified, and that a grant of the present applications would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That Ft. Myers Broadcast Company's "Petition to Deny" IS HEREBY DENIED.

IT IS FURTHER ORDERED that the above-captioned applications of Lee Co. TV, Inc. ARE GRANTED in accordance with specifications to be issued and subject to the following conditions:

If the television broadcast translator station herein authorized operates in an area within the predicted Grade A contour of any television broadcast station in operation, or which subsequently comes into operation, on such station's request, the television broadcast translator station must not duplicate simultaneously, or 15 days prior or subsequent thereto, a program broadcast by such television broadcast station.

That this action is subject to the outcome of the proceedings in Docket No. 15971.

Adopted June 2, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

SEPARATE OPINION OF COMMISSIONER LOEVINGER

This case involves applications for construction permits for certain UHF translators to rebroadcast television broadcasts to several small Florida communities not otherwise served by these broadcasts. The Commission grants the applications subject to the same limitations it imposes upon CATVs (in Dockets No.

[4] We will examine petitions bringing to our attention public interest considerations as to why the interim policy should be revised in its application to particular cases.

14895 and 15233). By rule the Commission prohibits CATVs from transmitting the same programs as local television stations for a period of 30 days (15 days before and 15 days after the date of broadcast) in order to limit CSTV competition with television stations. This course is said to be justified by four differences between CATVs and television broadcasting stations. The four factors are these: (1) Television stations can be received free while CATV reaches only those who pay. (2) CATVs are confined to urbanized areas while television stations reach rural areas. (3) Television stations must pay for their program material while CATVs transmit material without the consent of the originating stations and without contributing to payment of program costs. (4) Television stations originate local live programs while CATVs do not.

At least three of these four factors have no application to translators. Translators are low power broadcasting stations which receive the signal of another station and rebroadcast it in an area where it could not otherwise be received or be received as well. Consequently translator broadcasts can be received free, reach those in rural areas, and, by law, can be made only with the consent of the originating station. Therefore the reasons for applying the limitations imposed on CATVs do not exist in the case of translators.

Furthermore, as the Commission's own impartial consultant has reported, one of the principal reasons for the growth of CATVs is the restrictive and inhibiting policy which the Commission has applied to translators in the past. Dr. Martin Seiden, An Economic Analysis of Community Antenna Television Systems and the Broadcasting Industry (1965).

In these circumstances, it seems peculiarly illogical and unwise to apply the restrictions devised to limit the operation of CATVs to the operation of translators. A more detailed analysis of these restrictions and the difficulties foreseeable in their application is contained in my separate opinion in Dockets No. 14895, 15233 and 15971.

Accordingly, I dissent from the imposition of the conditions imposed upon this grant but concur in the grant.

The proceedings referred to in the instant opinion and order undoubtedly will continue for a substantial period of time. In all probability there will be other applications for translator authorizations during the pendency of such proceedings, and, presumably, the Commission will impose the same conditions as in this proceeding when it grants such authorizations. I may vote for such authorizations without recording a specific objection to the imposition of the conditions in each case. However, this opinion will stand as a record of my position on this matter until other facts or different considerations cause me to change my position, when I will make such change a matter of record.

F.C.C. 65R-214

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| CHARLOTTESVILLE BROADCASTING CORP. (WINA), CHARLOTTESVILLE, VA. | Docket No. 15861<br>File No. BP-15768 |
| WBXM BROADCASTING CO., INC., SPRINGFIELD, VA. | Docket No. 15862<br>File No. BP-15808 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBERS NELSON AND PINCOCK ABSTAINING.

1. The above-captioned mutually exclusive applications were designated for hearing by Memorandum Opinion and Order, FCC 65-147, released February 25, 1965. The Hearing Examiner granted WGAY, Inc.'s (hereafter referred to as WGAY) petition to intervene by Order, FCC 65M-437, released April 9, 1965. WGAY, thereupon filed the petition here under consideration April 23, 1965,[1] requesting that the issues in this proceeding be enlarged as follows:

(1) To determine whether the listening public in the Washington Metropolitan area may be confused and misled between the operation of the proposed station of WBXM Broadcasting Company, Inc. on 1070 kc, and the existing operation of Station WQMR on 1050 kc;

(2) To determine whether WGAY, Inc. will be economically injured by the advent of the proposed station of WBXM Broadcasting Company, Inc. in Springfield, Virginia;

(3) To determine whether the expected operating revenues estimated by WBXM Broadcasting Company, Inc. are reasonable, and, in light of the evidence adduced, whether WBXM Broadcasting Company, Inc. is financially qualified to construct and to operate the station as proposed in its application.

2. WGAY argues that since its petition was filed within two weeks of the date the Hearing Examiner permitted it to intervene in this proceeding, it has acted with diligence and that the petition should be considered on its merits. Both WBXM Broadcasting Company, Inc. (hereafter referred to as WBXM) and the Broadcast Bureau oppose the petition as untimely filed. The Bureau notes that WGAY waited almost thirty days after the matter was designated for hearing to seek intervention and that it offers no explanation for this delay. The Bureau argues that even though WGAY filed its petition to enlarge issues within two weeks after the Hearing Examiner permitted its intervention, said petition is not timely filed, and that in view of WGAY's unexplained delay in seeking intervention, good cause to accept the late filed petition

[1] The Board also has before it Broadcast Bureau's Partial Opposition to "Petition to Enlarge Issues", filed May 5, 1965; and an Opposition to Petition to Enlarge Issues, filed by WBXM Broadcasting Company, Inc., May 6, 1965.

to enlarge the issues cannot be found. WBXM has also argued that the petition to enlarge issues was not timely filed and that no good cause which would warrant the late acceptance of the petition has been shown. We agree that Section 1.229 of the Commission's Rules and Regulations applies to intervenors as well as to applicants, and that it behooves an intervenor to act promptly after a matter is designated for hearing so that its petitions to enlarge or to modify issues will be timely filed.[2] WGAY has failed to file its petition within the time provided by Section 1.229(b) of the Commission's Rules and Regulations. Moreover, it has advanced no explanation for its delay in seeking intervention nor has it set forth any facts or arguments which might otherwise show good cause for consideration of its late filed pleading. Accordingly, the petition to enlarge issues filed by WGAY, Inc., April 23, 1965, will be denied.

3. In its partial opposition to the petition to enlarge issues, the Bureau noted that the petition must be denied as lacking merit. However, the Bureau observed that the portion of the third requested issue which relates to the financial qualifications of WBXM raises a significant question which warrants further exploration despite the procedural deficiencies of the petition. The Bureau notes that WBXM's financial qualifications rest solely upon a $50,000 loan which is to be made to the corporation by Mr. and Mrs. Benito Gaguine, who will in turn obtain the necessary funds through a loan from American Security and Trust Company of Washington, D.C. The Bureau argues that since the bank's letter of commitment speaks of lending funds to the Gaguines "for investment in a Springfield Radio Station" and since the bank may not be aware of the Gaguines' intention to lend the money to WBXM, rather than obtain an ownership interest in the proposed station, the funds may not be forthcoming. Moreover, the Bureau argues that since the bank letter notes that terms and security for the loan will be worked out later, it is incumbent upon WBXM to make a further showing of the Gaguines' ability to provide the $50,000. The Board fails to perceive the significance of the distinction, for the purposes of the lending agency, between an investment by the Gaguines in the form of a loan and an investment whereby they would acquire a proprietary interest in the station. Moreover, there is no indication that the bank was not fully aware of the intentions of the Gaguines at the time its letter was written. Furthermore, the unconditional letter agreeing to lend Mr. and Mrs. Gaguine $50,000, in the absence of some factual allegations to the contrary, is sufficient to persuade the Board that the bank will in fact make the loan. Since no allegations to the contrary have come to the Board's attention, the financial qualifications issue will not now be added to this proceeding.

Accordingly, IT IS ORDERED, This 7th day of June, 1965, That the Petition to Enlarge Issues, filed April 23, 1965, by WGAY, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] *Kenosha Broadcasting, Inc.*, 22 RR 97 (1961).

F.C.C. 65R-216

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| NEBRASKA RURAL RADIO ASSOCIATION (KRVN), LEXINGTON, NEBR. | Docket No. 15812<br>File No. BP-15348 |
| TOWN & FARM CO., INC. (KMMJ), GRAND ISLAND, NEBR. | Docket No. 15813<br>File No. BP-15354 |
| For Construction Permits | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Before the Review Board for consideration is a petition to enlarge issues in this proceeding, filed February 23, 1965, by Nebraska Rural Radio Association (KRVN).[1] KRVN would have the Board add a contingent standard comparative issue and the following further issues:

To determine whether the proposal of Town & Farm Co., Inc. (KMMJ), would comply with Section 73.35(a) of the Commission's Rules.

To determine (a) whether there is a need for specialized agricultural-oriented programming in the area proposed to be served; and (b) the extent to which the programming proposals of the applicants would meet such need.

To determine (a) whether Town & Farm Co., Inc., did in fact attempt to ascertain the programming needs and interests of its proposed service area; and (b) how the applicant intends to meet such needs.

2. KRVN, Lexington, Nebraska (1010 kc, 25 kw, Day, DA, Class II) and KMMJ, Grand Island, Nebraska (750 kc, 10 kw, L-WSB, DA-1, Class II) seek construction permits for 880 kc, 50 kw, U, DA-2, Class II-A facilities. The mutually exclusive applications were set for hearing by Commission Order (FCC 65-54) released January 29, 1965, on issues including Section 307(b); areas and populations to be served; adjustment and maintenance of nighttime directional antenna arrays; whether KMMJ would cause objectionable interference to Station KJSK, Columbus, Nebraska; whether KMMJ's tower would be a menace to air navigation; whether in light of evidence adduced under the directional antenna issues, the proposed stations would adequately protect the 0.5 mv/m—50% secondary service area of Station WCBS, New York City; and compliance by KMMJ with Section 73.188(b)(1) of the Rules.

3. KRVN's request for an issue as to compliance with Rule 73.35(a) (duopoly issue), based on extensive overlap between KMMJ and commonly owned Station KXXX in Colby, Kansas, must be

[1] Also before the Board are: opposition, filed March 24, 1965 by Town & Farm Co., Inc. (KMMJ); corrigendum to opposition, filed March 25, 1965, by KMMJ; comments, filed March 24, 1965, by the Broadcast Bureau; and reply, filed April 12, 1965, by KRVN.

denied in view of subsequent Commission action. On May 6, 1965 (FCC 65–368) the Commission denied KRVN's motion for reconsideration of its designation Order and dismissal of KMMJ's application and held that the KMMJ application could be accepted if any grant thereof were conditioned on disposal of KXXX prior to commencement of the expanded KMMJ operation. Accordingly, no duopoly question remains.

4. Petitioner next requests addition of a standard comparative issue, or "at the very least" a contingent standard comparative issue, because: although Rule 73.22 allocates 880 kc for Class II–A use in Nebraska and the Dakotas, the instant applications are the only such applications before the Commission; both KRVN and KMMJ propose 50 kw unlimited time operation in the same general area of Nebraska; and they would serve substantially the same area, as attached engineering exhibits show. KRVN argues that 307(b) considerations are "only one facet" of the determination herein and that the reception service to be provided "to the same wide-spread region much of it 'white area'" is of greater significance than the transmission aspects of the proposals. The Broadcast Bureau supports addition of a contingent standard comparative issue.

5. In opposition, KMMJ states that addition of a comparative issue would greatly increase the complexity and length of this proceeding, delaying the advent of service on 880 kc; that such delay would be inconsistent with the Commission's expressed purpose of "utilizing Class II–A facilities to bring primary service as rapidly as possible to large areas and populations which are presently without such service;" that a comparative issue should accordingly not be added except for compelling reasons; and that no such reasons exist here, the existing issues being "entirely adequate" to permit choice between the applicants. Substantial 307(b) differences between the applicants are alleged by KMMJ: Grand Island, KMMJ's principal community, had a 1960 population almost five times larger than Lexington's, and Lexington "is in no way comparable with Grand Island as a trade, transportation, communications, and administrative center;" contrary to KRVN's assertion in its petition, engineering figures allegedly demonstrate that KMMJ would serve substantially greater areas and populations than would KRVN; nighttime KMMJ woul dbring a first primary service to 34,238 more people than would KRVN; and, finally, particularly in view of the white area coverage differences, which the Commission has stated must be the primary consideration in Class II–A cases, a decisive Section 307(b) distinction is stated to exist.

6. In reply, KRVN notes that: the population differences cited by KMMJ are of little significance since KRVN would bring Lexington its first local nighttime transmission service, while KMMJ would bring Grand Island its second; any delay caused by addition of a comparative issue would not justify refusal to add it if Section 307(b) factors prove not to be decisive; and reception aspects must be given primary consideration when service areas are similar. KRVN asserts that, notwithstanding KMMJ's measurements, the areas are in fact similar; those measurements have not been

accepted in evidence and KRVN "believes they are seriously defective."

7. The requested issue will be added on a contingent basis. As noted by KRVN the transmission aspects of these proposals, so heavily relied upon by KMMJ, may not be of decisive significance, especially since these are Class II–A applications. See *Kent-Ravenna Broadcasting Co.*, FCC 61–1350, 22 RR 605. If, as asserted by KMMJ, conclusive Section 307(b) differences between the applicants do exist, the comparative issue need not be reached; however, that determination is to be made initially by the Examiner. *Rockland Broadcasting Co.*, FCC 62–577, 23 RR 789. Addition of a contingent issue at this time will expedite the proceeding in the event that, after hearing on the Section 307(b) issue, it is found that no decisive differences have been demonstrated.

8. KRVN has also requested an issue to determine whether the area to be served has a need for specialized agricultural programming and, if so, the extent to which the applicants' respective proposals would meet it. In support of its request, KRVN alleges that the area to be served is largely rural in nature; that a substantial number of the workers in the area are farm laborers or workers in related industries; and that there is an urgent need for programming directed to the agricultural community. Station KRVN has allegedly conducted a continuing survey of programming needs, both in its current service area and in the wider area proposed to be served and determined the existence of need for the following types of programming, among others: "1) technical information to assist the farmer and rancher in the operation of their business [sic]; 2) complete and timely market reports; 3) up-to-the minute weather information at frequent and key intervals; 4) broadcast time for the Agricultural College to reach the rural population; 5) broadcast time for farm organizations; 6) up-to-the minute legislative news from the state capital, as well as timely news from other areas having special bearing on the region's rural farm and ranch population; 7) a full discussion of urgent problems facing agriculture and rural areas, such as roads, taxes, schools, ets.; and 8) religious and entertainment programs geared to meet the needs and desires of the rural farm and ranch population." Each of these categories is discussed at some length in the petition and attached affidavits.

9. KMMJ and the Broadcast Bureau oppose addition of this issue, KMMJ argues that addition of the requested issue would delay the hearing almost as much as a comparative issue; that KRVN has not made the threshold showing of facts of decisional significance which is a prerequisite to addition of programming issues in Section 307(b) cases; that none of the cases cited in support of the request is a Section 307(b) case; and that neither the nature nor the material result of KRVN's alleged "continuing survey" is reported, and the letters and affidavits connected with these allegations are "not factual statements of the need for special programming in the Nebraska-Kansas community" but "are at best endorsements of Radio Station KRVN." The only factual data submitted by KRVN, argues KMMJ, are a letter from a Professor

of Agricultural Economics at the University of Nebraska and three U.S. Census maps of Nebraska showing "demographic" characteristics, and "while these maps may illustrate the rural character of the central Nebraska community, they in no sense show the need for a special programming issue." However, continues KMMJ, assuming arguendo that such needs exist, the evidence would not be of decisional significance according to Commission precedent unless KRVN had demonstrated that KMMJ would fail to serve such needs. And, concludes KMMJ, its own application and related pleadings and documents in support thereof in fact constitute a "threshold showing that such facts would not be of decisional significance." The Broadcast Bureau distinguishes the cases cited by KRVN; states that *white* area service is the prime consideration in the instant case; and concludes with the observation that KRVN's and KMMJ's respective programming proposals presently contemplate 14.9 and 14.8% agricultural programming.

10. KRVN attacks the Bureau's opposition on the ground that it is manifest that "bare category percentages cannot show how the programming to be offered by each applicant would meet the particular needs of the area for specialized programming." KMMJ's argument that the petition fails to make the proper threshold showing "is similarly with out merit." KRVN concludes:

> Neither the Bureau nor Town & Farm has show that such a need does not exist. In such circumstances it is imperative that the Commission add a special programming issue in order that it may (1) determine whether there is such a need and (2) evaluate the programming proposals of the applicants in this respect.

11. The requested issue will not be added. As the above statement from its reply pleading indicates, KRVN appears to have misconceived the requirement of *Cookeville Broadcasting Co.*, FCC 60–101, 19 RR 897, that *the moving party* make a threshold showing of facts of decisional significance in support of a requested programming issue. No such showing is made by the petitioner here; the mere assertion that its allegations of need for specialized programming are not refuted does not constitute a sufficient basis for addition of an issue. As pointed out by KMMJ, the petitioner makes absolutely no showing that the need is not met by existing services or that it would not be met equally well by either applicant, especially since both parties have shown specific efforts to serve the needs of agriculture. *Of. Spanish International Television Company, Inc.*, FCC 65–425, released May 21, 1965. Under such circumstances, "specialized programming" evidence would not be of decisional significance. Moreover, the contingent comparative issue, if reached, will permit comparison of the programming proposals of the applicants in light of all relevant factors.

12. KRVN's final request is for an issue to determine whether KMMJ has attempted to discover and to meet the programming needs and interests of its proposed service area (*Suburban* issue). The petitioner's request is based upon its "information and belief" that no survey as to the needs of the proposed gain area has been made by KMMJ in connection with the instant application, since the addenda to KMMJ's proposed program schedule relate only to inquiries in the present service area and none of the 60 community

leaders from whom KRVN submitted letters in connection with the instant petition had reportdly then been solicited by KMMJ in connection with the area's programming needs.

13. The request for a *Suburban* issue is opposed by both the Bureau and KMMJ. The Bureau cites the similarity of the two proposals, the fact that KMMJ is an operating station with experience in the area, and its claim to familiarity with the expanded area proposed to be served as precluding addition of a *Suburban* issue. KMMJ states that while a survey is not a prerequisite to meeting the *Suburban* test under Review Board precedent, it has nevertheless in fact made "a systematic diligent survey of its proposed service area," which was used as a guide in formulation of program plans for the expande doperation. This survey, conducted by both KMMJ and commonly owned KXXX, which presently serves most of the proposed gain area (see paragraph 2, *supra*), employed four major methods. As listed in addenda to the proposed progra mschedule submitted with KMMJ's June 9, 1964, amendment, these four ways were 1) daily on-the-air announcements inviting program and service contacts; 2) personal contact with the audience through contacts by the staff and management; 3) questionnaires mailed to a list of area people picked at random from area telephone directories. This questionnaire supplies 'in-depth' program ideas and information . . .; 4) contact with civic organizations, government agencies and community leaders, both by personal interview and letter." In addition to these survey methods, KMMJ cites its broadcast experience and that of KXXX in the area; the fact that eight members of its staff have been residents and employees for 20–38 years; and the fact that KMMJ's principal stockholder has been active in broadcasting since 1925 and associated in ownership and/or managerial positions with eight stations in Nebraska, Kansas, Iowa and Colorado which blanket the entire proposed service area in addition to his connection with KXXX and KMMJ. In reply, KRVN challenges the adequacy of KMMJ's survey, which it alleges was conducted only among residents of KMMJ's present service area, and states that KMMJ's principal stockholder has not for some years been a resident of the area and his broadcast experience is therefore without relevance to the present requested issue.

14. The Board can find no basis for addition of a *Suburban* issue. It is clear from its application and the pleadings herein that KMMJ has made diligent and continuing efforts to ascertain the needs and interests of its present service area. It is also clear, although the petitioner did not respond to this portion of KMMJ's opposition pleading, that similar efforts continue to be made on behalf of the commonly owned Colby, Kansas Station, KXXX. Moreover, as we stated in *Bootheel Broadcasting Co.*, FCC 62R–47, 24 RR 292, "Although familiarity with the community and its needs is essential, the Commission did not, in its *Suburban* decision, limit the means of acquiring such familiarity." The Commission and the Board have in the past recognized the validity of such sources of information as local residence (see *Community Telecasting Corporation,* 32 FCC 923, 24 RR 1) and association with

ations in the gain area (see *Selma Television, Incorporated*, FCC 5–216, released March 22, 1965; *Arthur D. Smith, Jr.* (*WMTS*), CC 63R–559, 1 RR 2d 915). In the instant case KMMJ has not nly conducted surveys in its present service area and most of the ain area, but also has utilized both methods of familiarizing itelf with area needs cited above. Moreover, KRVN does not chalenge KMMJ's familiarity with the gain area's needs or present ny facts whatsoever to counter the evidence in support of that tation's claim of familiarity with and efforts to serve the needs f its proposed gain area. In view of the foregoing, KRVN's request for a *Suburban* issue will be denied.

Accordingly, IT IS ORDERED, This 8th day of June, 1965, That he petition to enlarge issues in this proceeding, filed February 23, 965, by Nebraska Rural Radio Association (KRVN) IS GRANTED n part and IS DENIED in part; and that the issues in this proeeding ARE ENLARGED by addition of the following:

To determine, in the event it is concluded that a choice between the application should not be based solely on considerations relating to Section 307(b), which of the operations proposed in the above-captioned applications would better serve the public interest, in the light of the evidence adduced pursuant to the issues herein and the record made with respect to the significant differences between the said applicants as to:

(a) the background on the applicant's ability to own and operate the proposed standard broadcast station;

(b) the proposals of each of the applicants with respect to the management and operation of the proposed stations;

(c) the programming services proposed in each of the applications.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–511

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| LESLIE L. STERLING AND WILLIAM H. PATTERSON D.B.A. AS FLATHEAD VALLEY BROADCASTERS (KOFI), KALISPELL, MONT. | Docket No. 15815<br>File No. BP–16369 |
| GARDEN CITY BROADCASTING, INC. (KYSS), MISSOULA, MONT. | Docket No. 15816<br>File No. BP–16400 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT.

1. The Commission has before it for consideration a petition to enlarge issues and/or other relief, filed on February 17, 1965, by Rust Broadcasting Co., Inc. (hereinafter WHAM), and a motion to strike, filed on April 13, 1965, by Flathead Valley Broadcasters (hereinafter KOFI), as well as pleadings responsive thereto, all of which were certified to the Commission for its determination by Review Board Order (FCC 65R–144), released April 26, 1965.

2. This proceeding involves the above-captioned mutually exclusive applications for a construction permit to establish a Class II–A standard broadcast facility to operate on 1180 kilocycles in the State of Montana, as contemplated by Section 73.22 of our Rules. To qualify for such Class II–A operation, the proposals must meet certain criteria in order to avoid objectionable interference to Station WHAM, Rochester, New York, the dominant Class I–A station operating on the 1180 kilocycles channel. One of the issues designated for hearing in our Order (FCC 65–56), released January 29, 1965, seeks to determine whether Garden City Broadcasting, Inc. (KYSS) will be able to adjust and maintain the directional antenna system as proposed and whether adequate nighttime protection will be afforded Station WHAM, Rochester, New York. Other than this issue and the preclusion of pre-sunrise operation, no question of interference to Station WHAM is discussed in the designation order. WHAM was made a party to this proceeding by order of the Examiner released March 24, 1965.

3. After describing what it considers to be objectionable interference to Station WHAM's nighttime skywave service from the Voice of America (VOA) broadcasts on 1180 kilocycles, and the attendant foreign "jamming", WHAM petitions us to enlarge the issues herein to determine the overall nighttime skywave interference potentional to WHAM from the foregoing, coupled with the proposed Montana service. Alternatively, it requests us to pre-

lude Class II–A operation on the channel until such time as VOA eases operation on the frequency 1180 kilocycles.

4. WHAM's petition is opposed by both applicants and by the Broadcast Bureau. We agree that the petition must be denied. In the 1961 Clear Channel decision,[1] we concluded that one Class II–A station should be assigned on 1180 kc in the state of Montana. We decided, in effect, that the benefits of a new unlimited time station in Montana, serving a substantial area now lacking any primary nighttime AM service, outweighed whatever interference might result beyond the 0.5 mv/m 50% skywave contour of WHAM. The factors which entered into this balancing process remain unchanged today.

5. Under the Clear Channel decision, a new Class II–A station may not cause objectionable interference to WHAM within its 0.5 mv/m 50% skywave contour. Under established engineering policy, the degree of skywave interference caused to the skywave service of a Class I station by each other station on its channel is determined on an individual basis, with no consideration given to the cumulative effect of two or more interfering signals. Since this is the case, if a II–A station on 1180 kc, considered by itself, is found not to cause objectionable interference to WHAM, this conclusion will be unaltered by the fact that signals of other stations may or may not impinge on the WHAM protected contour. The total interference received by WHAM is not considered to be increased by the addition of a new signal which does not itself cause objectionable interference. If the Class II–A station properly protects WHAM's 0.5 mv/m 50% skywave contour, it will continue to protect that contour whether or not other interfering signals exist on 1180 kc. WHAM has made no allegation of public injury and, in these circumstances, interference that the station would receive from other service is not relevant in a hearing concerning applications for a II–A station in Montana. We conclude, therefore, that consideration of any other interference to WHAM would serve no useful purpose in this proceeding.

6. KOFI's motion to strike will also be denied. While the affidavits submitted by WHAM are little more than listener reports, they will be accepted for their worth.

Accordingly, IT IS ORDERED, This 9th day of June, 1965, that the petition to enlarge issues and/or other relief, filed February 17, 1965, by Rust Broadcasting Co., Inc. (WHAM) IS DENIED;

IT IS FURTHER ORDERED, That the motion to strike, filed April 13, 1965, by Flathead Valley Broadcasters (KOFI) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[1] Clear Channel Report, 31 F.C.C. 565, 21 Pike & Fischer, R.R. 1801, Docket No. 6741, September 14, 1961.

F.C.C. 65–527

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| In Re Applications of | |
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| SYRACUSE TELEVISION, INC., SYRACUSE, N.Y. | Docket No. 14368<br>File No. BPCT–2924 |
| W. R. C. BAKER RADIO & TELEVISION CORP., SYRACUSE, N.Y. | Docket No. 14369<br>File No. BPCT–2930 |
| ONONDAGA BROADCASTING, INC., SYRACUSE, N.Y. | Docket No. 14370<br>File No. BPCT–2931 |
| WAGE, INC., SYRACUSE, N.Y. | Docket No. 14371<br>File No. BPCT–2932 |
| SYRACUSE CIVIC TELEVISION ASSOCIATION, INC., SYRACUSE, N.Y. | Docket No. 14372<br>File No. BPCT–2933 |
| SIX NATIONS TELEVISION CORP., SYRACUSE, N.Y. | Docket No. 14444<br>File No. BPCT–2957 |
| SALT CITY BROADCASTING CORP., SYRACUSE, N.Y. | Docket No. 14445<br>File No. BPCT–2958 |
| GEORGE P. HOLLINGBERY, SYRACUSE, N.Y. | Docket No. 14446 |
| For Construction Permits for New Television Broadcast Stations | File No. BPCT–2968 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX ABSENT; COMMISSIONER WADSWORTH NOT PARTICIPATING.

1. The Commission has before it (a) a petition to vacate decision and reopen the record, jointly filed on February 23, 1965 by Syracuse Television, Inc. and five other of the above applicants;[1] (b) the pleadings responsive or relating thereto;[2] and (c) all other matters of record herein.

2. The Commission's decision in this proceeding was released on January 22, 1965;[3] in brief, it granted the Baker application, and denied those of the eight other applicants seeking a construction permit for a new television broadcast station on Channel 9 in Syracuse, New York. Unknown to the Commission at the time of the grant to Baker was the fact that, on December 31, 1964, the State of New York had instituted a civil antitrust proceeding

[1] The five other joint petitioners are Onondaga Broadcasting, Inc., WAGE, Inc., Syracuse Civic Television Association, Inc., Six Nations Television Corporation, and George P. Hollingbery. Hereinafter, the applicants will usually be referred to in the abbreviated fashions utilized in the decision.

[2] The other pleadings are the verified answer and reply filed by Baker on March 25, 1965; the response filed by the Commission's Broadcast Bureau on March 26, 1965; the joint reply filed by the six joint petitioners on April 16, 1965; and the statement of position filed by Salt City Broadcasting Corporation on April 16. 1965.

[3] The decision was released *sub nom. Veterans Broadcasting Company, Inc.*, and is reported at 38 F.C.C. 25 and 4 R.R. 2d 375. By order released March 2, 1965, FCC 65–156, the Commission granted a petition by Veterans re questing a dismissal of its application with prejudice.

against (among others) a number of New York State plumbing contractors, among them, the Edward Joy Company, which is almost wholly owned by the families of T. Frank Dolan, Jr. and Leonard P. Markert, two of Baker's principal stockholders.[4] Dolan and Markert are two of the five persons each owning 17.27% of Baker's stock, Dolan serving as president of Baker, and Markert serving as a vice president thereof.[5]

3. A copy of the New York complaint is attached to the joint petition to reopen. In general, it charges that the defendants have, for many years, agreed, arranged and conspired among themselves and others to restrain competition in the building construction industry in the State of New York for the purpose of establishing and maintaining a monopoly in the industry. In furtherance of the alleged conspiracy, the defendants are said by the complaint to have engaged or participated in eighteen acts or series of acts generally relating to the submission of bids for the plumbing work involved in public building construction projects; the classification of the type of work to be included in plumbing contracts; and the selling and/or installing of plumbing supplies, the prices to be charged therefor, and the circumstances under which such supplies should be sold and/or installed. Twelve specifications of damage are listed in the complaint, among them, that the state's awarding authority for the construction of academic facilities has suffered coercion, delays and increased costs, and that competition in the sale and installation of plumbing equipment has been abridged and restrained. The complaint, which is verified by a Deputy Assistant Attorney General of the State of New York, seeks permanent injunctive and other curative relief, and contetary penalties for the alleged past violations of the applicable laws.

4. Based on the complaint, the petitioners seek a reopening of the record, a remand of the proceeding to the Hearing Examiner, and further hearing on issues inquiring as to Dolan's and Markert's involvement in the alleged misconduct; Baker's failure to notify the Commission of the complaint; and whether Baker possesses the requisite character qualifications to be a Commission licensee. Notwithstanding denials by Baker of any wrongdoing by the Joy company or its officials, the Commission believes that the complaint raises serious public interest questions that can only be resolved through the hearing process. Accordingly, the Commission is granting the substance of the petition to reopen, and is remanding the proceeding to the Hearing Examiner for further hearing on

[4] Question 10(e) of Section II of the Commission's broadcast application form (Form FCC 301) inquires as to whether there is pending in any court or administrative body against the applicant or any party to the application, any action involving, among other things, "restraints and monopolies and combinations, contracts or agreements in restraint of trade, or of using unfair methods of competition." The question was answered in the negative in Baker's original application, and Baker did not amend its application following the filing of the New York complaint, notwithstanding the provisions of Sec. 1.65 of the Commission's Rules.

[5] It appears that olan has been president, treasurer and a director of the Joy company since 1936, and that he personally owns 7% of the company's stock. Markert has apparently never participated in the management of the Joy company, and his personal holdings (if any) in the company are not disclosed in the original application. Markert's son, Leonard P. Markert, Jr., is said to be vice president, secretary, a director and general manager of the company, and to have been active in the Syracuse Master Plumbers Association over the past eight years. Both DMarkert, Jr. and the Association are named as defendants in the complaint, although neither Dolan nor Markert, Sr. are.

issues essentially the same as those proposed by the petitioners.[6]

5. Although Baker suggests that its denials and affirmative showings are sufficient to warrant a rejection of the petition to reopen, it does not object to a further hearing. Its principal concerns are that the petitioners be required to assume the burden of proof as to the charges in the complaint; and that it be furnished, thirty days prior to the commencement of the formal hearing, with information as to the specific matters to be relied upon by the petitioners, the witnesses they intend to call, and the nature of the evidence to be offered. The Commission's Broadcast Bureau also contends for greater specificity, and would require the petitioners to support the petition to reopen, within sixty days, "with facts as to the nature and extent of the involvement of the principals of Baker in the allegations of unlawful conduct made by the State of New York."

6. The argument as to the "burden of proof" appears to be one of semantics only, since petitioners "adopt and offer to prove the charges in the complaint."[7]

7. The question as to the specificity of the petition and the complaint is only slightly more troublesome. A fair reading of the complaint (adopted in the petition) compels a conclusion that it is as specific as it can be without a revelation of the whole of the precise overt acts and evidence to be relied upon. And it may be noted here that Baker was able, in its verified answer, to make point-by-point denials of wrongdoing by the Joy company—notwithstanding its contention that "the New York State action makes no charges against the Edward Joy Company which are sufficiently specific to inform it of any acts of wrongdoing." But the foregoing is not to say that Baker must approach the further hearing without more complete information as to the witnesses to be called and the nature of the particular evidence to be presented. In the interests of fair play and orderly procedure, and to make the remand proceeding something more than a means of undully extending the existing interim operation on Channel 9, the Commission believes it incumbent upon the petitioners to give Baker reasonable notice of the witnesses to be called and tthe matters as to which such witnesses will respectively be examined. The Commission reads petitioners' reply (par. 14) as agreeing to this procedure, their offer conditioned only on Baker's agreeing to follow the same procedure with respect to its case. The Commission anticipates no problem here, and leaves to the discretion of the Hearing Examiner the question of what constitutes reasonable notice.

8. In connection with the foregoing, the petitioners' reply indicates that the New York proceeding will commence shortly. If this be so, there would seem to be a good opportunity for the in-

[6] Unlike the petitioners' issues, however, the Commission's do not call for the Hearing Examiner to make a new comparative determination among the applicants. In light of the fact that a decision has already been rendered in the proceeding, it is more appropriate that the Hearing Examiner merely determine whether the evidence adduced makes advisable the selection of a new recipient for the permit.

[7] The Commission does not read petitioners' "offer to prove the charges in the complaint as extending to the issue concerning Baker's failure to amend its application. With respect to this issue, and one (specified by the Commission) inquiring as to the relationship between Baker and the Joy company, the Commission believes that the burden of proceeding with the evidence more appropriately belongs with Baker.

creased use of stipulations and other procedures designed to speed up the hearing process. Such procedures substantially shortened the previous hearing, and the Hearing Officer is urged again to make full use of his authority to utilize them, to the end that the hearing be expedited and kept within practicable limits.

9. The remaining question has to do with Salt City's right to participate in the further hearing. In brief, various of the parties have dropped Salt City from the caption of the proceeding on the theory that, because Salt City has neither sought reconsideration of the decision nor appealed it under Section 402 of the Communications Act, it is no longer involved in the proceeding. These parties have overlooked the fact, however, that Sec. 405 of the Act provides that appeals need not be taken until thirty days after Commission action on all petitions for reconsiderattion.[8] Consequently, Salt City, as much as the petitioners, is still in the case, with full rights of participation in the further hearing.

In view of the foregoing, IT IS ORDERED, This 16th day of June, 1965, (a) that the Joint Petition to Vacate Decision and Reopen the Record, filed on February 23, 1965, by Syracuse Television, Inc., *et al.*, IS GRANTED to the extent hereinabove indicated; (b) that the hearing record herein IS REOPENED; and (c) that the proceeding IS REMANDED, to the Hearing Officer who presided originally, for further hearing on the following issues:

(1) To determine whether the Edward Joy Company or its owners, officers, directors or other officials, have engaged in violations of the New York State antitrust laws or in other anti-competitive activities in the building construction and/or plumbing industries in the State of New York.

(2) To determine the relationship, in terms of ownership and/or control, between the Edward Joy Company and the W.R.G. Baker Radio and Television Corporation.

(3). To determine the circumstances regarding the failure to Baker to inform the Commission, pursuant to Sec. 1.65 of the Commission's Rules, of the filing of an antitrust complaint against the Edward Joy Company by the State of New York.

(4) To determine, in light of the evidence adduced with respect to the preceding issues, whether Baker should be disqualified or, if not, whether a substantial demerit should be assessed against this applicant, warranting a further comparative evaluation of the applications in this proceeding.

IT IS FURTHER ORDERED, That the burden of proof shall be on Baker, except that as to Issue (1), the burden shall be on the petitioners.

IT IS FURTHER ORDERED, That the Hearing Examiner make full use of his authority to utilize, among other procedures, prehearing conferences and the filing of stipulations as to facts and issues, with the objective of refining the issues, expediting the proceeding, and keeping the further hearing within practicable limits.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[8] See *Florida Gulfcoast Broadcasters, Incorporated*, FCC 62R-183, 24 RR 800.

F..C. 65–528

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Applications of

GROUP I

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| JOE L. SMITH, JR., INC. (WKNA–TV), CHARLESTON, W.VA. | Docket No. 15889<br>File No. BMPCT–4201 |
| AGNES J. REEVES GREER (WAND–TV), PITTSBURGH, PA. | Docket No. 15890<br>File No. BMPC–4205 |
| CHANNEL 16 OF RHODE ISLAND, INC. (WNET), PROVIDENCE, R.I. | Docket No. 15891<br>File No. BMPCT–4220 |
| UNITED BROADCASTING CO. OF EASTERN MARYLAND, (WTLF), BALTIMORE, MD. | Docket No. 15892<br>File No. BMPCT 4222 |
| NEPTUNE BROADCASTING CORP. (WHTO–TV) ATLANTIC CITY, N.Y. | Docket No. 15893<br>File No. BMPCT–4239 |
| ELFRED BECK, (KCEB), TULSA, OKLA. | Docket No. 15894<br>File No. BMPCT–4262 |
| PIEDMONT BROADCASTING CORP., (WBTM–TV), DANVILLE, VA. | Docket No. 15895<br>File No. BMPCT–4264 |
| MID–AMERICA BROADCASTING CORP. (WEZI) LOUSVILLE,, KY. | Docket No. 15896<br>File No. BMPCT–4266 |
| KNUZ TELEVISION CO., (KNUZ–TV), HOUSTON, TEX. | Docket No. 15897<br>File No. BMPCT–4238 |
| ATLANTIC VIDEO CORP., (WRTV), ASBURY PARK, N.J. | Docket No. 15898<br>File No. BMPCT–4298 |
| APPALACHIAN CO., (WTVU), SCRANTON, PA. | Docket No. 15899<br>File No. BMPCT–4331 |
| STORER BROADCASTING CO., (WGBS–TV), MIAMI, FLA. | Docket No. 15900<br>File No. BMPCT–4697 |
| TELECASTING, INC., (WENS), PITTSBURGH, PA. | Docket No. 15901<br>File No. BMPCT–4992 |
| S. H. PATTERSON, (KSAN–TV), SAN FRANCISCO, CALIF. | Docket No. 15902<br>File No. BMPCT–5383 |

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| CONNECTICUT RADIO FOUNDATION, INC. (WELI–TV), NEW HAVEN, CONN. | Docket No. 15903<br>File No. BMPCT–5744 |
| KAISER BROADCASTING CORP., (KMTW), CORONA, CALIF. | Docket No. 15904<br>File No. BMPCT–5870 |
| ELTON H. DARBY, (WVNA–TV), TUSCUMBIA, ALA. | Docket No. 15905<br>File No. BMPCT–5943 |
| MISSISSIPPI BROADCASTING CO., (WCOC–TV), MERIDIAN, MISS.<br>For extension of Construction Permits | Docket No. 15906<br>File No. BMPCT–5976 |
| GROUP II | |
| RADIO ENTERPRISES OF OHIO, INC. (WICA–TV), ASHTABULA, OHIO<br>For License To Cover Construction Permit for New Television Broadcast Station | Docket No. 15907<br>File No. BLCT–154 |
| GROUP III | |
| ASSOCIATED BROADCASTERS, INC. (WLEV–TV), BETHLEHEM, PA. | Docket No. 15908<br>File No. BRCT–137 |
| LOCK HAVEN BROADCASTING CORP., (WBPZ–TV), LOCK HAVEN, PA. | Docket No. 15909<br>File No. BRCT–433 |
| CONNECTICUT-NEW YORK BROADCASTERS, INC., (WICC–TV), BRIDGEPORT, CONN.<br>For Renewal of Licenses | Docket No. 15910<br>File No. BRCT–454 |

## MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER WADSWORTH NOT PARTICIPATING.

1. The Commission has before it for consideration the above-captioned eighteen applications for additional time within which to complete construction, one application for license to cover construction permit for a new television broadcast station, and three applications for renewal of licenses; as well as pleadings related thereto.[1] Each of these applicants is a permittee or licensee of a UHF television broadcast station. None of these stations is presently in operation. By Order leased March 23, 1965 (FCC 65–217), the Commission designated these three groups of applications for oral argument on the following issues:

*(Group I)*

To determine whether the reasons advanced by the permittee in support of its request for extension of completition date, constitute a showing that failure to complete construction was due to causes not under control of the permittee, or constitute a showing of other matters sufficient to warrant further extension within the meaning of Section 319(b) of the Communications Act of 1934, as amended, and Section 1.534(a) of the Commission's Rules.

[1] In addition to the above-captioned applications, the following pleadings will be considered herein: (a) Petition to Dismiss Application Without Prejudice, filed April 9, 1965, by Associated Broadcasters, Inc. (KLEV-TV); (b) Petition to Accept Written Appearance, filed April 29, 1965, by Appalachian Company (WTVU); (c) Petition for Leave to Amend, filed May 12, 1965, by S. H. Patterson (KSAN-TV); (d) Broadcast Bureau's Opposition to KSAN-TV's Petition for Leave to Amend, filed May 25, 1965; and (e) Motion for Leave to Amend, filed May 20, 1965, by Mid-America Broadcasting Corporation (WEZI).

(*Groups II and III*)

To determine, in light of the ract that these stations have been silent for a considerable period of time, whether circumstances exist which warrant continued suspension and continued deferment of action with respect to the pending license and/or renewals, and, if not, whether these applications should be denied.

Oral argument was held before the Commission *en banc* on May 13, 1965, with all of the above-captioned parties participating except Appalachian Company (WTVU)[2] and Associated Broadcasters, Inc. (WLEV–TV).[3]

2. Four of the applicants, herein, namely, Agnes J. Reeves Greer (WAND–TV); KNUZ Television Company (KNUZ–TV); Telecasting, Inc. (WENS); and Mid-America Broadcasting Corporation (WEZI)[4], indicated at oral argument that they have filed or will file with the Commission applications for assignment of their construction permits or for transfer of control of the permittee corporations to assignees or transferees willing to commence broadcasting following approval by the Commission of such assignment or transfer applications. Five applicants, namely, Channel 16 of Rhode Island, Inc. (WNET); United Broadcasting Company of Eastern Maryland, Inc. (WTLF); Atlantic Video Corp. (WRTV); Storer Broadcasting Company (WGBS–TV); and Kaiser Broadcasting Corporation (KMTW–TV) stated that they have filed or will file with the Commission applications for modification of their construction permits, seeking changes in their transmitter sites, increased power, or other engineering modifications. Since the Commission has committed itself to foster the institution of additional UHF television service, and since a grant of the applications for assignment, transfer of control, or modification of construction permit filed or to be filed by the above nine applicants will achieve this objective, these applications for additional time within which to complete construction will be granted; provided that the contemplated applications for assignment, transfer of control, or modification of construction permit, not yet on file[5], must be tendered to the Commission within two months

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[2] WTVU did not appear for oral argument. Therefore, its Petition to Accept Written Appearance will be dismissed, *infra*, as moot.

[3] WLEV-TV's Petition to Dismiss Application Without Prejudice will be granted, *infra*.

[4] WEZI, on May 20, 1965, filed a petition for leave to amend its application for additional time "to reflect the execution of a contract for sale of WEZI, and the intention of Mid-America to apply for consent to assignment of permit." No oppositions to this petition have been filed and it will be granted, *infra*.

[5] The following applications have been filed as of June 8, 1965:

*Agnes J. Reeves Greer* (*WAND-TV*)—Application for assignment of construction permit to D. H. Overmyer Communications Company, filed May 11, 1965 (BAPCT–364).

*United Broadcasting Company of Eastern Maryland, Inc.* (*WTLF*)—Application for modification of construction permit to change transmitter site, filed April 29, 1965 (BMPCT–6097).

*KNUZ Television Company* (*KNUZ-TV*)—Application for transfer of control of permittee to WKY Television System, Inc., filed May 12, 1965 (BTC–4817).

*Atlantic Video Corp.* (*WRTV*)—Application for modification of construction permit to change transmitter site, filed May 12, 1965 (BMPCT–6105).

