

simply being in a position of telling one's family when he will be getting out.

Finally, the critical concern for many prisoners (and perhaps the most important concern in terms of their eventual reintegration into normal society) appeared to be the continuation of marital ties that having a firm date encourages.

THE ISSUE OF RETROACTIVITY

The Commission understands the concerns of those prisoners who will not be made eligible for an early hearing under this rule. However, the Commission does not presently have the resources to: (1) Conduct its normally scheduled hearings; (2) conduct the additional initial hearings required by this amended rule for those newly-sentenced prisoners who would otherwise not have to be heard until completion of their minimum terms; and (3) in addition grant early hearings at the same time to all presently incarcerated inmates who would not be heard until completion of their minimum terms.

The Commission does intend, however, during the coming year, to provide initial hearings to remaining prisoners as the workload permits. The procedure for adding these cases to the dockets will be as follows.

Each institution will be asked to submit a list of names and register numbers of all prisoners who, as of October 1, 1979, will not have received an initial hearing but who would be eligible for an initial hearing if the revised rules were made fully retroactive.

The list will be sent to the appropriate regional office. Upon receipt of the list, the regional office will notify each institution to add a specified number of cases to each docket (depending upon workload), beginning with those prisoners closest to their parole eligibility dates. This procedure will remain in effect until full retroactivity is achieved.

Prisoners previously continued to four-year reconsideration hearings will be considered under the new procedures at their first statutory interim hearing.

TEXT OF THE REVISIONS

Accordingly, pursuant to the provisions of 18 U.S.C. 4203(a)(1) and 4204(a)(6), 28 CFR Chapter I, Part 2, is revised as set forth below:

1. Paragraphs (a), (b) and (c) of § 2.12 are consolidated into paragraphs (a) and (b) and revised to read as set forth below. Paragraph (c) is deleted.

§ 2.12 Initial hearings: Setting presumptive release dates.

(a) An initial hearing shall be conducted within 120 days of a prisoner's arrival at a Federal institution or as soon thereafter as practicable; except

that in the case of a prisoner with a minimum term of parole ineligibility of ten years or more, the initial hearing shall be conducted at least 30 days prior to the completion of such minimum term, or as soon thereafter as practicable.

(b) Following initial hearing, the Commission shall (1) set a presumptive release date (either by parole or by mandatory release) within ten years of the hearing; (2) set an effective date of parole; or (3) continue the prisoner to a ten-year reconsideration hearing pursuant to § 2.14(c).

(c) [Deleted]

2. Paragraph (d) of § 2.12 becomes (c), and paragraph (e) of § 2.12 becomes (d).

3. Paragraphs (a) and (c) of § 2.14 are revised to read as follows:

§ 2.14 Subsequent proceedings.

(a) *Interim proceedings.* The purpose of an interim hearing required by 18 U.S.C. 4208(h) shall be to consider any significant developments or changes in the prisoner's status that may have occurred subsequent to the initial hearing.

(1) Notwithstanding a previously ordered presumptive release date or ten-year reconsideration hearing, interim hearings shall be conducted by an examiner panel pursuant to the procedures of § 2.13(b), (c), (e) and (f) at the following intervals from the date of the last hearing:

(i) In the case of a prisoner with a maximum term or terms of less than 7 years, every 18 months (until released);

(ii) In the case of a prisoner with a maximum term or terms of 7 years or more, every 24 months (until released). However, in the case of prisoner with an unsatisfied minimum term, the first interim hearing shall be deferred until the docket of hearings immediately preceding the month of parole eligibility.

(2) Following an interim hearing the Commission may:

(i) Order no change in the previous decision;

(ii) Advance a presumptive release date, or the date of a ten-year reconsideration hearing. However, it shall be the policy of the Commission that once set, a presumptive release date or the date of a ten-year reconsideration hearing shall not be advanced except under clearly exceptional circumstances;

(c) *Ten-year reconsideration hearings.* A ten-year reconsideration hearing shall be a full reassessment of the case pursuant to the procedures of § 2.13.

(1) A ten-year reconsideration hearing shall be ordered following the initial hearing in any case in which a release date is not set.

(2) Following a ten-year reconsideration hearing, the Commission may take any one of the actions authorized by § 2.12(b).

Dated: January 5, 1979.

CECIL C. McCALL,
Chairman, United States
Parole Commission.

[FR Doc. 79-1345 Filed 1-15-79; 8:45 am]

[4410-01-M]

PART 2—PAROLE, RELEASE, SUPERVISION AND RECOMMITMENT OF PRISONERS, YOUTH OFFENDERS AND JUVENILE DELINQUENTS

Paroling, Recommitting and Supervising Federal Prisoners

AGENCY: United States Parole Commission.

ACTION: Interim rule.

SUMMARY: This rule requires that whenever, prior to the actual release of a prisoner, the Commission rescinds or retards a previously granted parole date on the basis of a disciplinary violation, the decision as to how long the prisoner should remain in confinement thereafter must be made pursuant to guidelines as set forth in the rule. These guidelines establish a policy that most cases of misconduct will result in a retardation of the release date by no more than 60 days. Rescission of parole will be indicated only for the most serious cases (e.g. multiple or aggravated misconduct or criminal violations). In addition, the Commission's procedural rules for reopening and rescinding parole dates are consolidated and clarified by a number of supplemental amendments.