*Storer Broadcasting Company* (*WGBS-TV*)—Application for modification of construction permit (to effect engineering changes), filed May 13, 1965 (BMPCT–6106).

*Telecasting, Inc.* (*WENS*)—Application for assignment of construction permit to Springfield Television Broadcasting Corporation, filed April 8, 1965 (BAPCT–363).

*Kaiser Broadcasting Corporation* (*KMTW*)—Application for modification of construction permit (to effect engineering changes), filed May 18, 1965 (BMPCT–6108).

*Channel 16 of Rhode Island, Inc.* (*WNET*) has stated that it will file an application for modification of its construction permit to reflect engineering changes. *Mid-America Broadcasting Corporation* (*WEZI-TV*) has stated it will file an application for assignment of its construction permit to South Central Broadcasting Corporation and has petitioned the Commission for leave to amend its application for additional time to reflect this proposed filing.

following release of this Order; and provided further that construction must be completed by these nine applicants or their assignees or transferees within six months following Commission action on the applications for assignment, transfer of control, or modification of construction permit. It is stressed that grant of these applications for additional time in no way constitutes prejudgment or approval by the Commission of the aforementioned applications for assignment, transfer of control or modification of construction permit.

3. At oral argument, one of the above nine applicants, KNUZ Television Company (KNUZ–TV), indicated that, pending approval of its pending application for transfer of control, it plans to file and prosecute an application to change its transmitter site. KNUZ–TV will, accordingly, be given six months from the date of Commission action on its transfer application or on its modification application, whichever is later, within which to complete construction of its station, provided that no consideration will be given to the date action is taken on the modification application if such is not filed within two months following release of this Order. Also, Atlantic Video Corp. (WRTV), both in its application to change its transmitter site and at the oral argument herein, indicated that it intended to apply for a permit to construct translator stations as soon as the Commission adopts its proposed translator rules (Docket No. 15858). Therefore, WRTV will be given six months following Commission action on its modification application or final Commission action on the proposed translator rules, whichever is later, within which to complete construction of its station.

4. S. H. Patterson (KSAN–TV), on May 12, 1965, filed a petition for leave to amend its application for extension of time. The amendment contemplates modification of applicant's programming proposal presently on file with the Commission and proposes operation of KSAN–TV, Channel 32, at San Francisco, California, as a satellite of KICU–TV, Channel 43, Visalia, California, which is owned by applicant's son. If the Commission permits the amendment and grants the application for extension of time, applicant stated it will begin broadcasting within six months. The Commission believes it would be in the public interest for this additional service to be available to the people of San Francisco. Therefore, the petition for leave to amend, and the application for extension of time for six months will be granted.

5. The application of Elton H. Darby (WVNA–TV) for a construction permit was granted on November 7, 1962. Upon expiration of that permit, a new construction permit was granted on August 9, 1963. The instant application for additional time within which to complete construction was filed on January 9, 1964. At oral argument, applicant stated that its equipment "will be ordered or [applicant will be] well along the line of ordering the equipment and proceeding with actual construction within the next six months period." Applicant will, accordingly, be given six months additional time within which to construct its station.

6. Mississippi Broadcasting Company (WCOC) will also be

given six months within which to complete construction since that applicant advised that it will commence operation by November 1, 1965.

7. Two of the above applicants propose share-time operation with educational television interests and request time within which to complete negotiations with these interests. Piedmont Broadcasting Corporation (WBTM–TV), Danville, Virginia, requests additional time to complete construction until September 1966, at which time it expects to commence educational broadcasting daily until 6 p.m. and commercial broadcasting after 6 p.m. Negotiations are now in process between the applicant and representatives of the six school divisions in Danville and its surrounding area. Radio Enterprises of Ohio, Inc. (WICA–TV), Ashtabula, Ohio, which has pending a license application to cover its construction permit, requests additional time within which to resume operation in order to reach financial agreement with the Ashtabula County Educational Television Foundation. The Foundation is a non-profit corporation whose trustees are the seven superintendents of the public school systems in Ashtabula County plus the chief officer of Kent State University's local branch. Applicant's vice-president and general counsel acts as statutory agent and counsel for the Foundation. As in Danville, a share-time operation is proposed. Both applicants have indicated that, in their respective areas, it would be many years before the educational interests could construct their own television stations and provide full-scale educational television. Since the proposed share-time operations of WBTM–TV and WICA–TV would bring educational television to the Danville and Ashtabula areas earlier than might otherwise be expected, the Commission believes it would be in the public interest for these applications to be granted. Therefore, WBTM–TV's construction permit will be extended for six months following release of this Order. At that time, if construction has not been completed, the applicant will be in a position to report to the Commission the status of negotiations between it and the educational interests and the Commission will then be able to act upon any request for additional time. WICA–TV's application for license to cover construction permit will be held in abeyance for six months following release of this Order, at which time the Commission will take action on any further requests then made to it by WICA–TV.

8. The remaining applicants have made no firm commitments to complete construction or to commence or resume broadcasting. The primary reason advanced for their inaction is that UHF operation at this time would be economically infeasible. As was done in the 1960 proceeding concerning UHF construction permits (Docket Nos. 13550, *et al.*), the applicants cite the history of failure of UHF stations in areas served by VHF stations, and the fact that most television sets now owned by the public are unable to receive UHF signals.

9. Section 319(b) of the Communications Act of 1934, as amended, states:

> . . . [The construction permit] shall show specifically the earliest and latest

dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

Section 1.534 of our rules states that applications for additional time within which to construct a station

> . . . will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension.

10. We stated in our 1960 Memorandum Opinion and Order, *Thames Broadcasting Corporation,* FCC 60–1394( 20 Pike & Fischer, R.R. 1023, that:

> We believe that none of these applicants, all of whom at the time they obtained their construction permits stated they would construct the subject station and who now substantially state that they do not intend to commence construction, have demonstrated that their failure to construct was due to causes not under their control. The applicants have failed to satisfactorily demonstrate that they could not have physically constructed their stations as contemplated by Section 319 of the Act . . . [W]e emphasize that the Commission is not compelling the applicants to construct facilities for which they have applied. On the other hand, we do not feel that it is in the public interest to have these construction permits outstanding when the applicants have no intention of going ahead with construction in the near future. It is the applicants' choice to build or not. Since they do not choose to build and the reasons they have advanced do not involve causes beyond their control, their applications . . . should be denied.

The foregoing aptly applies to this proceeding. As to applicant's argument that most television sets now owned by the public are unable to receive UHF signals, we stated in *Thames Broadcasting Corporation, supra,* that this "involves the matter of business judgment, since it bears on the availability of an audience." A permittee or licensee who voluntarily postpones construction or ceases operation because of economic factors exercises his independent business judgment, and such postponement or cessation is clearly due to causes under control of the permittee or licensee.[6]

In view of the foregoing, those applications not heretofore considered in paragraphs 2 through 7 and footnote 3, *supra* will be denied.

Accordingly, IT IS ORDERED, This 16th day of June, 1965, That the applications for additional time within which to complete construction of Agnes J. Reeves Greer (WAND–TV) (Docket No. 15890); United Broadcasting Company of Eastern Maryland, Inc. (WTLF) (Docket No. 15892); Storer Broadcasting Company (WGBS–TV) (Docket No. 15900); Telecasting, Inc. (WENS) (Docket No. 15901); and Kaiser Broadcasting Corporation (KMTW) (Docket No. 15904) ARE GRANTED, and that the construction permits of said applicants are extended for six months following Commission action on their applications for assignment of construction permit, transfer of control of per-

[6] It is also to be noted that pursuant to Sections 303(s) and 330 of the Communications Act of 1934, as amended, all television sets now manufactured and shipped in interstate commerce must be able to receive all television frequencies allocated by the Commission.

mittee, or modification of construction permit now on file with the Commission;[7]

IT IS FURTHER ORDERED, That the application for additional time within which to complete construction of KNUZ Television Company (KNUZ–TV) (Docket No. 15897) IS GRANTED, and that its construction permit is extended for six months following Commission action on its application for transfer of control or application for modification of construction permit [8], whichever is later, PROVIDED that no consideration will be given to the date of action by the Commission on the application for modification of construction permit if such application is not filed within two months following release of this Order;

IT IS FURTHER ORDERED, That the application for additional time within which to complete construction of Atlantic Video Corp. (WRTV) (Docket No. 15898) IS GRANTED, and that its construction permit is extended for six months following Commission action on its application for modification of construction permit or final Commission action on the proposed translator rules (Docket No. 15858), whichever is later;

IT IS FURTHER ORDERED, That the applications for additional time within which to complete construction of Channel 16 of Rhode Island, Inc. (WNET) (Docket No. 15891) and Mid-America Broadcasting Corporation (WEZI) (Docket No. 15896) ARE GRANTED, that their construction permits are extended for six months following Commission action on their applications for modification or assignment of construction permits [9], PROVIDED that these applications are filed within two months following release of this Order, and that the Motion for Leave to Amend filed May 20, 1965, by Mid-America Broadcasting Corporation IS GRANTED;

IT IS FURTHER ORDERED, That the applications for additional time within which to complete construction of Elton H. Darby (WVNA–TV) (Docket No. 15905) and Mississippi Broadcasting Company (WCOC–TV) (Docket No. 15906) ARE GRANTED, and that their construction permits are extended for six months;

IT IS FURTHER ORDERED, That the application for additional time within which to complete construction of Piedmont Broadcasting Corporation (WBTM–TV) (Docket No. 15895) IS GRANTED, and that its construction permit is extended for six months;

IT IS FURTHER ORDERED, That the application for license to cover construction permit of Radio Enterprises of Ohio, Inc. (WICA–TV) (Docket No. 15907) WILL BE HELD IN ABEYANCE for six months;

IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed May 12, 1965, by S. H. Patterson (KSAN–TV) (Docket No. 15902) IS GRANTED, that its application for additional time within which to complete construction IS GRANTED, and that its construction permit is extended for six months;

[7] See footnote 5, *supra*.
[8] See para. 3 and footnote 5, *supra*.
[9] See footnote 5, *supra*.

IT IS FURTHER ORDERED, That the Petition to Dismiss Application Without Prejudice, filed April 9, 1965, by Associated Broadcasters, Inc. (WLEV–TV) (Docket No. 15908) IS GRANTED, and that its application for renewal of license IS DISMISSED without prejudice;

IT IS FURTHER ORDERED, That the Petition to Accept Written Appearance, filed April 29, 1965, by Appalachian Company (WTVU) (Docket No. 15899) IS DISMISSED as moot;

IT IS FURTHER ORDERED, That the applications for additional time within which to complete construction of Joe L. Smith, Jr., Incorporated (WKNA–TV) (Docket No. 15889), Neptune Broadcasting Corporation (WHTO–TV) (Docket No. 15893), Elfred Beck (KCEB) (Docket No. 15894), Appalachian Company ((WTVU) (Docket No. 15899), and Connecticut Radio Foundation, Incorporated (WELI–TV) (Docket No. 15903), ARE DENIED without prejudice; and

IT IS FURTHER ORDERED, That the applications for renewal of license of Lock Haven Broadcasting Corporation (WBPZ–TV) (Docket No. 15909), and Connecticut-New York Broadcasters, Inc. (WICC–TV) (Docket No. 15910), ARE DENIED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–537

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of<br>BOISE VALLEY BROADCASTERS, INC. (KBOI),<br>BOISE, IDAHO<br>Has: 950 kc., 5 kw., DA–N, U, Class III<br>Requests: 670 kc., 25 kw., 50 kw.,–LS, DA–N, U, Class II–A<br>For Construction Permit | File No. BP–15769 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER LEE ABSTAINING FROM VOTING; COMMISSIONER COX ABSENT.

1. The Commission has before it for consideration (a) the above-captioned application; (b) a Memorandum Opinion and Order, FCC 65–149, 4 R.R. 2d 559, adopted February 24, 1965, (1) dismissing a petition to deny filed by the National Broadcasting Company, Inc. ("NBC"), licensee of Class I–A standard broadcast Station WMAQ, Chicago, Illinois; (2) denying petitions filed respectively by the Gem State Broadcasting Corporation ("Kem"), licensee of standard broadcast Station KGEM, Boise, Idaho, and the Mesabi Western Corporation, licensee of standard broadcast Station KIDO, Boise, Idaho; and (3) granting the application; (c) petitions for reconsideration filed by NBC and Gem; (d) pleadings by the applicant ("KBOI") in opposition to the petitions for reconsideration; and (e) related pleadings et al.

2. NBC, in its pre-grant pleadings, claimed standing as a party in interest on the ground that the KBOI proposal would cause nighttime interference to WMAQ within that station's protected 0.5 mv/m–50% skywave contour because of inability to adjust and maintain the array within the proposed pattern value of radiation, etc., and hence would constitute a modification of the WMAQ broadcast license. It substantively objected to the application (a) on the ground of such alleged interference in contravention of Section 73.22(d) of the Commission's Rules; and on the further grounds (b) that the KBOI proposal would not comply at night with the requirement, in Section 73.188(b)(1), of "A minimum field intensity of 25 to 50 mv/m . . . over the business or factory areas of the city"; (c) that the proposal did not satisfy the requirement, in Section 73.24(i) of the Rules, "That, in the case of an application for a Class II–2 station . . . , 25 percent or more of the area or population within the nighttime interference-free service contour of the proposed station receives no nighttime interference-

free primary service from another station"; that in fact only 13 percent of the area within the proposed KBOI nighttime interference-free service contour would be without primary service from a standard broadcast or FM station; and (d) that a grant of the KBOI application would be contrary to the public interest in that, according to the applicant itself, only 2977 persons would receive a first nighttime interference free primary standard broadcast service from the proposed operation.

3. Gem, in its pre-grant petition, claimed standing on the ground that it would potentially suffer economic injury if the KBOI application were granted. Its substantive objections were (a) that the proposal would cause objectionable interference to WMAQ; (b) that a grant would frustrate the Commission's efforts to provide new nighttime service for listeners who do not have such service, in that, considering standard broadcast service alone, the proposal would serve very few additional persons, and that many of those persons can receive substantially duplicated programming now over KBOI(A)'s sister station KBOI–FM; and (c) that a grant of the KBOI application would have a serious adverse effect upon the finances and programming of KGEM and other competing station in the Boise area.

4. In its petition for reconsideration, NBC incorporates by reference its previous objections and, in addition, makes the following objections to the Commission's Memorandum Opinion and Order: (a) With respect to the findings regarding interference to WMAQ, NBC contends that the Commission erred in—

> the use of information not in the pleadings before the Commission, the failure to notify the parties in advance that official notice might be taken of specific information so as to give the parties the opportunity to analyze it and to show the contrary; the failure to state in the decision itself what the information was of which the Commission took official notice; the failure to state in the decision how that information was used to arrive at the conclusion reached; and the failure to state the underlying facts found and the reasoning supporting the Commission's bald statement that the proposed operation of KBOI will not cause interference . . .

(b) With respect to the finding regarding compliance with Section 73.188(b)(1) of the Rules, NBC contends that in the pertinent paragraph of the Memorandum Opinion and Order the Commission justifies its finding in favor of the KBOI application only with the statement that "the Commission has considered the engineering data submitted by the parties and other available engineering data"; that in fact only one party, NBC, filed data regarding the question, all of it indicating that the proposal would not comply with Section 73.188(b)(1); and that in addition the Commission erred in the various respects indicated in the above quotation. (c) With respect to the findings regarding compliance with Section 73.24(i) of the Rules, NBC contends that the Commission failed to consider the argument that in view of its "current thinking" about aural services (i.e., that "an area which can receive an AM and FM signal is considered to receive two aural signals for purposes of determining program duplication"), it is required to consider FM as well as AM nighttime service in determining the size of the "white" area which woul dreceive a first nighttime interference-free service

from the proposal. (d) With respect to the findings regarding the public interest in view of the limited number of additional "white"-area residents to be served, NBC contends that the Commission failed to adequately consider waiting for other applicants to file for the frequency or some alternative disposition of the frequency.

5. Gem's petition for reconsideration reasserts the objections set forth in paragraph 3, items (b) and (c), *supra*, and contends, in support of those objections, that people, not land, require broadcast service; that, therefore, a grant of the KBOI application for the Idaho, 670kc, Class II–A frequency constitutes an inefficient allocation of that channel in derogation of the Commission's obligations under Sections 307(b) and 309(a) of the Communications Act of 1934, as amende, and its own objectives in providing for Class II–A stations; and that the public interest would be adversely affected by the socio-economic effects of providing KBOI with a position of dominance in the standard broadcast field in Idaho.

6. Although NBC's petition to deny was dismissed on the ground of lack of standing, the Commission nevertheless considered and made findings with respect to all of the objections made by NBC in that petition and related pleadings. Thus, the finding that NBC lacked standing as a party in interest had no practical effect upon the outcome of the Commission's pre-grant deliberations in this matter. Similarly, notwithstanding the effect of that finding upon NBC's entitlement to file a petition for reconsideration, we have carefully weighed the arguments in that petition and made appropriate findings thereon.

7. In the Memorandum Opinion and Order granting the KBOI application, it was incorrectly stated that the Commission's findings with respect to NBC's claim of standing, and NBC's related objection that the KBOI proposal would cause interference to WMAQ within its 0.5 mv/m–50% skywave contour, were based in part on unspecified "other engineering information available in the Commission's files." A similar error occurs in paragraph 12 of that Order (concerning Section 73.188(b)(1) of the Rules) which states, incorrectly, that the Commission has considered "other available engineering data." In both instances, the Commission relied solely upon data supplied by the parties or embodied in various sections of the Rules. Also, as reflected in the minutes of the Commission meeting at which the subject Memorandum Opinion and Order was issued, the Commission ordered that there be included in the construction permit two special conditions designed to remove any remaining doubt as to KBOI's ability to adjust and maintain its array and avoid interference to WMAQ. The texts of those two conditions were accidentally omitted from the Order and the construction permit. To cure those omissions, we will order the issuance of a corrected construction permit, and set forth the texts of those special conditions herein, as follows:

(5) That to insure maintenance of the radiated fields within the required tolerance, a properly designed phase monitor shall be continuously available as a means of correctly indicating the relative phase of the currents in the several elements of the directional antenna system with a resolution of 0.1 degree and the current ratios of the towers to 0.1%.

(6) That a study, based upon anticipated variations in phase and magnitude

of current in the individual antenna towers after initial adjustment, must be submitted with the application for license to indicate clearly that the inverse distance field strength at one mile can be maintained within the maximum expected operating values of radiation specified in the radiation pattern. Allowable deviations in phase and current determined from this study will be incorporated in the instrument of authorization.

8. As indicated in Paragraphs 10 and 11 of the previous Memorandum Opinion and Order, the Commission found that, even in the absence of those special conditions, KBOI would be able to adjust and maintain its array as proposed, and avoid interference to WMAQ. With the imposition of those conditions, however, all questions as to KBOI's ability to do so were rendered moot.

9. NBC's objection to the Commission's finding regarding Section 73.188(b)(1) is rejected. Upon consideration of the data submitted, the Commission, relying upon Figure M–3 of the Rules, found that the applicant's proposal was in substantial compliance with the requirements of Section 73.188(b)(1). No new data has been submitted by NBC that would warrant a change in that conclusion. The Commission has previously indicated in a number of decisions, e.g., *Birney Imes, Jr.*, 27 FCC 225, 17 R.R. 419 (1959), that substantial compliance with that rule is sufficient.

10. NBC's objection to the Commission's finding regarding Section 73.24(i) of the Rules also lacks merit. The Commission's intent in adopting Section 73.24(i), and its consistent application of that provision ever since, has been in terms of the availability of standard broadcast nighttime service without regard to the availability of other broadcast services.

11. Gem's reference to the potential "socio-economic" effects of a grant of the KBOI application is not supported by sufficient specific allegations of fact to raise a substantial question.

12. Other objections included by NBC and Gem in their petitions for reconsideration are essentially restatements of objections contained in their previous petitions in this matter, and are accompanied by no significant new information or arguments. Upon further consideration of those objections, we remain persuaded that our previous findings with respect to them were correct.

In view of the foregoing, IT IS ORDERED, That the petition for reconsideration filed by the National Broadcasting Company, Inc., IS DISMISSED for lack of standing; that the Gem State Broadcasting Corporation petition for reconsideration IS DENIED; and that a corrected construction permit SHALL BE ISSUED to the applicant, said permit to include the special conditions set forth in Paragraph 7 *supra*.

Adopted June 16, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

F..C. 65-540

BEFORE THE

**FEDERAL COMMUNCATIONS COMMISSION**

WASHINGTON, D.C.

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| In Re Application of<br>THOMAS C. CUTTER, VICKY JO CUTRER, OREN V. ZIMMERMAN, AND ANN C. ZIMMERMAN D.B.A. AS RADIO STATION WJQS (WJQS), JACKSON, MISS.<br>Has: 1400 kc., 250 w., U, Class IV<br>Requests: 1400 kc., 250 w., 1 kw.-LS, U, Class IV<br>For Construction Permit | File No. BP-15150 |

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it for consideration (a) the above-captioned and described application, granted by the Commission on March 17, 1965; (b) a "Petition for Reconsideration," filed March 31, 1965, by Grenada Broadcasting Company, Inc. ("WNAG") Grenada, Mississippi; (c) an "Opposition . . . ," filed April 21, 1965, by WJQS; and (d) a "Reply to Opposition. . . ." filed May 4, 1965 by WNAG.

2. In its petition WNAG states the following: (a) WJQS and WNAG are both Class IV stations operating on 1400kc; (b) WNAG is licensed to operate with 250w, but has pending an application for an increase in daytime power to 1kw; (c) on the same day on which the WJQS application was granted, the WNAG application (File No. BP-15864) was designated for hearing (Docket No. 15885) on the ground that the WNAG proposal would cause interference to WDSK, Cleveland, Mississippi, a non-Class IV station; (d) WJQS, operating as proposed, would cause substantial objectionable interference to the licensed operation of WNAG, affecting 278 square miles of the area within WNAG's interference-free contour (approximately 20 percent of that area) and 8838 persons now receiving primary service from WNAG (approximately 16 percent of WNAG's primary-service population). For these reasons, WNAG requests that the Commission reconsider its grant of the WJQS application, and designate the WJQS application for hearing in a consolidated proceeding with the application for an increase in the daytime power of Station WNAG.

3. In its opposition pleading, WJQS states: (a) The WNAG petition is statutorily defective, in that (1) Section 309 of the Communications Act of 1934, as amended, as well as Commission Rules implementing that section, require that objections to an application be filed prior to grant; and (2) even if WNAG may

initially object to the WJQS application via a petition for reconsideration under Section 405 of the Act, WNAG is obliged to submit facts not before the Commission at the time the grant was made, an obligation which WNAG has not fulfilled; (b) designation of the WJQS application for hearing now, after the application has already been granted, would not be in the public interest since it would run contrary to the Commission's established policy objective of increasing the daytime power of Class IV stations to 1kw.

4. In view of the fact that the one-kilowatt operation of WJQS will cause interference to the existing operation of WNAG, to which WNAG objects, the Commission will rescind its action of March 17, 1965, in granting the WJQS application.

5. This does not mean, however, that the WJQS application must or should be designated for hearing with the pending WNAG application in a consolidated proceeding. As pointed out in the Commission's Report and Order, FCC 61–601, released May 4, 1961, the consolidation for hearing of proposals by Class IV stations for increased daytime power generally serves no useful purpose. That is especially so in the present situation, in view of the essential dissimilarity of the two cases., i.e., the fact that the WNAG proposal—unlike the WJQS proposal—would cause interference to a non-Class IV station.

6. Instead, the Commission will, upon recission of the WJQS grant, hold the WJQS power-increase application without further action pending a final decision in the WNAG proceeding. If WNAG's application is denied, its objections to the WJQS application will be considered at that time. If, on the other hand, the WNAG application is granted, the authorization will be subject to acceptance of interference from the WJQS proposal and no further consideration of WNAG's pleading will be necessary.

Accordingly, IT IS ORDERED, That the petition for reconsideration tendered March 31, 1965, by the Grenada Broadcasting Company, Inc., IS GRANTED insofar as it requests recission of the Commission's grant of the above-captioned application and IS DENIED insofar as it requests designation of the above-captioned application fo rhearing in a consolidated proceeding with the pending plication for hearing in a consolidated proceeding with the pending

IT IS FURTHER ORDERED, That, following recission of the Commission's action of March 17, 1965, granting the WJQS application, further action on that application WILL BE HELD IN ABEYANCE pending a final decision in the WNAG hearing proceeding, Docket No. 15885.

Adopted June 16, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–238

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| 5 KW, INC., MARIETTA, OHIO | Docket No. 15854<br>File No. BPH–4485 |
| WILLIAM G. WELLS AND R. SANFORD GUYER D.B.A. MARIETTA BROADCASTING CO., MARIETTA, OHIO | Docket No. 15855<br>File No. BPH–4561 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The above-captioned applications for a permit to construct a new FM station in Marietta, Ohio, were designated for consolidated hearing by Commission Order, FCC 65–125, released February 23, 1965. The applicants in this proceeding seek approval of an agreement looking toward the dismissal of the 5 KW, Inc. (KW) application; the payment of $1,200.00 by Marietta Broadcasting Company (Marietta) to KW as partial reimbursement of expenses incurred by KW in the prosecution of its application; and the grant of Marietta's application.[1]

2. According to the itemized statement attached to the affidavit of Daniel W. Burton, president of KW, the expenses incurred by KW in the preparation of its application amounted to $2,431.45. Under the terms of the proposed agreement KW would receive $1,200.00 as partial reimbursement of its expenses. The Broadcast Bureau favors the grant of approval of the proposed agreement on the condition that petitioners file affidavits substantiating the fees of KW's attorneys (Ohio and Washington, D.C.) and engineering consultant.[2] The requested affidavits were filed by KW on June 4, 1965.

3. We have reviewed the pertinent affidavits and have no questions with respect to those substantiating the fees of KW's attorneys. However, the affidavit of Albert Gibbons, KW's engineering consultant, merits some discussion. Gibbons was employed as an engineer by KW on April 20, 1964 and eventually became the chief engineer of WMRJ, a standard broadcast station licensed to KW.

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[1] The Review Board has the following pleadings before it for consideration: (1) joint request for approval of agreement, for dismissal of the 5 KW, Inc. application, and for grant of the Marietta Broadcasting Company application, filed by KW and Marietta on May 14, 1965; (2) Broadcast Bureau's comments regarding joint request for approval of agreement, filed on May 24, 1965; and (3) response to Broadcast Bureau's comments, filed by KW on June 4, 1965.

[2] Several of the expense items set forth in KW's itemized statement are inadequately explained. However, since the combined fees of KW's attorneys and engineering consultant exceed the amount of the proposed partial reimbursement no purpose would be served by requiring additional information regarding the remaining expense items.

Since, at the time of his employment, construction of the WMRJ facilities had not progressed to a point where there were duties for him to perform, it was agreed that Gibbons would devote his time to the preparation of the engineering portion of KW's subject application for a new FM station. These services were completed prior to June 1, 1964, the date on which the subject application was filed.[3] Actual construction of the technical facilities of WBRJ did not begin until approximately July 6, 1964, when the building housing the station was completed to such an extent as to permit the installation of equipment. For his services in connection with the FM application, KW paid Gibbons the sum of $700.00 on a "time consumed basis." Unlike the situation in *Robert J. Martin,* FCC 65R–77, released March 2, 1965, wherein the dismissing individual applicant sought reimbursement for his personal time, or *Integrated Communications Systems, Inc. of Massachusetts,* FCC 65R–176, released May 18, 1965, in which reimbursement was sought for services performed by a parent company for an applicant which was its wholly-owned subsidiary, KW's application and Gibbons' affidavit demonstrate that the only relationship between KW and Gibbons was that of employer-employee and further that while technically he was an employee of KW at the time the subject engineering services were performd, for purposes of this project Gibbons was treated as an outside engineering consultant. Accordingly, we are of the opinion that the $700.00 engineering fee is a prope rexpense item for which KW may be reimbursed.

4. We find that petitioners have complied with the requirements of Section 1.525 of the Rules; that dismissal of the KW application will moot the issues in this proceeding; and that the agreement is in the public interest in that itsapproval will permit the early institution of FM service to Marietta, Ohio.

Accordingly, IT IS ORDERED, This 23rd day of June, 1965, That the joint request for approval of agreement, for dismissal of the 5 KW, Inc. application, and for grant of the Marietta Broadcasting Company application, filed by 5 KW, Inc. and William G. Wells and R. Sanford Guyer d/b as Marietta Broadcasting Company on May 14, 1965, IS GRANTED; that such agreement IS APPROVED; that the application of 5 KW, Inc. (BPH–4485) IS DISMISSED; that the application of William G. Wells and R. Sanford Guyer d/b as Marietta Broadcasting Company (BPH–4561) IS GRANTED, and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[3] Subsequently, Gibbons prepared an amendment to the subject application. According to his affidavit, Gibbons was compensated for these services by salary which is not included in the $700.00 referred to herein.

F.C.C. 65R–237

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| JACK O. GROSS, TRADING AS GROSS BROADCASTING CO., SAN DIEGO, CALIF. | Docket No. 15824<br>File No. BPCT–3346 |
| CALIFORNIA WESTERN UNIVERSITY OF SAN DIEGO, SAN DIEGO, CALIF. | Docket No. 15825<br>File No. BPCT–3421 |
| For Construction Permit for New Television Broadcast Station | |

### MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The above-captioned applications for a permit to construct a new UHF television station on Channel 51, San Diego, California, were designated for consolidated hearing by Commission Order, FCC 65–84, released February 5, 1965. On April 30, 1965, the petitioners filed a joint request for approval of agreement,[1] California Western University of San Diego (California Western) simultaneously filing a petition for leave to dismiss its application.[2]

2. The settlement agreement between the parties provides, among other things, that California Western will withdraw its pending application (BPCT–3421) in return for an option to acquire a 50% interest in the new television facility and UHF license. By its terms the option is exercisable at any time prior to the experation of the ninth complete calendar month following the date of a grant to Gross of Program Test Authority with the proviso that in the event California Western applies for a construction permit on such additional UHF channel as may be allocated to San Diego, the option will automatically terminate upon a "Final Grant" of that application. The agreement further provides that at such time as California Western elects to exercise its option the parties will form a joint venture and will file with the Commission an application for the assignment of the permits and licenses held by Gross to the joint venture. The price to be paid to Gross by California Western for its acquisition of the 50% interest is, "an amount equalling one-half of the total cash amounts Gross has contributed in the construction and operation of the station."

3. The Broadcast Bureau (Bureau) opposes the joint request for approval of agreement for the following reasons: (a) the

[1] From the facts before the Review Board it appears that the joint request was untimely filed. However, good cause having been shown for such tardiness, the joint request will be accepted.

[2] The Review Board also has before it the Broadcast Bureau's opposition to joint request for approval of agreement, filed on May 21, 1965, and joint reply to the Broadcast Bureau's opposition to joint request for approval of agreement, filed by Gross and California Western on June 3, 1965.

parties have not furnished the Review Board with a copy of the joint venture agreement thereby precluding a determination of the precise nature of the agreement and whether it provides for a consideration in excess of the expenses incurred by California Western in the prosecution of its application; (b) there are no restrictions on the possible purchase of California Western's option rights by Gross at a price in excess of California Western's expenses; (c) the option period extends into the initial period of the new station's operation making a concurrent determination of the value of the option impossible; and (d) one of the provisions to be included in the joint venture agreement will require any programming dispute arising between the joint venturers to be submitted to arbitrators. It is the Bureau's contention that this latter provision would constitute an improper delegation of responsibility and as such would be violative of Section 310(b) of the Communications Act.

4. The fact that the proposed joint venture agreement has not been submitted to the Review Board at this time is of no consequence. While the Bureau is correct in noting that in *Spanish International Television Company, Inc.*, FCC 65–425, released May 21, 1965, a copy of the proposed joint venture agreement was submitted with the joint request for approval of agreement, it fails to take cognizance of the Commission's statement therein that the effectuation of the joint venture agreement was not involved in the dismissal proceeding and that the Commission would exercise its judgment on the joint venture agreement at such time as the parties submit their application seeking the Commission's consent to the assignment of the construction permit to the joint venture. We are of the opinion that the Commission's statement in *Spanish International Television Company, Inc., supra,* is applicable to this proceeding. With respect to the Bureau's contention that the consideration passing to California Western could exceed its expenditures, we note that Section 311(c)(3) of the Communications Act prohibiting approval of agreements providing for payments in excess of expenditures is not applicable to cases where the agreement contemplates a merger.[3] In such cases the determination to be made by the Commission is whether the proposed marger is a bona fide merger of competing interests or whether it is merely a device to circumvent the prohibition applicable to nonmerger agreements.[4] There has been no showing of facts in this proceeding which would raise any question as to the bona fides of the proposed joint venture.

5. While the settlement agreement is silent as to restrictions which would prohibit Gross from purchasing California Western's option rights, this fact along is insufficient to warrant our denial of the joint request. As we have stated above there has been no showing that the settlement agreement is not of a bona fide nature. Moreover, the purchase of California Western's option rights by Gross would constitute a material deviation from the terms of the

[3] For purposes of Section 311(c)(3) of the Communications Act, the Commission has treated a joint venture as being tantamount to a merger, *Spanish International Television Company, Inc.*, FCC 65–425, released May 21, 1965.

[4] H. R. Rept. No. 1800, 86th Cong. (1960).

settlement agreement presently under consideration, and as the *quid pro quo* for dismissal, the revised settlement agreement would require the approval of the Commission prior to effectuation. *Music Publications, Inc.*, FCC 63–715, 1 RR 2d 30, released August 2, 1963.[5]

6. Finally, the Bureau urges that the joint request be denied because of a provision that the parties have agreed will be included in the joint venture agreement whereby any dispute between the parties involving quality and standards of programming will be settled by arbitration. It is the Bureau's contention that such a provision constitutes an improper delegation of responsibility and is violative of Section 310(b) of the Communications Act. As stated earlier herein, the joint venture agreement is not involved in this proceeding and it is, therefore, unnecessary for us to pass judgment upon that proposed agreement, or any of the provisions to be contained therein, at this time. We find that the petitioners have complied with the requirements of Section 1.525 of the Rules;[6] that dismissal of California Western's application will moot the issues; and that the agreement is in the public interest inasmuch as its approval will permit early institution of an additional UHF television station for the San Diego area.

Accordingly, IT IS ORDERED, This 23rd day of June, 1965, That the Joint Request for Approval of Agreement, filed by Jack O. Gross, tr/as Gross Broadcasting Company and California Western University of San Diego on April 30, 1965, IS GRANTED; that such agreement IS APPROVED; that the Petition for Leave to Dismiss Application filed by California Western University of San Diego on April 30, 1965, IS GRANTED; and that its application (BPCT–3421) IS DISMISSED; that the application of Jack O. Gross, tr/as Gross Broadcasting Company (BPCT–3346) IS GRANTED subject to the condition specified below, and the proceeding IS TERMINATED.

Prior to licensing, acceptable data shall be submitted for type-acceptance of the proposed transmitter in accordance with the requirements of Secttion 73.640 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

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[5] In *United Artists Broadcasting, Inc.*, FCC 65R–210, released June 4, 1965, the merger agreement approved by the Review Board was similarly devoid of restrictions prohibiting a sale of the option rights.

[6] Section 1.525(d)(1) of the Rules requires that the officer executing an affidavit filed pursuant to Section 1.525 have personal knowledge of the facts contained therein. Petitioners' joint request indicates that Mr. Robert S. Dunn, who executed the affidavit filed on behalf of California Western, participated in the negotiations. While on the basis of the foregoing we assume Mr. Dunn, California Western's vice-president, had the requisite personal knowledge, better practice dictates the inclusion of a statement to such effect in the affidavit.

F.C.C. 65R–241

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Application of SELMA TELEVISION, INC. (WSLA–TV), SELMA, ALA. For Construction Permit | Docket No. 15888 File No. BPCT–2827 |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. Selma Television, Incorporated is the licensee of WSLA–TV, Channel 8, Selma, Alabama. In the above-captioned application, it seeks increased antenna height, increased power, and a change of transmitter site from a point 4 miles southwest of Selma to a point 45 miles north of its present site, with an objective of expanding its coverage to the Birmingham and Tuscaloosa, Alabama areas. The application was designated for hearing by the Commission by Order released March 22, 1965 (FCC 65–216), such order granting-in-part petitions to deny filed by Birmingham Television Corporation, a UHF permittee in Birmingham, Alabama; Montgomery Independent Telecasters, Inc., a UHF permittee in Birmingham, Alabama; Montgomery Independent Telecasters, Inc., a UHF permittee in Montgomery, Alabama; and WCOV, Inc., a UHF licensee in Montgomery.

2. Now before the Review Board is a petition to enlarge issues, filed by WCOV, Inc. on April 12, 1965, and the pleadings responsive thereto.[1] Petitioner (supported by Montgomery Independent Telecasters) seeks additional issues for the proceeding, to determine (a) whether the applicant has been so negligent, careless and inept in the prosecution of its application as to seriously reflect upon its overall reliability;[2] and (b) whether the applicant (and its predecessor) misrepresented its true intentions with respect to locating the Channel 8 facility in connection with the original application therefor.[3] Enlargement is resisted by both the applicant and the Commission's Broadcast Bureau.

3. Petitioner grounds its request for the "ineptness" issue in alleged inconsistencies between the applicant's amendments of February 11 and July 2, 1964, such inconsistencies relating to the applicant's estimates of operating expenses, anticipated revenues, proposals for spot announcements and broadcast hours, staff pro-

[1] The other pleadings are the comments filed by the Broadcast Bureau on May 7, 1965; the opposition filed by the applicant on May 7, 1965; and the response filed by Montgomery Independent Telecasters on May 7, 1965.

[2] Such an issue was added by the Board in *Beamon Advertising, Inc.*, FCC 63R–467, 1 RR 2d 285.

[3] The applicant's predecessor was Deep South Broadcasting Company; the latter was granted a construction permit for Channel 8 at Selma on February 24, 1954 (BPCT–1814).

posals, and past operation of the Channel 8 facility.[4] The bulk of the factual matters relied upon by the petitioner were urged to the Commission in connection with petitioner's petition to deny and other pre-designation pleadings. Both the applicant and the Broadcast Bureau point this out, and petitioner admits it in paragraph 6 of its instant pleading. The questions raised by the petitioner were considered by the Commission in paragraph 12 of the designation Order, the Commission stating that the applicant had not explained the "apparent discrepancies", and holding that the Hearing Examiner could consider the questions (except as to adequacy of staff) "if properly brought before him on motion for an 'Evansville' issue."

4. In connection with its request for a "misrepresentation" issue, petitioner recites the history of the attempts by the applicant (and its predecessor, Deep South) to secure Commission approval of requests for changes in transmitter location. It characterizes that history as a "persistent tugging [by the applicant] at its Selma ties in order to acquire larger market association [making] suspect the true motives and intentions of this applicant insofar as its representations to the Commission in its original application are concerned." Again, as contended by the applicant and the Broadcast Bureau, a substantially similar presentation was made by the petitioner in its pre-designation pleadings, its supplement of July 31, 1964 requesting an issue to determine "the true purpose of the applicant in itially constructing WSLA as evidenced by its subsequent actions to move it anywhere so long as it is away from Selma." Although not specifically commenting on the latter request, the Commission stated in its designation Order (paragraph 14) that it had "carefully considered all of the matters raised in the various pleadings", and that, except as indicated in the Order, "no substantial and material questions of fact have been raised by the pleadings."

5. Because the substance of petitioner's request has already been advanced to and rejected by the Commission, the instant petition, although labeled a petition to enlarge issues, is in the nature of a petition for reconsideration. This is particularly the case with respect to the request for an "ineptness" issue, since the Commission's designation Order specifically discusses the factual allegations relied upon by petitioner, and provides for no issue beyond the "Evansville" issue. As to the "misrepresentation" issue, the designation Order sets forth the basic history of the applicant's continuous attempts to relocate WSLA–TV's transmitter, and the absence of an issue designed to probe the history in detail evidences the Commission's satisfaction that no question as to possible disqualification is presented thereby.

6. Although the Board has enlarged issues where there was no certainly that the Commission, at the time of designation, had been fully informed or was otherwise aware of the matters warranting such issues, a petition (such as the one now before us) seeking reconsideration as to points clearly before the Commission

[4] The station, WSLA-TV, has been on the air since March, 1960.

at such time should be addressed to the Commission and not to the Board. See Section 1.106 of the Commission's Rules.

7. The Board's determination, however, need not rest of jurisdictional grounds, since there is no substantive basis for the additional issues in the showings submitted by the petitioner. It is true that in *Beamon* (*supra,* note 2)—a case not cited to the Commission, but relied upon here by the petittioner—the Boarde added an "ineptness" issue of the type now sought for this proceeding. There, however, there had been a threshold showing of a pattern of substantial nondisclosures and inaccuracies in the application and related pleadings, the applicant responding that all such defects were due to inadvertence and carelessness. Based upon the showings made, the Board allowed inquiry into the questions of whether the applicant had intentionally misrepresented material facts to the Commission, and if not, whether conclusions adverse to the applicant were nonetheless warranted because of a "proneness to 'mistakes' " on the part of such applicant. In the instant case, the applicant admits that errors as to the matters indicated in paragraph 3 hereof appear in its amendment of February 11, 1964, and states that the amendment of July 2, 1964, corrects those errors. Unlike the situation in *Beamon, supra,* the corrective amendment appears to have been completely voluntary, and there is nothing in petitioner's showing to suggest that the errors involved were not inadvertent. Clearly, no misrepresentation issue as to the errors would be warranted (and none is requested), and an isolated instance of "inadvertence and carelessness"—as opposed to the "proneness to mistakes" in the *Beamon* case—affords no basis for a general inquiry as to whether the Commission can "rely upon the applicant to fulfill the duties and responsibilities of a licensee."

8. Returning to the request for a "misrepresentation" issue, the short answer to petitioner's concern that it has always been applicant's motive "to acquire larger market association" is that such a motive is not a basis for disqualification where in the absence of a showing the station would not continue to be, in all respects, a station of the principal community. *Cf. New Jersey Television Broadcasting Corp.,* FCC 64296, 2 RR 2d 263, and cases there cited.

Accordingly, IT IS ORDERED, This 24th day of June, 1965, That the petition to enlarge issues, filed by WCOV, Inc. on April 12, 1965, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R-248

BEFORE THE

**FEDERAL COMMUNCATIONS COMMISSION**

WASHINGTON, D.C.

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| In Re Applications of | |
| WILLIAM A. CHAPMAN AND GEORGE K. CHAPMAN D.B.A. CHAPMAN RADIO & TELEVISION CO., ANNISTON, ALA. | Docket No. 15856<br>File No. BPCT-3317 |
| ANNISTON BROADCASTING CO., ANNISTON, ALA. | Docket No. 15857<br>File No. BPCT-3320 |
| For Construction Permits for New Television Broadcast Stations | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. By Order, FCC 65-127, released February 19, 1965, the Commission designated the petitioners' mutually exclusive applications for a construction permit for a new UHF television station for hearing in a consolidated proceeding on several issues including, as to Anniston, a "Suburban issue." The Review Board has before it a motion to approve a contract between the parties, dismiss the Chapman application without prejudice and grant the Anniston application, filed jointly by William A. Chapman and George K. Chapman, d/b as Chapman Radio and Television Company (Chapman) and Anniston Broadcasting Company (Anniston) on April 20, 1965.[1]

2. The agreement of which the petitioners seek approval contemplates dismissal of the Chapman application for and in consideration of $2,000.00, or such lesser amount as the Commission approves, as partial reimbursement of the expenses incurred by Chapman in the preparation and prosecution of its application. The Broadcast Bureau opposes approval of the joint motion for the following reasons: (a) the amount to be paid to Chapman is not fixed and certain; (b) reimbursement is sought for work personally performed by Chapman in the preparation of its application; (c) there has been no showing made of reasons which would justify a dismissal of Chapman's application without prejudice; and (d) the "Suburban" issue must be resolved prior to grant of the Anniston application. In its reply to the Bureau's opposition Chapman states that unless the Commission is in agreement with its request for (1) reimbursement of the personal time allocation; (2) dismissal of its application without prejudice; and (3) immediate

[1] The Review Board also has before it the following pleadings: (1) Broadcast Bureau's opposition to motion to approve contract between the parties, dismiss the Chapman application and grant the Anniston application, filed on May 5, 1965; (2) reply to the opposition of the Broadcast Bureau, filed by Anniston on May 27, 1965; and (3) reply to Broadcast Bureau's opposition, filed by Chapman on May 27, 1965.

grant of the Anniston application, the hearing should be continued as though the request for dismissal of the Chapman application in favor of the Anniston application had not been proffered. On the basise of the facts presented herein, we are of the opinion that the terms which Chapman has presented as a prerequisite to dismissal of its application may not be granted.

3. The major portion of the expenses for which Chapman seeks reimbursement consists of personal time employed by Chapman in the preparation of its application. In *Robert J. Martin,* FCC 65R–77, 4 RR 2d 647, released March 2, 1965, we determined that the personal time claimed by an applicant as reimbursable does not constitute an "amount" which the applicant has "expended" as required by Section 311(c) of the Communications Act, nor an "expense" which has been "incurred" as contemplated by Section 1.525 (a) of the Rules. Our ruling in the *Martin* case interpreting the applicable statutory provisions precludes reimbursement for Chapman's personal time allocation.

4. Section 1.568(c) of the Rules provides that requests to dismiss an application without prejudice after it has been designated for hearing shall be granted only upon a showing that the request is based on circumstances wholly beyond the applicant's control which precludes further prosecution of his application. No such showing has been made in this proceeding and accordingly, dismissal of the Chapman application without prejudice would be unwarranted.[2]

5. In view of the foregoing and the express condition on consideration of the subject motion, no purpose would be served by considering the matter further.

Accordingly, IT IS ORDERED, This 30th day of June, 1965, That the motion to approve contract between the parties, dismiss the Chapman application and grant the Anniston application, filed jointly by William A. Chapman and George A. Chapman, d/b as Chapman Radio and Television Company and Anniston Broadcasting Company on April 20, 1965, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[2] From its pleadings it is clear that Chapman is confused as to the meaning of the word "prejudice" as used in legal parlance. *Black's Law Dictionary,* 4th Edition 1961, defines the phrase "dismissed with prejudice" as, "an adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause." Under the provisions of Section 1.519 of the Commission's Rules the effect of such a dismissal is to preclude the refiling of substantially the same application by the same applicant within 12 months from the date of the Commission's action.

F.C.C. 65–569

BEFORE THE

**FEDERAL COMMUNCATIONS COMMISSION**

WASHINGTON, D.C.

In Re Application of
FLORENCE BROADCASTING CO., INC., FLORENCE, ALA.
Requests: 107.3 mc., #297; 25 kw.; 170 f.
For Construction Permit

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it (a) the above-captioned and described FM application; (b) the applicant's request for waiver of the minimum mileage separation requirements (Section 73.207 (a) of the Rules) to permit acceptance of the application; (c) a Motion to Dismiss [1] filed on behalf of Lebanon Broadcasting, Inc., ("Lebanon") licensee of Station WCOR–FM, Lebanon, Tennessee; (d) applicant's Opposition to the Motion to Dismiss; and (e) Lebanon's Reply.

2. The applicant, Florence Broadcasting Company, Inc., ("Florence") licensee of Station WJOI–AM, Florence, Alabama, seeks authority to construct a new FM broadcast station at Florence on assigned Class C channel 297. The channel requested was previously authorized for use by Station WOWL–FM, Florence, but that authorization was withdrawn when the outstanding construction permit expired on April 27, 1964 and no timely application was filed for its extension. The authorizations for both WCOR–FM in Lebanon and WOWL–FM in Florence (127.5 miles away) preceded adoption of the minimum mileage separation requirements which now require a spacing of 180 miles between co-channel Class C stations. Since, like WOWL–FM, Florence's proposal would involve a spacing of only about 125 miles, it has requested waiver of the minimum mileage requirement to permit acceptance of its application for filing.

3. On March 30, 1965 Lebanon, licensee of WCOR–FM, filed a Motion to Dismiss the Florence application because it would be short-spaced with its own operation. In its Motion, Lebanon urges that with the cancellation of WOWL–FM's authorization, the situation as it existed at the time the Table of Assignments was adopted allocating Channel 297 to Florence no longer exists, and that the present need for protection to WCOR–FM is greater in view of the numerous stations nearby, than the need for another

[1] Actually, the application has never been accepted for filing.

FM station which would be short-spaced, especially since use of Channel 297 at Florence will prevent it (Lebanon) from ever operating with maximum Class C facilities. As an alternative, Lebanon points out that if Channel 297 were removed from Florence, Channel 292A assigned to Sheffield, Alabama, would be available under the provisions of the "25-mile" rule [Section 73.203(b)], and that use of this channel would fully comply with the minimum spacing requirements, while at the same time providing ample service to Florence and surrounding areas.

4. Florence, in its opposition, contends that the Commission knowingly established the table of FM assignments which included a number of short-spaced allocations, this one among them, and adequate reason for upsetting this plan has not been offered. Florence contends that in the absence of a claim that interference would occur, there is no basis for removing the only Class C channel available for use in Florence, particularly since there is only one FM station nearby. Florence rejects the suggested use of Channel 292A as inadequate to serve the needs of Florence and surrounding areas.

5. Lebanon's Reply takes the position that the Commission, as it has done elsewhere, should inaugurate a rule making proceeding to delete the channel because of the restrictions the existence of this assignment places on Lebanon's operation. Adequate aural service, it is said, exists in the area and Lebanon has endeavored to show in the attached engineering exhibits that a city-grade signal would be provided to the "quad-cities", including Florence, by an operation on Channel 292A.

6. In our Fourth Report and Order in the FM Allocation rule making proceeding (3 R.R. 2d 1571, (1964)), we rejected the earlier proposal that upon the relinquishment of a station's authorization, the channel on which it operated would be automatically deleted, (Id. at 1588–1589). Rather, we expressed the view that even where shortages were involved, such deletions would be considered on a case-by-case basis giving emphasis to such matters as the number of assignments in the area, the need for the assignment elsewhere and the shortages involved. As pointed out by Florence, the "quad-cities" have only one operating FM station. Removal of Channel 297 from Florence would deprive it of its only channel and leave the area with 3 assignments, only one of which would be Class C. Furthermore, no justification for such action is offered in terms of a preferable use of the channel elsewhere; rather, it is justified only in terms of removing a shortage which would prevent Lebanon from obtaining maximum Class C facilities (100kw at 2000 feet). Lebanon, however, operates with sub-minimum facilities of 3.3kw at 170 feet[2] and has shown no inclination to seek to improve its facilities. Moreover, even with this shortage, under our rules WCOR–FM would be permitted to operate with 50kw at 2000 feet. Under these circumstances, we do not believe that deletion of Channel 297 would be justified unless there were other means of insuring adequate local service to Florence.

[2] Lebanon's facilities were granted before Section 73.211 of our Rules was amended to require applicants for new Class C stations to specify at least 25 kw ERP.

7. Lebanon has suggested use under the "25-mile" rule of Channel 292A, assigned to Sheffield, but this, too, is unsatisfactory, for such use would not only place a severe limit on the area and population which could be served, but even more importantly, would deprive Sheffield of the only channel which is or now could be assigned to it. Consequently, we believe that Channel 297 should be retained in Florence to provide a Class C channel for that community of more than 31,000 persons. Under these circumstances, we have concluded that waiver of Section 73.207 of the Rules to permit acceptance of the application for filing is warranted.

Consequently, IT IS ORDERED, This 30th day of June, 1965, That Lebanon Broadcasting, Inc.'s Motion to Dismiss IS DENIED and Channel 297 IS RETAINED at Florence, Alabama.

IT IS FURTHER ORDERED, That Florence Broadcasting Company's request for waiver of Section 73.207 IS GRANTED and its above-captioned application IS ACCEPTED for filing.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–575

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of AMENDMENT OF SECTION 73.207, CONCERNING MINIMUM REQUIRED SPACING BETWEN FM BROADCAST STATIONS TO PROVIDE FOR IF INTERFERENCE PROTECTION | Docket No. 15934 |

### REPORT AND ORDER

BY THE COMMISSION: COMMISSIONER COX DISSENTING.

1. The Commission has before it for consideration its Notice of Proposed Rule Making, FCC 65–275, issued in this proceeding on April 2, 1965 and published in the Federal Register on April 7, 1965 (30 FR 4495), inviting comments on a proposal to substitute a mileage table for the Note appended to Section 73.207 of the Rules and Regulations.

2. The Note appended to Section 73.207 is intended to prevent interference between FM broadcast stations that are separated in frequency by 10.6 or 10.8 Mc/s (53 or 54 channels) and reads as follows:

> NOTE: Intermediate frequency amplifiers of most FM broadcast receivers are designed to operate on 10.7 megacycles. For this reason the assignment of two stations in the same area, one on a frequency of 10.6 or 10.8 megacycles removed from that of the other, will be avoided if possible.

Thus, the present rule is inadequate in that it merely precludes such assignments in the same community or "same area" but does not spell out what the "taboo" distances should be for the various classes of stations.

3. It has been demonstrated that stations separated by the IF frequency difference cannot operate in the same community without destructive interference to reception. This is due to a spurious response in the receiver and will vary with the design of the receiver. The interference will vary with the strength of the desired and undesired signals. The worst type of interference is that resulting to the reception of a third station from two undesired stations separated by the IF difference. Since IF difference interference occurs over the entire reception band of the receiver, it does not lend itself readily to a cure by the insertion of "wave traps" or filters.

4. Based upon a recent study by the Commission's Laboratory of the interference to typical FM receivers, a set of mileage separation "taboos" were proposed in the Notice ranging from 5 miles for two Class A stations to 30 miles for two Class C stations. These mileages represented the distances required to prevent over-

lap of the 20 mv/m contours rounded out to the nearest 5 miles, since the tests indicated that elimination of such overlap was necessary to avoid this type of interference. No comments or data were filed in the proceeding. In the absence of measurements indicating that closer spacings would be acceptable, we are of the view that the proposed table should be adopted. These spacings will of course apply to both commercial and non-commercial educational FM stations. We do not expect, however, that there will be the same problem with the 10 watt educational stations and are not proposing any mileage separation rules for these stations. The IF problem for such stations will be considered on a case-by-case basis. We do not propose to change any existing assignments which may not conform to the new table except on specific request of interested parties.

5. Authority for the adoption of the amendment contained herein is contained in Sections 4(i) and (j), 303, and 307(b) of the Communications Act of 1934, as amended.

6. In view of the foregoing, IT IS ORDERED, That Part 73 of the Commission's Rules and Regulations IS AMENDED, effective August 9, 1965, as follows:

a. In § 73.207(a) the Note to the table is amended to read as follows:

§ 73.207 *Minimum mileage separations between co-channel and adjacent channel stations on commercial channels.*

* * * * * * *

NOTE: Stations or assignments separated in frequency by 10.6 or 10.8 Mc/s (53 or 54 channels) will not be authorized unless they conform to the following separation table:

| *Class of Stations* | *Required Spacing in Miles* |
|---|---|
| A to A | 5 |
| B to A | 10 |
| B to B | 15 |
| C to A | 20 |
| C to B | 25 |
| C to C | 30 |

b. In § 73.504, a new paragraph (g) is added as follows:

§ 73.504 *Zones, classes of stations, use of channels, facilities, and minimum mileage separations between stations.*

* * * * * * *

(g) Stations separated in frequency by 10.6 or 10.8 Mc/s (53 or 54 channels) from stations or assignments on commercial channels will not be authorized unless they conform to the following separation table:

| *Class of Stations* | *Required Spacing in Miles* |
|---|---|
| A to A | 5 |
| B to A | 10 |
| B to B | 15 |
| C to A | 20 |
| C to B | 25 |
| C to C | 30 |

NOTE: Rules changes herein will be covered by T.S. III(64)-9.

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

Adopted June 30, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65R–280

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In Re Applications of | |
| OCEAN COUNTY RADIO BROADCASTING CO., TOMS RIVER, N.J. | Docket No. 15944<br>File No. BPH–4078 |
| SEASHORE BROADCASTING CORP., TOMS RIVER, N.J. | Docket No. 15945<br>File No. BPH–4632 |
| BEACH BROADCASTING CORP., TOMS RIVER, N.J. | Docket No. 15946<br>File No. BPH–4638 |
| For Construction Permits for New FM Broadcast Station | |

MEMORANDUM OPINION AND ORDER

BY THE REVIEW BOARD:

1. The Commission, by the Chief of the Broadcast Bureau acting under delegated authority, designated the above-captioned mutually exclusive applications for hearing in a consolidated proceeding by Order (Mimeo No. 66828), released May 6, 1965. Each of the applicants was found to be legally, technically, financially and otherwise qualified to construct and operate as proposed. On May 14, 1965, a motion to enlarge issues was filed by Seashore Broadcasting Corporation (Seashore) to determine whether Ocean County Radio Broadcasting Company's (Ocean County) staffing proposal is adequate and whether Ocean County is financially qualified to construct and operate the proposed FM broadcast station.[1]

2. *Staffing issue.* In support of its request for a staffing issue, Seashore contends that the proposed staff of Ocean County does not appear to be adequate to effectuate 126 hours of programming a week (6.3% of which will be "live" programming).[2] Specifically Seashore points out that fundamental responsibility will be placed on two persons (full-time announcer-salesmen) to handle the 126 hours a week of broadcasting and that the Technical Department will be handled by only one engineer. Seashore cites *Semo Broadcasting Corp.*, FCC 62R–132, 24 RR 605. In *Semo*, a staffing issue was added where the applicant proposed to operate 126 hours a week (9.06% live programming) and proposed a staff of twelve (nine full-time and three part-time employees).[3]

[1] Before the Review Board are: (1) Motion to enlarge issues, filed on May 14, 1965, by Seashore Broadcasting Corporation; (2) Comments of Broadcast Bureau re "Motion to Enlarge Issues," filed on May 26, 1965; (3) opposition to motion to enlarge issues, filed n June 8, 1965, by Ocean County Radio Broadcasting Company; and (4) Reply to opposition to motion to enlarge issues, filed on June 15, 1965, by Seashore Broadcasting Corporation.

[2] The Ocean County application (BPH–4078) lists the following proposed staff: 1 full-time General Manager and Program Director; 2 full-time Announcers and part-time Salesmen; 1 full-time Engineer; 1 full-time Receptionist, billing and copy girl; and 2 part-time Announcers and part-time Salesmen.

[3] In the *Semo* case, *supra*, a staffing issue was also added against the petitioning applicant, who proposed to operate 84 hours a week with two announcers who had other duties and only one full-time engineer. In both instances, the insufficient number of engineers was a prime consideration in finding the staff inadequate.

3. Ocean County in its opposition to the motion to enlarge issues has submitted a "manning and availability" schedule which shows in detail how its proposed staff of five full-time and two part-time employees will cover the proposed 126 hours of broadcasting. This schedule shows that the staff will cover 290 work hours a week (with 166 hours allocated for the 126 hours of air-time, leaving 40 surplus hours of air-time available for relief and vacation periods). Responsibility for the programming will be placed on four full-time staff members, not as Seashore alleges, solely on the two announcer-salesmen. Mr. Foley (Ocean County's president) and the full-time copy girl will be available for programming. Insofar as the Technical Department is concerned, Ocean County points out that a Class A non-directional FM station will not require demanding technical duties. Thus, a full-time first class engineer will have time to perform announcing duties.

4. Seashore and the Bureau place great reliance on *Semo Broadcasting, supra,* in urging the addition of a staffing issue against Ocean County. However, *Semo* is distinguishable as it involved a directional antenna operation which requires close technical supervision. Moreover, the Review Board based its decision on the failure of that applicant to show how its engineering staff could operate for 126 hours a week. In the other cases cited by Seashore, either a directional operation was involved, with a higher percentage of live programming than Ocean County's 6.3%, or the programming burden was placed on one or two individuals without a showing how they could handle the proposed program.

5. Ocean County has given careful consideration to its proposed staffing requirements as evidenced by the "manning and availability" schedule. Unlike the cases cited by Seashore, the non-directional operation it proposes can be adequately handled by the one engineer and by the staff which, it is proposed, will secure third class operators licenses. The proposed staff of five full-time and two part-time employees has been fully utilized so as to cover the 126 hours of broadcasting in detail. Any doubts as to Ocean County's ability to operate as proposed are fully dispelled by a review of its comprehensive staffing plans and it is upon plans that we deny the addition of a staffing issue.

6. *Financial Issue.* Seashore requests that financial issues be added against Ocean County. It contends that James L. Parker, an Ocean County stockholder, who has agreed to loan the corporation up to $40,000 for working capital, does not have cash and/or current liquid assets sufficient to meet this commitment. Parker's financial statement, dated April 15, 1964, sets forth a total net worth of $1,162,229.29, and liabilities of $79,816.88. Seashore does not dispute these figures but claims the current liquid assets amount to only $38,143.76 being derived from cash on hand, cash in the bank, tax refund and cash surrender value of life insurance policies. It is further asserted that the current liquid assets would be used to satisfy the outstanding liabilities of $79,816.88, leaving Mr. Parker without any liquid assets.

7. Ocean County has submitted a revised balance sheet of Parker which does not materially alter his financial position as his current

liabilities still exceed the current liquid assets. In addition, Ocean County has introduced a proposed loan commitment of $40,000 given by The First National Bank of Toms River, New Jersey, to Mr. and Mrs. Parker. This loan would provide Parker with the necessary funds to meet his loan commitment to Ocean County; however, Mrs. Parker has not expressed a willingness to execute this proposed loan.

8. The Bureau contends that Ocean County's actual cash requirement to construct and operate the station for three months is only $21,328 when the deferred credit of $15,686 is taken into consideration. The Bureau also states that Parker can easily secure a loan on the basis of his non-liquid assets which exceed $1,000,000.

9. The Review Board is of the opinion that Ocean County is financially qualified to operate as proposed. The actual cash requirement needed by Ocean County is $21,328. Mr. Parker's loan commitment of $40,000 cannot be seriously questioned in view of his ownership of non-liquid assets of over $1,000,000 (including real estate valued at $390,000 after deducting the outstanding mortgages). See *United Artists Broadcasting, Inc.*, FCC 64R–551, 4 RR 2d 453; and *Springfield Television Broadcasting Corporation*, FCC 64R–234, 2 RR 2d 841.

Accordingly, IT IS ORDERED, This 26th day of July, 1965, That the motion to enlarge issues, filed May 14, 1965, by Seashore Broadcasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

F.C.C. 65–818

BEFORE THE

## FEDERAL COMMUNCATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of AMENDMENT OF SECTION IV (STATEMENT OF PROGRAM SERVICE) OF BROADCAST APPLICATION FORMS 301, 303, 314, AND 315 | Docket No. 13961 |

SUPPLEMENT TO REPORT AND ORDER (AM AND FM PROGRAM FORM)

BY THE COMMISSION: COMMISSIONER HYDE ABSENT.

1. The Commission has determined on its own motion to revise the effective date of the new AM and FM program reporting form for use in filing applications for renewal. As set forth in the Report and Order adopted in this proceeding on July 27, 1965 the revised form is to be used for applications for renewal of AM and FM licenses which are due to be filed on or after November 1, 1966.

2. In order to provide for the fullest effective use of the revised form, it has been decided to require all applicants for renewal of AM and FM licenses which are required to file on or after January 1, 1966 and until November 1, 1966 to use the revised form in reporting on matters pertaining to their proposed operation, and to use the existing Section IV to report on past operation. To avoid confusion as to what will be required of affected applicants, instructions will be contained in the renewal package sent by the Commission to these individual licensees affected.

3. In view of the foregoing, IT IS ORDERED, That the effective date of the revised Section IV as previously adopted in this Docket on July 27, 1965 shall be modified in part for applications for renewal of AM and FM licenses which are due to be filed on or after January 1, 1966 but prior to November 1, 1966. Such applicants shall be required to answer Parts I, III, V, VI and VII of the revised Section IV and Questions 1(a), 2(a), 3(a), 4(a), 5(a) and (b), and 10 of the present Section IV.

Adopted September 15, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

# SUBJECT DIGEST

JOINT PETITION FOR APPROVAL OF REIMBURSEMENT AGREEMENT BETWEEN APPLICANTS FOR UHF TV STATION, FOR DISMISSAL OF ONE APPLICANT AND GRANT OF THE OTHER, GRANTED IN ORDER TO MAKE AVAILABLE A THIRD COMMERCIAL STATION TO ERIE, PA. (SEC. 311 OF THE ACT). ***WEPA-TV, INC.*** 2437

JOINT REQUEST BY MUTUALLY EXCLUSIVE TV APPLICANTS FOR APPROVAL OF AGREEMENT PROVIDING FOR DISMISSAL OF ONE APPLICANT AND SUBSEQUENT MERGER OF THE TWO, GRANTED, SINCE NOT FOR REIMBURSEMENT PURPOSES (SEC. 1.525). ***UNITED ARTISTS B/CING, INC.*** 2482

JOINT REQUEST FOR APPROVAL OF REIMBURSEMENT AGREEMENT, FOR DISMISSAL OF ONE APPLICATION AND GRANT OF THE OTHER, GRANTED, SINCE SEC. 1.525 REQUIREMENTS HAVE BEEN MET. ***5 KW, INC.*** 2528

MOTION TO APPROVE CONTRACT BETWEEN MUTUALLY EXCLUSIVE UHF TVAPPLICANTS TO DISMISS ONE APPLICATION WITHOUT PREJUDICE (SEC. 1.519) AND GRANT THE OTHER, DENIED, SINCE REIMBURSEMENT FOR PERSONAL TIME IS NOT ALLOWED UNDER SEC. 1.525 AND APPLICATION DISMISSED WITH PREJUDICE (SEC. 1.568 (C)). ***CHAPMAN RADIO & TV CO.*** 2536

**AGREEMENT TO WITHDRAW**

JOINT PETITION FOR REIMBURSEMENT AND WITHDRAWAL HELD IN ABEYANCE PENDING COMPLIANCE WITH PUBLICATION PURSUANT TO SEC. 1.525. ***HOLSTON B/CING CORP.*** 1551

REQUEST FOR APPROVAL OF A WITHDRAWAL AND REIMBURSEMENT AGREEMENT DENIED, BECAUSE REMAINING APPLICANT HAS SELECTED A CHANNEL ASSIGNMENT AND THUS A REASONABLE REIMBURSEMENT FIGURE CANNOT BE MADE. ***TVUE ASSOC., INC.*** 1741

PETITION FOR APPROVAL OF SETTLEMENT AGREEMENT (SEC. 1.525(A)GRANTED AND COMPETING APPLICANT DISMISSED SUBJECT TO RESOLUTION OF A PROGRAMING ISSUE AND ESTABLISHMENT OF A JOINT VENTURE AFTER GRANT. ***SPANISH INTERNATIONAL TV CO.*** 2333

REQUEST FOR APPROVAL OF REIMBURSEMENT. AGREEMENT GRANTED AS TO EXPENDITURES LIMITED TO THOSE LEGITIMATELY FOR THE PREPARATION AND FILING OF THE APPLICATION. ***INTEGRATED COMM. SYS. INC. OF MASS.*** 2347

JOINT REQUEST FOR APPROVAL OF AGREEMENT WHEREBY ONE UHF TV APPLICANT WILL HAVE ITS APPLICATION DISMISSED IN RETURN FOR AN OPTION TO ACQUIRE ONEHALF INTEREST IN THE SUCCESSFUL LICENSEE AS A JOINT VENTURE, GRANTED, SINCE SEC. 1.525 IS MET. ***GROSS B/CING CO.*** 2530

**AGREEMENT UNITED STATES - MEXICAN**

PETITION FOR RECONSIDERATION OF ORDER DENYING APPLICATION ONGROUNDS THAT APPLICATION DID NOT CONFORM WITH NARBA AND MEXICAN BILATERAL TREATIES, DENIED. ***METROPOLITAN TELEVISION CO.*** 2275

PETITION BY ASSOCIATION OF CLASS IV RADIO STATIONS FOR RULE MAKING PROCEEDINGS LOOKING TOWARD AUTHORIZATION FOR INCREASED NIGHTTIME POWER CEILING FOR CLASS IV STATIONS, DENIED, IN VIEW OF NARBA AND U.S. MEXICAN AGREEMENT LIMITATIONS. ***POWER LIMITATION-CLASS IV STATIONS*** 2446

**AIR HAZARD, MENACE TO AIR NAVIGATION**

PETITIONS TO MODIFY ISSUES ON HEARING OF APPLICATIONS TO INCREASE ANTENNA HEIGHT, GRANTED TO EXTENT OF DETERMINING MENACE TO AIR NAVIGATION BY EITHER APPLICATION. ***CHRONICLE PUBLISHING CO.*** 1545

APPLICATIONS FOR CLASS II STATIONS DESIGNATED FOR HEARING ONABILITY TO ADJUST AND MAINTAIN NIGHTTIME DIRECTIONAL ANTENNA, AND AIR NAVIGATION HAZARD. PETITION TO DENY APPLICATIONS ON GROUND THAT RULES PROHIBIT ASSIGNMENT OF SECOND UNLIMITED-TIME STATION TO PETITIONERS FREQUENCY, DISMISSED. ***NEBRASKA RURAL RADIO ASSN.*** 1978

APPLICATIONS TO CHANGE TV ANTENNA SITES DESIGNATED FOR CONSOLIDATED HEARING TO DETERMINE WHETHER TOWER PROPOSALS WOULD MENACE NAVIGATION, WHETHER EQUIVALENT PROTECTION SHOULD BE AFFORDED AND WHETHER WAIVER OF SEC. 73.610(A) (SHORT SPACING) IS WARRANTED. ***TLB, INC.*** 2009

APPLICATIONS TO INCREASE ANTENNA HEIGHT GRANTED AND AS TO ONE APPLICANT AND DENIED, AS TO THE OTHER AFTER DENIAL OF REQUEST FOR COMPARATIVE ISSUE, SINCE THE FORMER WAS PREFERABLE ON CRITICAL AIR HAZARD ISSUE. ***CHRONICLE PUBLISHING CO.*** 2398

**AIR HAZARDS - ISSUES**

PETITIONS FOR RECONSIDERATION OF GRANT WITHOUT HEARING (SEC.1.229) OF APPLICATION TO INCREASE TV ANTENNA HEIGHT ON CONDITION THAT TOWER BE MADE AVAILABLE TO OTHER BROADCASTERS, DENIED, SINCE COMPARATIVE ISSUE WAS CONTINGENT ON AIR HAZARD ISSUE, AND PUBLIC INTEREST REQUIRES EXPEDITIOUS CONSTRUCTION. ***CHRONICLE PUBLISHING CO.*** 2490

**ALIEN OWNERSHIP**

PETITION TO ENLARGE ISSUES TO INCLUDE A SEC. 310(A) ISSUE (ALIEN OWNERSHIP), A SEC. 73.636(A)(2) MULTIPLE OWNERSHIP ISSUE AND AN UNDISCLOSED PRINCIPAL ISSUE DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***SPANISH INTERNATIONAL TV CO.*** 2263

**ALLEGATIONS SUFFICIENCY OF**

JOINT PETITION TO DENY ASSIGNMENT OF LICENSE DENIED SINCE STANDING UNDER SEC. 309(D)(1) IS NOT SHOWN AND SINCE PETITION IS NOT SUPPORTED BY AFFIDAVIT. ALLEGATIONS OF UNDUE CONCENTRATION, POSSIBILITY OF JOINT ADVERTISING RATES AND CANDOR ARE UNSUPPORTED BY FACTS. ***WGRY, INC.*** 1452

PETITION TO DENY TRANSFER OF CONTROL ON GROUNDS THAT IT WAS UNAUTHORIZED DENIED ON GROUNDS THAT ALLEGATIONS (ECONOMIC INJURY, UNAUTHORIZED TRANSFER, MISREPRESENTATIONS) FAILED TO RAISE MATERIAL AND SUBSTANTIAL QUESTIONS OF FACT. THREE YEAR RULE (SEC. 1.597) WAIVED. ***PARKER, PARKET*** 1625

PETITION TO DENY APPLICATION BECAUSE OF ALLEGATIONS THAT APPLICANTS SIMILAR NAME WILL LEAD TO UNFAIR METHODS OF COMPETITION, DENIED ON GROUNDS INSUFFICIENCY OF ALLEGATIONS. ***WARNER, MELVIN B.*** 1672

PETITION FOR RECONSIDERATION OF GRANT ON GROUNDS OF ECONOMIC INJURY TO EXISTING STATION GRANTED AND PETITIONER PERMITTED TO AMEND PETITION TO SHOW SPECIFIC FACTS CONCERNING ECONOMIC INJURY. ***MISSOURI-ILLINOIS B/CING CO.*** 1675

PETITION TO ENLARGE ISSUES TO INCLUDE CONCENTRATION OF CONTROL OF MASS MEDIA ISSUE DENIED ON GROUNDS THAT PETITIONER DID NOT GIVE SPECIFIC ALLEGATIONS TO PROVE CONCENTRATION OF CONTROL (SEC. 1.229(C)). ***BROWN PUBLISHING CO.*** 1651

PETITION TO DENY GRANT DUE TO LACK OF FINANCIAL QUALIFICATIONS, LACK OF REVENUE IN AREA AND POOR PROGRAMMING DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS ARE INSUFFICENT. ***VANDER PLATE, LOUIS*** 1700

PETITION FOR RECONSIDERATION OF ASSIGNMENT OF CP BECAUSE OF ALLEGED FRAUD BY THE MAJORITY SHAREHOLDERS AGAINST THE MINORITY, DENIED, SINCE ALLEGATIONS WERE UNSUPPORTED, PETITION WAS UNTIMELY FILED, AND PROPER FORUM IS CIVIL COURTS. ***TRIANGLE B/CING CO.*** 1746

PETITION FOR RECONSIDERATION OF GRANT OF APPLICATION ALLEGING MISREPRESENTATION AS TO OWNERSHIP AND FINANCIAL POSITION, DENIED AS NOT BASED ON SUPPORTABLE EVIDENCE AND FOR FAILURE TO FILE PRE-GRANT OBJECTIONS (SEC. 1.106(C)(1)). ***CORUM, ALVIN B., JR.*** 2028

PETITION TO ENLARGE ISSUES AS TO REAL PARTY IN INTEREST, DENIED SINCE ALLEGATIONS WERE NOT DOCUMENTED AND AMOUNTED TO SPECULATION AND HEARSAY. ***TRI-CITIES B/CING CO.*** 2068

PETITION TO ENLARGE ISSUES TO DETERMINE IF THE MAXIMUM EXPECTED OPERATING VALUES (MEOV) FOR THE DIRECTIONAL ANTENNA PATTERN OF AN APPLICANT ARE THOSE THAT CAN REASONABLY BE EXPECTED TO BE ACHIEVED, DENIED, ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***KFOX, INC.*** 2177

PETITION TO ENLARGE ISSUES TO INCLUDE A NIGHTTIME RADIATION PATTERN ISSUE, DENIED ON GROUNDS THAT PETITIONER FAILED TO SET FORTH SUFFICIENT ENGINEERING DATA (SEC. 73.15 (A)) TO SUPPORT ITS ALLEGATIONS. ***KFOX, INC.*** 2260

PETITION TO ENLARGE ISSUES TO INCLUDE A SEC. 310(A) ISSUE (ALIEN OWNERSHIP), A SEC. 73.636(A)(2) MULTIPLE OWNERSHIP ISSUE AND AN UNDISCLOSED PRINCIPAL ISSUE DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***SPANISH INTERNATIONAL TV CO.*** 2263

PETITION BY APPLICANTS FOR ASSIGNMENT OF CP FOR WAIVER OF SEC. 73.636(A)(2) (MULTIPLE OWNERSHIP RULES) DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT TO APPLICATION UNDER SEC. 1.518. ***D.H. OVERMYER COMMUNICATIONS CO.*** 2272

PETITION TO ENLARGE ISSUES TO INCLUDE A FINANCIAL QUALIFICATIONS ISSUE, A JOINT AM-FM OPERATION ISSUE AND A PLANNING AND PREPARATION ISSUE DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***LEBANON VALLEY RADIO*** 2288

REQUEST FOR ENLARGEMENT OF ISSUES TO INCLUDE ANTENNA LOCATION ISSUE AND A DETERMINATION AS TO WHETHER THE MEOVS SPECIFIED ARE SUFFICIENT, DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS ARE INSUFFICIENT. ***KEOX, INC.*** 2256

PETITION TO ENLARGE ISSUES TO INCLUDE FINANCIAL QUALIFICATIONS AND FINANCIAL ARRANGEMENT ISSUES DENIED ON GROUNDS THAT ALLEGATIONS WERE INSUFFICIENT. ***FLATHEAD VALLEY B/CERS*** 2285

PETITION REQUESTING A WAIVER OF SEC. 73.240 (MULTIPLE OWNERSHIP RULES) AND REVIEW OF DECISION GRANTING COMPETING APPLICATION DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS ARE INSUFFICIENT TO JUSTIFY A WAIVER OF THESE RULES. ***DOVER B/CING CO., INC.*** 2329

PETITION TO ENLARGE ISSUES TO DETERMINE IF APPLICANT VIOLATED A FEDERAL LAW, MADE FALSE ENTRIES IN PROGRAM LOGS IN VIOLATION OF SEC. 73.112, PROMOTED HIS OWN BUSINESS INTERESTS UNFAIRLY AND IN GENERAL, HIS CHARACTER QUALIFICATIONS, DENIED DUE TO INSUFFICIENCY OF ALLEGATIONS. ***BROWN RADIO & TV CO.*** 2351

REQUEST FOR WAIVER OF SEC. 73.614 (ANTENNA HEIGHT LIMITATIONS) DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS FAIL TO SHOW PUBLIC INTEREST BENEFIT BY REASON OF EXPANSION OF SERVICE AT THE EXPENSE OF ADJACENT CHANNEL STATIONS. ***CAPITAL CITIES B/CING CORP.*** 2384

PETITION FOR RECONSIDERATION OF DECISION DENYING WAIVER OF SEC. 73.35(A) (OVERLAP RULE) AND ASSIGNMENT APPLICATION DENIED SINCE WAIVER WILL NOT BE GRANTED WHERE THE EFFICIENCY OF THE FACILITIES IN REDUCED SOLELY TO AVID OVERLAP PROBLEMS. ***SUDBURY, JONES T.*** 2081

**AMENDMENT**

APPEAL FROM EXAMINERS ORDER DENYING LEAVE TO AMEND A UHF TV APPLICATION TO REFLECT A MASSIVE CORPORATE REORGANIZATION DENIED, FOR LACK OF GOOD CAUSE (SEC. 1.522(B)) AS REQUIRED FOR POST-DESIGNATION AMENDMENTS, PETITION TO ADD CANDOR ISSUE DENIED. ***CLEVELAND T/CING CORP.*** 1892

**AMENDMENT CREATING CONFLICT WITH EXISTING APPLICATION**

APPEAL FROM EXAMINERS DENIAL OF LEAVE TO AMEND AN APPLICATION FOR CHANGES OF STOCKHOLDERS, OFFICERS AND DIRECTORS, AND AS TO MODIFICATIONS IN STAFFING, COST ESTIMATES, AND FINANCING (SEC. 1.301), DENIED, AS BEING UNTIMELY AND RADICALLY CHANGING APPLICATION WITHOUT GOOD CAUSE. ***CLEVELAND T/CING CORP.*** 1548

**AMENDMENT ENGINEERING CHANGE**

PETITION FOR LEAVE TO AMEND TV APPLICATION AFTER DESIGNATIONFOR HEARING (SEC. 1.522), GRANTED, AND SEC. 73.685(E) (DIRECTIONAL ANTENNA OPERATING REQUIREMENTS) IS WAIVED TO PERMIT COMPLIANCE WITH THE NEW OVERLAP RULE (SEC. 73.636). ***AMERICAN COLONIAL B/CING CORP.*** 2232

**AMENDMENT POST-DESIGNATION**

PETITION FOR LEAVE TO AMEND APPLICATION AS TO ENGINEERING AND FINANCIAL CHANGES DENIED ON GROUNDS THAT GOOD CAUSE (SEC. 1.522(B)) FOR A POST-DESIGNATION AMENDMENT NOT SHOWN. APPLICANT WITHOUT COUNSEL PERMITTED TO REFORM EXHIBITS FOUND TO BE IRRELEVANT. ***SYMPHONY NETWORK ASSOC., INC.*** 1614

**AMENDMENT PROPOSAL CHANGE**

PETITION TO AMEND APPLICATION BY CLASS II-A APPLICANT FOR STATION OR CLEAR CHANNEL FREQUENCY TO REDUCE PROPOSED NIGHTIME POWER GRANTED, SINCE PETITIONER COULD NOT REASONABLY HAVE ANTICIPATED THE NEED FOR AMENDMENT AND NO PREJUDICE WILL RESULT. ***FLATHEAD VALLEY B/CERS*** 2219

**AMENDMENT TO MEET NEW ISSUE**

JOINT REQUEST FOR APPROVAL OF MERGER OF TWO NEW TV CP APPLICANTS GRANTED, SEC. 1.525 FILING NOTICE REQUIREMENT WAIVED, SINCE COMPETING APPLICANTS ARE NOT INJURED AND MAY AMEND THEIR APPLICATIONS ACCORDINGLY. ***LIVESAY B/CING CO.*** 1473

**AMENDMENT-POST DESIGNATIONS**

MOTION TO ENLARGE ISSUES TO INCLUDE PROGRAMMING NEEDS, BUSINESS INTERESTS AND LOAN AGREEMENTS, GRANTED, MOTIONS TO ENLARGE OR MODIFY FINANCIAL ISSUES, DENIED, APPEAL FROM HEARING EXAMINER RULING GRANTING AMENDMENT DENIED ON GROUNDS THAT GOOD CAUSE FOR ACCEPTANCE OF A POST-DESIGNATION AMENDMENT WAS SHOWN. ***UNITED ARTISTS B/CING*** 1604

**ANTENNA ARRAY**

PETITION TO ENLARGE ISSUES TO INCLUDE DIRECTIONAL ANTENNA ARRAY, DENIED, SINCE UNTIMELY AND ALLEGATIONS OF REDUCTION OF RADIATION ARE NOT SUFFICIENTLY SPECIFIC (SEC. 1.229(C)). ***ABACOA RADIO CORP.*** 2225

PETITIONS FOR RECONSIDERATION OF GRANT OF CLASS 2 C.P. ON BASIS OF SEC. 73.188 (B)(1)(MINIMUM FIELD INTENSITY OVER CITY) AND SEC. 73.24 (I) (NIGHTTIME INTERFERENCE) DENIED BUT CONSTRUCTION PERMIT AMENDED AS TO ANTENNA ARRAY TO MINIMIZE INTERFERENCE TO THE THREATENED STATION. ***BOISE VALLEY B/CERS*** 2522

**ANTENNA DIRECTIONAL**

PETITION FOR LEAVE TO AMEND TV APPLICATION AFTER DESIGNATIONFOR HEARING (SEC. 1.522), GRANTED, AND SEC. 73.685(E) (DIRECTIONAL ANTENNA OPERATING REQUIREMENTS) IS WAIVED TO PERMIT COMPLIANCE WITH THE NEW OVERLAP RULE (SEC. 73.636). ***AMERICAN COLONIAL B/CING CORP.*** 2232

APPEAL FROM EXAMINERS ORDER DISSMISSING APPLICATION DENIED IN VIEW OF SEC. 73.240 (DUAPOLY RULE) VIOLATION OF APPLICATION. ***DOVER B/CING CO.*** 1928

APPEAL FROM HEARING EXAMINERS RULING DENYING LEAVE TO AMEND APPLICATION FOR NEW TV CP TO SHOW CHANGE IN OWNERSHIP, DENIED, SINCE AMENDMENT MIGHT IMPROVE APPLICANTS COMPARATIVE POSITION AND NO CONTERVAILING CONSIDERATIONS ARE PRESENTED. ***FARRAGUT TV CORP.*** 1984

**APPEAL PROCEDURAL REQUIREMENTS**

RULE AMENDMENTS ISSUED DELINEATING SCOPE OF REVIEW AUTHORITY OF HEARING EXAMINER (SEC. 0.341 AND 3.351) AND OF THE REVIEW BOARD (SEC. 0.361 AND 0.365). PROCEDURES FOR AND SCOPE OF APPEAL TO REVIEW BOARD DESIGNATED IN SEC. 1.92(C), 1.207, 1.223, 1.291-98, 1.568(C), 1.594(B), 1.744-45, 1.748 AND 1.918 AS AMENDED. ***DELEGATIONS OF AUTHORITY*** 1431

**APPLICANT PRO SE**

PETITION FOR LEAVE TO AMEND APPLICATION AS TO ENGINEERING AND FINANCIAL CHANGES DENIED ON GROUNDS THAT GOOD CAUSE (SEC. 1.522(B)) FOR A POST-DESIGNATION AMENDMENT NOT SHOWN. APPLICANT WITHOUT COUNSEL PERMITTED TO REFORM EXHIBITS FOUND TO BE IRRELEVANT. ***SYMPHONY NETWORK ASSOC., INC.*** 1614

**APPLICATION ACCEPTANCE OF**

APPLICATION TENDERED FOR FILING FOR NEW TV B/CAST C.P. ON A SUBSTITUTED CHANNEL, DENIED, AS UNTIMELY SINCE THE SUBSTITUTION OF ANOTHER CHANNEL FOR ONE WHICH HAS BEEN MADE UNAVAILABLE TO APPLICANTS IN HEARING STATUS DOES NOT GIVE A NEW APPLICANT THE RIGHT TO FILE. ***HARRISON, AUSTIN A.*** 1782

REQUEST BY NUMEROUS APPLICANTS FOR WAIVER OF NOTE TO SEC. 1.571 OF RULES FOR EXEMPTIONS TO AM FREEZE, TO PERMIT FILING OF APPLICATIONS FOR 1110 KC IN SOUTHERN CALIFORNIA, GRANTED, APPLICATIONS ACCEPTED AND DESIGNATED FOR HEARING. A CONTINGENT COMPARATIVE ISSUE IS ADDED. ***KFOX, INC.*** 1948

PETITIONS TO HAVE A CLASS IV AM APPLICATION RETURNED AS UNACCEPTABLE FOR FILING UNDER SEC. 73.24(B)(1) AND 73.37 (OVERLAP), DENIED, AND BOTH RULES ARE WAIVED TO PERMIT ACCEPTANCE, WITHOUT RULING ON THE MERITS. ***B & K B/CING CO.*** 2221

**APPLICATION AMENDMENT OF**

PETITION TO AMEND APPLICATION TO CONFORM ENGINEERING IN APPLICATION TO PROOF, GRANTED ON GROUNDS THAT GOOD CAUSE SHOWN AND AMENDMENTS WILL NOT NECESSITATE ADDITIONAL HEARINGS. ***PACIFIC COAST B/CING CO.*** 2254

PETITION FOR LEAVE TO AMEND APPLICATION AFTER ORAL ARGUMENT BUT BEFORE DECISION SINCE TRANSMITTER SITE BECAME UNAVAILABLE, GRANTED ON GROUNDS THAT GOOD CAUSE (SEC. 1.522 (B)) WAS SHOWN FOR THE AMENDMENT. ***S & W ENTERPRISES, INC.*** 1617

PETITION TO DENY AMENDMENT OF APPLICATION TO CHANGE ENGINEERING DATA ON GROUNDS THAT IT WAS FILED LATE AND PREJUDICIAL, DENIED ON GROUNDS THAT AMENDMENT COMPLIED WITH SEC. 1.522(B) CONCERNING LATE FILED ENGINEERING DATA. ***OTTAWA B/CING CORP.*** 1635

PETITION FOR REVIEW OF GRANT OF AMENDMENT OF APPLICATION CONCERNING FINANCIAL QUALIFICATIONS DENIED ON GROUNDS THAT AMENDMENT WILL IN NO WAY PREJUDICE PETITIONER IN HEARING ON FINANCIAL ISSUES. ***WEBR, INC.*** 1654

PETITION FOR LEAVE TO AMEND APPLICATION TO NOTE CHANGE IN FINANCIAL QUALIFICATIONS DENIED ON GROUNDS THAT GOOD CAUSE (SEC. 1.522(B)) NECESSARY TO AMEND APPLICATION AFTER IT HAS BEEN DESIGNATED FOR HEARING WAS NOT SHOWN. ***RHINELANDER TV CABLE CORP.*** 1690

PETITION FOR LEAVE TO AMEND APPLICATION TO SPECIFY NEW TRANSMITTER SITE AND MAIN STUDIO LOCATION, DENIED, SINCE THE UNAVAILABILITY OF ITS PROPOSED SITE COULD REASONABLY HAVE BEEN FORESEEN. (SEC. 1.522(B)). ***SYMPHONY NETWORK ASSOCIATION, INC.*** 2196

**APPLICATION DEFECTIVE**

PETITION FOR RECONSIDERATION OF RETURN OF PETITIONERS APPLICATION FOR FAILURE TO SHOW ABSENCE OF THE PROPOSALS EFFECT ON A FUTURE CLASS II-A CHANNEL (SEC. 1.569(B)(I)), IN TERMS OF NIGHTTIME INTERFERENCE DENIED. ***RADIO STATION WMGA*** 1834

PETITION BY APPLICANTS FOR ASSIGNMENT OF CP FOR WAIVER OF SEC. 73.636(A)(2) (MULTIPLE OWNERSHIP RULES) DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT TO APPLICATION UNDER SEC. 1.518. ***D.H. OVERMYER COMMUNICATIONS CO.*** 2272

**APPLICATION DISMISSAL REQUESTS FOR**

PETITION FOR LEAVE TO DISMISS APPLICATION FOR NEW STANDARD BROADCAST STATION BECAUSE OF DOUBTFUL SUPPORT FOR A SECOND STATION IN THE COMMUNITY, APPROVED. REIMBURSEMENT OF EXPENSES BY EXISTING STATION ALSO APPROVED. ***BIGBEE B/CING CO.*** 1990

**APPLICATION FAILURE TO PROSECUTE**

PETITION TO DISMISS APPLICATION TO CHANGE DIRECTIONAL ANTENNA SYSTEM FOR FAILURE TO PROSECUTE DENIED, SINCE CONTINUANCES WERE PREVIOUSLY GRANTED AND THE EXAMINER DID NOT ABUSE HIS DISCRETION BY GRANT. SEC. 1.568 NOT APPLICABLE. ***PROGRESS B/CING CORP.*** 1557

ON REMAND TO DEVELOP THE RECORD MORE ADEQUATELY, THE COMMISSION RECOMMENDED TO THE D.C. COURT OF APPEALS THAT APPELLANTS AM APPLICATION BE GRANTED AS FULLY QUALIFIED AND IN PUBLIC INTEREST SINCE THE COMPETING APPLICATION, PREVIOUSLY GRANTED, WAS ABANDONED BY THE GRANTEE-APPELLEE. ***BURLINGTON B/CING CO., INC.*** 1842

**APPLICATION SUBSTANTIAL CHANGE**

PART I OF THE RULES AMENDED AND SEC. 1.65 IS ADOPTED REQUIRING APPLICANTS TO INFORM THE COMMISSION OF SUBSTANTIAL CHANGES IN INFORMATION SET FORTH IN APPLICATIONS OF IN ANY OTHER SIGNIFICANT CIRCUMSTANCES. ***AMENDMENT OF PART I*** 1793

**AREA SERVICE**

MOTION TO ENLARGE ISSUES GRANTED TO EXTENT OF DETERMINING LOCATION OF PROPOSED GRADE A AND GRADE B CONTOURS, COMPARATIVE COVERAGE ISSUE, AND THE EXTENT OF SERVICES ANTICIPATED FOR AREAS NOT OTHERWISE SERVED. ***UNITED ARTISTS B/CING, INC.*** 1937

**ASSIGNMENT INVOLUNTARY**

PETITION TO DENY APPLICATION FOR INVOLUNTARY ASSIGNMENT OF LICENSE TO RECEIVER IN BANKRUPTCY, ALSO RENEWAL OF LICENSE DENIED, SINCE SEC. 309(C)(2)0B) AND SEC. 1.580(A)(2) PROTECT INVOLUNTARY ASSIGNMENTS, RENEWAL APPLICATION AND VOLUNTARY ASSIGNMENT OF LICENSE TO THIRD PARTIES, GRANTED. ***GULF COAST RADIO, INC.*** 1865

**ASSIGNMENT OF FREQUENCIES**

PETITION FOR RECONSIDERATION OF ORDER HOLDING PROCEEDINGS INABEYANCE UNTIL FURTHER NOTICE, FOLLOWING DISMISSAL OF AN APPLICATION, DENIED, SINCE SEC. 307(B) REQUIRES PROTECTION OF THE COMMUNITY WHOSE APPLICANT HAS WITHDRAWN. APPLICANTS INVITED TO RESUBMIT IN VIEW OF DEMAND FOR A CHANNEL ASSIGNMENT THERE. ***RADIO AMERICANA, INC.*** 1378

**BRIEF**

MOTION TO ACCEPT BRIEF EXCEEDING FIFTY PAGES IN LENGTH (SEC.1.227(C)). GRANTED SINCE THE BRIEF IS ON LETTER-SIZED PAPER, MOTION TO ACCEPT A LIKE REPLY DENIED SINCE UNREASONABLY LENGTHY. ***SUNBEAM TV CORP.*** 1855

**BROADCAST BUREAU**

PARTICIPATION OF COMMISSION BROADCAST BUREAU IN A SEGMENT OFTHE HEARING WITHOUT INTENDING TO FILE PROPOSED FINDINGS UNDER SECS. 1.263 AND 1.21 DISCUSSED. ***TELEVISION SAN FRANCISCO*** 2303

**BROADCAST RECORD**

APPLICATION FOR RENEWAL AND ASSIGNMENT OF LICENSES GRANTED AFTER APPLICANTS ANTI-TRUST VIOLATIONS WERE WEIGHED AGAINST LONGSTANDING EXCELLENT BROADCASTING RECORD AND CORPORATE STRUCTURE CHANGES MAKING THE LICENSEES MOVE RESPONSIBLE TO TOP MANAGEMENT. ***GENERAL ELECTRIC B/CING CO.*** 1592

**BURDEN OF PROOF**

PETITION TO VACATE DECISION GRANTING A TV C.P. AND REOPEN RECORD, ON GROUNDS OF NEW EVIDENCE OF FILING A CIVIL ANTI-TRUST ACTION AGAINST STOCKHOLDERS OF THE PERMITTEE IN CONNECTION WITH ANOTHER BUSINESS, GRANTED, HEARING DESIGNATED AND BURDEN OF PROOF IS ON THE PERMITTEE. ***SYRACUSE TV, INC.*** 2510

**BUSINESS INTEREST REPORTABLE**

MOTION TO ENLARGE ISSUES TO INCLUDE PROGRAMMING NEEDS, BUSINESS INTERESTS AND LOAN AGREEMENTS, GRANTED, MOTIONS TO ENLARGE OR MODIFY FINANCIAL ISSUES, DENIED, APPEAL FROM HEARING EXAMINER RULING GRANTING AMENDMENT DENIED ON GROUNDS THAT GOOD CAUSE FOR ACCEPTANCE OF A POST-DESIGNATION AMENDMENT WAS SHOWN. ***UNITED ARTISTS B/CING*** 1604

PETITION TO ENLARGE ISSUES TO DETERMINE IF APPLICANT HAS INTENTIONALLY FAILED TO DISCLOSE BUSINESS INTERESTS OF ITS OFFICERS, DENIED, ON GROUNDS THAT GOOD CAUSE NOT SHOWN FOR LATE FILING AND ON THE MERITS. ***CHICAGO TV CO.*** 2075

**CANDOR LACK OF**

JOINT PETITION TO DENY ASSIGNMENT OF LICENSE DENIED SINCE STANDING UNDER SEC. 309(D)(1) IS NOT SHOWN AND SINCE PETITION IS NOT SUPPORTED BY AFFIDAVIT. ALLEGATIONS OF UNDUE CONCENTRATION, POSSIBILITY OF JOINT ADVERTISING RATES AND CANDOR ARE UNSUPPORTED BY FACTS. ***WGRY, INC.*** 1452

PETITION TO ADD FINANCIAL QUALIFICATIONS, LACK OF CANDOR ANDSTRIKE APPLICATION ISSUES AGAINST MUTUALLY EXCLUSIVE FM APPLICANT, GRANTED AS TO FINANCIAL ISSUE SINCE FUNDS AVAILABLE SEEM INSUFFICIENT, DENIED AS TO THE OTHER TWO. ***TRIAD STATIONS, INC.*** 1831

APPEAL FROM EXAMINERS ORDER DENYING LEAVE TO AMEND A UHF TV APPLICATION TO REFLECT A MASSIVE CORPORATE REORGANIZATION DENIED, FOR LACK OF GOOD CAUSE (SEC. 1.522(B)) AS REQUIRED FOR POST-DESIGNATION AMENDMENTS, PETITION TO ADD CANDOR ISSUE DENIED. ***CLEVELAND T/CING CORP.*** 1892

**CARROLL ISSUE**

PETITION TO DENY APPLICATION TO CONSTRUCT NEW TV STATION ON BASIS OF SUBURBAN ISSUE, FINANCIAL QUALIFICATIONS AND CARROLL ISSUE DENIED, SEC. 73.613(A) (MAIN STUDIO LOCATION OUTSIDE CITY LIMITS) WAIVED, AND APPLICATION GRANTED. ***K-SIX TV, INC.*** 1814

APPEAL FROM DECISION DISMISSING COMPETING APPLICATION AND APPROVING A REIMBURSEMENT AGREEMENT GRANTED AND AGREEMENT SET ASIDE ON GROUNDS THAT

EVIDENCE AS TO AREA SUPPORT WAS INSUFFICIENT (CARROLL ISSUE). ***BIG BEE B/CING CO.*** 2307

PETITION FOR RECONSIDERATION OF GRANT WITHOUT HEARING OF NEWAND RENEWAL APPLICATION GRANTED AND CONSOLIDATED HEARING DESIGNATED TO INCLUDE A CARROLL ISSUE AND COMPARATIVE CONSIDERATIONS. ***MISSOURI-ILLINOIS B/CING CO.*** 2376

APPLICATIONS FOR UHF TRANSLATOR STATIONS, GRANTED, SUBJECT TO AFFORDING PROTECTION TO TV BROADCAST STATIONS AND IMPOSING NON-DUPLICATION RESTRICTION TO GRADE A CONTOURS, PETITIONS TO DENY ON BASIS OF CARROLL, MISREPRESENTATION AND FINANCIAL ISSUES DENIED. ***LEE CO. TV, INC.*** 2495

**CATV MICROWAVE CARRIAGE**

APPLICATIONS FOR C.P. TO ESTABLISH NEW AND ADDITIONAL FACILITIES IN DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE TO PROVIDE DISTANT SIGNALS FOR CATV SYSTEMS, PARTIALLY GRANTED, WHERE THE FACILITIES HAVE BEEN TEMPORARILY AUTHORIZED, BUT SUBJECT TO FINAL ACTION AT A LATER DATE. ***ALABAMA MICROWAVE, INC.*** 1821

**CEASE AND DESIST ORDER, ISSUE AUTHORITY TO**

ADOPTION OF LETTER DECLINING TO INVOKE SEC. 312(B) OF ACT INITIATE CEASE AND DESIST PROCEEDINGS AGAINST LICENSEE CANCELING PETITIONERS RELIGIOUS PROGRAM AND SUBSTITUTING OTHER RELIGIOUS PROGRAMS, SUBSEQUENT LETTER ADOPTED RECONSIDERING AND AGAIN DENYING PETITION AS INFORMAL MATTER (SEC. 1.767). ***SNEED, REV. J. RICHARD*** 1397

**CERTIFICATION**

MOTION TO MODIFY AND ENLARGE ISSUES TO INQUIRE INTO SUFFICIENCY OF FUNDS AND COST OF CONSTRUCTION DENIED, BUT GRANTED AS TO COMPARATIVE COVERAGE ISSUE, REQUEST THAT COMMISSION CONSIDER ESTABLISHING POLICY WITH RESPECT TO FINANCIAL SHOWINGS OF UHF APPLICANTS GRANTED AND ISSUE CERTIFIED. ***ULTRAVISION B/CING CO.*** 1342

**CERTIFICATION OF QUESTIONS**

PETITION TO ENLARGE ISSUES TO INCLUDE ADEQUACY OF STAFF PROPOSAL, AND FEASIBILITY OF PROGRAM PROPOSAL, GRANTED AS TO FORMER, WITH LATTER CERTIFIED TO COMMISSION FOR DETERMINATION. ***UNITED ARTISTS B/CING, INC.*** 1411

**CHANGES SUBSTANTIAL OR SIGNIFICANT**

PETITION FOR WAIVER OF SEC. 73.35(A) BANNING COMMON OWNERSHIP OF TWO OR MORE STATIONS WITH OVERLAP, CAUSED BY PROPOSED MAJOR CHANGES (SEC. 1.571(A)(1) IN EXISTING FACILITIES, DENIED ON GROUND THAT SEC. 73.28(D)(3) (TEN PERCENT RULE) IS NOT VIOLATED. ***VOICE OF DIXIE, INC.*** 2479

**CHANNEL ASSIGNMENT**

PETITION FOR COMPARATIVE HEARING WITH A TV LICENSEE THAT MUST AMEND ITS LICENSE BY SPECIFYING A NEW CHANNEL ASSIGNED IN LIEU OF THE PRESENT ASSIGNMENT (SEC. 3.606(E)), DISMISSED, SINCE THE ASSIGNMENT PROCEEDINGS HAVE NOT YET BEEN COMPLETED. ***AMENDMENT OF SEC. 3.606*** 2242

**CHARACTER QUALIFICATIONS**

PETITION FOR ENLARGEMENT OF ISSUES GRANTED AS TO REQUESTED INEPTNESS OR ABUSE OF FCC PROCESSES ISSUE AND DENIED AS TO CHARACTER QUALIFICATIONS AND REAL PARTY IN INTEREST ISSUES. ***TRI-STTE COMMUNICATIONS CO.*** 1293

PETITION TO ENLARGE ISSUES TO INCLUDE CHARACTER QUALIFICATIONS ISSUE BASED ON ALLEGED CONFLICTS IN TESTIMONY, DENIED SINCE ALREADY ENCOMPASSED IN PRESENT ISSUES. ***KWEN B/CING CO.*** 1381

MOTIONS TO ENLARGE ISSUES TO INCLUDE CHARACTER QUALIFICATIONS, DENIED AS LACKING IN SPECIFICITY SEC. 1.229 (C). PETITION TO MODIFY CP ORDER SO AS TO PRECLUDE PREJUDICE IN PENDING LITIGATION, GRANTED. PETITION TO ENLARGE ISSUES TO INCLUDE STAFFING PROPOSAL, GRANTED. ***SPANISH INTERNATIONAL TV CO.*** 1384

PETITION TO ENLARGE ISSUES TO INCLUDE MISREPRESENTATION, CHARACTER AND FINANCIAL ISSUES GRANTED, TO EXTENT OF DETERMINING IF FACTS WERE CONCEALED BY APPLICANT AND IF SO, WHAT EFFECT THIS HAS ON HIS QUALIFICATIONS. ***TRI-CITIES B/CING CO.*** 1995

REQUEST FOR TEMPORARY SUSPENSION OF PRODEDURES ON GROUNDS THAT COMPETING APPLICANTS HAVE AGREED TO AN ASSIGNMENT OF THE LICENSE, DENIED, SINCE ISSUES OF CHARACTER QUALIFICATIONS AND LICENSE RENEWAL ARE UNRESOLVED. ***BROWN RADIO & TV CO.*** 2200

MOTION TO ENLARGE ISSUES TO INCLUDE A FINANCIAL QUALIFICATIONS ISSUE AND A CHARACTER QUALIFICATIONS ISSUE (TECHNICAL CONVICTION) DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***BROWN RADIO & TV CO.*** 2367

**CITIZENSHIP REQUIREMENTS**

MOTION TO DELETE, MODIFY AND ENLARGE ISSUES GRANTED TO EXTENT OF ADDITION OF MULTIPLE OWNERSHIP AND SEC. 310 (A)(5) ISSUES (CITIZENSHIP REQUIREMENTS OF OWNERS) DENIED AS TO A GENERAL LEGAL QUALIFICATIONS ISSUE CROSS INTEREST AND AS TO A SUBURBAN ISSUE. ***UNITED ARTISTS B/CING INC.*** 1306

MOTION TO ENLARGE ISSUES TO INCLUDE LEGAL AND FINANCIAL QUALIFICATIONS ISSUES AND A MULTIPLE INTEREST AND CONTROL ISSUE (SEC. 73.636) DENIED AND MOTION TO ADD CITIZENSHIP ISSUE (COMPLIANCE WITH SEC. 310(A)(4) GRANTED. ***CHICAGOLAND TV CO.*** 2123

**CLASS 2 STATIONS**

APPLICATIONS FOR CLASS 2 STATIONS DESIGNATED FOR HEARING ON ISSUES OF AREAS AND POPULATIONS OF PRIMARY SERVICE, OVERLAP, OBJECTIONABLE INTERFERENCE, PROPER MAINTENANCE OF DIRECTIONAL ANTENNA SYSTEM, AND FINANCIAL QUALIFICATIONS. ***RADIO AMERICANA, INC.*** 1999

PETITIONS FOR RECONSIDERATION OF GRANT OF CLASS 2 C.P. ON BASIS OF SEC. 73.188 (B)(1)(MINIMUM FIELD INTENSITY OVER CITY) AND SEC. 73.24 (I) (NIGHTTIME INTERFERENCE) DENIED BUT CONSTRUCTION PERMIT AMENDED AS TO ANTENNA ARRAY TO MINIMIZE INTERFERENCE TO THE THREATENED STATION. ***BOISE VALLEY B/CERS*** 2522

**CLASS 2-A ASSIGNMENT**

PETITION FOR RECONSIDERATION OF RETURN OF PETITIONERS APPLICATION FOR FAILURE TO SHOW ABSENCE OF THE PROPOSALS EFFECT ON A FUTURE CLASS II-A CHANNEL (SEC. 1.569(B)(I)), IN TERMS OF NIGHTTIME INTERFERENCE DENIED. ***RADIO STATION WMGA*** 1834

APPLICATIONS FOR CLASS II STATIONS DESIGNATED FOR HEARING ONABILITY TO ADJUST AND MAINTAIN NIGHTTIME DIRECTIONAL ANTENNA, AND AIR NAVIGATION HAZARD. PETITION TO DENY APPLICATIONS ON GROUND THAT RULES PROHIBIT ASSIGNMENT OF SECOND UNLIMITED-TIME STATION TO PETITIONERS FREQUENCY, DISMISSED. ***NEBRASKA RURAL RADIO ASSN.*** 1978

PETITIONS TO DENY CLASS 2-A APPLICATION ON GROUNDS OF ECONOMIC INJURY TO EXISTING STATIONS, INTERFERENCE (SEC. 73.57) FAILURE TO MEET WHITE AREA (SEC. 73.24(I)) REQUIREMENTS AND CITY COVERAGE, (SEC. 73.188(U)) DISMISSED, SINCE ALLEGATIONS WERE UNSUPPORTED. ***BOISE VALLEY B/CERS, INC.*** 2053

PETITION BY CLASS I STATION TO ENLARGE ISSUES AS TO CLASS II-A OPERATION CONCERNING NIGHTTIME SKYWAVE INTERFERENCE POTENTIAL, AND FOR DENIAL PENDING CESSATION OF EXISTING INTERFERENCE, DENIED, ON GROUNDS OF ESTABLISHMENT OF A NEW UNLIMITED SERVICE. ***FLATHEAD VALLEY B/CERS*** 2508

**CLASS 4 POWER INCREASE POLICY**

PETITION FOR RECONSIDERATION OF ORDER DENYING CLASS IV APPLICATION TO INCREASE NIGHTTIME POWER, GRANTED AND APPLICATION GRANTED WITHOUT HEARING SINCE IT IS CLEAR THAT ANY POSSIBLE INTERFERENCE CAUSED WILL BE MINIMAL. ***BLACKHAWK B/CING CO.*** 1499

PETITION FOR RECONSIDERATION OF GRANT OF CLASS IV POWER INCREASE GRANTED AND APPLICATION RESCINDED DUE TO INTERFERENCE CAUSED, APPLICATION HELD IN ABEYANCE PENDING FINAL DECISION ON ANOTHER CLASS IV STATION REQUEST FOR POWER INCREASE. ***RADIO STATION WJQS*** 2526

**CLASS 4 STATIONS**

PETITION BY ASSOCIATION OF CLASS IV RADIO STATIONS FOR RULE MAKING PROCEEDINGS LOOKING TOWARD AUTHORIZATION FOR INCREASED NIGHTTIME POWER CEILING FOR CLASS IV STATIONS, DENIED, IN VIEW OF NARBA AND U.S. MEXICAN AGREEMENT LIMITATIONS. ***POWER LIMITATION-CLASS IV STATIONS*** 2446

PETITION BY CO-CHANNEL CLASS IV STATION TO DESIGNATE A CLASSIV APPLICATION FOR HEARING IS ACCEPTED, ALTHOUGH NOT TIMELY, SINCE ITS LICENSE WOULD BE MODIFIED BY THE PROPOSAL (SEC. 1.580(I)), APPLICATION HELD IN ABEYANCE PENDING ACTION ON PETITIONERS PENDING APPLICATION FOR POWER INCREASE. ***BOONEVILLE B/CING CO.*** 2475

**CLEAR CHANNEL**

PETITION TO AMEND APPLICATION BY CLASS II-A APPLICANT FOR STATION OR CLEAR CHANNEL FREQUENCY TO REDUCE PROPOSED NIGHTIME POWER GRANTED, SINCE PETITIONER COULD NOT REASONABLY HAVE ANTICIPATED THE NEED FOR AMENDMENT AND NO PREJUDICE WILL RESULT. ***FLATHEAD VALLEY B/CERS*** 2219

PETITION BY CLEAR CHANNEL LICENSEE FOR PUBLIC HEARING (SEC. 316) GRANTED IN PART AND HEARING DESIGNATED ON THE FOLLOWING ISSUES PRIMARY SERVICE, DIRECTIONAL ANTENNA SYSTEM, MAIN STUDIO LOCATION (SEC. 73.30(A)), POPULATION (SEC. 73.24) AND (SEC. 307(B) ISSUE. ***EMERALD B/CING CORP.*** 2295

**CLEAR CHANNEL FREEZE RULE**

PETITION FOR RULE MAKING REQUESTING A NEW DAYTIME ASSIGNMENTON A I-A CLEAR CHANNEL (SECS. 73.21 AND 73.25), DENIED SINCE NO BASIS FOR WAIVER OF THE TEMPORARY MORATORIUM ON SUCH ASSIGNMENTS HAS BEEN ALLEGED. ***AMEND. OF SEC. 73.21 AND 73.25*** 1497

APPLICATIONS FOR CLASS II STATIONS DESIGNATED FOR HEARING ONABILITY TO ADJUST AND MAINTAIN NIGHTTIME DIRECTIONAL ANTENNA, AND AIR NAVIGATION HAZARD. PETITION TO DENY APPLICATIONS ON GROUND THAT RULES PROHIBIT ASSIGNMENT OF SECOND UNLIMITED-TIME STATION TO PETITIONERS FREQUENCY, DISMISSED. ***NEBRASKA RURAL RADIO ASSN.*** 1978

**CLEAR CHANNEL STATIONS**

REQUEST FOR WAIVER OF RULES (SEC. 73.25 ADDITIONAL DAYTIME ONLY FACILITIES ON CLASS 1-A CHANNELS DENIED ON GROUNDS THAT CLEAR CHANNEL POLICY CONSIDERATIONS PROHIBIT SUCH A WAIVER. ***KXA, INC.*** 2381

**COMMUNITY**

PETITION TO ENLARGE ISSUES AS TO WHETHER PROPOSAL WOULD SERVE A COMMUNITY WITHIN THE MEANING OF SEC. 73.30(A), DENIED AS LATE FILED. HOWEVER ISSUE IS INCLUDED ON REVIEW BOARDS OWN ORDER. ***MILLER, VERNE M.*** 1340

**COMMUNITY NEEDS**

PETITION TO ENLARGE ISSUES GRANTED AS TO COMMUNITY NEEDS FORSPECIALIZED PROGRAMMING, SINCE EVIDENCE OF EXISTING PROGRAMMING IS NOT ADMISSIBLE UNDER STANDARD COMPARATIVE ISSUE, DENIED AS TO ALL OTHER ISSUES. ***CHICAGOLAND TV CO.*** 1879

PETITION TO DENY APPLICATION ON GROUNDS OF INADEQUATE COMMUNITY SUPPORT, LACK OF FINANCIAL QUALIFICATIONS AND FAILURE TO ASCERTAIN COMMUNITY PROGRAMMING NEEDS, DENIED AS UNSUPPORTED ALLEGATIONS. ***HOLDER, JAMES B.*** 2050

PETITION TO ENLARGE ISSUES FOR DETERMINATION OF CITIZENSHIP OF CHURCH TRUSTEES (SEC. 3.10(A)(4)) AND BUSINESS INTERESTS OF MEMBERS (SEC. 73.636) AS TO AN EDUCATIONAL APPLICANT, GRANTED, BUT DENIED AS TO FINANCIAL AND DETERMINATION OF COMMUNITY NEEDS. ***GROSS B/CING CO.*** 2228

APPLICATION FOR A NEW STANDARD STATION WAS GRANTED OVER INFORMAL OBJECTIONS (SEC. 1.587) BASED ON ECONOMIC IMPACT, THE AREAS LACK OF NEED FOR A NEW STATION, AND MISREPRESENTATIONS BY THE APPLICANT SINCE ALLEGATIONS WERE UNSUBSTANTIATED. ***M.R. LANKFORD B/CING CO.*** 2424

**COMMUNITY SURVEY**

PETITION TO DENY APPLICATION TO CHANGE TRANSMITTER LOCATION DENIED ON GROUNDS THAT PETITIONER DEFAULTED AND THE ISSUES OF ASCERTAINING PROGRAMMING NEEDS AND COMMUNITY SURVEY WERE HELD TO HAVE BEEN MET, AND GRANT OF APPLICATIONS AFFIRMED. ***WEAT-TV, INC.*** 2361

**COMPARATIVE CONSIDERATIONS**

PETITION TO ENLARGE ISSUES, GRANTED AS TO COMPARATIVE ISSUESOF BACKGROUND AND MANAGEMENT AND PROGRAMMING PROPOSALS, CONTINGENT ON SEC. 307(B) CONSIDERATIONS. ***NEBRASKA RURAL RADIO ASSOC.*** 2502

**COMPARATIVE COVERAGE ISSUE**

PETITION TO ENLARGE ISSUES TO INCLUDE A SUBURBAN COMMUNITY NEEDS ISSUE, A TRANSMITTER AND STUDIO SITE ISSUE AND A COMPARATIVE COVERAGE ISSUE GRANTED AND HEARING DESIGNATED. ***SPRINGFIELD T/CING CO.*** 1710

MOTION TO ENLARGE ISSUES GRANTED TO EXTENT OF DETERMINING LOCATION OF PROPOSED GRADE A AND GRADE B CONTOURS, COMPARATIVE COVERAGE ISSUE, AND THE EXTENT OF SERVICES ANTICIPATED FOR AREAS NOT OTHERWISE SERVED. ***UNITED ARTISTS B/CING, INC.*** 1937

**COMPARATIVE HEARING**

PETITION FOR COMPARATIVE HEARING WITH A TV LICENSEE THAT MUST AMEND ITS LICENSE BY SPECIFYING A NEW CHANNEL ASSIGNED IN LIEU OF THE PRESENT ASSIGNMENT (SEC. 3.606(E)), DISMISSED, SINCE THE ASSIGNMENT PROCEEDINGS HAVE NOT YET BEEN COMPLETED. ***AMENDMENT OF SEC. 3.606*** 2242

**COMPARATIVE ISSUE, CONTINGENT**

PETITION TO ADD A CONTINGENT COMPARATIVE ISSUE GRANTED, SINCE SUCH A POSSIBILITY IS SUFFICIENTLY EVIDENT FROM THE PLEADINGS. ***CHARLES COUNTY B/CING CO., INC.*** 1348

REQUEST BY NUMEROUS APPLICANTS FOR WAIVER OF NOTE TO SEC. 1.571 OF RULES FOR EXEMPTIONS TO AM FREEZE, TO PERMIT FILING OF APPLICATIONS FOR 1110 KC IN SOUTHERN CALIFORNIA, GRANTED, APPLICATIONS ACCEPTED AND DESIGNATED FOR HEARING. A CONTINGENT COMPARATIVE ISSUE IS ADDED. ***KFOX, INC.*** 1948

PETITIONS FOR RECONSIDERATION OF GRANT WITHOUT HEARING (SEC.1.229) OF APPLICATION TO INCREASE TV ANTENNA HEIGHT ON CONDITION THAT TOWER BE MADE AVAILABLE TO OTHER BROADCASTERS, DENIED, SINCE COMPARATIVE ISSUE WAS CONTINGENT ON AIR HAZARD ISSUE, AND PUBLIC INTEREST REQUIRES EXPEDITIOUS CONSTRUCTION. ***CHRONICLE PUBLISHING CO.*** 2490

PETITION TO ENLARGE ISSUES, GRANTED AS TO COMPARATIVE ISSUESOF BACKGROUND AND MANAGEMENT AND PROGRAMMING PROPOSALS, CONTINGENT ON SEC. 307(B) CONSIDERATIONS. ***NEBRASKA RURAL RADIO ASSOC.*** 2502

**COMPETITION**

PETITION TO DENY APPLICATIONS FOR CHANGE OF TV TRANSMITTER SITE GRANTED, CONSOLIDATED HEARING DESIGNATED ON COMPARATIVE AND ECONOMIC VIABILITY ISSUES. ***KTIV TV CO.*** 1310

PETITION TO MODIFY APPLICATION FOR NEW VHF TV TRANSMITTER SITE AND WAIVER OF SEC. 73.610 AND 73.685 SHORT-SPACING REQUIREMENTS, GRANTED TO AFFORD COMPETITION WITHOUT ADDITIONAL VHF CHANNEL ASSIGNMENT, AND MAINTAIN EXISTING SERVICE IN DEVELOPING COMMUNITY. ***ST. ANTHONY TV CORP.*** 1363

PETITION FOR RECONSIDERATION OF GRANT OF RENEWAL WITHOUT HEARING GRANTED TO DETERMINE VERACITY OF A SURVEY TAKEN AND MISREPRESENTATION BUT DENIED AS TO COMPETITIVE FACILITY ISSUE, GAIN AND LOSS OF SERVICE ISSUE, AND 307(B) AND IF GRANTED, EQUIVALENT PROTECTION MUST BE ASSURED. ***TELEVISION B/CERS, INC.*** 2338

**COMPETITIVE PRACTICES**

APPLICATION FOR CHANGE OF TRANSMITTER SITE BY UHF STATION, DESIGNATED FOR HEARING ON ISSUES AS TO INJURY IF ANY TO AREA UHF STATIONS, COMPETITIVE FACTORS, 307(B) ISSUE (EQUITABLE DESTRIBUTION OF BROADCAST FACILITIES) (SEC. 73.606), WAIVER OF SEC. 73.685(E) (TRANSMITTER LOCATION AND ANTENNA SIZE). ***SELMA TELEVISION, INC.*** 2180

**CONCENTRATION OF CONTROL**

PETITION FOR RECONSIDERATION OF ACCEPTANCE OF APPLICATION FOR FILING, DENIED, AND COMPARATIVE HEARING DESIGNATED ON ISSUES AS TO FINANCIAL QUALIFICATIONS, HAZARD TO AIR NAVIGATION AND CONCENTRATION OF CONTROL. ***TRI-CITIES B/CING CO.*** 1772

PETITION TO DENY GRANT OF APPLICATION FOR NEW AM STATION GRANTED, AND CONCENTRATION OF CONTROL (SEC. 73.35(B)) AND SUBURBAN ISSUES DESIGNATED FOR HEARING. STRICT REQUIREMENTS OF PUBLICATION OF NOTICE (SEC. 1.580(C)(1)) WAIVED. ***CHILDRESS JAMES B.*** 2136

**CONDUCT IMPROPER**

MOTION TO SUBSTITUTE TRUSTEE FOR BANKRUPT RENEWAL APPLICANT AS A PARTY, DENIED AS DENYING LICENSEE STATUTORY RIGHT TO PARTICIPATE IN PROCEEDING. MOTION BY CORPORATE APPLICANT FOR RENEWAL AND ASSIGNMENT DENIED, PENDING OUTCOME OF INQUIRY INTO CONDUCT OF STOCKHOLDER. REQUEST BY PARTNER TO FILE SEPARATE EXCEPTIONS, DENIED. ***TIPTON COUNTY B/CERS*** 1327

**CONSTRUCTION PERMIT EXTENSION**

THE COMMISSION TOOK VARIOUS ACTIONS IN UHF TV RULINGS ON 18 APPLICATIONS FOR ADDITIONAL TIME TO CONSTRUCT, (SEC 1.534) 1 APPLICATION FOR LICENSE TO COVER NEW TV C.P. AND THREE RENEWALS. ***JOE L. SMITH, JR., INC.*** 2514

**CRIMINAL LAW, VIOLATIONS OF**

MOTION TO ENLARGE ISSUES TO INCLUDE A FINANCIAL QUALIFICATIONS ISSUE AND A CHARACTER QUALIFICATIONS ISSUE (TECHNICAL CONVICTION) DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***BROWN RADIO & TV CO.*** 2367

**CROSS INTEREST**

MOTION TO DELETE, MODIFY AND ENLARGE ISSUES GRANTED TO EXTENT OF ADDITION OF MULTIPLE OWNERSHIP AND SEC. 310 (A)(5) ISSUES (CITIZENSHIP REQUIREMENTS OF OWNERS) DENIED AS TO A GENERAL LEGAL QUALIFICATIONS ISSUE CROSS INTEREST AND AS TO A SUBURBAN ISSUE. ***UNITED ARTISTS B/CING INC.*** 1306

**DAYTIME SKY WAVE TRANSMISSIONS**

PETITION FOR RULE MAKING REQUESTING A NEW DAYTIME ASSIGNMENTON A I-A CLEAR CHANNEL (SECS. 73.21 AND 73.25), DENIED SINCE NO BASIS FOR WAIVER OF THE TEMPORARY MORATORIUM ON SUCH ASSIGNMENTS HAS BEEN ALLEGED. ***AMEND. OF SEC. 73.21 AND 73.25*** 1497

**DAYTIME STATIONS**

PETITION FOR REVIEW OF ACTION DENYING DAYTIME ONLY OPERATION BECAUSE OF A FAILURE TO PROCEED WITH CONSTRUCTION UNDER PARTIAL GRANT, GRANTED AND REMANDED TO DETERMINE IF A PARTIAL GRANT WOULD SERVE THE PUBLIC INTEREST. (SEC. 73.35 (A)). ***NORTH ATLANTA B/CING CO.*** 1791

**DECISION RECONSIDERED**

APPLICATION FOR REVIEW OF ORDER SCHEDULING ORAL ARGUMENT AFTER MISTAKENLY GRANTING NEW STANDARD BROADCAST APPLICATION, DENIED, SINCE THE REVIEW BOARD ACTED WITHIN ITS POWERS IN SETTING ASIDE ITS OWN DECISION AND THE NEW DECISION BY THE REVIEW BOARD IS STILL SUBJECT TO REVIEW (SEC. 1.115) BY THE COMMISSION. ***PRATTVILLE B/CING CO.*** 1407

**DEFAULT**

PETITION TO DENY APPLICATION TO CHANGE TRANSMITTER LOCATION DENIED ON GROUNDS THAT PETITIONER DEFAULTED AND THE ISSUES OF ASCERTAINING PROGRAMMING NEEDS AND COMMUNITY SURVEY WERE HELD TO HAVE BEEN MET, AND GRANT OF APPLICATIONS AFFIRMED. ***WEAT-TV, INC.*** 2361

**DEPARTMENT OF STATE**

PETITION BY DEPT. OF STATE OF INTERVENE (SEC. 1.722) IN PROCEEDING BETWEEN INTERNATIONAL BANKS AND INTERNATIONAL COMMON CARRIERS, GRANTED, FOR LIMITED PURPOSE OF REQUESTING THAT THE FCC NOT ADOPT SPECIFIC CONCLUSION IN DECISION OF HEARING EXAMINER. ***ALL-AMERICAN CABLES AND RADIO, INC.*** 2248

**DEPOSITION AUTHORITY TO TAKE**

MOTION TO QUASH DEPOSITIONS DENIED ON GROUNDS THAT IT IS WITHIN DISCRETION OF HEARING EXAMINER TO GRANT THE TAKING OF DEPOSITIONS, AND THE EXAMINER FOUND THE REQUESTS TO BE WITHIN THE REQUIREMENTS OF SEC. 1.312(B)(4) ***CHICAGOLAND TV CO.*** 2395

**DEPOSITION NOTICE OF INTENTION TO TAKE**

MOTION TO QUASH DEPOSITIONS DENIED ON GROUNDS THAT IT IS WITHIN DISCRETION OF HEARING EXAMINER TO GRANT THE TAKING OF DEPOSITIONS, AND THE EXAMINER FOUND THE REQUESTS TO BE WITHIN THE REQUIREMENTS OF SEC. 1.312(B)(4) ***CHICAGOLAND TV CO.*** 2395

**DIRECTIONAL ANTENNA SYSTEM ADJUSTMENT**

APPLICATIONS FOR CLASS II STATIONS DESIGNATED FOR HEARING ONABILITY TO ADJUST AND MAINTAIN NIGHTTIME DIRECTIONAL ANTENNA, AND AIR NAVIGATION HAZARD. PETITION TO DENY APPLICATIONS ON GROUND THAT RULES PROHIBIT ASSIGNMENT OF SECOND UNLIMITED-TIME STATION TO PETITIONERS FREQUENCY, DISMISSED. ***NEBRASKA RURAL RADIO ASSN.*** 1978

**DIRECTIONAL ANTENNA SYSTEMS**

APPLICATION TO CHANGE TRANSMITTER SITE, INCREASE ANTENNA HEIGHT AND REDUCE VISUAL EFFECTIVE RADIATED POWERS, GRANTED SUBJECT TO LIMITATION ON ALLOWABLE POWER, AND A HEARING TO DETERMINE IMPACT UPON OPERATION OF AN EXISTING STATION WITHOUT DIRECTIONALIZATION. (SEC. 1.110). ***WHAS, INC.*** 1509

APPLICATIONS FOR CLASS 2 STATIONS DESIGNATED FOR HEARING ON ISSUES OF AREAS AND POPULATIONS OF PRIMARY SERVICE, OVERLAP, OBJECTIONABLE INTERFERENCE, PROPER MAINTENANCE OF DIRECTIONAL ANTENNA SYSTEM, AND FINANCIAL QUALIFICATIONS. ***RADIO AMERICANA, INC.*** 1999

**DISCLOSURE FULL**

MOTION TO HAVE COMPETING APPLICANT AMEND APPLICATION FOR NEWTV C.P. TO MAKE IT MORE DEFINITE AS TO INTERESTS OF LEADING STOCKHOLDER, GRANTED WITH CONCOMITANT WAIVER OF SEC. 1.45 TO ALLOW SUPPLEMENT SPECIFYING SOME OF THESE OWNERSHIP INTERESTS. ***SPANISH INT. TV CO. INC.*** 1304

**DISCOVERY**

APPEAL FROM ORDER DENYING DISCOVERY REQUEST OF INTERNAL STAFF REPORTS, BILL OF PARTICULARS PLACING ULTIMATE BURDEN OF PROOF IN RENEWAL PROCEEDINGS ON LICENSEE, AND IN REVOCATION PROCEEDINGS ON THE COMMISSION AND SETTING TIME AND PLACE OF HEARING, DENIED. EXPEDITIOUS CONSIDERATION OF PLEADINGS ORDERED. ***WTIF, INC.*** 1322

**DISMISSAL WITH PREJUDICE**

MOTION TO APPROVE CONTRACT BETWEEN MUTUALLY EXCLUSIVE UHF TVAPPLICANTS TO DISMISS ONE APPLICATION WITHOUT PREJUDICE (SEC. 1.519) AND GRANT THE OTHER, DENIED, SINCE REIMBURSEMENT FOR PERSONAL TIME IS NOT ALLOWED UNDER SEC. 1.525 AND APPLICATION DISMISSED WITH PREJUDICE (SEC. 1.568 (C). ***CHAPMAN RADIO***

**DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE**

APPLICATION TO CHANGE STATION LOCATION AND INCREASE ANTENNA HEIGHT FOR DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE, GRANTED SINCE MERE CONCLUSORY ALLEGATION OF ABNORMAL PROPOGATION CONDITIONS IS NOT SUFFICIENT TO ESTABLISH STANDING UNDER SEC. 309(D). ***ANSWENITE PROFESSIONAL TEL. SERVICE*** 1388

**DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE**

APPLICATIONS FOR C.P. TO ESTABLISH NEW AND ADDITIONAL FACILITIES IN DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE TO PROVIDE DISTANT SIGNALS FOR CATV SYSTEMS, PARTIALLY GRANTED, WHERE THE FACILITIES HAVE BEEN TEMPORARILY AUTHORIZED, BUT SUBJECT TO FINAL ACTION AT A LATER DATE. ***ALABAMA MICROWAVE, INC.*** 1821

**DOUBLE BILLING**

PETITION TO ENLARGE ISSUES TO DETERMINE WHETHER APPLICANT FALSIFIED PROGRAM LOGS AND ENGAGED IN PRACTICE OF DOUBLE BILLING GRANTED. ***PRATTVILLE B/CING CO.*** 2072

**DUOPOLY RULE**

AMENDMENT OF SEC. 73.35, 73.240 AND 73.636 (DUOPOLY RULES) RELATING TO MULTIPLE OWNERSHIP OF STANDARD, FM AND TELEVISION BROADCAST STATIONS. ***AMEND. OF SEC. 73.35*** 1728

APPEAL FROM EXAMINERS ORDER DISSMISSING APPLICATION DENIED IN VIEW OF SEC. 73.240 (DUAPOLY RULE) VIOLATION OF APPLICATION. ***DOVER B/CING CO.*** 1928

**DUPLICATION OF AM BY FM**

AMENDMENT OF PARTS 1 AND 73 OF THE RULES REGARDING AM STATION ASSIGNMENTS STANDARDS AND THE RELATION BETWEEN THE AM AND FM B/CST SERVICES. SEE 45A FCC 1541 FOR CORRECTION OF SEC. 73.37(A)). ***ASSIGNMENT STANDARDS-AM AND FM*** 1515

PETITIONS FOR RECONSIDERATION OF AMENDMENT TO SEC. 73.37 (MINIMUM SEPERATION BETWEEN STATIONS, PROHIBITED OVERLAP) AND SEC. 73.242 (DUPLICATION OF AM AND FM PROGRAMMING) DENIED, AND AMENDMENTS ADOPTED. ***AMENDMENT OF PART 73*** 2092

**ECONOMIC IMPACT**

APPLICATION FOR A NEW STANDARD STATION WAS GRANTED OVER INFORMAL OBJECTIONS (SEC. 1.587) BASED ON ECONOMIC IMPACT, THE AREAS LACK OF NEED FOR A NEW STATION, AND MISREPRESENTATIONS BY THE APPLICANT SINCE ALLEGATIONS WERE UNSUBSTANTIATED. ***M.R. LANKFORD B/CING CO.*** 2424

**ECONOMIC INJURY**

PETITIONS TO DENY APPLICATION FOR NEW TV BROADCAST TRANSLATOR STATIONS ON GROUNDS OF ECONOMIC INJURY, DENIED FOR FAILURE TO ALLEGE SUBSTANTIAL AND SPECIFIC QUESTIONS OF FACT. ***KCMC, INC.*** 1421

APPLICATION FOR NEW VHF BROADCAST STATION TO PROVIDE A THIRDNETWORK OUTLET IN THE COMMUNITY, GRANTED. PETITION TO DISMISS DENIED, SINCE ADDITIONAL COMPETITION PROVIDED BY GRANT DOES NOT DEMONSTRATE SUBSTANTIAL ECONOMIC HARM TO PETITIONER. ***KAKE-TV AND RADIO, INC.*** 1424

PETITION TO DENY TRANSFER OF CONTROL ON GROUNDS THAT IT WAS UNAUTHORIZED DENIED ON GROUNDS THAT ALLEGATIONS (ECONOMIC INJURY, UNAUTHORIZED TRANSFER, MISREPRESENTATIONS) FAILED TO RAISE MATERIAL AND SUBSTANTIAL QUESTIONS OF FACT. THREE YEAR RULE (SEC. 1.597) WAIVED. ***PARKER, PARKET*** 1625

PETITION FOR RECONSIDERATION OF GRANT ON GROUNDS OF ECONOMIC INJURY TO EXISTING STATION GRANTED AND PETITIONER PERMITTED TO AMEND PETITION TO SHOW SPECIFIC FACTS CONCERNING ECONOMIC INJURY. ***MISSOURI-ILLINOIS B/CING CO.*** 1675

PETITION TO DENY APPLICATION FOR NEW UHF TV STATION BECAUSE OF A MARGINAL ECONOMIC MARKET IN THE TOWN AND COMPETITIVE INJURY TO THE EXISTING STATION, DENIED, SINCE GRANT WILL PROVIDE A CHOICE OF NETWORK SERVICE. ***WICHITA TV CORP., INC.*** 1754

PETITIONS TO DENY CLASS 2-A APPLICATION ON GROUNDS OF ECONOMIC INJURY TO EXISTING STATIONS, INTERFERENCE (SEC. 73.57) FAILURE TO MEET WHITE AREA (SEC. 73.24(I)) REQUIREMENTS AND CITY COVERAGE, (SEC. 73.188(U)) DISMISSED, SINCE ALLEGATIONS WERE UNSUPPORTED. ***BOISE VALLEY B/CERS, INC.*** 2053

**ECONOMIC SUPPORT ISSUE**

JOINT REQUEST FOR APPROVAL OF WITHDRAWAL-REIMBURSEMENT AGREEMENT, AND FOR SEVERANCE AND GRANT OF A COMPANION FM APPLICATION, DENIED, ACTION WILL BE HELD IN ABEYANCE PENDING RESOLUTION OF ECONOMIC ISSUES DESIGNATED FOR HEARING. ***CHARLES COUNTY B/CING CO., INC.*** 1823

PETITION FOR LEAVE TO DISMISS APPLICATION FOR NEW STANDARD BROADCAST STATION BECAUSE OF DOUBTFUL SUPPORT FOR A SECOND STATION IN THE COMMUNITY, APPROVED. REIMBURSEMENT OF EXPENSES BY EXISTING STATION ALSO APPROVED. ***BIG-BEE B/CING CO.*** 1990

PETITION TO DENY APPLICATION ON GROUNDS OF INADEQUATE COMMUNITY SUPPORT, LACK OF FINANCIAL QUALIFICATIONS AND FAILURE TO ASCERTAIN COMMUNITY PROGRAMMING NEEDS, DENIED AS UNSUPPORTED ALLEGATIONS. ***HOLDER, JAMES B.*** 2050

**ECONOMIC VIABILITY ISSUE**

PETITION TO DENY APPLICATIONS FOR CHANGE OF TV TRANSMITTER SITE GRANTED, CONSOLIDATED HEARING DESIGNATED ON COMPARATIVE AND ECONOMIC VIABILITY ISSUES. ***KTIV TV CO.*** 1310

**EDUCATIONAL TELEVISION SERVICE**

PETITION TO REOPEN THE RECORD AND REMAND FOR FURTHER HEARINGS GRANTED ON THE FOLLOWING ISSUES, (A) ALTERNATIVE MEANS OF EDUCATIONAL TELEVISION BROADCAST, (B) WHETHER A SHARE-CHANNEL APPLICANT WOULD PROVIDE AN EFFECTIVE COMPETITIVE OUTLET FOR A THIRD NETWORK SERVICE. ***FLOWER CITY TV CORP.*** 2322

**EFFECTIVE RADIATED POWER**

APPLICATION TO CHANGE TRANSMITTER SITE, INCREASE ANTENNA HEIGHT AND REDUCE VISUAL EFFECTIVE RADIATED POWERS, GRANTED SUBJECT TO LIMITATION ON ALLOWABLE POWER, AND A HEARING TO DETERMINE IMPACT UPON OPERATION OF AN EXISTING STATION WITHOUT DIRECTIONALIZATION. (SEC. 1.110). ***WHAS, INC.*** 1509

**ELECTRICAL INTERFERENCE**

PETITION TO DENY CLASS 2-A LICENSE ON GROUNDS THAT GRANT WOULD CAUSE ELECTRICAL INTERFERENCE TO PETITIONERS SECONDARY SERVICE AREA DENIED BECAUSE PETITIONER LACKED STANDING BECAUSE OF LACK OF SPECIFICITY IN ITS PLEADING. ***BARNETT, JOHN A.*** 1623

**ENGINEERING DATA**

PETITION TO DENY AMENDMENT OF APPLICATION TO CHANGE ENGINEERING DATA ON GROUNDS THAT IT WAS FILED LATE AND PREJUDICIAL, DENIED ON GROUNDS THAT AMENDMENT COMPLIED WITH SEC. 1.522(B) CONCERNING LATE FILED ENGINEERING DATA. ***OTTAWA B/CING CORP.*** 1635

PETITION TO ENLARGE ISSUES TO INCLUDE A NIGHTTIME RADIATION PATTERN ISSUE, DENIED ON GROUNDS THAT PETITIONER FAILED TO SET FORTH SUFFICIENT ENGINEERING DATA (SEC. 73.15 (A)) TO SUPPORT ITS ALLEGATIONS. ***KFOX, INC.*** 2260

**ENGINEERING STANDARDS**

PETITION FOR DELETION OF FINANCIAL QUALIFICATIONS ISSUE AND INTERFERENCE RELATED ENGINEERING ISSUES, DENIED, PETITION TO ADD ISSUE RE EFFECT OF PROPOSAL ON A NEARBY ELECTRONIC TESTING FACILITY GRANTED. ***JOBBINS, CHARLES W.*** 2454

**EQUITABLE DISTRIBUTION OF BROADCAST FACILITIES**

MOTION TO DISMISS SEVENTEEN OF NINETEEN APPLICATIONS ON GROUNDS THAT THOSE APPLICATIONS VIOLATE THE FREEZE AND THAT PETITIONER IS THE ONLY APPLICANT WHO FULFILLS 307(B) REQUIREMENTS, DENIED AND WAIVER OF FREEZE RULES GRANTED. SEC. 1.569 WAIVED. ***RADIO SOUTHERN CAL., INC.*** 1681

APPLICATION FOR CHANGE OF TRANSMITTER SITE BY UHF STATION, DESIGNATED FOR HEARING ON ISSUES AS TO INJURY IF ANY TO AREA UHF STATIONS, COMPETITIVE FACTORS, 307(B) ISSUE (EQUITABLE DESTRIBUTION OF BROADCAST FACILITIES) (SEC. 73.606), WAIVER OF SEC. 73.685(E) (TRANSMITTER LOCATION AND ANTENNA SIZE). ***SELMA TELEVISION, INC.*** 2180

PETITION BY CLEAR CHANNEL LICENSEE FOR PUBLIC HEARING (SEC. 316) GRANTED IN PART AND HEARING DESIGNATED ON THE FOLLOWING ISSUES PRIMARY SERVICE, DIRECTIONAL ANTENNA SYSTEM, MAIN STUDIO LOCATION (SEC. 73.30(A)), POPULATION (SEC. 73.24) AND (SEC. 307(B) ISSUE. ***EMERALD B/CING CORP.*** 2295

PETITION FOR RECONSIDERATION OF GRANT OF RENEWAL WITHOUT HEARING GRANTED TO DETERMINE VERACITY OF A SURVEY TAKEN AND MISREPRESENTATION BUT DENIED AS TO COMPETITIVE FACILITY ISSUE, GAIN AND LOSS OF SERVICE ISSUE, AND 307(B) AND IF GRANTED, EQUIVALENT PROTECTION MUST BE ASSURED. ***TELEVISION B/CERS, INC.*** 2338

**EVANSVILLE ISSUE**

PETITION TO ENLARGE ISSUES, AS TO TV LICENSEE SEEKING INCREASED POWER, ANTENNA HEIGHT AND SITE RELOCATION, DENIED AS TO INEPTNESS ISSUE, IN VIEW OF AN EXISTING EVANSVILLE ISSUE, AND AS TO MISREPRESENTATION ISSUE SINCE UNWARRANTED. ***SELMA TV, INC.*** 2533

**EVIDENCE IMMATERIAL OR IRRELEVANT**

PETITION FOR RECONSIDERATION OF ADVERSE RULING DENYING ADMITTANCE OF CERTAIN EXHIBITS INTO EVIDENCE, DENIED, ON GROUNDS THAT EXHIBITS WERE NOT MATERIAL TO THE PROCEEDING. ***CHICAGOLAND TV CO.*** 2142

**EXHIBITS**

PETITION FOR LEAVE TO AMEND APPLICATION AS TO ENGINEERING AND FINANCIAL CHANGES DENIED ON GROUNDS THAT GOOD CAUSE (SEC. 1.522(B)) FOR A POST-DESIGNATION AMENDMENT NOT SHOWN. APPLICANT WITHOUT COUNSEL PERMITTED TO REFORM EXHIBITS FOUND TO BE IRRELEVANT. ***SYMPHONY NETWORK ASSOC., INC.*** 1614

**FAIR DISTRIBUTION OF BROADCAST FACILITIES**

PETITION FOR RECONSIDERATION OF ORDER HOLDING PROCEEDINGS INABEYANCE UNTIL FURTHER NOTICE, FOLLOWING DISMISSAL OF AN APPLICATION, DENIED, SINCE SEC. 307(B) REQUIRES PROTECTION OF THE COMMUNITY WHOSE APPLICANT HAS WITHDRAWN, APPLICANTS INVITED TO RESUBMIT IN VIEW OF DEMAND FOR A CHANNEL ASSIGNMENT THERE. ***RADIO AMERICANA, INC.*** 1378

MUTUALLY EXCLUSIVE FM APPLICATIONS DESIGNATED FOR HEARING ONISSUES AS TO MINIMUM SIGNAL STRENGTH (SEC. 73.210(D)) AND DISTRIBUTION OF SERVICE AMONG POPULATIONS (SEC. 307(B),SEC. 73.207) (MINIMUM FM MILEAGE SEPARATION) IS WAIVED. ***CAMPBELL & SHEFTALL*** 2486

**FAIRNESS DOCTRINE ACCESS TO BROADCAST FACILITIES**

PETITION TO REVOKE LICENSE FOR VIOLATION OF SEC. 315 (FAIRNESS DOCTRINE), DENIED. ALTHOUGH LICENSEE FAILED TO COMPLY WITH THE REQUIREMENTS OF THE DOCTRINE BY DENYING ACCESS THE MATTER IS PROPERLY CONSIDERED AT LICENSE RENEWAL TIME. ***SPRINGFIELD TV B/CING CORP.*** 2083

**FAIRNESS DOCTRINE SANCTIONS.**

PETITION TO REVOKE LICENSE FOR VIOLATION OF SEC. 315 (FAIRNESS DOCTRINE), DENIED. ALTHOUGH LICENSEE FAILED TO COMPLY WITH THE REQUIREMENTS OF THE DOCTRINE BY DENYING ACCESS THE MATTER IS PROPERLY CONSIDERED AT LICENSE RENEWAL TIME. ***SPRINGFIELD TV B/CING CORP.*** 2083

**FEDERAL AVIATION AGENCY**

FCC POLICY STATEMENT CONCERNING HEIGHT OF RADIO AND TV ANTENNA TOWERS, ISSUED WITH FAA CONCURRENCE, STATES THAT TOWERS HIGHER THAN 2,000 FEET ABOVE GROUND WILL BE PRESUMED INCONSISTENT WITH THE PUBLIC INTEREST, WITH THE BURDEN ON APPLICANTS TO OVERCOME THAT PRESUMPTION. ***HEIGHT OF TOWERS*** 2451

**FIELD INTENSITY CONTOUR MEASUREMENTS**

PETITION FOR RECONSIDERATION OF STANDARD BROADCAST GRANT BECAUSE OF SHORT CO-CHANNEL SPACING AND THE NEED FOR MORE ADAQUATE PROTECTION, GRANTED TO EXTENT OF REQUIRING ADDITIONAL FIELD INTENSITY MEASUREMENTS. ***MCLEAN COUNTY B/CING CO.*** 2048

**FILING TIME FOR**

PETITION TO DENY AMENDMENT OF APPLICATION TO CHANGE ENGINEERING DATA ON GROUNDS THAT IT WAS FILED LATE AND PREJUDICIAL, DENIED ON GROUNDS THAT AMENDMENT COMPLIED WITH SEC. 1.522(B) CONCERNING LATE FILED ENGINEERING DATA. ***OTTAWA B/CING CORP.*** 1635

PETITION FOR RECONSIDERATION OF GRANT DENIED ON GROUNDS THATPETITIONER FAILED TO RAISE OBJECTIONS AT THE PRE-GRANT STAGE OF THE PROCEEDING AND GOOD CAUSE HAS NOT BEEN SHOWN FOR FAILURE TO PARTICIPATE PRIOR TO GRANT (SEC. 1.106). ***KEN-SELL, INC.*** 1695

MOTION TO CLARIFY ISSUE CONCERNING LEGAL QUALIFICATIONS DENIED ON GROUNDS THAT MOTION WAS PREMATURELY FILED AND WAVED REQUIRE INFORMATION NOT REQUIRED BY FCC FORM. ***WHDH, INC.*** 1723

PETITION FOR RECONSIDERATION OF ASSIGNMENT OF CP BECAUSE OF ALLEGED FRAUD BY THE MAJORITY SHAREHOLDERS AGAINST THE MINORITY, DENIED, SINCE ALLEGATIONS WERE UNSUPPORTED, PETITION WAS UNTIMELY FILED, AND PROPER FORUM IS CIVIL COURTS. ***TRIANGLE B/CING CO.*** 1746

PETITION TO ENLARGE ISSUES TO DETERMINE IF APPLICANT HAS INTENTIONALLY FAILED TO DISCLOSE BUSINESS INTERESTS OF ITS OFFICERS, DENIED, ON GROUNDS THAT GOOD CAUSE NOT SHOWN FOR LATE FILING AND ON THE MERITS. ***CHICAGO TV CO.*** 2075

PETITION TO ENLARGE ISSUES AGAINST MUTUALLY EXCLUSIVE APPLICATIONS, FILED BY INTERVENOR TWO WEEKS AFTER INTERVENTION, DENIED AS UNTIMELY (SEC. 1.229), SINCE NO EXPLANATION FOR DELAY IN SEEKING INTERVENTION WAS GIVEN, AND ON THE MERITS OF A REQUESTED FINANCIAL ISSUE. ***CHARLOTTESVILLE B/CING CORP.*** 2500

**FINANCIAL ISSUE**

PETITION FOR REVIEW OF EXAMINERS ORDER (SEC. 1.353) TO REQUIRE PRODUCTION OF ITEMS SOUGHT BY THE SUBPOENA DUCES TECUM (SEC. 1.333) RE FINANCIAL STATUS OF A LICENSEE, GRANTED AND THE ORDER SET ASIDE SINCE THE ORDER IS TOO IMPRECISE FOR DETERMINATION OF RELEVANT INFORMATION. ***RADIO STATION WTIF, INC.*** 1869

MOTION TO REOPEN RECORD AND ADD MISREPRESENTATION AND FINANCIAL ISSUES GRANTED DUE TO UNSATISFACTORY RESPONSES TO INQUIRIES. PROCEEDING CONSOLIDATED. ***WIDE WATER B/CING CO., INC.*** 2016

PETITION TO ENLARGE ISSUES FOR DETERMINATION OF CITIZENSHIP OF CHURCH TRUSTEES (SEC. 3.10(A)(4)) AND BUSINESS INTERESTS OF MEMBERS (SEC. 73.636) AS TO AN EDUCATIONAL APPLICANT, GRANTED, BUT DENIED AS TO FINANCIAL AND DETERMINATION OF COMMUNITY NEEDS. ***GROSS B/CING CO.*** 2228

PETITION TO DELETE FINANCIAL ISSUE DENIED ON GROUNDS OF INSUFFICIENT INFORMATION TO MAKE A DETERMINATION. ***LEBANON VALLEY RADIO*** 2282

APPLICATIONS FOR UHF TRANSLATOR STATIONS, GRANTED, SUBJECT TO AFFORDING PROTECTION TO TV BROADCAST STATIONS AND IMPOSING NON-DUPLICATION RESTRICTION TO GRADE A CONTOURS, PETITIONS TO DENY ON BASIS OF CARROLL, MISREPRESENTATION AND FINANCIAL ISSUES DENIED. ***LEE CO. TV, INC.*** 2495

PETITION TO ENLARGE ISSUES AGAINST MUTUALLY EXCLUSIVE APPLICATIONS, FILED BY INTERVENOR TWO WEEKS AFTER INTERVENTION, DENIED AS UNTIMELY (SEC. 1.229), SINCE NO EXPLANATION FOR DELAY IN SEEKING INTERVENTION WAS GIVEN, AND ON THE MERITS OF A REQUESTED FINANCIAL ISSUE. ***CHARLOTTESVILLE B/CING CORP.*** 2500

MOTION TO ENLARGE ISSUES AS TO STAFFING PROPOSAL ADEQUACY AND FINANCIAL QUALIFICATIONS DENIED SINCE PRIMA FACIE SHOWINGS REVEAL SUFFICIENT STAFFING AND FINANCING. ***OCEAN COUNTY RADIO B/CING CO.*** 2543

**FINANCIAL QUALIFICATIONS**

PETITION TO ENLARGE ISSUES TO INCLUDE FINANCIAL QUALIFICATIONS GRANTED SINCE ON FACE OF APPLICATION APPLICANT FAILED TO SHOW ADAQUATE FUNDING. ***COMMUNITY B/CING SERVICE, INC.*** 1331

MOTION TO ENLARGE ISSUES TO INCLUDE PROGRAMMING NEEDS, BUSINESS INTERESTS AND LOAN AGREEMENTS, GRANTED, MOTIONS TO ENLARGE OR MODIFY FINANCIAL ISSUES, DENIED, APPEAL FROM HEARING EXAMINER RULING GRANTING AMENDMENT DENIED ON GROUNDS THAT GOOD CAUSE FOR ACCEPTANCE OF A POST-DESIGNATION AMENDMENT WAS SHOWN. ***UNITED ARTISTS B/CING*** 1604

PETITION FOR LEAVE TO AMEND APPLICATION TO NOTE CHANGE IN FINANCIAL QUALIFICATIONS DENIED ON GROUNDS THAT GOOD CAUSE (SEC. 1.522(B)) NECESSARY TO AMEND APPLICATION AFTER IT HAS BEEN DESIGNATED FOR HEARING WAS NOT SHOWN. ***RHINELANDER TV CABLE CORP.*** 1690

PETITION TO ENLARGE ISSUES TO DETERMINE THE FINANCIAL QUALIFICATIONS AND THE ABILITY TO CONSTRUCT AND OPERATE PROPOSED FM STATIONS, GRANTED. ***NELSON B/CING CO.*** 1757

PETITION FOR RECONSIDERATION OF ACCEPTANCE OF APPLICATION FOR FILING, DENIED, AND COMPARATIVE HEARING DESIGNATED ON ISSUES AS TO FINANCIAL QUALIFICATIONS, HAZARD TO AIR NAVIGATION AND CONCENTRATION OF CONTROL. ***TRI-CITIES B/CING CO.*** 1772

MOTION TO ENLARGE ISSUES TO INCLUDE SEPARATE COMMUNITY ISSUE (SEC. 73.30(A)), AND STANDARD FINANCIAL QUALIFICATIONS ISSUE GRANTED SINCE TIMELY (SEC. 1.229(B)) AND WARRANTED ON THE FACTS. ***MOORE, MARION*** 1810

PETITION TO DENY APPLICATION TO CONSTRUCT NEW TV STATION ON BASIS OF SUBURBAN ISSUE, FINANCIAL QUALIFICATIONS AND CARROLL ISSUE DENIED, SEC. 73.613(A) (MAIN STUDIO LOCATION OUTSIDE CITY LIMITS) WAIVED, AND APPLICATION GRANTED. ***K-SIX TV, INC.*** 1814

PETITION TO ADD FINANCIAL QUALIFICATIONS AND SUBURBAN ISSUESAGAINST FM APPLICANT SEEKING TO DUPLICATE PROGRAMMING FROM ITS NEARBY AM STATION GRANTED AS TO FORMER ISSUE, DENIED AS TO LATTER BECAUSE OF APPLICANTS FAMILIARITY WITH THE AREA. ***DOVER B/CING CO., INC.*** 1827

PETITION TO ADD FINANCIAL QUALIFICATIONS, LACK OF CANDOR ANDSTRIKE APPLICATION ISSUES AGAINST MUTUALLY EXCLUSIVE FM APPLICANT, GRANTED AS TO FINANCIAL ISSUE SINCE FUNDS AVAILABLE SEEM INSUFFICIENT, DENIED AS TO THE OTHER TWO. ***TRIAD STATIONS, INC.*** 1831

MOTION TO ENLARGE ISSUES GRANTED AS TO SUBURBAN ISSUE, AND MAIN STUDIO LOCATION (SEC. 73.613(A)) ISSUE, DENIED AS TO SEC.307(B), SEC.73.606 AND 73.607 ISSUES, SINCE NOW RENDERED MOOT AND THE FINANCIAL QUALIFICATIONS ISSUE IS RESOLVED ON THE RECORD. ***UNITED ARTISTS B/CING, INC.*** 1836

PETITION TO DELETE FINANCIAL QUALIFICATIONS ISSUE DENIED, BECAUSE OF CONFLICTING STATEMENTS AS TO PETITIONERS LIABILITIES. ***VANDA, CHARLES*** 1915

ORDER DESIGNATING MUTUALLY EXCLUSIVE UHF APPLICATIONS FOR NEW TV CP FOR HEARING TO DETERMINE FINANCIAL QUALIFICATION, ADAQUACY OF MANAGEMENT, PROGAMMING AND STAFFING PROPOSALS) ***CHAPMAN RADIO & TV CO.*** 2031

PETITION TO DENY APPLICATION ON GROUNDS OF INADEQUATE COMMUNITY SUPPORT, LACK OF FINANCIAL QUALIFICATIONS AND FAILURE TO ASCERTAIN COMMUNITY PROGRAMMING NEEDS, DENIED AS UNSUPPORTED ALLEGATIONS. ***HOLDER, JAMES B.*** 2050

MOTION TO ENLARGE ISSUES TO INCLUDE LEGAL AND FINANCIAL QUALIFICATIONS ISSUES AND A MULTIPLE INTEREST AND CONTROL ISSUE (SEC. 73.636) DENIED AND MOTION TO ADD CITIZENSHIP ISSUE (COMPLIANCE WITH SEC. 310(A)(4) GRANTED. ***CHICAGOLAND TV CO.*** 2123

PETITION TO ENLARGE ISSUES TO INCLUDE A FINANCIAL QUALIFICATIONS ISSUE, A JOINT AM-FM OPERATION ISSUE AND A PLANNING AND PREPARATION ISSUE DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***LEBANON VALLEY RADIO*** 2288

PETITION TO ENLARGE ISSUES TO INCLUDE FINANCIAL QUALIFICATIONS AND FINANCIAL ARRANGEMENT ISSUES DENIED ON GROUNDS THAT ALLEGATIONS WERE INSUFFICIENT. ***FLATHEAD VALLEY B/CERS*** 2285

MOTION TO ENLARGE ISSUES TO INCLUDE A FINANCIAL QUALIFICATIONS ISSUE AND A CHARACTER QUALIFICATIONS ISSUE (TECHNICAL CONVICTION) DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***BROWN RADIO & TV CO.*** 2367

PETITION TO ENLARGE ISSUES TO INCLUDE FINANCIAL QUALIFICATIONS, SITE AVAILABILITY, SUBURBAN ISSUE, AND A STAFF ISSUE DUE TO PROPOSED LIVE PROGRAMMING, GRANTED. ***BOCA B/CERS, INC.*** 2432

PETITION FOR DELETION OF FINANCIAL QUALIFICATIONS ISSUE AND INTERFERENCE RELATED ENGINEERING ISSUES, DENIED, PETITION TO ADD ISSUE RE EFFECT OF PROPOSAL ON A NEARBY ELECTRONIC TESTING FACILITY GRANTED. ***JOBBINS, CHARLES W.*** 2454

PETITIONS TO ENLARGE ISSUES TO INCLUDE SEC. 73.188(B)(1) (TECHNICAL QUALIFICATIONS) AND FINANCIAL QUALIFICATIONS ISSUES, DENIED SINCE NOT SPECIFICALLY ALLEGED AND NOT PRIMA FACIE ESTABLISHED. ***LEBANON VALLEY RADIO*** 2462

**FINANCIAL QUALIFICATIONS-ULTRAVISION**

MOTION TO ENLARGE ISSUES IN THREE SEPARATE COMPARATIVE PROCEEDINGS FOR UHF TV STATIONS TO INCLUDE FINANCIAL QUALIFICATIONS, OPERATING COSTS AND ESTIMATED ANNUAL REVENUES, GRANTED, AND INDIVIDUAL HEARINGS DESIGNATED. ***ULTRAVISION B/CING CO.*** 2103

**FINDINGS AND CONCLUSIONS, PROPOSED**

PARTICIPATION OF COMMISSION BROADCAST BUREAU IN A SEGMENT OFTHE HEARING WITHOUT INTENDING TO FILE PROPOSED FINDINGS UNDER SECS. 1.263 AND 1.21 DISCUSSED. ***TELEVISION SAN FRANCISCO*** 2303

**FIRST CLASS OPERATOR**

PETITION TO AMEND SEC. 73.93 TO RELAX OPERATOR REQUIREMENTS FOR STANDARD BROADCAST STATIONS EMPLOYING DIRECTIONAL ANTENNAS, DENIED, THE BASIC TECHNICAL KNOWLEDGE OF A FIRST- CLASS LICENSE BEING NECESSARY. ***MITCHELL B/CING CO.*** 1788

**FM BROADCAST STATION, OPERATION**

PETITION TO ENLARGE ISSUES TO DETERMINE THE FINANCIAL QUALIFICATIONS AND THE ABILITY TO CONSTRUCT AND OPERATE PROPOSED FM STATIONS, GRANTED. ***NELSON B/CING CO.*** 1757

**FM BROADCAST STATION, REQUIREMENTS**

MUTUALLY EXCLUSIVE FM APPLICATIONS DESIGNATED FOR HEARING ONISSUES AS TO MINIMUM SIGNAL STRENGTH (SEC. 73.210(D)) AND DISTRIBUTION OF SERVICE AMONG POPULATIONS (SEC. 307(B),SEC. 73.207) (MINIMUM FM MILEAGE SEPARATION) IS WAIVED. ***CAMPBELL & SHEFTALL*** 2486

EFFECTIVE AUGUST 9, 1965, SEC. 73.207 AND 73.504 (G) ARE AMENDED TO PROVIDE FOR FM MINIMUM MILEAGE SEPARATIONS BETWEEN CO-CHANNEL AND ADJACENT CHANNEL

STATIONS, ACCORDING TO CLASSES OF STATIONS WITH THE 10.6 OR 10.8 MC/S FREQUENCY SEPARATION. ***FM B/C STATION SPACING*** 2541

**FM BROADCAST STATION, SHORT-SPACED**

APPLICATION TO CONSTRUCT NEW FM STATION FOR EXISTING CHANNELAND WAIVER OF SEC. 73.207 (MINIMUM MILEAGE SEPARATION) GRANTED, MOTION TO DISMISS BY CO-CHANNEL STATION DENIED AND FM CHANNEL ALLOCATION, MADE PRIOR TO ADOPTION OF SEC. 73.207, IS RETAINED IN VIEW OF THE NEED FOR SERVICE. ***FLORENCE B/CING CO., INC.*** 2538

**FOREIGN LANGUAGE BROADCASTS**

APPEAL FROM EXAMINERS ORDER APPROVING INTERROGATORIES BETWEEN APPLICANT FOR ENGLISH LANGUAGE STATION AND A SPANISH LANGUAGE STATION, DENIED, SINCE INTERROGATORIES ARE RELEVANT TO DESIGNATED ISSUES, APPEAL AS TO DENIAL OF CROSS INTERROGATORIES, DENIED, SINCE IRRELEVANT. ***LA FIESTA B/CING CO.*** 1803

**FORFEITURE**

FORFEITURE OF 500 ORDERED FOR WILLFUL OR REPEATED VIOLATIONOF STATION AUTHORIZATION BY FICTITIONS LOG ENTRIES AND OF SEC. 73.111 (B) (FAILURE TO INSTRUCT EMPLOYEES ON KEEPING OPERATING LOG UP-TO-DATE). ***MERCHANTS B/CERS, INC.*** 1296

FORFEITURE ORDERED FOR LICENSEES VIOLATION OF SEC. 310(B) AND SEC. 1.540 (UNLAWFUL TRANSFER OF CONTROL). ***CHEYENNE B/CING CO., INC.*** 1725

ORDER OF FORFEITURE OF 100 FOR WILLFUL VIOLATION OF SEC. 325(A) OF ACT AND SEC. 73.655 OF RULES BY REBROADCAST OF A PROFESSIONAL FOOTBALL GAME WITHOUT HAVING RECEIVED CONSENT FOR REBROADCAST. ***CHANNEL SEVEN, INC.*** 1945

ORDER OF FORFEITURE OF 5,000 FOR WILLFUL AND REPEATED VIOLATIONS OF SEC. 317 OF ACT (SPONSORSHIP IDENTIFICATION) AND OF LOG KEPPING REQUIREMENTS. ***UNITED B/CING CO.*** 1921

FORFEITURE ORDERED FOR VIOLATION OF SEC. 1.540 (TRANSFER OF CONTROL OF OPERATION OF STATION FROM INDIVIDUAL TO CORPORATION). ***SCHOFIELD, ARTHUR C.*** 2313

**FORFEITURE NOTICE OF APPARENT LIABILITY**

FORFEITURE ORDERED FOR VIOLATION OF SEC. 73.93(B) FOR FAILURE TO HAVE A PROPERLY LICENSED OPERATOR ON DUTY AT THE TRANSMITTER. ***EASTERN B/CING CO.*** 2269

**FORFEITURE PAYMENT OF**

ORDER REQUIRING FORFEITURE BY RADIO STATION FOR OPERATION BEYOND SPECIFIED HOURS (SEC. 73.98 AND 73.79). ***SEVEN LEAGUE PRODUCTIONS INC.*** 1491

**FORUM**

PETITION TO DENY LICENSE ASSIGNMENT APPLICATION ON GROUNDS THAT ASSIGNEE WILL NOT RECOGNIZE PRIOR LABOR CONTRACTS OF ASSIGNOR DENIED, SINCE THE COMMISSION IS NOT THE PROPER FORUM. ***WRATHER CORP.*** 1629

**FRAUD**

PETITION FOR RECONSIDERATION OF ASSIGNMENT OF CP BECAUSE OF ALLEGED FRAUD BY THE MAJORITY SHAREHOLDERS AGAINST THE MINORITY, DENIED, SINCE ALLEGATIONS WERE UNSUPPORTED, PETITION WAS UNTIMELY FILED, AND PROPER FORUM IS CIVIL COURTS. ***TRIANGLE B/CING CO.*** 1746

**GRANT PARTIAL**

PETITION FOR REVIEW OF ACTION DENYING DAYTIME ONLY OPERATION BECAUSE OF A FAILURE TO PROCEED WITH CONSTRUCTION UNDER PARTIAL GRANT, GRANTED AND REMANDED TO DETERMINE IF A PARTIAL GRANT WOULD SERVE THE PUBLIC INTEREST. (SEC. 73.35 (A)). ***NORTH ATLANTA B/CING CO.*** 1791

APPLICATIONS FOR C.P. TO ESTABLISH NEW AND ADDITIONAL FACILITIES IN DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE TO PROVIDE DISTANT SIGNALS FOR CATV SYSTEMS, PARTIALLY GRANTED, WHERE THE FACILITIES HAVE BEEN TEMPORARILY AUTHORIZED, BUT SUBJECT TO FINAL ACTION AT A LATER DATE. ***ALABAMA MICROWAVE, INC.*** 1821

**GRANT PROSPECTIVE, EFFECT OF**

JOINT PETITION FOR CLARIFICATION AND REVISION OF HEARING ISSUES ON APPLICATION TO CHANGE ANTENNA SITES AND HEIGHTS DENIED. PETITION TO ENLARGE ISSUES TO INQUIRE INTO MOTIVE AND BACKGROUND BEHIND JOINT PETITION, DENIED, SINCE ONLY CONCERN IS EFFECT OF GRANTING APPLICATIONS, NOT HISTORICAL BACKGROUND. ***KTIV TV CO.*** 1446

**GRANT RECONSIDERATION OF**

PROTEST OF GRANT OF RENEWAL AND REQUEST FOR HEARING, GRANTEDIN COMPLIANCE WITH APPELATE COURT REMAND. REQUEST TO POSTPONE EFFECTIVE DATE OF GRANT, DENIED AS NECESSARY TO MAINTENANCE OF EXISTING SERVICE. ***WBBF, INC.*** 1403

**HEARING CONSOLIDATION OF**

PETITION TO DENY APPLICATIONS FOR CHANGE OF TV TRANSMITTER SITE GRANTED, CONSOLIDATED HEARING DESIGNATED ON COMPARATIVE AND ECONOMIC VIABILITY ISSUES. ***KTIV TV CO.*** 1310

APPLICATIONS TO CHANGE TV ANTENNA SITES DESIGNATED FOR CONSOLIDATED HEARING TO DETERMINE WHETHER TOWER PROPOSALS WOULD MENACE NAVIGATION, WHETHER EQUIVALENT PROTECTION SHOULD BE AFFORDED AND WHETHER WAIVER OF SEC. 73.610(A) (SHORT SPACING) IS WARRANTED. ***TLB, INC.*** 2009

**HEARING DESIGNATION FOR**

MOTION TO VACATE ORDER SCHEDULING HEARINGS DENIED ON GROUNDSTHAT UNDER SEC. 1.243 (F) THE HEARING EXAMINER HAS DESCRETION TO SET THE DATE AND PETITIONER HAS FAILED TO SHOW THIS ACTION TO BE ARBITRARY OR CAPRICIOUS. ***WMOZ, INC.*** 2374

**HEARING DOCKETS**

PETITION FOR RECONSIDERATION OF GRANT WITHOUT HEARING OF NEWAND RENEWAL APPLICATION GRANTED AND CONSOLIDATED HEARING DESIGNATED TO INCLUDE A CARROLL ISSUE AND COMPARATIVE CONSIDERATIONS. ***MISSOURI-ILLINOIS B/CING CO.*** 2376

**HEARING EXAMINER, AUTHORITY**

PETITION FOR REVIEW OF EXAMINERS ORDER (SEC. 1.353) TO REQUIRE PRODUCTION OF ITEMS SOUGHT BY THE SUBPOENA DUCES TECUM (SEC. 1.333) RE FINANCIAL STATUS OF A LICENSEE, GRANTED AND THE ORDER SET ASIDE SINCE THE ORDER IS TOO IMPRECISE FOR DETERMINATION OF RELEVANT INFORMATION. ***RADIO STATION WTIF, INC.*** 1869

MOTION TO QUASH DEPOSITIONS DENIED ON GROUNDS THAT IT IS WITHIN DISCRETION OF HEARING EXAMINER TO GRANT THE TAKING OF DEPOSITIONS, AND THE EXAMINER FOUND THE REQUESTS TO BE WITHIN THE REQUIREMENTS OF SEC. 1.312(B)(4) ***CHICAGOLAND TV CO.*** 2395

**HEARING EXAMINER, DUTIES**

MOTION TO VACATE ORDER SCHEDULING HEARINGS DENIED ON GROUNDSTHAT UNDER SEC. 1.243 (F) THE HEARING EXAMINER HAS DESCRETION TO SET THE DATE AND PETITIONER HAS FAILED TO SHOW THIS ACTION TO BE ARBITRARY OR CAPRICIOUS. ***WMOZ, INC.*** 2374

**HEARING LOCATION OF**

APPEAL FROM ORDER DENYING DISCOVERY REQUEST OF INTERNAL STAFF REPORTS, BILL OF PARTICULARS PLACING ULTIMATE BURDEN OF PROOF IN RENEWAL PROCEEDINGS ON LICENSEE, AND IN REVOCATION PROCEEDINGS ON THE COMMISSION AND SETTING TIME AND PLACE OF HEARING, DENIED. EXPEDITIOUS CONSIDERATION OF PLEADINGS ORDERED. ***WTIF, INC.*** 1322

MOTION FOR FIELD HEARING, DENIED, CONVENIENCE OF WITNESSES IS NOT A SUFFICIENT BASIS FOR FIELD HEARING. ***COMMUNITY B/CING SERVICE, INC.*** 1346

**HEARING NECESSITY FOR**

PETITION TO DELETE OVERLAP ISSUE (SEC. 73.636(A)(1)) BECAUSE AREA INVOLVED IS DE MINIMIS DENIED SINCE SUCH MATTERS SHOULD BE RESOLVED AT HEARING AND NOT IN THE PLEADINGS. ***SPANISH INTERNATIONAL TV*** 1320

REQUEST FOR PUBLIC HEARING(SEC. 316) ON APPLICATION TO SHIFTAM FREQUENCY (SEC. 73.25(D)), ALLEGING CO-CHANNEL INTERFERENCE AND OVERLAP(SEC. 73.37), DENIED, SINCE PETITIONERS RECENTLY GRANTED RENEWAL WAS CONDITIONED ON ACCEPTING THESE FACTORS, SECS. 73.25, APA 2(C), AND 73.37 WAIVED, APPLICATION GRANTED. ***MIDWEST TV, INC.*** 1818

JOINT REQUEST FOR APPROVAL OF WITHDRAWAL-REIMBURSEMENT AGREEMENT, AND FOR SEVERANCE AND GRANT OF A COMPANION FM APPLICATION, DENIED, ACTION WILL BE HELD IN ABEYANCE PENDING RESOLUTION OF ECONOMIC ISSUES DESIGNATED FOR HEARING. ***CHARLES COUNTY B/CING CO., INC.*** 1823

PETITION TO DENY GRANT OF APPLICATION FOR NEW AM STATION GRANTED, AND CONCENTRATION OF CONTROL (SEC. 73.35(B)) AND SUBURBAN ISSUES DESIGNATED FOR HEARING. STRICT REQUIREMENTS OF PUBLICATION OF NOTICE (SEC. 1.580(C)(1)) WAIVED. ***CHILDRESS JAMES B.*** 2136

**HEARING PROCEDURE**

PARTICIPATION OF COMMISSION BROADCAST BUREAU IN A SEGMENT OFTHE HEARING WITHOUT INTENDING TO FILE PROPOSED FINDINGS UNDER SECS. 1.263 AND 1.21 DISCUSSED. ***TELEVISION SAN FRANCISCO*** 2303

**HEARING STATUS**

ON THE COMMISSIONS OWN MOTION, FOLLOWING THE IMPOSITION OF A FREEZE ON NEW TV STATION APPLICATIONS, NUMEROUS APPLICATIONS ARE REMOVED FROM HEARING DOCKET FOR FURTHER COMPARATIVE CONSIDERATIONS. ***TRAVELERS B/CING SERVICE CORP.*** 2250

**HORSE RACING**

MOTION TO ENLARGE ISSUES IN HEARING ON MATTER OF NEW CLASSIFICATIONS, REGULATIONS AND PRACITICES IN INTERSTATE DISSEMINATION OF HORSE OR DOG RACING NEWS, DENIED, SINCE ISSUES REQUESTED ARE INAPPROPRIATE FOR THE PURPOSES OF THIS HEARING. ***WESTERN UNION TEL. CO.*** 2245

THE COMMISSION ESTABLISHED AN ADVISORY COMMITTEE ON BROADCAST OF HORSE RACING INFORMATION IN ACCORD WITH EXECUTIVE ORDER 11007. ***ADVISORY COMMITTEE-HORSE RACING INFO*** 2236

**INEPTNESS ISSUE**

PETITION FOR ENLARGEMENT OF ISSUES GRANTED AS TO REQUESTED INEPTNESS OR ABUSE OF FCC PROCESSES ISSUE AND DENIED AS TO CHARACTER QUALIFICATIONS AND REAL PARTY IN INTEREST ISSUES. ***TRI-STTE COMMUNICATIONS CO.*** 1293

PETITION TO ENLARGE ISSUES, AS TO TV LICENSEE SEEKING INCREASED POWER, ANTENNA HEIGHT AND SITE RELOCATION, DENIED AS TO INEPTNESS ISSUE, IN VIEW OF AN EXISTING EVANSVILLE ISSUE, AND AS TO MISREPRESENTATION ISSUE SINCE UNWARRANTED. ***SELMA TV, INC.*** 2533

**INFORMATION CHANGE IN**

PETITION FOR RECONSIDERATION AND GRANT WITHOUT HEARING OF CPTO CHANGE TRANSMITTER SITE, DENIED SINCE THERE WOULD BE A LOSS OF COVERAGE. PETITION TO CHANGE ISSUES, DENIED AS UNTIMELY UNDER SEC. 1.229(B). PETITION FOR LEAVE TO AMEND APPLICATION TO SHOW UPDATING OF INFORMATION GRANTED UNDER SEC. 1.522(B). ***AMERICAN COLONIAL B/CING CORP.*** 1359

**INFORMATION FILING OF**

JOINT PETITION FOR APPROVAL OF REIMBURSEMENT AGREEMENT, GRANT OF ONE APPLICATION AND DISMISSAL OF THE OTHER, DENIED, FOR FAILURE TO PROVIDE SUFFICIENT INFORMATION ON REIMBURSABLE EXPENSES. ***DIRIGO B/CING, INC.*** 1972

**INJURY**

PETITION FOR REVIEW OF EXAMINERS ADVERSE RULING, DENYING A CONTINUANCE DENIED, SINCE THERE WAS NO SHOWING OF IRREPARABLE INJURY EITHER TO THE PETITIONER OR THE PUBLIC. ***BURLINGTON B/CING CO.*** 1565

**INTERFERENCE**

PETITIONS TO DENY CLASS 2-A APPLICATION ON GROUNDS OF ECONOMIC INJURY TO EXISTING STATIONS, INTERFERENCE (SEC. 73.57) FAILURE TO MEET WHITE AREA (SEC. 73.24(I)) REQUIREMENTS AND CITY COVERAGE, (SEC. 73.188(U)) DISMISSED, SINCE ALLEGATIONS WERE UNSUPPORTED. ***BOISE VALLEY B/CERS, INC.*** 2053

PETITION TO ENLARGE ISSUES IN MULTI PARTY PROCEEDING GRANTEDAS TO SEPARATE COMMUNITY (SEC. 307(B) AND 73.30), TEN PERCENT RULE (SEC. 73.28(D)(3)), INTERFERENCE (SEC. 73.24 (B)), STOCKHOLDER AND MULTIPLE OWNERSHIP(SEC. 73.35(B)) ISSUES. ***JOBBINS, CHARLES W.*** 2407

APPLICATION BY TV LICENSEE FOR INCREASE OF EFFECTIVE RADIATED VISUAL POWER, AND FOR WAIVER OF POWER RESTRICTIONS OF SEC. 73.614(B), DENIED, FOR FAILURE TO SHOW GOOD CAUSE FOR WAIVER IN VIEW OF RESULTING CO-CHANNEL AND ADJACENT CHANNEL INTERFERENCE. ***TELEVISION WISCONSIN, INC.*** 2420

**INTERFERENCE AM STATIONS**

REQUEST FOR PUBLIC HEARING(SEC. 316) ON APPLICATION TO SHIFTAM FREQUENCY (SEC. 73.25(D)), ALLEGING CO-CHANNEL INTERFERENCE AND OVERLAP(SEC. 73.37), DENIED, SINCE PETITIONERS RECENTLY GRANTED RENEWAL WAS CONDITIONED ON ACCEPTING THESE FACTORS, SECS. 73.25, APA 2(C), AND 73.37 WAIVED, APPLICATION GRANTED. ***MIDWEST TV, INC.*** 1818

**INTERFERENCE DE MINIMIS**

PETITION FOR RECONSIDERATION OF ORDER DENYING CLASS IV APPLICATION TO INCREASE NIGHTTIME POWER, GRANTED AND APPLICATION GRANTED WITHOUT HEARING SINCE IT IS CLEAR THAT ANY POSSIBLE INTERFERENCE CAUSED WILL BE MINIMAL ***BLACKHAWK B/CING CO.*** 1499

APPLICATION FOR NEW EDUCATIONAL TV STATION AND REQUEST FOR WAIVER OF SECS. 73.610(B), 73.685(A) AND 73.613(A) (SPACING REQUIREMENTS) GRANTED, ON GROUNDS THAT APPLICANT WILL PROVIDE EQUIVALENT PROTECTION TO MINIMIZE INTERFERENCE. ***NEBRASKA EDUC. TV COMM.*** 2191

**INTERFERENCE HARMFUL**

INFORMAL OBJECTION TO GRANT OF TRANSLATOR APPLICATION DENIEDON GROUNDS THAT BECAUSE OF TERRAIN NO INTERFERENCE WOULD BE CAUSED. ***ELLENVILLE TELECABLE CORP.*** 2366

PETITION FOR DELETION OF FINANCIAL QUALIFICATIONS ISSUE AND INTERFERENCE RELATED ENGINEERING ISSUES, DENIED, PETITION TO ADD ISSUE RE EFFECT OF PROPOSAL ON A NEARBY ELECTRONIC TESTING FACILITY GRANTED. ***JOBBINS, CHARLES W.*** 2454

**INTERFERENCE NIGHTTIME**

PETITION FOR RECONSIDERATION OF RETURN OF PETITIONERS APPLICATION FOR FAILURE TO SHOW ABSENCE OF THE PROPOSALS EFFECT ON A FUTURE CLASS II-A CHANNEL (SEC. 1.569(B)(I)), IN TERMS OF NIGHTTIME INTERFERENCE DENIED. ***RADIO STATION WMGA*** 1834

PETITION BY CLASS I STATION TO ENLARGE ISSUES AS TO CLASS II-A OPERATION CONCERNING NIGHTTIME SKYWAVE INTERFERENCE POTENTIAL, AND FOR DENIAL PENDING CESSATION OF EXISTING INTERFERENCE, DENIED, ON GROUNDS OF ESTABLISHMENT OF A NEW UNLIMITED SERVICE. ***FLATHEAD VALLEY B/CERS*** 2508

PETITIONS FOR RECONSIDERATION OF GRANT OF CLASS 2 C.P. ON BASIS OF SEC. 73.188 (B)(1)(MINIMUM FIELD INTENSITY OVER CITY) AND SEC. 73.24 (I) (NIGHTTIME INTERFERENCE) DENIED BUT CONSTRUCTION PERMIT AMENDED AS TO ANTENNA ARRAY TO MINIMIZE INTERFERENCE TO THE THREATENED STATION. ***BOISE VALLEY B/CERS*** 2522

**INTERFERENCE OBJECTIONABLE**

PETITION FOR RECONSIDERATION OF GRANT OF APPLICATION FOR POWER INCREASE GRANTED ON GROUNDS THAT GRANT ALLEGEDLY CAUSED INTERFERENCE TO PETITIONER THAT MODIFIED HIS LICENSE. PETITIONER HELD TO BE A PARTY AGGRIEVED (SEC. 405). ***INDIAN RIVER B/CING CO.*** 1610

PETITION TO DENY GRANT OF APPLICATION IN GROUNDS THAT GRANT WILL CAUSE INTERFERENCE TO PETITIONERS STATION (SEC. 73.28 (D)(3)) DENIED SINCE THE ONLY EVIDENCE OF INTERFERENCE IS TO PETITIONERS PROPOSAL OPERATION AND THEREFORE PETITIONER HAS NO STANDING. ***WGSB B/CING CO.*** 1668

PETITION TO DENY APPLICATION ON GROUNDS THAT GRANT WOULD CAUSE OBJECTIONABLE INTERFERENCE IN VIOLATION OF SEC. 73.24 (B) DENIED ON SHOWING BY APPLICANT BY ENGINEERING DATA THAT THERE WOULD BE NO INTERFERENCE PROBLEM. ***DOVER B/CING CO.*** 1679

APPLICATION FOR VHF TRANSLATOR DENIED ON GROUNDS THAT GRANT WOULD CAUSE INTERFERENCE TO A LICENSEE AND AN ADJACENT CHANNEL IN VIOLATION OF SEC. 74.702 AND SEC. 74.703(A). ***CAPITOL B/CING CO., INC.*** 1704

APPLICATIONS FOR CLASS 2 STATIONS DESIGNATED FOR HEARING ON ISSUES OF AREAS AND POPULATIONS OF PRIMARY SERVICE, OVERLAP, OBJECTIONABLE INTERFERENCE, PROPER MAINTENANCE OF DIRECTIONAL ANTENNA SYSTEM, AND FINANCIAL QUALIFICATIONS. ***RADIO AMERICANA, INC.*** 1999

ORDER DESIGNATING APPLICATIONS FOR COMPARATIVE HEARING ON ISSUES OF AREAS AND POPULATIONS TO BE SERVED, EFFECT OF PROPOSALS ON OTHER SERVICE, OVERLAP, AND OBJECTIONABLE INTERFERENCE. ***CHARLOTTESVILLE B/CING CORP.*** 2059

PETITION FOR RECONSIDERATION OF GRANT OF INCREASE OF POWER GRANTED AND ISSUES OF OBJECTIONABLE INTERFERENCE AND PRIMARY SERVICE GAIN OR LOSS WERE DESIGNATED FOR HEARING. ***EFFINGHAM B/CING CO.*** 2391

PETITION FOR RECONSIDERATION DENIAL OF GRANT TO INCREASE POWER ON CLASS 2 STATION DENIED, PETITION TO DISSOLVE STAY DENIED AND PETITION FOR STAY, TO CONTINUE OPERATING AT NORMAL POWER, GRANTED PENDING OUTCOME OF HEARING TO DETERMINE OBJECTIONABLE INTERFERENCE. ***EFFINGHAM B/CING CO.*** 2278

**INTERFERENCE TV EQUIVALENT PROTECTION**

PETITION FOR RECONSIDERATION OF GRANT OF RENEWAL WITHOUT HEARING GRANTED TO DETERMINE VERACITY OF A SURVEY TAKEN AND MISREPRESENTATION BUT DENIED AS TO COMPETITIVE FACILITY ISSUE, GAIN AND LOSS OF SERVICE ISSUE, AND 307(B) AND IF GRANTED, EQUIVALENT PROTECTION MUST BE ASSURED. ***TELEVISION B/CERS, INC.*** 2338

**INTERIM OPERATION**

INTERIM OPERATION OF STATION OF REVOKED LICENSE GRANTED TO APPLICANT NOT A PARTY TO THE COMPARATIVE PROCEEDING (19 APPLICANTS)(SEC. 1.592) IN ORDER TO AVOID CONTROVERSY. ***OAK KNOLL B/CING CORP.*** 1571

PETITIONS TO RECONSIDER GRANT OF TV APPLICATION FOR INTERIM OPERATION OF THE STATION, DISMISSED UNDER SEC. 309(C) AND SEC. 1.580(A)(3), PROGRAM TEST AUTHORITY GRANTED. (SEC. 73.629). ***WEST MICHIGAN T/CERS, INC.*** 1873

**INTERROGATORIES, WRITTEN**

APPEAL FROM EXAMINERS ORDER APPROVING INTERROGATORIES BETWEEN APPLICANT FOR ENGLISH LANGUAGE STATION AND A SPANISH LANGUAGE STATION, DENIED, SINCE INTERROGATORIES ARE RELEVANT TO DESIGNATED ISSUES, APPEAL AS TO DENIAL OF CROSS INTERROGATORIES, DENIED, SINCE IRRELEVANT. ***LA FIESTA B/CING CO.*** 1803

**INTERVENOR**

PETITION TO INTERVENE IN PROCEEDING CONCERNING CHANGES AND PRACTICES IN CONNECTION WITH TELETYPEWRITER EXCHANGE SERVICE( GRANTED) ***AMER. TEL & TEL CO.*** 2130

PETITION TO INTERVENE IN ORAL ARGUMENT DENIED ON GROUNDS THAT REQUEST WAS NOT TIMELY FILED (SEC. 1.233) AND PETITIONER IS NOT A PARTY IN INTEREST. ***JOE L. SMITH, JR., INC.*** 2301

**INTERVENTION**

PETITION BY DEPT. OF STATE OF INTERVENE (SEC. 1.722) IN PROCEEDING BETWEEN INTERNATIONAL BANKS AND INTERNATIONAL COMMON CARRIERS, GRANTED, FOR LIMITED PURPOSE OF REQUESTING THAT THE FCC NOT ADOPT SPECIFIC CONCLUSION IN DECISION OF HEARING EXAMINER. ***ALL-AMERICAN CABLES AND RADIO, INC.*** 2248

PETITION TO INTERVENE BY OWNER OF PROPERTY IN APPLICATION FOR CP TO INCREASE ANTENNA HEIGHT, GRANTED, SINCE, ALTHOUGH NOT A PARTY IN INTEREST, IT COULD ASSIST THE COMMISSION. ***CHRONICLE PUBLISHING CO.*** 1409

APPEAL OF EXAMINERS ORDER GRANTING PETITION TO INTERVENE (SEC. 309(E)) ON GROUND THAT AN OATH WAS NOT TAKEN, DENIED, ON CONDITION THAT AN APPROPRIATE PERSON TAKE THE REQUISITE OATH TO SUPPORT THE PETITION. ***SOUTHINGTON B/CERS*** 2477

PETITION TO ENLARGE ISSUES AGAINST MUTUALLY EXCLUSIVE APPLICATIONS, FILED BY INTERVENOR TWO WEEKS AFTER INTERVENTION, DENIED AS UNTIMELY (SEC. 1.229), SINCE NO EXPLANATION FOR DELAY IN SEEKING INTERVENTION WAS GIVEN, AND ON THE MERITS OF A REQUESTED FINANCIAL ISSUE. ***CHARLOTTESVILLE B/CING CORP.*** 2500

**ISSUE CLARIFICATION OF**

JOINT PETITION FOR CLARIFICATION AND REVISION OF HEARING ISSUES ON APPLICATION TO CHANGE ANTENNA SITES AND HEIGHTS DENIED. PETITION TO ENLARGE ISSUES

**LICENSE ASSIGNMENT OF**

PETITION TO DENY LICENSE ASSIGNMENT APPLICATION ON GROUNDS THAT ASSIGNEE WILL NOT RECOGNIZE PRIOR LABOR CONTRACTS OF ASSIGNOR DENIED, SINCE THE COMMISSION IS NOT THE PROPER FORUM. ***WRATHER CORP.*** 1629

PETITION TO DENY ASSIGNMENT OF LICENSE ON GROUNDS THAT PETITIONER MAY IN THE FUTURE BE A JUDGMENT CREDITOR DENIED ON GROUNDS THAT THIS DOES NOT QUALIFY PETITIONER AS A PARTY IN INTEREST (SEC. 309(D)). ***TUSCHMAN B/CING CORP.*** 1721

PETITION TO DENY ASSIGNMENT OF LICENSE, DENIED, ON GROUNDS THAT THE PETITIONER FAILED TO SHOW THAT IT WAS A PARTY IN INTEREST UNDER SEC. 309(D). ***MARSHALL B/CING CORP.*** 2203

**LICENSE CANCELLATION**

PETITION TO TERMINATE PROCEEDING AS MOOT, GRANTED, AFTER LICENSEE SURRENDURRED LICENSE TO THE COMMISSION. ***RADIO 13, INC.*** 2131

**LICENSE MODIFICATION OF**

PETITION FOR RECONSIDERATION OF GRANT OF APPLICATION FOR POWER INCREASE GRANTED ON GROUNDS THAT GRANT ALLEGEDLY CAUSED INTERFERENCE TO PETITIONER THAT MODIFIED HIS LICENSE. PETITIONER HELD TO BE A PARTY AGGRIEVED (SEC. 405). ***INDIAN RIVER B/CING CO.*** 1610

**LICENSE RENEWAL OF**

APPLICATION FOR RENEWAL AND ASSIGNMENT OF LICENSES GRANTED AFTER APPLICANTS ANTI-TRUST VIOLATIONS WERE WEIGHED AGAINST LONGSTANDING EXCELLENT BROADCASTING RECORD AND CORPORATE STRUCTURE CHANGES MAKING THE LICENSEES MOVE RESPONSIBLE TO TOP MANAGEMENT. ***GENERAL ELECTRIC B/CING CO.*** 1592

PETITION FOR IMMEDIATE, FAVORABLE ACTION ON RENEWAL AND TRANSFER OF LICENSE BY A RECEIVER DENIED ON GROUNDS THAT PETITIONER, A RECEIVER, INTENDS TO ASSIGN LICENSE TO TRANSFEREE AFTER RENEWAL, SINCE GRANT CAN NOT BE MADE UNTIL QUALIFICATIONS OF TRANSFEREE ARE ASSESSED. ***TELEVISION COMPANY OF AMERICA, INC.*** 1707

REQUEST FOR TEMPORARY SUSPENSION OF PRODEDURES ON GROUNDS THAT COMPETING APPLICANTS HAVE AGREED TO AN ASSIGNMENT OF THE LICENSE, DENIED, SINCE ISSUES OF CHARACTER QUALIFICATIONS AND LICENSE RENEWAL ARE UNRESOLVED. ***BROWN RADIO & TV CO.*** 2200

**LICENSEE RESPONSIBILITY**

JOINT REQUEST FOR APPROVAL OF AGREEMENT WHEREBY ONE UHF TV APPLICANT WILL HAVE ITS APPLICATION DISMISSED IN RETURN FOR AN OPTION TO ACQUIRE ONEHALF INTEREST IN THE SUCCESSFUL LICENSEE AS A JOINT VENTURE, GRANTED. SINCE SEC. 1.525 IS MET. ***GROSS B/CING CO.*** 2530

**LITIGATION PENDING**

MOTIONS TO ENLARGE ISSUES TO INCLUDE CHARACTER QUALIFICATIONS, DENIED AS LACKING IN SPECIFICITY SEC. 1.229 (C). PETITION TO MODIFY CP ORDER SO AS TO PRECLUDE PREJUDICE IN PENDING LITIGATION, GRANTED. PETITION TO ENLARGE ISSUES TO INCLUDE STAFFING PROPOSAL, GRANTED. ***SPANISH INTERNATIONAL TV CO.*** 1384

**LOAN COMMITMENT, ABILITY TO MEET**

MOTION TO ENLARGE ISSUES TO INCLUDE PROGRAMMING NEEDS, BUSINESS INTERESTS AND LOAN AGREEMENTS, GRANTED, MOTIONS TO ENLARGE OR MODIFY FINANCIAL ISSUES, DENIED, APPEAL FROM HEARING EXAMINER RULING GRANTING AMENDMENT DENIED ON GROUNDS THAT GOOD CAUSE FOR ACCEPTANCE OF A POST-DESIGNATION AMENDMENT WAS SHOWN. ***UNITED ARTISTS B/CING*** 1604

**LOCAL NOTICE OF FILING**

PETITION FOR STAY OF EFFECTIVE DATE OF LOCAL FILE RULES DENIED AND EFFECTIVE DATE RETAINED FOR NEW RULES CONCERNING INSPECTION OF RECORDS, PREGRANT PROCEDURE AND TO LOCAL NOTICE (SEC. 0.418, 0.417, 1.59). ***AMENDMENT RE INSPECTION OF RECORDS*** 2327

**LOGS FALSE**

FORFEITURE OF 500 ORDERED FOR WILLFUL OR REPEATED VIOLATIONOF STATION AUTHORIZATION BY FICTITIONS LOG ENTRIES AND OF SEC. 73.111 (B) (FAILURE TO INSTRUCT EMPLOYEES ON KEEPING OPERATING LOG UP-TO-DATE). ***MERCHANTS B/CERS, INC.*** 1296

PETITION TO ENLARGE ISSUES TO DETERMINE WHETHER APPLICANT FALSIFIED PROGRAM LOGS AND ENGAGED IN PRACTICE OF DOUBLE BILLING GRANTED. ***PRATTVILLE B/CING CO.*** 2072

PETITION TO ENLARGE ISSUES TO DETERMINE IF APPLICANT VIOLATED A FEDERAL LAW, MADE FALSE ENTRIES IN PROGRAM LOGS IN VIOLATION OF SEC. 73.112, PROMOTED HIS OWN BUSINESS INTERESTS UNFAIRLY AND IN GENERAL, HIS CHARACTER QUALIFICATIONS, DENIED DUE TO INSUFFICIENCY OF ALLEGATIONS. ***BROWN RADIO & TV CO.*** 2351

**LOGS MAINTENANCE OF**

ORDER OF FORFEITURE OF 5,000 FOR WILLFUL AND REPEATED VIOLATIONS OF SEC. 317 OF ACT (SPONSORSHIP IDENTIFICATION) AND OF LOG KEPPING REQUIREMENTS. ***UNITED B/CING CO.*** 1921

**MAIN STUDIO LOCATION**

PETITION TO DENY APPLICATION FOR WAIVER OF SEC. 73.613 (PRINCIPAL COMMUNITY) AND RELOCATE TV TRANSMITTER SITE, DENIED, SINCE RELOCATION OF MAIN STUDIO AND TRANSMITTER WILL IMPROVE SERVICE. ***NEW JERSEY TV B/CING CORP.*** 1335

PETITION TO DENY APPLICATION TO CONSTRUCT NEW TV STATION ON BASIS OF SUBURBAN ISSUE, FINANCIAL QUALIFICATIONS AND CARROLL ISSUE DENIED, SEC. 73.613(A) (MAIN STUDIO LOCATION OUTSIDE CITY LIMITS) WAIVED, AND APPLICATION GRANTED. ***K-SIX TV, INC.*** 1814

MOTION TO ENLARGE ISSUES GRANTED AS TO SUBURBAN ISSUE, AND MAIN STUDIO LOCATION (SEC. 73.613(A)) ISSUE, DENIED AS TO SEC.307(B), SEC.73.606 AND 73.607 ISSUES, SINCE NOW RENDERED MOOT AND THE FINANCIAL QUALIFICATIONS ISSUE IS RESOLVED ON THE RECORD. ***UNITED ARTISTS B/CING, INC.*** 1836

PETITION BY CLEAR CHANNEL LICENSEE FOR PUBLIC HEARING (SEC. 316) GRANTED IN PART AND HEARING DESIGNATED ON THE FOLLOWING ISSUES PRIMARY SERVICE, DIRECTIONAL ANTENNA SYSTEM, MAIN STUDIO LOCATION (SEC. 73.30(A)), POPULATION (SEC. 73.24) AND (SEC. 307(B) ISSUE. ***EMERALD B/CING CORP.*** 2295

**MARKETS TOP 50**

AS PART OF ITS MULTIPLE OWNERSHIP POLICY UNDER SEC. 313, THEFCC ANNOUNCED PLANS TO DESIGNATE FOR HEARING ANY APPLICATION FOR ACQUISITION OF A SECOND VHF STATION IN THE TOP 50 MARKETS. ***SECOND VHF STATION IN MAJOR MARKETS*** 1851

**MASS MEDIA, CONTROL OF**

PETITION TO ENLARGE ISSUES TO INCLUDE CONCENTRATION OF CONTROL OF MASS MEDIA ISSUE DENIED ON GROUNDS THAT PETITIONER DID NOT GIVE SPECIFIC ALLEGATIONS TO PROVE CONCENTRATION OF CONTROL (SEC. 1.229(C)). ***BROWN PUBLISHING CO.*** 1651

AS PART OF ITS MULTIPLE OWNERSHIP POLICY UNDER SEC. 313, THEFCC ANNOUNCED PLANS TO DESIGNATE FOR HEARING ANY APPLICATION FOR ACQUISITION OF A SECOND VHF STATION IN THE TOP 50 MARKETS. ***SECOND VHF STATION IN MAJOR MARKETS*** 1851

**MAXIMUM EXPECTED OPERATING VALUES**

PETITION TO ENLARGE ISSUES TO DETERMINE IF THE MAXIMUM EXPECTED OPERATING VALUES (MEOV) FOR THE DIRECTIONAL ANTENNA PATTERN OF AN APPLICANT ARE THOSE THAT CAN REASONABLY BE EXPECTED TO BE ACHIEVED, DENIED, ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***KFOX, INC.*** 2177

REQUEST FOR ENLARGEMENT OF ISSUES TO INCLUDE ANTENNA LOCATION ISSUE AND A DETERMINATION AS TO WHETHER THE MEOVS SPECIFIED ARE SUFFICIENT, DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS ARE INSUFFICIENT. ***KEOX, INC.*** 2256

PETITIONS TO ENLARGE ISSUES AS TO SITE AVAILABILITY AND ZONING, SEC. 73.188(B)(1) OVERLAP, AND MEOV IN DIRECTIONAL NIGHTTIME OPERATION, DENIED, REPLY PLEADINGS ARE STRICKEN TO EXTENT THEY GO BEYOND REBUTTAL OF ALLEGATIONS IN THE OPPOSITIONS. ***JOBBINS, CHARLES W.*** 2469

**MERGER**

JOINT REQUEST FOR APPROVAL OF MERGER OF TWO NEW TV CP APPLICANTS GRANTED, SEC. 1.525 FILING NOTICE REQUIREMENT WAIVED, SINCE COMPETING APPLICANTS ARE NOT INJURED AND MAY AMEND THEIR APPLICATIONS ACCORDINGLY. ***LIVESAY B/CING CO.*** 1473

MERGER AGREEMENT APPROVED AND WAIVER OF SEC. 73.610 (SHORT SPACING) WHERE APPLICANT WILL USE AN ANTENNA FARM LOCATION. ***ILLIANA T/CING CORP.*** 2388

**MERGER AND DROP OUT CASES**

PETITION FOR APPROVAL OF REIMBURSEMENT AND DROP-OUT AGREEMENT GRANTED IN PART AND DENIED TO THE EXTENT THE AGREEMENT DOES NOT MEET THE REQUIREMENTS OF SEC. 1.525(A) (FULL STATEMENTS CONCERNING MERGERS, CONSIDERATION, ETC.). ***CENTRAL B/CING CORP.*** 2358

JOINT REQUEST BY MUTUALLY EXCLUSIVE TV APPLICANTS FOR APPROVAL OF AGREEMENT PROVIDING FOR DISMISSAL OF ONE APPLICANT AND SUBSEQUENT MERGER OF THE TWO, GRANTED, SINCE NOT FOR REIMBURSEMENT PURPOSES (SEC. 1.525). ***UNITED ARTISTS B/CING, INC.*** 2482

**MINIMUM MILEAGE SEPARATION**

MUTUALLY EXCLUSIVE FM APPLICATIONS DESIGNATED FOR HEARING ONISSUES AS TO MINIMUM SIGNAL STRENGTH (SEC. 73.210(D)) AND DISTRIBUTION OF SERVICE AMONG POPULATIONS (SEC. 307(B),SEC. 73.207) (MINIMUM FM MILEAGE SEPARATION) IS WAIVED. ***CAMPBELL & SHEFTALL*** 2486

APPLICATION TO CONSTRUCT NEW FM STATION FOR EXISTING CHANNELAND WAIVER OF SEC. 73.207 (MINIMUM MILEAGE SEPARATION) GRANTED, MOTION TO DISMISS BY CO-CHANNEL STATION DENIED AND FM CHANNEL ALLOCATION, MADE PRIOR TO ADOPTION OF SEC. 73.207, IS RETAINED IN VIEW OF THE NEED FOR SERVICE. ***FLORENCE B/CING CO., INC.*** 2538

EFFECTIVE AUGUST 9, 1965, SEC. 73.207 AND 73.504 (G) ARE AMENDED TO PROVIDE FOR FM MINIMUM MILEAGE SEPARATIONS BETWEEN CO-CHANNEL AND ADJACENT CHANNEL STATIONS, ACCORDING TO CLASSES OF STATIONS WITH THE 10.6 OR 10.8 MC/S FREQUENCY SEPARATION. ***FM B/C STATION SPACING*** 2541

**MISREPRESENTATION**

PETITION TO REOPEN RECORD AND INSERT ISSUES, GRANTED AND ISSUES AS TO MISREPRESENTATION, AVAILABILITY OF SITE AND FINANCIAL QUALIFICATIONS ARE DESIGNATED. ***SOUTHERN RADIO AND TV CO.*** 1457

PETITION TO ENLARGE ISSUES TO INCLUDE MISREPRESENTATION, CHARACTER AND FINANCIAL ISSUES GRANTED, TO EXTENT OF DETERMINING IF FACTS WERE CONCEALED BY APPLICANT AND IF SO, WHAT EFFECT THIS HAS ON HIS QUALIFICATIONS. ***TRI-CITIES B/CING CO.*** 1995

MOTION TO REOPEN RECORD AND ADD MISREPRESENTATION AND FINANCIAL ISSUES GRANTED DUE TO UNSATISFACTORY RESPONSES TO INQUIRIES. PROCEEDING CONSOLIDATED. ***WIDE WATER B/CING CO., INC.*** 2016

PETITION FOR RECONSIDERATION OF GRANT OF APPLICATION ALLEGING MISREPRESENTATION AS TO OWNERSHIP AND FINANCIAL POSITION, DENIED AS NOT BASED ON SUPPORTABLE EVIDENCE AND FOR FAILURE TO FILE PRE-GRANT OBJECTIONS (SEC. 1.106(C)(1)). ***CORUM, ALVIN B., JR.*** 2028

APPLICATION FOR A NEW STANDARD STATION WAS GRANTED OVER INFORMAL OBJECTIONS (SEC. 1.587) BASED ON ECONOMIC IMPACT, THE AREAS LACK OF NEED FOR A NEW STATION, AND MISREPRESENTATIONS BY THE APPLICANT SINCE ALLEGATIONS WERE UNSUBSTANTIATED. ***M.R. LANKFORD B/CING CO.*** 2424

APPLICATIONS FOR UHF TRANSLATOR STATIONS, GRANTED, SUBJECT TO AFFORDING PROTECTION TO TV BROADCAST STATIONS AND IMPOSING NON-DUPLICATION RESTRICTION TO GRADE A CONTOURS, PETITIONS TO DENY ON BASIS OF CARROLL, MISREPRESENTATION AND FINANCIAL ISSUES DENIED. ***LEE CO. TV, INC.*** 2495

PETITION TO ENLARGE ISSUES, AS TO TV LICENSEE SEEKING INCREASED POWER, ANTENNA HEIGHT AND SITE RELOCATION, DENIED AS TO INEPTNESS ISSUE, IN VIEW OF AN EXISTING EVANSVILLE ISSUE, AND AS TO MISREPRESENTATION ISSUE SINCE UNWARRANTED. ***SELMA TV, INC.*** 2533

**MOTIVE**

JOINT PETITION FOR CLARIFICATION AND REVISION OF HEARING ISSUES ON APPLICATION TO CHANGE ANTENNA SITES AND HEIGHTS DENIED. PETITION TO ENLARGE ISSUES TO INQUIRE INTO MOTIVE AND BACKGROUND BEHIND JOINT PETITION, DENIED, SINCE ONLY CONCERN IS EFFECT OF GRANTING APPLICATIONS, NOT HISTORICAL BACKGROUND. ***KTIV TV CO.*** 1446

**MULTIPLE OWNERSHIP**

MOTION TO DELETE, MODIFY AND ENLARGE ISSUES GRANTED TO EXTENT OF ADDITION OF MULTIPLE OWNERSHIP AND SEC. 310 (A)(5) ISSUES (CITIZENSHIP REQUIREMENTS OF OWNERS) DENIED AS TO A GENERAL LEGAL QUALIFICATIONS ISSUE CROSS INTEREST AND AS TO A SUBURBAN ISSUE. ***UNITED ARTISTS B/CING INC.*** 1306

AS PART OF ITS MULTIPLE OWNERSHIP POLICY UNDER SEC. 313, THEFCC ANNOUNCED PLANS TO DESIGNATE FOR HEARING ANY APPLICATION FOR ACQUISITION OF A SECOND VHF STATION IN THE TOP 50 MARKETS. ***SECOND VHF STATION IN MAJOR MARKETS*** 1851

PETITION TO ENLARGE ISSUES TO INCLUDE A SEC. 310(A) ISSUE (ALIEN OWNERSHIP), A SEC. 73.636(A)(2) MULTIPLE OWNERSHIP ISSUE AND AN UNDISCLOSED PRINCIPAL ISSUE DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***SPANISH INTERNATIONAL TV CO.*** 2263

PETITION TO ENLARGE ISSUES IN MULTI PARTY PROCEEDING GRANTEDAS TO SEPARATE COMMUNITY (SEC. 307(B) AND 73.30), TEN PERCENT RULE (SEC. 73.28(D)(3)), INTERFERENCE (SEC. 73.24 (B)), STOCKHOLDER AND MULTIPLE OWNERSHIP(SEC. 73.35(B)) ISSUES. ***JOBBINS, CHARLES W.*** 2407

**MULTIPLE OWNERSHIP RULES**

PETITION TO ENLARGE ISSUES IN WHDH RENEWAL PROCEEDINGS TO INCLUDE LEGAL CHARACTER QUALIFICATIONS, AND UNAUTHORIZED TRANSFER OF CONTROL ISSUES, GRANTED TO EXTENT OF DESIGNATING SUBSIDIARY CONTROL BY PARENT CORPORATION AND MULTIPLE OWNERSHIP ISSUES. SEC. 73.636. ***WHDH, INC.*** 1316

PETITION TO DISMISS APPLICATION FOR FAILURE TO COMPLY WITH SEC. 73.636 (MULTIPLE OWNERSHIP RULES), DENIED AND APPLICANT GIVEN OPPORTUNITY TO DEMONSTRATE COMPLIANCE. ***PRODUCERS, INC.*** 1415

AMENDMENT OF RULES SEC. 73.35, 73.240 AND 73.636 TO CLEARLY DEFINE THE CONDITIONS WHICH WOULD CONSTITUTE PROHIBITED OVERLAP IN RELATION TO MULTIPLE OWNERSHIP OF AM, FM AND TV STATIONS. ***AMEND. OF SEC. 73.35, 73.240 73.636*** 1476

AMENDMENT OF SEC. 73.35, 73.240 AND 73.636 (DUOPOLY RULES) RELATING TO MULTIPLE OWNERSHIP OF STANDARD, FM AND TELEVISION BROADCAST STATIONS. ***AMEND. OF SEC. 73.35*** 1728

MOTION TO DELETE ISSUES AS TO UHF ANTENNA LOCATION FEASIBILITY AND ALLEGED VIOLATION OF THE MULTIPLE OWNERSHIP RULES GRANTED, THE FORMER PREVIOUSLY DECIDED AND THE LATTER AMENDED TO PROPERLY CONFORM. ***SPANISH INTERNATIONAL TV CO., INC.*** 1744

PETITION FOR WAIVER OR, IN THE ALTERNATIVE, FOR MODIFICATIONOF ISSUE FOR WAIVER OF SEC. 73.240(A) MULTIPLE OWNERSHIP OVERLAP RULE, DENIED SINCE POLICY OBJECTIVE OF RULE CANNOT BE APPLIED IN AN AD HOC MANNER. ***DOVER B/CING CO., INC.*** 1940

MOTION TO ENLARGE ISSUES TO INCLUDE LEGAL AND FINANCIAL QUALIFICATIONS ISSUES AND A MULTIPLE INTEREST AND CONTROL ISSUE (SEC. 73.636) DENIED AND MOTION TO ADD CITIZENSHIP ISSUE (COMPLIANCE WITH SEC. 310(A)(4) GRANTED. ***CHICAGOLAND TV CO.*** 2123

PETITION BY APPLICANTS FOR ASSIGNMENT OF CP FOR WAIVER OF SEC. 73.636(A)(2) (MULTIPLE OWNERSHIP RULES) DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT TO APPLICATION UNDER SEC. 1.518. ***D.H. OVERMYER COMMUNICATIONS CO.*** 2272

PETITION REQUESTING A WAIVER OF SEC. 73.240 (MULTIPLE OWNERSHIP RULES) AND REVIEW OF DECISION GRANTING COMPETING APPLICATION DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS ARE INSUFFICIENT TO JUSTIFY A WAIVER OF THESE RULES. ***DOVER B/CING CO., INC.*** 2329

PETITION FOR WAIVER OF SEC. 73.35(A) BANNING COMMON OWNERSHIP OF TWO OR MORE STATIONS WITH OVERLAP, CAUSED BY PROPOSED MAJOR CHANGES (SEC. 1.571(A)(1) IN EXISTING FACILITIES, DENIED ON GROUND THAT SEC. 73.28(D)(3) (TEN PERCENT RULE) IS NOT VIOLATED. ***VOICE OF DIXIE, INC.*** 2479

**NARBA**

PETITION FOR RECONSIDERATION OF ORDER DENYING APPLICATION ONGROUNDS THAT APPLICATION DID NOT CONFORM WITH NARBA AND MEXICAN BILATERAL TREATIES, DENIED. ***METROPOLITAN TELEVISION CO.*** 2275

**NARBA LIMITATIONS**

PETITION BY ASSOCIATION OF CLASS IV RADIO STATIONS FOR RULE MAKING PROCEEDINGS LOOKING TOWARD AUTHORIZATION FOR INCREASED NIGHTTIME POWER CEILING FOR CLASS IV STATIONS, DENIED, IN VIEW OF NARBA AND U.S. MEXICAN AGREEMENT LIMITATIONS. ***POWER LIMITATION-CLASS IV STATIONS*** 2446

**NETWORK**

APPLICATION FOR NEW VHF BROADCAST STATION TO PROVIDE A THIRDNETWORK OUTLET IN THE COMMUNITY, GRANTED. PETITION TO DISMISS DENIED, SINCE ADDITIONAL

**NOTICE**

PETITION FOR RECONSIDERATION OF ORDER GRANTING APPLICATION FOR ASSIGNMENT OF LICENSE DISMISSED SINCE DEFECTIVE NOTICE OF THE PROPOSED ASSIGNMENT DID NOT PREJUDICE PETITIONER (SEC. 1.580(E)) AND PETITIONER ALLEGED NO FACTS REQUIRING RECONSIDERATION (SEC. 1.106). ***RADION B/CING, INC.*** 1418

**NOTICE SUFFICIENCY OF**

PETITION TO DENY GRANT OF APPLICATION FOR NEW AM STATION GRANTED, AND CONCENTRATION OF CONTROL (SEC. 73.35(B)) AND SUBURBAN ISSUES DESIGNATED FOR HEARING. STRICT REQUIREMENTS OF PUBLICATION OF NOTICE (SEC. 1.580(C)(1)) WAIVED. ***CHILDRESS JAMES B.*** 2136

**NOTICE WAIVER OF RULES**

JOINT REQUEST FOR APPROVAL OF MERGER OF TWO NEW TV CP APPLICANTS GRANTED, SEC. 1.525 FILING NOTICE REQUIREMENT WAIVED, SINCE COMPETING APPLICANTS ARE NOT INJURED AND MAY AMEND THEIR APPLICATIONS ACCORDINGLY. ***LIVESAY B/CING CO.*** 1473

**OATH**

APPEAL OF EXAMINERS ORDER GRANTING PETITION TO INTERVENE (SEC. 309(E)) ON GROUND THAT AN OATH WAS NOT TAKEN, DENIED, ON CONDITION THAT AN APPROPRIATE PERSON TAKE THE REQUISITE OATH TO SUPPORT THE PETITION. ***SOUTHINGTON B/CERS*** 2477

**OBJECTION, INFORMAL**

INFORMAL OBJECTION TO GRANT OF TRANSLATOR APPLICATION DENIEDON GROUNDS THAT BECAUSE OF TERRAIN NO INTERFERENCE WOULD BE CAUSED. ***ELLENVILLE TELECABLE CORP.*** 2366

**OPERATOR ABSENCE OF**

VIOLATION OF SEC. 73.93 FOR REPEATED FAILURE TO HAVE A LICENCED OPERATOR IN CHARGE AND FAILURE TO REDUCE POWER AT THE PROPER TIMES. ***DUBUQUE B/CING CO.*** 1769

**OPERATOR LICENSE**

FORFEITURE ORDERED FOR VIOLATION OF SEC. 73.93(B) FOR FAILURE TO HAVE A PROPERLY LICENSED OPERATOR ON DUTY AT THE TRANSMITTER. ***EASTERN B/CING CO.*** 2269

**OPERATOR REQUIREMENTS**

PETITION TO AMEND SEC. 73.93 TO RELAX OPERATOR REQUIREMENTS FOR STANDARD BROADCAST STATIONS EMPLOYING DIRECTIONAL ANTENNAS, DENIED, THE BASIC TECHNICAL KNOWLEDGE OF A FIRST- CLASS LICENSE BEING NECESSARY. ***MITCHELL B/CING CO.*** 1788

FORFEITURE ORDERED FOR VIOLATION OF SEC. 73.93(B) FOR FAILURE TO HAVE A PROPERLY LICENSED OPERATOR ON DUTY AT THE TRANSMITTER. ***EASTERN B/CING CO.*** 2269

**ORAL ARGUMENT**

PETITION FOR ORAL ARGUMENT AND SUBSEQUENT GRANT OF AN APPLICATION FOR VHF TV B/C TRANSLATOR STATION, DENIED SINCE THERE STILL REMAINS THE UHF IMPACT

**OVERLAP**



**OVERLAP RULE**

**OWNERSHIP**

PETITION TO ENLARGE ISSUES FOR DETERMINATION OF CITIZENSHIP OF CHURCH TRUSTEES (SEC. 3.10(A)(4)) AND BUSINESS INTERESTS OF MEMBERS (SEC. 73.636) AS TO AN EDUCATIONAL APPLICANT, GRANTED, BUT DENIED AS TO FINANCIAL AND DETERMINATION OF COMMUNITY NEEDS. ***GROSS B/CING CO.*** 2228

**OWNERSHIP CHANGES**

PETITION TO SET ASIDE TRANSFER OF CONTROL ON GROUNDS THAT OVER 500 OF THE STOCK WAS TRANSFERED, WITHOUT CONSENT, TO NEWCOMERS AND DE FACTO CONTROL SHIFTED TO ASSIGNEE, OWNER ONE OF THE TWO DAILY NEWSPAPERS IN THE COUNTY, GRANTED SINCE QUALIFICATIONS OF ASSIGNEES HAD NOT BEEN PASSED ON. ***ELYRIA-LORAIN B/CING CO.*** 1738

APPEAL FROM HEARING EXAMINERS RULING DENYING LEAVE TO AMEND APPLICATION FOR NEW TV CP TO SHOW CHANGE IN OWNERSHIP, DENIED, SINCE AMENDMENT MIGHT IMPROVE APPLICANTS COMPARATIVE POSITION AND NO CONTERVAILING CONSIDERATIONS ARE PRESENTED. ***FARRAGUT TV CORP.*** 1984

**OWNERSHIP FOREIGN**

PETITION TO ENLARGE ISSUES TO INCLUDE INQUIRY INTO COMPLIANCE WITH SEC. 310(A)(5) OF ACT, GRANTED SINCE INFORMATION SUPPLIED IS NOT UP TO DATE ON THE FOREIGN OWNERSHIP ISSUE. ***WHDH, INC.*** 1351

PETITION TO ENLARGE ISSUES FOR DETERMINATION OF CITIZENSHIP OF CHURCH TRUSTEES (SEC. 3.10(A)(4)) AND BUSINESS INTERESTS OF MEMBERS (SEC. 73.636) AS TO AN EDUCATIONAL APPLICANT, GRANTED, BUT DENIED AS TO FINANCIAL AND DETERMINATION OF COMMUNITY NEEDS. ***GROSS B/CING CO.*** 2228

**OWNERSHIP REPORTS**

SEC. 0.417 (INSPECTION OF RECORDS), 1.526 (RECORDS LOCALLY MAINTAINED FOR PUBLIC INSPECTION), 1.580 (LOCAL NOTICE OF FILING), 1.594 (LOCAL NOTICE OF HEARING), 1.615 (OWNERSHIP REPORTS), AND SEC. 73.120, 73.290, 73.590 AND 73.657 (POLITICAL CANDIDATE BROADCASTS) ARE AMENDED. ***AMENDMENT RE INSPECTION OF RECORDS*** 2206

**OWNERSHIP, DISCLOSURE**

MOTION TO HAVE COMPETING APPLICANT AMEND APPLICATION FOR NEWTV C.P. TO MAKE IT MORE DEFINITE AS TO INTERESTS OF LEADING STOCKHOLDER, GRANTED WITH CONCOMITANT WAIVER OF SEC. 1.45 TO ALLOW SUPPLEMENT SPECIFYING SOME OF THESE OWNERSHIP INTERESTS. ***SPANISH INT. TV CO. INC.*** 1304

**PARTIES, SUBSTITUTION OF**

MOTION TO SUBSTITUTE TRUSTEE FOR BANKRUPT RENEWAL APPLICANT AS A PARTY, DENIED AS DENYING LICENSEE STATUTORY RIGHT TO PARTICIPATE IN PROCEEDING. MOTION BY CORPORATE APPLICANT FOR RENEWAL AND ASSIGNMENT DENIED, PENDING OUTCOME OF INQUIRY INTO CONDUCT OF STOCKHOLDER. REQUEST BY PARTNER TO FILE SEPARATE EXCEPTIONS, DENIED. ***TIPTON COUNTY B/CERS*** 1327

**PARTNERSHIP APPLICANT, DISSOLUTION OF, EFFECT OF,**

MOTION TO SUBSTITUTE TRUSTEE FOR BANKRUPT RENEWAL APPLICANT AS A PARTY, DENIED AS DENYING LICENSEE STATUTORY RIGHT TO PARTICIPATE IN PROCEEDING. MOTION BY CORPORATE APPLICANT FOR RENEWAL AND ASSIGNMENT DENIED, PENDING OUTCOME OF INQUIRY INTO CONDUCT OF STOCKHOLDER. REQUEST BY PARTNER TO FILE SEPARATE EXCEPTIONS, DENIED. ***TIPTON COUNTY B/CERS*** 1327

**PARTY IN INTEREST**

APPLICATION TO CHANGE STATION LOCATION AND INCREASE ANTENNA HEIGHT FOR DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE, GRANTED SINCE MERE CONCLUSORY ALLEGATION OF ABNORMAL PROPOGATION CONDITIONS IS NOT SUFFICIENT TO ESTABLISH STANDING UNDER SEC. 309(D). ***ANSWENITE PROFESSIONAL TEL. SERVICE*** 1388

PETITION TO INTERVENE BY OWNER OF PROPERTY IN APPLICATION FOR CP TO INCREASE ANTENNA HEIGHT, GRANTED, SINCE, ALTHOUGH NOT A PARTY IN INTEREST, IT COULD ASSIST THE COMMISSION. ***CHRONICLE PUBLISHING CO.*** 1409

PETITION FOR RECONSIDERATION OF GRANT OF APPLICATION FOR POWER INCREASE GRANTED ON GROUNDS THAT GRANT ALLEGEDLY CAUSED INTERFERENCE TO PETITIONER THAT MODIFIED HIS LICENSE. PETITIONER HELD TO BE A PARTY AGGRIEVED (SEC. 405). ***INDIAN RIVER B/CING CO.*** 1610

PETITION TO DENY GRANT OF APPLICATION IN GROUNDS THAT GRANT WILL CAUSE INTERFERENCE TO PETITIONERS STATION (SEC. 73.28 (D)(3)) DENIED SINCE THE ONLY EVIDENCE OF INTERFERENCE IS TO PETITIONERS PROPOSAL OPERATION AND THEREFORE PETITIONER HAS NO STANDING. ***WGSB B/CING CO.*** 1668

PETITION TO DENY ASSIGNMENT OF LICENSE ON GROUNDS THAT PETITIONER MAY IN THE FUTURE BE A JUDGMENT CREDITOR DENIED ON GROUNDS THAT THIS DOES NOT QUALIFY PETITIONER AS A PARTY IN INTEREST (SEC. 309(D)). ***TUSCHMAN B/CING CORP.*** 1721

PETITION TO DENY APPLICATIONS FOR ASSIGNMENT OF LICENSES, DENIED, SINCE PETITIONER LACKS STANDING AS A PARTY IN INTEREST AFTER HAVING WITHDRAWN ITS OWN APPLICATION. APPLICATIONS FOR RENEWAL AND ASSIGNMENT OF LICENSES ARE GRANTED. ***NATIONAL B/CING CO., INC.*** 2040

PETITION TO ENLARGE ISSUES AS TO REAL PARTY IN INTEREST, DENIED SINCE ALLEGATIONS WERE NOT DOCUMENTED AND AMOUNTED TO SPECULATION AND HEARSAY. ***TRI-CITIES B/CING CO.*** 2068

PETITION TO DENY ASSIGNMENT OF LICENSE, DENIED, ON GROUNDS THAT THE PETITIONER FAILED TO SHOW THAT IT WAS A PARTY IN INTEREST UNDER SEC. 309(D). ***MARSHALL B/CING CORP.*** 2203

PETITION TO INTERVENE IN ORAL ARGUMENT DENIED ON GROUNDS THAT REQUEST WAS NOT TIMELY FILED (SEC. 1.233) AND PETITIONER IS NOT A PARTY IN INTEREST. ***JOE L. SMITH, JR., INC.*** 2301

**PETITION FOR RECONSIDERATION, FORM OF**

PETITION FOR RECONSIDERATION OF ORDER GRANTING APPLICATION FOR ASSIGNMENT OF LICENSE DISMISSED SINCE DEFECTIVE NOTICE OF THE PROPOSED ASSIGNMENT DID NOT PREJUDICE PETITIONER (SEC. 1.580(E)) AND PETITIONER ALLEGED NO FACTS REQUIRING RECONSIDERATION (SEC. 1.106). ***RADION B/CING, INC.*** 1418

**PLANNING AND PREPARATION**

PETITION TO ENLARGE ISSUES TO INCLUDE A FINANCIAL QUALIFICATIONS ISSUE, A JOINT AM-FM OPERATION ISSUE AND A PLANNING AND PREPARATION ISSUE DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***LEBANON VALLEY RADIO*** 2288

**PLEADING LENGTH**

MOTION TO ACCEPT BRIEF EXCEEDING FIFTY PAGES IN LENGTH (SEC.1.227(C)), GRANTED SINCE THE BRIEF IS ON LETTER-SIZED PAPER, MOTION TO ACCEPT A LIKE REPLY DENIED SINCE UNREASONABLY LENGTHY. ***SUNBEAM TV CORP.*** 1855

**PLEADING RIGHT TO FILE**

PETITION BY CO-CHANNEL CLASS IV STATION TO DESIGNATE A CLASSIV APPLICATION FOR HEARING IS ACCEPTED, ALTHOUGH NOT TIMELY, SINCE ITS LICENSE WOULD BE MODIFIED BY THE PROPOSAL (SEC. 1.580(I)), APPLICATION HELD IN ABEYANCE PENDING ACTION ON PETITIONERS PENDING APPLICATION FOR POWER INCREASE. ***BOONEVILLE B/CING CO.*** 2475

**POLARIZATION ANTENNA**

PROCEEDING TO AMEND SEC. 73.316 CONCERNING ANTENNA SYSTEM FOR FM BROADCAST STATIONS (HORIZONTAL AND CIRCULAR OR ELLIPTICAL POLARIZATION) TERMINATED AND RULE KEPT AS WRITTEN. ***AMENDMENT OF SEC. 73.316*** 2088

**POWER EFFECTIVE RADIATED**

SEC. 73.682 AMENDED TO SPECIFY THAT THE EFFECTIVE RADIATED POWER OF THE AURAL TRANSMITTER SHALL NOT BE LESS THAN 10 PERCENT NOR MORE THAN 20 PERCENT OF THE PEAK RADIATED POWER OF THE VISUAL TRANSMITTER. ***AMENDMENT OF SEC. 73.682*** 2078

APPLICATION BY TV LICENSEE FOR INCREASE OF EFFECTIVE RADIATED VISUAL POWER, AND FOR WAIVER OF POWER RESTRICTIONS OF SEC. 73.614(B), DENIED, FOR FAILURE TO SHOW GOOD CAUSE FOR WAIVER IN VIEW OF RESULTING CO-CHANNEL AND ADJACENT CHANNEL INTERFERENCE. ***TELEVISION WISCONSIN, INC.*** 2420

**POWER INCREASE OF**

PETITION FOR RECONSIDERATION OF GRANT OF APPLICATION FOR POWER INCREASE GRANTED ON GROUNDS THAT GRANT ALLEGEDLY CAUSED INTERFERENCE TO PETITIONER THAT MODIFIED HIS LICENSE. PETITIONER HELD TO BE A PARTY AGGRIEVED (SEC. 405). ***INDIAN RIVER B/CING CO.*** 1610

PETITION FOR RECONSIDERATION OF GRANT OF INCREASE OF POWER GRANTED AND ISSUES OF OBJECTIONABLE INTERFERENCE AND PRIMARY SERVICE GAIN OR LOSS WERE DESIGNATED FOR HEARING. ***EFFINGHAM B/CING CO.*** 2391

APPLICATION BY TV LICENSEE FOR INCREASE OF EFFECTIVE RADIATED VISUAL POWER, AND FOR WAIVER OF POWER RESTRICTIONS OF SEC. 73.614(B), DENIED, FOR FAILURE TO SHOW GOOD CAUSE FOR WAIVER IN VIEW OF RESULTING CO-CHANNEL AND ADJACENT CHANNEL INTERFERENCE. ***TELEVISION WISCONSIN, INC.*** 2420

PETITION BY ASSOCIATION OF CLASS IV RADIO STATIONS FOR RULE MAKING PROCEEDINGS LOOKING TOWARD AUTHORIZATION FOR INCREASED NIGHTTIME POWER CEILING FOR CLASS IV STATIONS, DENIED, IN VIEW OF NARBA AND U.S. MEXICAN AGREEMENT LIMITATIONS. ***POWER LIMITATION-CLASS IV STATIONS*** 2446

**POWER REDUCTION OF**

ORDER PERMITTING PRE-SUNRISE OPERATION AT REDUCED POWER, AFTER AGREEMENT, WHERE SUCH SIGNALS CAUSE INTERFERENCE UNDER SEC. 73.87 (B). PROVISION HERETOFORE APPLIED ONLY ON A GO-NO-GO BASIS. ***PRESUNRISE OPERATING DISPUTES*** 1302

VIOLATION OF SEC. 73.93 FOR REPEATED FAILURE TO HAVE A LICENCED OPERATOR IN CHARGE AND FAILURE TO REDUCE POWER AT THE PROPER TIMES. ***DUBUQUE B/CING CO.*** 1769

PETITION TO AMEND APPLICATION BY CLASS II-A APPLICANT FOR STATION OR CLEAR CHANNEL FREQUENCY TO REDUCE PROPOSED NIGHTIME POWER GRANTED, SINCE PETITIONER COULD NOT REASONABLY HAVE ANTICIPATED THE NEED FOR AMENDMENT AND NO PREJUDICE WILL RESULT. ***FLATHEAD VALLEY B/CERS*** 2219

**PROGRAM ORIGINATION**

REQUEST FOR WAIVER OF SEC. 73.30 (MAIN STUDIO ORIGINATION OFPROGRAMS) BECAUSE OF EMPHASIS ON THE SPANISH-SPEAKING POPULATION, DENIED, SINCE A LICENSEE MUST ASCERTAIN AND SATISFY THE NEEDS OF THE CITY IT IS LICENSED TO SERVE. ***TELE-B/CERS OF CAL., INC.*** 1763

**PROGRAMMING FOREIGN LANGUAGE**

REQUEST FOR WAIVER OF SEC. 73.30 (MAIN STUDIO ORIGINATION OFPROGRAMS) BECAUSE OF EMPHASIS ON THE SPANISH-SPEAKING POPULATION, DENIED, SINCE A LICENSEE MUST ASCERTAIN AND SATISFY THE NEEDS OF THE CITY IT IS LICENSED TO SERVE. ***TELE-B/CERS OF CAL., INC.*** 1763

**PROGRAMMING ISSUES**

PETITION TO ENLARGE ISSUES TO INCLUDE ADAQUACY OF STAFF PROPOSAL AND PROGRAMMING NEEDS GRANTED, SINCE PROGRAMMING PROPOSALS ARE THE SAME AS PROPOSAL FOR ANOTHER COMMUNITY WITHOUT A SHOWING OF COMMUNITY FAMILIARITY. ***KFOX, INC.*** 2044

**PROGRAMMING LIVE**

PETITION TO ENLARGE ISSUES TO INCLUDE FINANCIAL QUALIFICATIONS, SITE AVAILABILITY, SUBURBAN ISSUE, AND A STAFF ISSUE DUE TO PROPOSED LIVE PROGRAMMING, GRANTED. ***BOCA B/CERS, INC.*** 2432

**PROGRAMMING NEED FOR EVIDENCE**

PETITION TO DENY APPLICATION TO CHANGE TRANSMITTER LOCATION DENIED ON GROUNDS THAT PETITIONER DEFAULTED AND THE ISSUES OF ASCERTAINING PROGRAMMING NEEDS AND COMMUNITY SURVEY WERE HELD TO HAVE BEEN MET, AND GRANT OF APPLICATIONS AFFIRMED. ***WEAT-TV, INC.*** 2361

ORDER FINDING APPLICANT FOR NEW TV CP LEGALLY AND TECHNICALLY QUALIFIED BUT DESIGNATING APPLICATION FOR HEARING ON ISSUES OF STAFFING, FINANCING, PROGRAMMING NEEDS, AND LOCATION OF MAIN STUDIO (SEC. 73.613(A)). ***NEW HORIZON STUDIOS*** 1460

MOTION TO ENLARGE ISSUES TO INCLUDE PROGRAMMING NEEDS, BUSINESS INTERESTS AND LOAN AGREEMENTS, GRANTED, MOTIONS TO ENLARGE OR MODIFY FINANCIAL ISSUES, DENIED, APPEAL FROM HEARING EXAMINER RULING GRANTING AMENDMENT DENIED ON GROUNDS THAT GOOD CAUSE FOR ACCEPTANCE OF A POST-DESIGNATION AMENDMENT WAS SHOWN. ***UNITED ARTISTS B/CING*** 1604

ORDER DESIGNATING MUTUALLY EXCLUSIVE UHF APPLICATIONS FOR NEW TV CP FOR HEARING TO DETERMINE FINANCIAL QUALIFICATION, ADAQUACY OF MANAGEMENT, PROGRAMMING AND STAFFING PROPOSALS. ***CHAPMAN RADIO & TV CO.*** 2031

**PROGRAMMING OVER-ALL**

PETITION TO DENY GRANT DUE TO LACK OF FINANCIAL QUALIFICATIONS, LACK OF REVENUE IN AREA AND POOR PROGRAMMING DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS ARE INSUFFICENT. ***VANDER PLATE, LOUIS*** 1700

**PROGRAMMING PLANNING**

PETITION FOR APPROVAL OF SETTLEMENT AGREEMENT (SEC. 1.525(A)GRANTED AND COMPETING APPLICANT DISMISSED SUBJECT TO RESOLUTION OF A PROGRAMING ISSUE AND ESTABLISHMENT OF A JOINT VENTURE AFTER GRANT. ***SPANISH INTERNATIONAL TV CO.*** 2333

**PUBLIC INTEREST BENEFITS**

APPLICATION FOR NEW VHF B/C TRANSLATOR STATION DESIGNATED FOR HEARING TO DETERMINE PUBLIC INTEREST BENEFITS OF PROPOSAL, ITS EFFECT ON UHF DEVELOPMENT, AND ADEQUACY OF PRESENT UHF SERVICE IN THE AREA. (SEC. 74.732) ***TRIANGLE PUBLICATIONS, INC.*** 1428

**PUBLICATION**

PETITION FOR WAIVER OF SEC. 1.594 (PUBLICATION AND BROADCASTOF LOCAL NOTICE) GRANTED, SINCE NO OBJECTIONS WERE FILED. ***WTIF, INC.*** 1339

**PUBLICATION IN DROP-OUT CASE**

PETITION FOR DISMISSAL OF COMPETING APPLICATION AND GRANT OFCP TO REMAINING APPLICANT GRANTED AFTER APPROPRIATE NOTICE OF PUBLICATION (SEC. 1.525(B)(5)). ***MARIETTA B/CING CO., INC.*** 1633

**QUALIFICATIONS, BASIC**

PETITION TO ENLARGE ISSUES IN WHDH RENEWAL PROCEEDINGS TO INCLUDE LEGAL CHARACTER QUALIFICATIONS, AND UNAUTHORIZED TRANSFER OF CONTROL ISSUES, GRANTED TO EXTENT OF DESIGNATING SUBSIDIARY CONTROL BY PARENT CORPORATION AND MULTIPLE OWNERSHIP ISSUES. SEC. 73.636. ***WHDH, INC.*** 1316

**QUESTION OF FACT**

PETITIONS TO DENY APPLICATION FOR NEW TV BROADCAST TRANSLATOR STATIONS ON GROUNDS OF ECONOMIC INJURY, DENIED FOR FAILURE TO ALLEGE SUBSTANTIAL AND SPECIFIC QUESTIONS OF FACT. ***KCMC, INC.*** 1421

**RADIATION PATTERN**

PETITION TO ENLARGE ISSUES TO INCLUDE A NIGHTTIME RADIATION PATTERN ISSUE, DENIED ON GROUNDS THAT PETITIONER FAILED TO SET FORTH SUFFICIENT ENGINEERING DATA (SEC. 73.15 (A)) TO SUPPORT ITS ALLEGATIONS. ***KFOX, INC.*** 2260

**REAL PARTY IN INTEREST**

PETITION FOR ENLARGEMENT OF ISSUES GRANTED AS TO REQUESTED INEPTNESS OR ABUSE OF FCC PROCESSES ISSUE AND DENIED AS TO CHARACTER QUALIFICATIONS AND REAL PARTY IN INTEREST ISSUES. ***TRI-STTE COMMUNICATIONS CO.*** 1293

**REBROADCASTS PROHIBITED**

ORDER OF FORFEITURE OF 100 FOR WILLFUL VIOLATION OF SEC. 325(A) OF ACT AND SEC. 73.655 OF RULES BY REBROADCAST OF A PROFESSIONAL FOOTBALL GAME WITHOUT HAVING RECEIVED CONSENT FOR REBROADCAST. ***CHANNEL SEVEN, INC.*** 1945

**RECEIVER**

PETITION FOR IMMEDIATE, FAVORABLE ACTION ON RENEWAL AND TRANSFER OF LICENSE BY A RECEIVER DENIED ON GROUNDS THAT PETITIONER, A RECEIVER, INTENDS TO ASSIGN LICENSE TO TRANSFEREE AFTER RENEWAL, SINCE GRANT CAN NOT BE MADE UNTIL QUALIFICATIONS OF TRANSFEREE ARE ASSESSED. ***TELEVISION COMPANY OF AMERICA, INC.*** 1707

**RECORD REOPENING OF**

PETITION TO REOPEN RECORD AND INSERT ISSUES, GRANTED AND ISSUES AS TO MISREPRESENTATION, AVAILABILITY OF SITE AND FINANCIAL QUALIFICATIONS ARE DESIGNATED. ***SOUTHERN RADIO AND TV CO.*** 1457

PETITION TO REOPEN THE RECORD AND REMAND FOR FURTHER HEARINGS GRANTED ON THE FOLLOWING ISSUES, (A) ALTERNATIVE MEANS OF EDUCATIONAL TELEVISION BROADCAST, (B) WHETHER A SHARE-CHANNEL APPLICANT WOULD PROVIDE AN EFFECTIVE COMPETITIVE OUTLET FOR A THIRD NETWORK SERVICE. ***FLOWER CITY TV CORP.*** 2322

PETITION TO VACATE DECISION GRANTING A TV C.P. AND REOPEN RECORD, ON GROUNDS OF NEW EVIDENCE OF FILING A CIVIL ANTI-TRUST ACTION AGAINST STOCKHOLDERS OF THE PERMITTEE IN CONNECTION WITH ANOTHER BUSINESS, GRANTED, HEARING DESIGNATED AND BURDEN OF PROOF IS ON THE PERMITTEE. ***SYRACUSE TV, INC.*** 2510

**RECORDS INSPECTION OF**

APPEAL FROM RULING DENYING MOTION TO QUASH SUBPOENA DUCES TECUM GRANTED AND SUBPOENA QUASHED ON GROUNDS THAT IT IS LACKING IN SPECIFICITY (SEC. 1.333(B)). ***WTIF, INC.*** 1657

SEC. 0.417 (INSPECTION OF RECORDS), 1.526 (RECORDS LOCALLY MAINTAINED FOR PUBLIC INSPECTION), 1.580 (LOCAL NOTICE OF FILING), 1.594 (LOCAL NOTICE OF HEARING), 1.615 (OWNERSHIP REPORTS), AND SEC. 73.120, 73.290, 73.590 AND 73.657 (POLITICAL CANDIDATE BROADCASTS) ARE AMENDED. ***AMENDMENT RE INSPECTION OF RECORDS*** 2206

PETITION FOR STAY OF EFFECTIVE DATE OF LOCAL FILE RULES DENIED AND EFFECTIVE DATE RETAINED FOR NEW RULES CONCERNING INSPECTION OF RECORDS, PREGRANT PROCEDURE AND TO LOCAL NOTICE (SEC. 0.418, 0.417, 1.59). ***AMENDMENT RE INSPECTION OF RECORDS*** 2327

**REIMBURSEMENT FOR EXPENSES**

JOINT PETITION FOR REIMBURSEMENT AND WITHDRAWAL HELD IN ABEYANCE PENDING COMPLIANCE WITH PUBLICATION PURSUANT TO SEC. 1.525. ***HOLSTON B/CING CORP.*** 1551

JOINT PETITION FOR APPROVAL OF REIMBURSEMENT AGREEMENT TO DISMISS ONE APPLICATION HELD IN ABEYANCE PENDING RECEIPT OF AFFIDAVITS FILED IN COMPLIANCE WITH SEC. 1.525(C). ***BROWN PUBLISHING CO.*** 1560

JOINT PETITION FOR APPROVAL OF REIMBURSEMENT AGREEMENT HELD IN ABEYANCE PENDING PUBLICATION UNDER SEC. 1.525. ***NAUGATUCK VALLEY SERVICE, INC.*** 1542

REQUEST FOR APPROVAL OF A WITHDRAWAL AND REIMBURSEMENT AGREEMENT DENIED, BECAUSE REMAINING APPLICANT HAS SELECTED A CHANNEL ASSIGNMENT AND THUS A REASONABLE REIMBURSEMENT FIGURE CANNOT BE MADE. ***TVUE ASSOC., INC.*** 1741

JOINT REQUEST FOR APPROVAL OF REIMBURSEMENT AGREEMENT AND GRANT, GRANTED, CONDITIONED ON NO PRE-SUNRISE OPERATION PENDING FINAL DECISION IN PRE-SUNRISE PROCEEDING AND PROOF OF PERFORMANCE OF ANTENNA EFFICIENCY. FM RENEWAL APPLICATION SERVERED AND GRANTED. ***CHARLES COUNTY B/CING CO.*** 1909

JOINT PETITION FOR APPROVAL OF REIMBURSEMENT AGREEMENT, GRANT OF ONE APPLICATION AND DISMISSAL OF THE OTHER, DENIED, FOR FAILURE TO PROVIDE SUFFICIENT INFORMATION ON REIMBURSABLE EXPENSES. ***DIRIGO B/CING, INC.*** 1972

PETITION FOR LEAVE TO DISMISS APPLICATION FOR NEW STANDARD BROADCAST STATION BECAUSE OF DOUBTFUL SUPPORT FOR A SECOND STATION IN THE COMMUNITY, APPROVED. REIMBURSEMENT OF EXPENSES BY EXISTING STATION ALSO APPROVED. ***BIG-BEE B/CING CO.*** 1990

PETITION FOR RECONSIDERATION OF ACCEPTANCE OF AN AMENDMENT ON GROUNDS THAT AMENDMENT VIOLATED SEC. 1.525 CONCERNING AN AGREEMENT TO CHANGE

FREQUENCY AND REIMBURSEMENT FOR EXPENSES DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***H-DESERT B/CING CORP.*** 2316

REQUEST FOR APPROVAL OF REIMBURSEMENT. AGREEMENT GRANTED AS TO EXPENDITURES LIMITED TO THOSE LEGITIMATELY FOR THE PREPARATION AND FILING OF THE APPLICATION. ***INTEGRATED COMM. SYS. INC. OF MASS.*** 2347

PETITION FOR APPROVAL OF REIMBURSEMENT AND DROP-OUT AGREEMENT GRANTED IN PART AND DENIED TO THE EXTENT THE AGREEMENT DOES NOT MEET THE REQUIREMENTS OF SEC. 1.525(A) (FULL STATEMENTS CONCERNING MERGERS, CONSIDERATION, ETC.). ***CENTRAL B/CING CORP.*** 2358

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ADOPTION OF LETTER DECLINING TO INVOKE SEC. 312(B) OF ACT INITIATE CEASE AND DESIST PROCEEDINGS AGAINST LICENSEE CANCELING PETITIONERS RELIGIOUS PROGRAM AND SUBSTITUTING OTHER RELIGIOUS PROGRAMS, SUBSEQUENT LETTER ADOPTED RECONSIDERING AND AGAIN DENYING PETITION AS INFORMAL MATTER (SEC. 1.767). ***SNEED, REV. J. RICHARD*** 1397

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PETITION FOR RECONSIDERATION OF GRANT WITHOUT HEARING OF NEWAND RENEWAL APPLICATION GRANTED AND CONSOLIDATED HEARING DESIGNATED TO INCLUDE A CARROLL ISSUE AND COMPARATIVE CONSIDERATIONS. ***MISSOURI-ILLINOIS B/CING CO.*** 2376

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MOTION TO SUBSTITUTE TRUSTEE FOR BANKRUPT RENEWAL APPLICANT AS A PARTY, DENIED AS DENYING LICENSEE STATUTORY RIGHT TO PARTICIPATE IN PROCEEDING. MOTION BY CORPORATE APPLICANT FOR RENEWAL AND ASSIGNMENT DENIED, PENDING OUTCOME OF INQUIRY INTO CONDUCT OF STOCKHOLDER. REQUEST BY PARTNER TO FILE SEPARATE EXCEPTIONS, DENIED. ***TIPTON COUNTY B/CERS*** 1327

PETITION FOR RECONSIDERATION OF GRANT OF ASSIGNMENT OF LICENSE DENIED, SINCE GRANT OF ASSIGNMENT WHILE RENEWAL WAS IN DEFERRED STATUS BECAUSE STATION WAS SILENT, IS WITHIN COMMISSION DISCRETION AS IS HOLDING IN ABEYANCE RENEWAL PENDING SHOWING OF COMPLIANCE WITH PREVIOUS LICENSE. ***STEVENS B/CING, INC.*** 1750

PETITION TO DENY APPLICATION FOR INVOLUNTARY ASSIGNMENT OF LICENSE TO RECEIVER IN BANKRUPTCY, ALSO RENEWAL OF LICENSE DENIED, SINCE SEC. 309(C)(2)OB) AND SEC. 1.580(A)(2) PROTECT INVOLUNTARY ASSIGNMENTS, RENEWAL APPLICATION AND VOLUNTARY ASSIGNMENT OF LICENSE TO THIRD PARTIES, GRANTED. ***GULF COAST RADIO, INC.*** 1865

PETITION TO DENY APPLICATIONS FOR ASSIGNMENT OF LICENSES, DENIED, SINCE PETITIONER LACKS STANDING AS A PARTY IN INTEREST AFTER HAVING WITHDRAWN ITS OWN APPLICATION. APPLICATIONS FOR RENEWAL AND ASSIGNMENT OF LICENSES ARE GRANTED. ***NATIONAL B/CING CO., INC.*** 2040

THE COMMISSION TOOK VARIOUS ACTIONS IN UHF TV RULINGS ON 18 APPLICATIONS FOR ADDITIONAL TIME TO CONSTRUCT, (SEC 1.534) 1 APPLICATION FOR LICENSE TO COVER NEW TV C.P. AND THREE RENEWALS. ***JOE L. SMITH, JR., INC.*** 2514

**SERVICE NEED FOR**

REQUEST FOR EXTENSION OF TEMPORARY OPERATING AUTHORITY GRANTED PURSUANT TO SEC. 309(F) TO CONTINUE THE ONLY AVAILABLE SERVICE TO AN AREA AND SEC. 1.542 OF RULES IS WAIVED. PETITION TO REVIEW ORIGINAL GRANT AND PETITION TO DENY EXTENSION, DENIED. ***COMMUNITY RADIO OF SARATOGA SPRINGS*** 1567

**SERVICE PRIMARY**

APPLICATIONS FOR CLASS 2 STATIONS DESIGNATED FOR HEARING ON ISSUES OF AREAS AND POPULATIONS OF PRIMARY SERVICE, OVERLAP, OBJECTIONABLE INTERFERENCE, PROPER MAINTENANCE OF DIRECTIONAL ANTENNA SYSTEM, AND FINANCIAL QUALIFICATIONS. ***RADIO AMERICANA, INC.*** 1999

PETITION FOR RECONSIDERATION OF GRANT OF INCREASE OF POWER GRANTED AND ISSUES OF OBJECTIONABLE INTERFERENCE AND PRIMARY SERVICE GAIN OR LOSS WERE DESIGNATED FOR HEARING. ***EFFINGHAM B/CING CO.*** 2391

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APPLICATION FOR NEW VHF B/C TRANSLATOR STATION DESIGNATED FOR HEARING TO DETERMINE PUBLIC INTEREST BENEFITS OF PROPOSAL, ITS EFFECT ON UHF DEVELOPMENT, AND ADEQUACY OF PRESENT UHF SERVICE IN THE AREA. (SEC. 74.732) ***TRIANGLE PUBLICATIONS, INC.*** 1428

**SEVERANCE**

JOINT REQUEST FOR APPROVAL OF WITHDRAWAL-REIMBURSEMENT AGREEMENT, AND FOR SEVERANCE AND GRANT OF A COMPANION FM APPLICATION, DENIED, ACTION WILL BE HELD IN ABEYANCE PENDING RESOLUTION OF ECONOMIC ISSUES DESIGNATED FOR HEARING. ***CHARLES COUNTY B/CING CO., INC.*** 1823

**SHARE-TIME STATIONS**

PETITION TO REOPEN THE RECORD AND REMAND FOR FURTHER HEARINGS GRANTED ON THE FOLLOWING ISSUES, (A) ALTERNATIVE MEANS OF EDUCATIONAL TELEVISION BROADCAST, (B) WHETHER A SHARE-CHANNEL APPLICANT WOULD PROVIDE AN EFFECTIVE COMPETITIVE OUTLET FOR A THIRD NETWORK SERVICE. ***FLOWER CITY TV CORP.*** 2322

**SHORT SPACING**

PETITION TO DENY APPLICATION FOR CHANGE OF TRANSMITTER SITE DENIED AND WAIVER OF SEC. 73.610 (SHORT SPACING) GRANTED ON GROUNDS THAT IT WILL MAKE APPLICANT MORE COMPETITIVE WITH THE OTHER STATIONS AND PETITIONER WILL NOT RECEIVE OBJECTIONABLE INTERFERENCE. ***PENINSULA B/CING CORP.*** 1662

APPLICATION TO RELOCATE TV TRANSMITTER AND INCREASE ANTENNA HEIGHT, RESULTING IN SEC. 73.610 CO-CHANNEL SHORT SPACING, SUBJECT TO FURTHER ACTION IF OTHER TV LICENSEE IS PERMITTED TO RELOCATE, GRANTED, SUBJECT TO PROTECTION OF NEARBY FM STATION. ***MIDCONTINENT B/CING CO.*** 1798

APPLICATION TO CHANGE TRANSMITTER SITE, WITH CONCOMITANT REQUEST FOR WAIVER OF SEC. 73.610 OF RULES TO PERMIT SHORT-SPACED OPERATION, GRANTED, CONDITIONED ON PROVIDING EQUIVALENT PROTECTION TO CO-CHANNEL STATION. ***TELEVISION B/CERS, INC.*** 1897

APPLICATIONS TO CHANGE TV ANTENNA SITES DESIGNATED FOR CONSOLIDATED HEARING TO DETERMINE WHETHER TOWER PROPOSALS WOULD MENACE NAVIGATION, WHETHER EQUIVALENT PROTECTION SHOULD BE AFFORDED AND WHETHER WAIVER OF SEC. 73.610(A) (SHORT SPACING) IS WARRANTED. ***TLB, INC.*** 2009

PETITION FOR RECONSIDERATION OF STANDARD BROADCAST GRANT BECAUSE OF SHORT CO-CHANNEL SPACING AND THE NEED FOR MORE ADAQUATE PROTECTION, GRANTED TO EXTENT OF REQUIRING ADDITIONAL FIELD INTENSITY MEASUREMENTS. ***MCLEAN COUNTY B/CING CO.*** 2048

MERGER AGREEMENT APPROVED AND WAIVER OF SEC. 73.610 (SHORT SPACING) WHERE APPLICANT WILL USE AN ANTENNA FARM LOCATION. ***ILLIANA T/CING CORP.*** 2388

**SIGNAL REQUIREMENTS**

MUTUALLY EXCLUSIVE FM APPLICATIONS DESIGNATED FOR HEARING ONISSUES AS TO MINIMUM SIGNAL STRENGTH (SEC. 73.210(D)) AND DISTRIBUTION OF SERVICE AMONG POPULATIONS (SEC. 307(B),SEC. 73.207) (MINIMUM FM MILEAGE SEPARATION) IS WAIVED. ***CAMPBELL & SHEFTALL*** 2486

**SITE AVAILABILITY**

PETITION TO REOPEN RECORD AND INSERT ISSUES, GRANTED AND ISSUES AS TO MISREPRESENTATION, AVAILABILITY OF SITE AND FINANCIAL QUALIFICATIONS ARE DESIGNATED. ***SOUTHERN RADIO AND TV CO.*** 1457

MOTION TO ENLARGE ISSUES TO ASSURE AVAILABILITY OF PROPOSED ANTENNA SITE, GRANTED, THERE BEING A QUESTION WHETHER SITE AUTHORIZATION CAN BE SECURED. ***MILAM AND LANSMAN, PARTNERSHIP*** 1917

PETITION TO ENLARGE ISSUES TO INCLUDE FINANCIAL QUALIFICATIONS, SITE AVAILABILITY, SUBURBAN ISSUE, AND A STAFF ISSUE DUE TO PROPOSED LIVE PROGRAMMING, GRANTED. ***BOCA B/CERS, INC.*** 2432

PETITIONS TO ENLARGE ISSUES AS TO SITE AVAILABILITY AND ZONING, SEC. 73.188(B)(1) OVERLAP, AND MEOV IN DIRECTIONAL NIGHTTIME OPERATION, DENIED, REPLY PLEADINGS ARE STRICKEN TO EXTENT THEY GO BEYOND REBUTTAL OF ALLEGATIONS IN THE OPPOSITIONS. ***JOBBINS, CHARLES W.*** 2469

**SPACING REQUIREMENTS**

APPLICATION FOR NEW EDUCATIONAL TV STATION AND REQUEST FOR WAIVER OF SECS. 73.610(B), 73.685(A) AND 73.613(A) (SPACING REQUIREMENTS) GRANTED, ON GROUNDS THAT APPLICANT WILL PROVIDE EQUIVALENT PROTECTION TO MINIMIZE INTERFERENCE. ***NEBRASKA EDUC. TV COMM.*** 2191

**SPECIAL TEMPORARY AUTHORIZATION**

REQUEST FOR WAIVER OF SEC. 1.571(C) (PROCESSING LIVE PROCEDURES) AND FOR SPECIAL TEMPORARY AUTHORITY TO USE FACILITIES OF EXISTING STATION GRANTED AFTER SHOWING OF EXTRAORDINARY CIRCUMSTANCES. ***BIRMINGHAM B/CING CO.*** 1687

REQUEST FOR WAIVER OF SEC. 1.571(C) TO ALLOW IMMEDIATE PROCESSING OF APPLICATION AND REQUEST FOR SPECIAL TEMPORARY AUTHORITY (SEC. 309(F)) GRANTED AFTER SHOWING OF EXTRAORDINARY CIRCUMSTANCES. ***SEWARD B/CING CORP.*** 1698

**SPONSORS IDENTIFICATION OF, SANCTIONS**

ORDER OF FORFEITURE OF 5,000 FOR WILLFUL AND REPEATED VIOLATIONS OF SEC. 317 OF ACT (SPONSORSHIP IDENTIFICATION) AND OF LOG KEPPING REQUIREMENTS. ***UNITED B/CING CO.*** 1921

**STAFF PROPOSALS**

MOTIONS TO ENLARGE ISSUES TO INCLUDE CHARACTER QUALIFICATIONS, DENIED AS LACKING IN SPECIFICITY SEC. 1.229 (C). PETITION TO MODIFY CP ORDER SO AS TO PRECLUDE PREJUDICE IN PENDING LITIGATION, GRANTED. PETITION TO ENLARGE ISSUES TO INCLUDE STAFFING PROPOSAL, GRANTED. ***SPANISH INTERNATIONAL TV CO.*** 1384

**STATION LOCATION, CHANGE OF**

APPLICATION FOR CHANGE IN TRANSMITTER SITE GRANTED SINCE PROPOSAL WOULD NOT PREVENT APPLICANT FROM FULFILLING ITS OBLIGATION TO ITS ASSIGNED COMMUNITY. ***RADIO CHIPPEWA, INC.*** 1353

**STAY PENDING OUTCOME OF OTHER PROCEEDING**

PETITION FOR RECONSIDERATION DENIAL OF GRANT TO INCREASE POWER ON CLASS 2 STATION DENIED, PETITION TO DISSOLVE STAY DENIED AND PETITION FOR STAY, TO CONTINUE OPERATING AT NORMAL POWER, GRANTED PENDING OUTCOME OF HEARING TO DETERMINE OBJECTIONABLE INTERFERENCE. ***EFFINGHAM B/CING CO.*** 2278

**STOCKHOLDER**

MOTION TO HAVE COMPETING APPLICANT AMEND APPLICATION FOR NEWTV C.P. TO MAKE IT MORE DEFINITE AS TO INTERESTS OF LEADING STOCKHOLDER, GRANTED WITH CONCOMITANT WAIVER OF SEC. 1.45 TO ALLOW SUPPLEMENT SPECIFYING SOME OF THESE OWNERSHIP INTERESTS. ***SPANISH INT. TV CO. INC.*** 1304

**STOCKHOLDER DISPUTE**

PETITION FOR RECONSIDERATION OF ASSIGNMENT OF CP BECAUSE OF ALLEGED FRAUD BY THE MAJORITY SHAREHOLDERS AGAINST THE MINORITY, DENIED, SINCE ALLEGATIONS WERE UNSUPPORTED, PETITION WAS UNTIMELY FILED, AND PROPER FORUM IS CIVIL COURTS. ***TRIANGLE B/CING CO.*** 1746

**STOCKHOLDER IDENTIFICATION**

PETITION TO REVIEW EXAMINERS ADVERSE RULINGS RE CORPORATE RENEWAL APPLICANTS OBLIGATION TO ANSWER INTERROGATORIES CONCERNING ITS STOCKHOLDERS AND PARENT CONTROL DENIED, MOTION TO STRIKE QUESTIONS DISMISSED. ***WHDH, INC.*** 1862

MOTION TO ADD ISSUES AS TO SEC. 310(A)(5)(ALIEN CONTROL) ANDSEC. 73.636(A)(STOCKHOLDER IDENTIFICATION AND CONTROL), DENIED AS REMOTELY UNLIKELY. ***FARRAGUT TV CORP.*** 1888

PETITION TO ENLARGE ISSUES AS TO REAL PARTY IN INTEREST, DENIED SINCE ALLEGATIONS WERE NOT DOCUMENTED AND AMOUNTED TO SPECULATION AND HEARSAY. ***TRI-CITIES B/CING CO.*** 2068

PETITION TO ENLARGE ISSUES IN MULTI PARTY PROCEEDING GRANTEDAS TO SEPARATE COMMUNITY (SEC. 307(B) AND 73.30), TEN PERCENT RULE (SEC. 73.28(D)(3)), INTERFERENCE (SEC. 73.24 (B)), STOCKHOLDER AND MULTIPLE OWNERSHIP(SEC. 73.35(B)) ISSUES. ***JOBBINS, CHARLES W.*** 2407

**STRIKE APPLICATION ISSUE**

REQUEST FOR ADDITION OF ISSUE TO DETERMINE IF APPLICATION BYONE PARTY WAS MADE TO DELAY AND ABSTRUCT DENIED ON GROUNDS THAT REQUEST WAS INPROPERLY MADE IN A RESPONSIVE PLEADING. ***SPRINGFIELD T/CING CO.*** 1710

PETITION TO ADD FINANCIAL QUALIFICATIONS, LACK OF CANDOR ANDSTRIKE APPLICATION ISSUES AGAINST MUTUALLY EXCLUSIVE FM APPLICANT, GRANTED AS TO FINANCIAL ISSUE SINCE FUNDS AVAILABLE SEEM INSUFFICIENT, DENIED AS TO THE OTHER TWO. ***TRIAD STATIONS, INC.*** 1831

**STRIKE APPLICATION ISSUE, DISMISSED**

MOTION TO ENLARGE ISSUES TO ADD A STRIKE ISSUE DENIED FOR LACK OF SUBSTANTIVE FACTS AND PETITIONERS DELAY IN FILING THE ALLEGATIONS. ***NORTHERN INDIANA B/CERS, INC.*** 1504

**STUDIO LOCATION**

ORDER FINDING APPLICANT FOR NEW TV CP LEGALLY AND TECHNICALLY QUALIFIED BUT DESIGNATING APPLICATION FOR HEARING ON ISSUES OF STAFFING, FINANCING, PROGRAMMING NEEDS, AND LOCATION OF MAIN STUDIO (SEC. 73.613(A)). ***NEW HORIZON STUDIOS*** 1460

PETITION FOR LEAVE TO AMEND APPLICATION TO SPECIFY NEW TRANSMITTER SITE AND MAIN STUDIO LOCATION, DENIED, SINCE THE UNAVAILABILITY OF ITS PROPOSED SITE COULD REASONABLY HAVE BEEN FORESEEN. (SEC. 1.522(B)). ***SYMPHONY NETWORK ASSOCIATION, INC.*** 2196

**STUDIO TRANSMITTER**

PETITION TO ENLARGE ISSUES TO INCLUDE A SUBURBAN COMMUNITY NEEDS ISSUE, A TRANSMITTER AND STUDIO SITE ISSUE AND A COMPARATIVE COVERAGE ISSUE GRANTED AND HEARING DESIGNATED. ***SPRINGFIELD T/CING CO.*** 1710

**SUBPOENA DUCES TECUM**

APPEAL FROM RULING DENYING MOTION TO QUASH SUBPOENA DUCES TECUM GRANTED AND SUBPOENA QUASHED ON GROUNDS THAT IT IS LACKING IN SPECIFICITY (SEC. 1.333(B)). ***WTIF, INC.*** 1657

PETITION FOR REVIEW OF EXAMINERS ORDER (SEC. 1.353) TO REQUIRE PRODUCTION OF ITEMS SOUGHT BY THE SUBPOENA DUCES TECUM (SEC. 1.333) RE FINANCIAL STATUS OF A LICENSEE, GRANTED AND THE ORDER SET ASIDE SINCE THE ORDER IS TOO IMPRECISE FOR DETERMINATION OF RELEVANT INFORMATION. ***RADIO STATION WTIF, INC.*** 1869

**SUBPOENA LIMITATIONS**

APPEAL FROM RULING DENYING MOTION TO QUASH SUBPOENA DUCES TECUM GRANTED AND SUBPOENA QUASHED ON GROUNDS THAT IT IS LACKING IN SPECIFICITY (SEC. 1.333(B)). ***WTIF, INC.*** 1657

**SUBSCRIPTION TELEVISION**

REQUEST FOR EXTENSION OF AUTHORIZATION TO CONDUCT TRIAL SUBSCRIPTION TV OPERATIONS FOR AN ADDITIONAL THREE YEARS OR UNTIL SUBSCRIPTION TV RULEMAKING PROCEEDINGS ARE TERMINATED, GRANTED, TO PERMIT CONTINUED EXPERIMENTS IN PROGRAMMING AND TO INCREASE SUBSCRIBERS. ***TRIAL SUBSCRIPTION TV*** 2441

**SUBSTITUTION OF TV CHANNELS**

APPLICATION TENDERED FOR FILING FOR NEW TV B/CAST C.P. ON A SUBSTITUTED CHANNEL, DENIED, AS UNTIMELY SINCE THE SUBSTITUTION OF ANOTHER CHANNEL FOR ONE WHICH HAS BEEN MADE UNAVAILABLE TO APPLICANTS IN HEARING STATUS DOES NOT GIVE A NEW APPLICANT THE RIGHT TO FILE. ***HARRISON, AUSTIN A.*** 1782

**SUBURBAN COMMUNITY 307(B) ISSUE**

PETITION FOR ADDITIONAL PLEADINGS ACCEPTED AND MOTION TO REMAND TO HEARING EXAMINER GRANTED TO DETERMINE WHETHER THE SERVICE IS FOR A SEPARATE COMMUNITY AND IF NOT WHETHER SERVICE CONTRAVENES THE TEN PERCENT RULE (SEC. 73.28(D)(3). ***NORTHERN INDIANA B/CERS, INC.*** 1643

**SUBURBAN ISSUE**

MOTION TO DELETE, MODIFY AND ENLARGE ISSUES GRANTED TO EXTENT OF ADDITION OF MULTIPLE OWNERSHIP AND SEC. 310 (A)(5) ISSUES (CITIZENSHIP REQUIREMENTS OF OWNERS) DENIED AS TO A GENERAL LEGAL QUALIFICATIONS ISSUE CROSS INTEREST AND AS TO A SUBURBAN ISSUE. ***UNITED ARTISTS B/CING INC.*** 1306

PETITION TO ADD SUBURBAN AND LEGAL QUALIFICATIONS ISSUES DENIED. REQUEST FOR CONSIDERATION OF SUPPLEMENTAL STATEMENT DENIED, ABSENT A SHOWING THAT THE INFORMATION COULD NOT HAVE BEEN INCLUDED IN OPPOSITION TO PETITION. ***ABACOA RADIO CORP.*** 1441

PETITION TO ENLARGE ISSUES TO INCLUDE A SUBURBAN COMMUNITY NEEDS ISSUE, A TRANSMITTER AND STUDIO SITE ISSUE AND A COMPARATIVE COVERAGE ISSUE GRANTED AND HEARING DESIGNATED. ***SPRINGFIELD T/CING CO.*** 1710

PETITION TO DENY APPLICATION TO CONSTRUCT NEW TV STATION ON BASIS OF SUBURBAN ISSUE, FINANCIAL QUALIFICATIONS AND CARROLL ISSUE DENIED, SEC. 73.613(A) (MAIN STUDIO LOCATION OUTSIDE CITY LIMITS) WAIVED, AND APPLICATION GRANTED. ***K-SIX TV, INC.*** 1814

PETITION TO ADD FINANCIAL QUALIFICATIONS AND SUBURBAN ISSUESAGAINST FM APPLICANT SEEKING TO DUPLICATE PROGRAMMING FROM ITS NEARBY AM STATION GRANTED AS TO FORMER ISSUE, DENIED AS TO LATTER BECAUSE OF APPLICANTS FAMILIARITY WITH THE AREA. ***DOVER B/CING CO., INC.*** 1827

MOTION TO ENLARGE ISSUES GRANTED AS TO SUBURBAN ISSUE, AND MAIN STUDIO LOCATION (SEC. 73.613(A)) ISSUE, DENIED AS TO SEC.307(B), SEC.73.606 AND 73.607 ISSUES, SINCE NOW RENDERED MOOT AND THE FINANCIAL QUALIFICATIONS ISSUE IS RESOLVED ON THE RECORD. ***UNITED ARTISTS B/CING, INC.*** 1836

PETITION TO ENLARGE ISSUES TO INCLUDE ADAQUACY OF STAFF PROPOSAL AND PROGRAMMING NEEDS GRANTED, SINCE PROGRAMMING PROPOSALS ARE THE SAME AS PROPOSAL FOR ANOTHER COMMUNITY WITHOUT A SHOWING OF COMMUNITY FAMILIARITY. ***KFOX, INC.*** 2044

PETITION TO DENY GRANT OF APPLICATION FOR NEW AM STATION GRANTED, AND CONCENTRATION OF CONTROL (SEC. 73.35(B)) AND SUBURBAN ISSUES DESIGNATED FOR HEARING. STRICT REQUIREMENTS OF PUBLICATION OF NOTICE (SEC. 1.580(C)(1)) WAIVED. ***CHILDRESS JAMES B.*** 2136

PETITION TO ENLARGE ISSUES TO INCLUDE FINANCIAL QUALIFICATIONS, SITE AVAILABILITY, SUBURBAN ISSUE, AND A STAFF ISSUE DUE TO PROPOSED LIVE PROGRAMMING, GRANTED. ***BOCA B/CERS, INC.*** 2432

**SUNSET**

PETITION FOR RECONSIDERATION OF AMENDMENT OF SEC. 73.79 TO SPECIFY A NEW METHOD OF CALCULATING UNIFORM SUNSET TIMES DENIED. ***AMENDMENT OF SEC. 73.78*** 2311

**SURVEY**

PETITION FOR RECONSIDERATION OF GRANT OF RENEWAL WITHOUT HEARING GRANTED TO DETERMINE VERACITY OF A SURVEY TAKEN AND MISREPRESENTATION BUT DENIED AS TO COMPETITIVE FACILITY ISSUE, GAIN AND LOSS OF SERVICE ISSUE, AND 307(B) AND IF GRANTED, EQUIVALENT PROTECTION MUST BE ASSURED. ***TELEVISION B/CERS, INC.*** 2338

**TABLE OF ASSIGNMENT, FM**

APPLICATION TO CONSTRUCT NEW FM STATION FOR EXISTING CHANNELAND WAIVER OF SEC. 73.207 (MINIMUM MILEAGE SEPARATION) GRANTED, MOTION TO DISMISS BY CO-CHANNEL STATION DENIED AND FM CHANNEL ALLOCATION, MADE PRIOR TO ADOPTION OF SEC. 73.207, IS RETAINED IN VIEW OF THE NEED FOR SERVICE. ***FLORENCE B/CING CO., INC.*** 2538

EFFECTIVE AUGUST 9, 1965, SEC. 73.207 AND 73.504 (G) ARE AMENDED TO PROVIDE FOR FM MINIMUM MILEAGE SEPARATIONS BETWEEN CO-CHANNEL AND ADJACENT CHANNEL STATIONS, ACCORDING TO CLASSES OF STATIONS WITH THE 10.6 OR 10.8 MC/S FREQUENCY SEPARATION. ***FM B/C STATION SPACING*** 2541

**TECHNICAL REQUIREMENT**

PETITIONS TO ENLARGE ISSUES TO INCLUDE SEC. 73.188(B)(1) (TECHNICAL QUALIFICATIONS) AND FINANCIAL QUALIFICATIONS ISSUES, DENIED SINCE NOT SPECIFICALLY ALLEGED AND NOT PRIMA FACIE ESTABLISHED. ***LEBANON VALLEY RADIO*** 2462

**TELEPHONY**

ADOPTION OF AMENDMENTS TO SEC. 7.134(D) AND 7.306(D) TO MAKEALL-AREA INTERSHIP FREQUENCY 2638 KC AVAILABLE ON LIMITED BASIS FOR PUBLIC SHIP-SHORE TELEPHONY ON INTERIOR WATERS WHERE EXISTING COASTAL STATIONS ARE INADEQUATE. ***AMENDMENT OF PARTS 7 AND 8*** 1392

**TELEVISION ASSIGNMENT DUAL CITY**

PETITION TO MODIFY APPLICATION FOR NEW VHF TV TRANSMITTER SITE AND WAIVER OF SEC. 73.610 AND 73.685 SHORT-SPACING REQUIREMENTS, GRANTED TO AFFORD COMPETITION WITHOUT ADDITIONAL VHF CHANNEL ASSIGNMENT, AND MAINTAIN EXISTING SERVICE IN DEVELOPING COMMUNITY. ***ST. ANTHONY TV CORP.*** 1363

**TELEVISION BROADCAST STATION, ELIGIBILITY**

AS PART OF ITS MULTIPLE OWNERSHIP POLICY UNDER SEC. 313, THEFCC ANNOUNCED PLANS TO DESIGNATE FOR HEARING ANY APPLICATION FOR ACQUISITION OF A SECOND VHF STATION IN THE TOP 50 MARKETS. ***SECOND VHF STATION IN MAJOR MARKETS*** 1851

**TELEVISION BROADCAST TRANSLATOR STATIONS**

PETITIONS TO DENY APPLICATION FOR NEW TV BROADCAST TRANSLATOR STATIONS ON GROUNDS OF ECONOMIC INJURY, DENIED FOR FAILURE TO ALLEGE SUBSTANTIAL AND SPECIFIC QUESTIONS OF FACT. ***KCMC, INC.*** 1421

PETITION FOR ORAL ARGUMENT AND SUBSEQUENT GRANT OF AN APPLICATION FOR VHF TV B/C TRANSLATOR STATION, DENIED SINCE THERE STILL REMAINS THE UHF IMPACT ISSUE, AND THE SAME REQUEST WAS PREVIOUSLY DENIED. ***SPARTAN RADIOCASTING CO.*** 1495

APPLICATIONS FOR UHF TRANSLATOR STATIONS, GRANTED, SUBJECT TO AFFORDING PROTECTION TO TV BROADCAST STATIONS AND IMPOSING NON-DUPLICATION RESTRICTION TO GRADE A CONTOURS, PETITIONS TO DENY ON BASIS OF CARROLL, MISREPRESENTATION AND FINANCIAL ISSUES DENIED. ***LEE CO. TV, INC.*** 2495

**TEMPORARY AUTHORIZATION**

REQUEST FOR EXTENSION OF TEMPORARY OPERATING AUTHORITY GRANTED PURSUANT TO SEC. 309(F) TO CONTINUE THE ONLY AVAILABLE SERVICE TO AN AREA AND SEC. 1.542 OF RULES IS WAIVED. PETITION TO REVIEW ORIGINAL GRANT AND PETITION TO DENY EXTENSION, DENIED. ***COMMUNITY RADIO OF SARATOGA SPRINGS*** 1567

INTERIM OPERATION OF STATION OF REVOKED LICENSE GRANTED TO APPLICANT NOT A PARTY TO THE COMPARATIVE PROCEEDING (19 APPLICANTS)(SEC. 1.592) IN ORDER TO AVOID CONTROVERSY. ***OAK KNOLL B/CING CORP.*** 1571

**TEN PERCENT RULE**

PETITION TO DENY GRANT OF APPLICATION IN GROUNDS THAT GRANT WILL CAUSE INTERFERENCE TO PETITIONERS STATION (SEC. 73.28 (D)(3)) DENIED SINCE THE ONLY EVIDENCE OF INTERFERENCE IS TO PETITIONERS PROPOSAL OPERATION AND THEREFORE PETITIONER HAS NO STANDING. ***WGSB B/CING CO.*** 1668

PETITION FOR ADDITIONAL PLEADINGS ACCEPTED AND MOTION TO REMAND TO HEARING EXAMINER GRANTED TO DETERMINE WHETHER THE SERVICE IS FOR A SEPARATE

COMMUNITY AND IF NOT WHETHER SERVICE CONTRAVENES THE TEN PERCENT RULE (SEC. 73.28(D)(3). ***NORTHERN INDIANA B/CERS, INC.*** 1643

APPLICATION TO CHANGE TRANSMITTER SITE, AND WAIVER OF SEC. 73.28 TO ALLOW NIGHTIME OPERATION, DENIED, THE NECESSARY UNUSUAL CIRCUMSTANCES FOR WAIVER OF THE 100 RULE NOT PRESENT. ***HUDSON VALLEY B/CING CORP.*** 1780

PETITION TO ENLARGE ISSUES IN MULTI PARTY PROCEEDING GRANTEDAS TO SEPARATE COMMUNITY (SEC. 307(B) AND 73.30), TEN PERCENT RULE (SEC. 73.28(D)(3)), INTERFERENCE (SEC. 73.24 (B)), STOCKHOLDER AND MULTIPLE OWNERSHIP(SEC. 73.35(B)) ISSUES. ***JOBBINS, CHARLES W.*** 2407

PETITION FOR WAIVER OF SEC. 73.35(A) BANNING COMMON OWNERSHIP OF TWO OR MORE STATIONS WITH OVERLAP, CAUSED BY PROPOSED MAJOR CHANGES (SEC. 1.571(A)(1) IN EXISTING FACILITIES, DENIED ON GROUND THAT SEC. 73.28(D)(3) (TEN PERCENT RULE) IS NOT VIOLATED. ***VOICE OF DIXIE, INC.*** 2479

**TERMINATION OF PROCEEDING**

PETITION TO TERMINATE PROCEEDING AS MOOT, GRANTED, AFTER LICENSEE SURRENDURRED LICENSE TO THE COMMISSION. ***RADIO 13, INC.*** 2131

**THREE YEAR RULE**

PETITION TO DENY TRANSFER OF CONTROL ON GROUNDS THAT IT WAS UNAUTHORIZED DENIED ON GROUNDS THAT ALLEGATIONS (ECONOMIC INJURY, UNAUTHORIZED TRANSFER, MISREPRESENTATIONS) FAILED TO RAISE MATERIAL AND SUBSTANTIAL QUESTIONS OF FACT. THREE YEAR RULE (SEC. 1.597) WAIVED. ***PARKER, PARKET*** 1625

**TIME EXTENSION OF**

APPLICATION FOR ADDITIONAL TIME TO CONSTRUCT RADIO STATION, DESIGNATED FOR ORAL ARGUMENT TO DETERMINE WHETHER FAILURE TO COMPLETE WAS DUE TO FACTORS BEYOND APPLICANTS CONTROL WITHIN SEC. 319 OF ACT AND SEC. 1.534(A) OF RULES. ***SOUTH EASTERN ALASKA B/CERS, INC.*** 1905

**TIMELINESS**

PETITION TO ENLARGE ISSUES AS TO WHETHER PROPOSAL WOULD SERVE A COMMUNITY WITHIN THE MEANING OF SEC. 73.30(A), DENIED AS LATE FILED. HOWEVER ISSUE IS INCLUDED ON REVIEW BOARDS OWN ORDER. ***MILLER, VERNE M.*** 1340

PETITION FOR RECONSIDERATION AND GRANT WITHOUT HEARING OF CPTO CHANGE TRANSMITTER SITE, DENIED SINCE THERE WOULD BE A LOSS OF COVERAGE. PETITION TO CHANGE ISSUES, DENIED AS UNTIMELY UNDER SEC. 1.229(B). PETITION FOR LEAVE TO AMEND APPLICATION TO SHOW UPDATING OF INFORMATION GRANTED UNDER SEC. 1.522(B). ***AMERICAN COLONIAL B/CING CORP.*** 1359

APPEAL FROM EXAMINERS DENIAL OF LEAVE TO AMEND AN APPLICATION FOR CHANGES OF STOCKHOLDERS, OFFICERS AND DIRECTORS, AND AS TO MODIFICATIONS IN STAFFING, COST ESTIMATES, AND FINANCING (SEC. 1.301), DENIED, AS BEING UNTIMELY AND RADICALLY CHANGING APPLICATION WITHOUT GOOD CAUSE. ***CLEVELAND T/CING CORP.*** 1548

APPLICATION TENDERED FOR FILING FOR NEW TV B/CAST C.P. ON A SUBSTITUTED CHANNEL, DENIED, AS UNTIMELY SINCE THE SUBSTITUTION OF ANOTHER CHANNEL FOR ONE WHICH HAS BEEN MADE UNAVAILABLE TO APPLICANTS IN HEARING STATUS DOES NOT GIVE A NEW APPLICANT THE RIGHT TO FILE. ***HARRISON, AUSTIN A.*** 1782

MOTION TO ENLARGE ISSUES TO INCLUDE SEPARATE COMMUNITY ISSUE (SEC. 73.30(A)), AND STANDARD FINANCIAL QUALIFICATIONS ISSUE GRANTED SINCE TIMELY (SEC. 1.229(B)) AND WARRANTED ON THE FACTS. ***MOORE, MARION*** 1810

PETITION TO DELETE C.P. OF A STANDARD BROADCAST STATION, DISMISSED SINCE FILED UNTIMELY AND WITHOUT GOOD CAUSE (SEC. 1.106(B)). ***ROCK RIVER TV CORP.*** 1877

PETITION TO ENLARGE ISSUES TO INCLUDE DIRECTIONAL ANTENNA ARRAY, DENIED, SINCE UNTIMELY AND ALLEGATIONS OF REDUCTION OF RADIATION ARE NOT SUFFICIENTLY SPECIFIC (SEC. 1.229(C)). ***ABACOA RADIO CORP.*** 2225

**TOWER HEIGHT OF**

PETITION FOR RECONSIDERATION OF ACCEPTANCE OF APPLICATION FOR FILING, DENIED, AND COMPARATIVE HEARING DESIGNATED ON ISSUES AS TO FINANCIAL QUALIFICATIONS, HAZARD TO AIR NAVIGATION AND CONCENTRATION OF CONTROL. ***TRI-CITIES B/CING CO.*** 1772

FCC POLICY STATEMENT CONCERNING HEIGHT OF RADIO AND TV ANTENNA TOWERS, ISSUED WITH FAA CONCURRENCE, STATES THAT TOWERS HIGHER THAN 2,000 FEET ABOVE GROUND WILL BE PRESUMED INCONSISTENT WITH THE PUBLIC INTEREST, WITH THE BURDEN ON APPLICANTS TO OVERCOME THAT PRESUMPTION. ***HEIGHT OF TOWERS*** 2451

PETITIONS FOR RECONSIDERATION OF GRANT WITHOUT HEARING (SEC.1.229) OF APPLICATION TO INCREASE TV ANTENNA HEIGHT ON CONDITION THAT TOWER BE MADE AVAILABLE TO OTHER BROADCASTERS, DENIED, SINCE COMPARATIVE ISSUE WAS CONTINGENT ON AIR HAZARD ISSUE, AND PUBLIC INTEREST REQUIRES EXPEDITIOUS CONSTRUCTION. ***CHRONICLE PUBLISHING CO.*** 2490

**TOWER MARKING**

LETTER CONCERNING PROPOSED CHANGE IN THE COMMUNICATIONS ACT WITH RESPECT TO PAINTING, ILLUMINATION AND DISMANTLEMENT OF RADIO TOWERS. ***BUREAU OF THE BUDGET*** 1603

**TRANSFER OF CONTROL, UNAUTHORIZED**

PETITION TO ENLARGE ISSUES IN WHDH RENEWAL PROCEEDINGS TO INCLUDE LEGAL, CHARACTER QUALIFICATIONS, AND UNAUTHORIZED TRANSFER OF CONTROL ISSUES, GRANTED TO EXTENT OF DESIGNATING SUBSIDIARY CONTROL BY PARENT CORPORATION AND MULTIPLE OWNERSHIP ISSUES. SEC. 73.636. ***WHDH, INC.*** 1316

PETITION TO DENY TRANSFER OF CONTROL ON GROUNDS THAT IT WAS UNAUTHORIZED DENIED ON GROUNDS THAT ALLEGATIONS (ECONOMIC INJURY, UNAUTHORIZED TRANSFER, MISREPRESENTATIONS) FAILED TO RAISE MATERIAL AND SUBSTANTIAL QUESTIONS OF FACT. THREE YEAR RULE (SEC. 1.597) WAIVED. ***PARKER, PARKET*** 1625

FORFEITURE ORDERED FOR LICENSEES VIOLATION OF SEC. 310(B) AND SEC. 1.540 (UNLAWFUL TRANSFER OF CONTROL). ***CHEYENNE B/CING CO., INC.*** 1725

PETITION TO SET ASIDE TRANSFER OF CONTROL ON GROUNDS THAT OVER 500 OF THE STOCK WAS TRANSFERED, WITHOUT CONSENT, TO NEWCOMERS AND DE FACTO CONTROL SHIFTED TO ASSIGNEE, OWNER ONE OF THE TWO DAILY NEWSPAPERS IN THE COUNTY, GRANTED SINCE QUALIFICATIONS OF ASSIGNEES HAD NOT BEEN PASSED ON. ***ELYRIA-LORAIN B/CING CO.*** 1738

FORFEITURE ORDERED FOR VIOLATION OF SEC. 1.540 (TRANSFER OF CONTROL OF OPERATION OF STATION FROM INDIVIDUAL TO CORPORATION). ***SCHOFIELD, ARTHUR C.*** 2313

**TRANSFER PROCEDURE**

PETITION FOR IMMEDIATE, FAVORABLE ACTION ON RENEWAL AND TRANSFER OF LICENSE BY A RECEIVER DENIED ON GROUNDS THAT PETITIONER, A RECEIVER, INTENDS TO ASSIGN LICENSE TO TRANSFEREE AFTER RENEWAL, SINCE GRANT CAN NOT BE MADE UNTIL QUALIFICATIONS OF TRANSFEREE ARE ASSESSED. ***TELEVISION COMPANY OF AMERICA, INC.*** 1707

**TRANSLATOR INTERFERENCE FROM**

APPLICATION FOR VHF TRANSLATOR DENIED ON GROUNDS THAT GRANT WOULD CAUSE INTERFERENCE TO A LICENSEE AND AN ADJACENT CHANNEL IN VIOLATION OF SEC. 74.702 AND SEC. 74.703(A). ***CAPITOL B/CING CO., INC.*** 1704

**TRANSLATOR VHF**

APPLICATION FOR NEW VHF TV TRANSLATOR STATION AND WAIVER OF SEC. 74.732(E)(1) TO PERMIT BROADCASTING BEYOND GRADE B CONTOUR OF REBROADCASTED UHF TV STATION, DENIED ON BASIS OF POLICY FAVORING FULL DEVELOPMENT OF UHF CAPACITIES. ***FOX, WILLIAM L.*** 1912

PETITION TO DENY GRANT OF APPLICATION OF VHF TV BROADCAST TRANSLATOR STATION ON GROUNDS THAT THERE WOULD BE INTERFERENCE VIOLATIVE OF SEC. 74.703(A), NEED FOR A TRANSLATOR(SEC. 74.731(A)) AND THAT A GRANT WOULD RETARD UHF DEVELOPMENT, DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***CAPITAL CITIES B/CING CORP.*** 2292

**TRANSMISSION STANDARDS**

SEC. 73.682 AMENDED TO SPECIFY THAT THE EFFECTIVE RADIATED POWER OF THE AURAL TRANSMITTER SHALL NOT BE LESS THAN 10 PERCENT NOR MORE THAN 20 PERCENT OF THE PEAK RADIATED POWER OF THE VISUAL TRANSMITTER. ***AMENDMENT OF SEC. 73.682*** 2078

**TRANSMITTER LOCATION**

APPLICATION TO CHANGE TRANSMITTER SITE, AND WAIVER OF SEC. 73.28 TO ALLOW NIGHTIME OPERATION, DENIED, THE NECESSARY UNUSUAL CIRCUMSTANCES FOR WAIVER OF THE 100 RULE NOT PRESENT. ***HUDSON VALLEY B/CING CORP.*** 1780

APPLICATION TO RELOCATE TV TRANSMITTER AND INCREASE ANTENNA HEIGHT, RESULTING IN SEC. 73.610 CO-CHANNEL SHORT SPACING, SUBJECT TO FURTHER ACTION IF OTHER TV LICENSEE IS PERMITTED TO RELOCATE, GRANTED, SUBJECT TO PROTECTION OF NEARBY FM STATION. ***MIDCONTINENT B/CING CO.*** 1798

JOINT PETITION FOR AUTHORITY TO CHANGE TRANSMITTER LOCATIONSAND INCREASE ANTENNA HEIGHT, GRANTED. REQUEST FOR APPROVAL OF CONTRACT FOR UHF PICK-UP AND REBROADCAST OF NETWORK PROGRAMS GRANTED, EXCEPT FOR RESTRICTIVE PROVISION CONCERNING SOLICITATION OF LOCAL ADVERTISING AND PROMOTIONS. ***KTIV TV CO.*** 1933

**TRANSMITTER SITE**

PETITION TO DENY APPLICATION FOR WAIVER OF SEC. 73.613 (PRINCIPAL COMMUNITY) AND RELOCATE TV TRANSMITTER SITE, DENIED, SINCE RELOCATION OF MAIN STUDIO AND TRANSMITTER WILL IMPROVE SERVICE. ***NEW JERSEY TV B/CING CORP.*** 1335

APPLICATION FOR CHANGE IN TRANSMITTER SITE GRANTED SINCE PROPOSAL WOULD NOT PREVENT APPLICANT FROM FULFILLING ITS OBLIGATION TO ITS ASSIGNED COMMUNITY. ***RADIO CHIPPEWA, INC.*** 1353

PETITION FOR RECONSIDERATION AND GRANT WITHOUT HEARING OF CPTO CHANGE TRANSMITTER SITE, DENIED SINCE THERE WOULD BE A LOSS OF COVERAGE. PETITION TO CHANGE ISSUES, DENIED AS UNTIMELY UNDER SEC. 1.229(B). PETITION FOR LEAVE TO AMEND APPLICATION TO SHOW UPDATING OF INFORMATION GRANTED UNDER SEC. 1.522(B). ***AMERICAN COLONIAL B/CING CORP.*** 1359

PETITION TO MODIFY APPLICATION FOR NEW VHF TV TRANSMITTER SITE AND WAIVER OF SEC. 73.610 AND 73.685 SHORT-SPACING REQUIREMENTS, GRANTED TO AFFORD COMPETITION WITHOUT ADDITIONAL VHF CHANNEL ASSIGNMENT, AND MAINTAIN EXISTING SERVICE IN DEVELOPING COMMUNITY. ***ST. ANTHONY TV CORP.*** 1363

APPLICATION TO CHANGE TRANSMITTER SITE, INCREASE ANTENNA HEIGHT AND REDUCE VISUAL EFFECTIVE RADIATED POWERS, GRANTED SUBJECT TO LIMITATION ON ALLOWABLE POWER, AND A HEARING TO DETERMINE IMPACT UPON OPERATION OF AN EXISTING STATION WITHOUT DIRECTIONALIZATION. (SEC. 1.110). ***WHAS, INC.*** 1509

PETITION FOR LEAVE TO AMEND APPLICATION AFTER ORAL ARGUMENT BUT BEFORE DECISION SINCE TRANSMITTER SITE BECAME UNAVAILABLE, GRANTED ON GROUNDS THAT GOOD CAUSE (SEC. 1.522 (B)) WAS SHOWN FOR THE AMENDMENT. ***S & W ENTERPRISES INC.*** 1617

PETITION TO DENY APPLICATION FOR CHANGE OF TRANSMITTER SITE DENIED AND WAIVER OF SEC. 73.610 (SHORT SPACING) GRANTED ON GROUNDS THAT IT WILL MAKE APPLICANT MORE COMPETITIVE WITH THE OTHER STATIONS AND PETITIONER WILL NOT RECEIVE OBJECTIONABLE INTERFERENCE. ***PENINSULA B/CING CORP.*** 1662

APPLICATION TO CHANGE TRANSMITTER SITE, WITH CONCOMITANT REQUEST FOR WAIVER OF SEC. 73.610 OF RULES TO PERMIT SHORT-SPACED OPERATION, GRANTED, CONDITIONED ON PROVIDING EQUIVALENT PROTECTION TO CO-CHANNEL STATION. ***TELEVISION B/CERS, INC.*** 1897

APPLICATION FOR CHANGE OF TRANSMITTER SITE BY UHF STATION, DESIGNATED FOR HEARING ON ISSUES AS TO INJURY IF ANY TO AREA UHF STATIONS, COMPETITIVE FACTORS, 307(B) ISSUE (EQUITABLE DESTRIBUTION OF BROADCAST FACILITIES) (SEC. 73.606), WAIVER OF SEC. 73.685(E) (TRANSMITTER LOCATION AND ANTENNA SIZE). ***SELMA TELEVISION, INC.*** 2180

PETITION FOR LEAVE TO AMEND APPLICATION TO SPECIFY NEW TRANSMITTER SITE AND MAIN STUDIO LOCATION, DENIED, SINCE THE UNAVAILABILITY OF ITS PROPOSED SITE COULD REASONABLY HAVE BEEN FORESEEN. (SEC. 1.522(B)). ***SYMPHONY NETWORK ASSOCIATION, INC.*** 2196

**TRANSMITTER VISUAL**

SEC. 73.682 AMENDED TO SPECIFY THAT THE EFFECTIVE RADIATED POWER OF THE AURAL TRANSMITTER SHALL NOT BE LESS THAN 10 PERCENT NOR MORE THAN 20 PERCENT OF THE PEAK RADIATED POWER OF THE VISUAL TRANSMITTER. ***AMENDMENT OF SEC. 73.682*** 2078

**UHF DEVELOPMENT POLICY**

MOTION TO MODIFY AND ENLARGE ISSUES TO INQUIRE INTO SUFFICIENCY OF FUNDS AND COST OF CONSTRUCTION DENIED, BUT GRANTED AS TO COMPARATIVE COVERAGE ISSUE, REQUEST THAT COMMISSION CONSIDER ESTABLISHING POLICY WITH RESPECT TO FINANCIAL SHOWINGS OF UHF APPLICANTS GRANTED AND ISSUE CERTIFIED. ***ULTRAVISION B/CING CO.*** 1342

APPLICATION FOR NEW VHF B/C TRANSLATOR STATION DESIGNATED FOR HEARING TO DETERMINE PUBLIC INTEREST BENEFITS OF PROPOSAL, ITS EFFECT ON UHF DEVELOPMENT, AND ADEQUACY OF PRESENT UHF SERVICE IN THE AREA. (SEC. 74.732) ***TRIANGLE PUBLICATIONS, INC.*** 1428

APPLICATION FOR NEW VHF TV TRANSLATOR STATION AND WAIVER OF SEC. 74.732(E)(1) TO PERMIT BROADCASTING BEYOND GRADE B CONTOUR OF REBROADCASTED UHF TV STATION, DENIED ON BASIS OF POLICY FAVORING FULL DEVELOPMENT OF UHF CAPACITIES. ***FOX, WILLIAM L.*** 1912

APPLICATION FOR CHANGE OF TRANSMITTER SITE BY UHF STATION, DESIGNATED FOR HEARING ON ISSUES AS TO INJURY IF ANY TO AREA UHF STATIONS, COMPETITIVE FACTORS, 307(B) ISSUE (EQUITABLE DESTRIBUTION OF BROADCAST FACILITIES) (SEC. 73.606), WAIVER OF SEC. 73.685(E) (TRANSMITTER LOCATION AND ANTENNA SIZE). ***SELMA TELEVISION, INC.*** 2180

PETITION TO DENY GRANT OF APPLICATION OF VHF TV BROADCAST TRANSLATOR STATION ON GROUNDS THAT THERE WOULD BE INTERFERENCE VIOLATIVE OF SEC. 74.703(A), NEED FOR A TRANSLATOR(SEC. 74.731(A)) AND THAT A GRANT WOULD RETARD UHF DEVELOPMENT, DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***CAPITAL CITIES B/CING CORP.*** 2292

**UHF IMPACT**

PETITION FOR ORAL ARGUMENT AND SUBSEQUENT GRANT OF AN APPLICATION FOR VHF TV B/C TRANSLATOR STATION, DENIED SINCE THERE STILL REMAINS THE UHF IMPACT ISSUE, AND THE SAME REQUEST WAS PREVIOUSLY DENIED. ***SPARTAN RADIOCASTING CO.*** 1495

**UHF OPERATION**

MOTION TO ENLARGE ISSUES IN THREE SEPARATE COMPARATIVE PROCEEDINGS FOR UHF TV STATIONS TO INCLUDE FINANCIAL QUALIFICATIONS, OPERATING COSTS AND ESTIMATED ANNUAL REVENUES, GRANTED, AND INDIVIDUAL HEARINGS DESIGNATED. ***ULTRAVISION B/CING CO.*** 2103

THE COMMISSION TOOK VARIOUS ACTIONS IN UHF TV RULINGS ON 18 APPLICATIONS FOR ADDITIONAL TIME TO CONSTRUCT, (SEC 1.534) 1 APPLICATION FOR LICENSE TO COVER NEW TV C.P. AND THREE RENEWALS. ***JOE L. SMITH, JR., INC.*** 2514

**UNAUTHORIZED OPERATION**

ORDER REQUIRING FORFEITURE BY RADIO STATION FOR OPERATION BEYOND SPECIFIED HOURS (SEC. 73.98 AND 73.79). ***SEVEN LEAGUE PRODUCTIONS INC.*** 1491

**UNFAIR TRADE PRACTICE**

PETITION TO DENY APPLICATION BECAUSE OF ALLEGATIONS THAT APPLICANTS SIMILAR NAME WILL LEAD TO UNFAIR METHODS OF COMPETITION, DENIED ON GROUNDS INSUFFICIENCY OF ALLEGATIONS. ***WARNER, MELVIN B.*** 1672

**WAIVER OF RULES**

MOTION TO DISMISS SEVENTEEN OF NINETEEN APPLICATIONS ON GROUNDS THAT THOSE APPLICATIONS VIOLATE THE FREEZE AND THAT PETITIONER IS THE ONLY APPLICANT WHO FULFILLS 307(B) REQUIREMENTS, DENIED AND WAIVER OF FREEZE RULES GRANTED. SEC. 1.569 WAIVED. ***RADIO SOUTHERN CAL., INC.*** 1681

**WHITE AREA**

PETITIONS TO DENY CLASS 2-A APPLICATION ON GROUNDS OF ECONOMIC INJURY TO EXISTING STATIONS, INTERFERENCE (SEC. 73.57) FAILURE TO MEET WHITE AREA (SEC. 73.24(I)) REQUIREMENTS AND CITY COVERAGE, (SEC. 73.188(U)) DISMISSED, SINCE ALLEGATIONS WERE UNSUPPORTED. ***BOISE VALLEY B/CERS, INC.*** 2053

**ZONING**

PETITIONS TO ENLARGE ISSUES AS TO SITE AVAILABILITY AND ZONING, SEC. 73.188(B)(1) OVERLAP, AND MEOV IN DIRECTIONAL NIGHTTIME OPERATION, DENIED, REPLY PLEADINGS ARE STRICKEN TO EXTENT THEY GO BEYOND REBUTTAL OF ALLEGATIONS IN THE OPPOSITIONS. ***JOBBINS, CHARLES W.*** 2469

# DIGEST BY STATUTORY AND RULE PROVISIONS

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| **ADMINISTRATIVE PROCEDURES ACT** | | |
| 2(C) | 5USC 2(C) | REQUEST FOR PUBLIC HEARING(SEC. 316) ON APPLICATION TO SHIFTAM FREQUENCY (SEC. 73.25(D)), ALLEGING CO-CHANNEL INTERFERENCE AND OVERLAP(SEC. 73.37), DENIED, SINCE PETITIONERS RECENTLY GRANTED RENEWAL WAS CONDITIONED ON ACCEPTING THESE FACTORS, SECS. 73.25, APA 2(C), AND 73.37 WAIVED, APPLICATION GRANTED. ***MIDWEST TV, INC.*** 1818 |
| **COMMUNICATIONS ACT OF 1934, AS AMENDED** | | |
| 307(B) | 47USC 307(B) | PETITION TO ADD A CONTINGENT COMPARATIVE ISSUE GRANTED, SINCE SUCH A POSSIBILITY IS SUFFICIENTLY EVIDENT FROM THE PLEADINGS. ***CHARLES COUNTY B/CING CO., INC.*** 1348 |
| | | PETITION FOR RECONSIDERATION OF ORDER HOLDING PROCEEDINGS INABEYANCE UNTIL FURTHER NOTICE, FOLLOWING DISMISSAL OF AN APPLICATION, DENIED, SINCE SEC. 307(B) REQUIRES PROTECTION OF THE COMMUNITY WHOSE APPLICANT HAS WITHDRAWN, APPLICANTS INVITED TO RESUBMIT IN VIEW OF DEMAND FOR A CHANNEL ASSIGNMENT THERE. ***RADIO AMERICANA, INC.*** 1378 |
| | | PETITION FOR ADDITIONAL PLEADINGS ACCEPTED AND MOTION TO REMAND TO HEARING EXAMINER GRANTED TO DETERMINE WHETHER THE SERVICE IS FOR A SEPARATE COMMUNITY AND IF NOT WHETHER SERVICE CONTRAVENES THE TEN PERCENT RULE (SEC. 73.28(D)(3). ***NORTHERN INDIANA B/CERS, INC.*** 1643 |
| | | MOTION TO DISMISS SEVENTEEN OF NINETEEN APPLICATIONS ON GROUNDS THAT THOSE APPLICATIONS VIOLATE THE FREEZE AND THAT PETITIONER IS THE ONLY APPLICANT WHO FULFILLS 307(B) REQUIREMENTS, DENIED AND WAIVER OF FREEZE RULES GRANTED. SEC. 1.569 WAIVED. ***RADIO SOUTHERN CAL., INC.*** 1681 |
| | | MOTION TO ENLARGE ISSUES GRANTED AS TO SUBURBAN ISSUE, AND MAIN STUDIO LOCATION (SEC. 73.613(A)) ISSUE, DENIED AS TO SEC.307(B), SEC.73.606 AND 73.607 ISSUES, SINCE NOW RENDERED MOOT AND THE FINANCIAL QUALIFICA- |

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| | | TIONS ISSUE IS RESOLVED ON THE RECORD. ***UNITED ARTISTS B/CING, INC.*** 1836 |
| | | APPLICATION FOR CHANGE OF TRANSMITTER SITE BY UHF STATION, DESIGNATED FOR HEARING ON ISSUES AS TO INJURY IF ANY TO AREA UHF STATIONS, COMPETITIVE FACTORS, 307(B) ISSUE (EQUITABLE DESTRIBUTION OF BROADCAST FACILITIES) (SEC. 73.606), WAIVER OF SEC. 73.685(E) (TRANSMITTER LOCATION AND ANTENNA SIZE). ***SELMA TELEVISION, INC.*** 2180 |
| | | PETITION BY CLEAR CHANNEL LICENSEE FOR PUBLIC HEARING (SEC. 316) GRANTED IN PART AND HEARING DESIGNATED ON THE FOLLOWING ISSUES PRIMARY SERVICE, DIRECTIONAL ANTENNA SYSTEM, MAIN STUDIO LOCATION (SEC. 73.30(A)), POPULATION (SEC. 73.24) AND (SEC. 307(B) ISSUE. ***EMERALD B/CING CORP.*** 2295 |
| | | PETITION FOR RECONSIDERATION OF GRANT OF RENEWAL WITHOUT HEARING GRANTED TO DETERMINE VERACITY OF A SURVEY TAKEN AND MISREPRESENTATION BUT DENIED AS TO COMPETITIVE FACILITY ISSUE, GAIN AND LOSS OF SERVICE ISSUE, AND 307(B) AND IF GRANTED, EQUIVALENT PROTECTION MUST BE ASSURED. ***TELEVISION B/CERS, INC.*** 2338 |
| | | PETITION TO ENLARGE ISSUES IN MULTI PARTY PROCEEDING GRANTEDAS TO SEPARATE COMMUNITY (SEC. 307(B) AND 73.30), TEN PERCENT RULE (SEC. 73.28(D)(3)), INTERFERENCE (SEC. 73.24 (B)), STOCKHOLDER AND MULTIPLE OWNERSHIP(SEC. 73.35(B)) ISSUES. ***JOBBINS, CHARLES W.*** 2407 |
| | | MUTUALLY EXCLUSIVE FM APPLICATIONS DESIGNATED FOR HEARING ONISSUES AS TO MINIMUM SIGNAL STRENGTH (SEC. 73.210(D)) AND DISTRIBUTION OF SERVICE AMONG POPULATIONS (SEC. 307(B),SEC. 73.207) (MINIMUM FM MILEAGE SEPARATION) IS WAIVED) ***CAMPBELL & SHEFTALL*** 2486. |
| | | PETITION TO ENLARGE ISSUES, GRANTED AS TO COMPARATIVE ISSUESOF BACKGROUND AND MANAGEMENT AND PROGRAMMING PROPOSALS, CONTINGENT ON SEC. 307(B) CONSIDERATIONS. ***NEBRASKA RURAL RADIO ASSOC.*** 2502 |
| 307(D) | 47USC 307(D) | PETITION FOR RECONSIDERATION OF GRANT OF ASSIGNMENT OF LICENSE DENIED, SINCE GRANT OF ASSIGNMENT WHILE RENEWAL WAS IN DEFERRED STATUS BECAUSE STATION WAS SILENT, IS WITHIN COMMISSION DISCRETION AS IS HOLDING IN ABEYANCE RENEWAL PENDING SHOWING OF COMPLIANCE WITH PREVIOUS LICENSE. ***STEVENS B/CING, INC.*** 1750 |
| 309(C) | 47USC 309(C) | PETITION TO DENY APPLICATION FOR INVOLUNTARY ASSIGNMENT OF LICENSE TO RECEIVER IN BANKRUPTCY, ALSO RENEWAL OF LICENSE DENIED, SINCE SEC. 309(C)(2)OB) AND SEC. 1.580(A)(2) PROTECT INVOLUNTARY ASSIGNMENTS, RENEWAL APPLICATION AND VOLUNTARY ASSIGNMENT OF LICENSE TO THIRD PARTIES, GRANTED. ***GULF COAST RADIO, INC.*** 1865 |

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| | | PETITIONS TO RECONSIDER GRANT OF TV APPLICATION FOR INTERIM OPERATION OF THE STATION, DISMISSED UNDER SEC. 309(C) AND SEC. 1.580(A)(3), PROGRAM TEST AUTHORITY GRANTED. (SEC. 73.629). ***WEST MICHIGAN T/CERS, INC.*** 1873 |
| 309(D) | 47USC 309(D) | APPLICATION TO CHANGE STATION LOCATION AND INCREASE ANTENNA HEIGHT FOR DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE, GRANTED SINCE MERE CONCLUSORY ALLEGATION OF ABNORMAL PROPOGATION CONDITIONS IS NOT SUFFICIENT TO ESTABLISH STANDING UNDER SEC. 309(D). ***ANSWENITE PROFESSIONAL TEL. SERVICE*** 1388 |
| | | JOINT PETITION TO DENY ASSIGNMENT OF LICENSE DENIED SINCE STANDING UNDER SEC. 309(D)(1) IS NOT SHOWN AND SINCE PETITION IS NOT SUPPORTED BY AFFIDAVIT. ALLEGATIONS OF UNDUE CONCENTRATION, POSSIBILITY OF JOINT ADVERTISING RATES AND CANDOR ARE UNSUPPORTED BY FACTS. ***WGRY, INC.*** 1452 |
| | | PETITION TO DENY ASSIGNMENT OF LICENSE ON GROUNDS THAT PETITIONER MAY IN THE FUTURE BE A JUDGMENT CREDITOR DENIED ON GROUNDS THAT THIS DOES NOT QUALIFY PETITIONER AS A PARTY IN INTEREST (SEC. 309(D)). ***TUSCHMAN B/CING CORP.*** 1721 |
| | | PETITION TO DENY ASSIGNMENT OF LICENSE, DENIED, ON GROUNDS THAT THE PETITIONER FAILED TO SHOW THAT IT WAS A PARTY IN INTEREST UNDER SEC. 309(D). ***MARSHALL B/CING CORP.*** 2203 |
| 309(E) | 47USC 309(E) | APPEAL OF EXAMINERS ORDER GRANTING PETITION TO INTERVENE (SEC. 309(E)) ON GROUND THAT AN OATH WAS NOT TAKEN, DENIED, ON CONDITION THAT AN APPROPRIATE PERSON TAKE THE REQUISITE OATH TO SUPPORT THE PETITION. ***SOUTHINGTON B/CERS*** 2477 |
| 309(F) | 47USC 309(F) | REQUEST FOR EXTENSION OF TEMPORARY OPERATING AUTHORITY GRANTED PURSUANT TO SEC. 309(F) TO CONTINUE THE ONLY AVAILABLE SERVICE TO AN AREA AND SEC. 1.542 OF RULES IS WAIVED. PETITION TO REVIEW ORIGINAL GRANT AND PETITION TO DENY EXTENSION, DENIED. ***COMMUNITY RADIO OF SARATOGA SPRINGS*** 1567 |
| 310 | 47USC 310 | PETITION TO ENLARGE ISSUES FOR DETERMINATION OF CITIZENSHIP OF CHURCH TRUSTEES (SEC. 3.10(A)(4)) AND BUSINESS INTERESTS OF MEMBERS (SEC. 73.636) AS TO AN EDUCATIONAL APPLICANT, GRANTED, BUT DENIED AS TO FINANCIAL AND DETERMINATION OF COMMUNITY NEEDS. ***GROSS B/CING CO.*** 2228 |
| 310(A) | 47USC 310(A) | MOTION TO DELETE, MODIFY AND ENLARGE ISSUES GRANTED TO EXTENT OF ADDITION OF MULTIPLE OWNERSHIP AND SEC. 310 (A)(5) ISSUES (CITIZENSHIP REQUIREMENTS OF OWNERS) DENIED AS TO A GENERAL LEGAL QUALIFICATIONS ISSUE CROSS INTEREST AND AS TO A SUBURBAN ISSUE. ***UNITED ARTISTS B/CING INC.*** 1306 |
| | | PETITION TO ENLARGE ISSUES TO INCLUDE INQUIRY INTO COMPLIANCE WITH SEC. 310(A)(5) OF ACT, GRANTED SINCE INFORMATION SUPPLIED IS NOT UP |

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| | | TO DATE ON THE FOREIGN OWNERSHIP ISSUE. ***WHDH, INC.*** 1351 |
| | | MOTION TO ADD ISSUES AS TO SEC. 310(A)(5)(ALIEN CONTROL) ANDSEC. 73.636(A)(STOCKHOLDER IDENTIFICATION AND CONTROL), DENIED AS REMOTELY UNLIKELY. ***FARRAGUT TV CORP.*** 1888 |
| | | PETITION TO ENLARGE ISSUES TO INCLUDE A SEC. 310(A) ISSUE (ALIEN OWNERSHIP), A SEC. 73.636(A)(2) MULTIPLE OWNERSHIP ISSUE AND AN UNDISCLOSED PRINCIPAL ISSUE DENIED ON GROUNDS THAT PETITIONERS ALLEGATIONS WERE INSUFFICIENT. ***SPANISH INTERNATIONAL TV CO.*** 2263 |
| 310(A)(4) | 47USC 310(A)(4) | MOTION TO ENLARGE ISSUES TO INCLUDE LEGAL AND FINANCIAL QUALIFICATIONS ISSUES AND A MULTIPLE INTEREST AND CONTROL ISSUE (SEC. 73.636) DENIED AND MOTION TO ADD CITIZENSHIP ISSUE (COMPLIANCE WITH SEC. 310(A)(4) GRANTED. ***CHICAGOLAND TV CO.*** 2123 |
| 310(B) | 47USC 310(B) | PETITION TO ENLARGE ISSUES TO INCLUDE AN UNAUTHORIZED TRANSFER OF CONTROL (SEC. 310(B)) ISSUE GRANTED. ***WHDH, INC.*** 1638 |
| | | FORFEITURE ORDERED FOR LICENSEES VIOLATION OF SEC. 310(B) AND SEC. 1.540 (UNLAWFUL TRANSFER OF CONTROL). ***CHEYENNE B/CING CO., INC.*** 1725 |
| 311 | 47USC 311 | JOINT PETITION FOR APPROVAL OF REIMBURSEMENT AGREEMENT BETWEEN APPLICANTS FOR UHF TV STATION, FOR DISMISSAL OF ONE APPLICANT AND GRANT OF THE OTHER, GRANTED IN ORDER TO MAKE AVAILABLE A THIRD COMMERCIAL STATION TO ERIE, PA. (SEC. 311 OF THE ACT). ***WEPA-TV, INC.*** 2437 |
| 311(C) | 47USC 311(C) | JOINT REQUEST FOR APPROVAL OF AGREEMENT WHEREBY ONE UHF TV APPLICANT WILL HAVE ITS APPLICATION DISMISSED IN RETURN FOR AN OPTION TO ACQUIRE ONEHALF INTEREST IN THE SUCCESSFUL LICENSEE AS A JOINT VENTURE, GRANTED, SINCE SEC. 1.525 IS MET. ***GROSS B/CING CO.*** 2530 |
| 312(B) | 47USC 312(B) | ADOPTION OF LETTER DECLINING TO INVOKE SEC. 312(B) OF ACT INITIATE CEASE AND DESIST PROCEEDINGS AGAINST LICENSEE CANCELING PETITIONERS RELIGIOUS PROGRAM AND SUBSTITUTING OTHER RELIGIOUS PROGRAMS, SUBSEQUENT LETTER ADOPTED RECONSIDERING AND AGAIN DENYING PETITION AS INFORMAL MATTER (SEC. 1.767). ***SNEED, REV. J. RICHARD*** 1397 |
| 313 | 47USC 313 | AS PART OF ITS MULTIPLE OWNERSHIP POLICY UNDER SEC. 313, THEFCC ANNOUNCED PLANS TO DESIGNATE FOR HEARING ANY APPLICATION FOR ACQUISITION OF A SECOND VHF STATION IN THE TOP 50 MARKETS. ***SECOND VHF STATION IN MAJOR MARKETS*** 1851 |
| 316 | 47USC 316 | REQUEST FOR PUBLIC HEARING(SEC. 316) ON APPLICATION TO SHIFTAM FREQUENCY (SEC. 73.25(D)), ALLEGING CO-CHANNEL INTERFERENCE AND OVERLAP(SEC. 73.37), DENIED, SINCE PETITIONERS RECENTLY GRANTED RENEWAL WAS CONDITIONED ON ACCEPTING THESE FACTORS, SECS. 73.25, APA 2(C), AND 73.37 WAIVED, APPLICATION GRANTED. ***MIDWEST TV, INC.*** 1818 |

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# RULES AND REGULATIONS

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FEDERAL COMMUNICATIONS COMMISSION

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73.636(A)(2)

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73.682

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