EFFECTIVE DATE: March 5, 1979.

FOR FURTHER INFORMATION, CONTACT:

Michael A. Stover, Office of the General Counsel, U.S. Parole Commission, 320 First Street, NW., Washington, D.C. 20537, phone (202) 724-1991.

SUPPLEMENTARY INFORMATION: These rule revisions are being made effective as interim rules pending the submission of public comment. At present, the Commission does not have any explicit rules to structure or limit its exercise of discretion in determining how long a prisoner should be held in confinement following a finding of disciplinary violation. These rules are being published as interim rules pending the submission of public

comment in order to ensure that pertinent rules are in effect when the first interim review hearings for prisoners with presumptive parole dates are held pursuant to 18 U.S.C. 4208(h) in March of 1979. The need to resolve a number of administrative and policy issues prevented earlier publication of the rules contained in this document.

Notice of proposed rulemaking and an invitation for public and prisoner comment appear in the Proposed Rules section of this issue of the *FEDERAL REGISTER*. This comment, as well as the Commission's experience with its March 1979 dockets, will be considered before promulgation of a final rule governing parole rescissions.

Accordingly, pursuant to 5 U.S.C. 553(b)(3)(B), 18 U.S.C. 4203(a)(1) and 4204(a)(6), 28 CFR Chapter I, Part 2, is amended as set forth below, the amended portions to become effective in the interim pending public comment.

1. Section 2.34 is revised to read as follows:

§ 2.34 Rescission of parole.

(a) When an effective date of parole has been set by the Commission, release on that date is conditioned upon continued satisfactory conduct by the prisoner. If a prisoner granted such a date has been found in violation of institutional rules by an Institutional Disciplinary Committee or is alleged to have committed a new criminal act at any time prior to the delivery of the certificate of parole, the Regional Commissioner shall be advised promptly of such information. The prisoner shall not be released until the institution has been notified that no change has been made in the Commission's order to parole. Following receipt of such information, the Regional Commissioner may reopen the case and retard the parole date for up to 60 days without a hearing, or schedule a rescission hearing under this section on the next available docket at the institution or on the first docket following return to a federal institution from a community treatment center or a state or local halfway house.

(b) Upon the ordering of a rescission hearing under this section, the prisoner shall be afforded written notice specifying the information to be considered at the hearing. The notice shall further state that the purpose of the hearing will be to decide whether rescission of the parole date is warranted based on the charges listed on the notice, and shall advise the prisoner of the procedural rights described below.

(c) An Institutional Disciplinary Committee hearing resulting in a finding that the prisoner has committed a violation of disciplinary rules may be relied upon by the Commission as con-

clusive evidence of institutional misconduct. However, the prisoner will be afforded an opportunity to explain any mitigating circumstances, and to present documentary evidence in mitigation of the misconduct at the rescission hearing.

(d) In the case of allegations of new criminal conduct committed prior to delivery of the parole certificate, the Commission may consider documentary evidence and/or written testimony presented by the prisoner, arresting authorities, or other persons.

(e) The prisoner may be represented at a rescission hearing by a person of his choice. The function of the prisoner's representative shall be to offer a statement following the discussion of the charges with the prisoner, and to provide such additional information as the examiner panel may require. However, the presiding hearing examiner may limit or exclude any irrelevant or repetitious statement.

(f) The evidence upon which the rescission hearing is to be conducted shall be disclosed to the prisoner upon request, subject to the exemptions set forth at § 2.55. If the parole grant is rescinded, the Commission shall furnish to the prisoner a written statement of its findings and the evidence relied upon.

(g) The following guidelines shall apply to cases in which the prisoner has been found to have committed institutional misconduct or new criminal activity:

(1) Administrative rule infraction(s) (including drug/alcohol abuse) normally can be adequately sanctioned by postponing a presumptive or effective date by 0-60 days per instance of misconduct. Escape or other criminal conduct, however, shall normally indicate rescission and application of the guidelines as set forth below.

(2) In cases involving escape without force or threat, the following guidelines indicate the normal range of time to be added to the time in custody required by the presumptive or effective date previously set:

- (i) Non-Secure Facility or Program (absent less than 7 days), 3-6 months.
- (ii) Secure Facility (no force or threat used); or Non-Secure Facility or Program (absent 7 days or more), 6-12 months.

Notes

(A) Time in escape status is not to be credited to service of the time required by the presumptive/effective date.

(B) These guidelines shall also apply to the determination of total time to be served if a new consecutive or concurrent sentence is imposed for the escape.

(C) If other criminal conduct is committed during the escape or duration of time spent in escape status, the time to be served for the escape shall be added to that assessed under subparagraph (3) of this paragraph.

(3) In cases of new criminal conduct other than specified above, the case shall be reassessed against the guidelines at § 2.20 or § 2.21, as applicable, with the new criminal behavior treated as an aggravating factor on the offense severity dimension.

(4) The above are merely guidelines. Where the circumstances warrant, a decision outside the guidelines (above or below) may be rendered, providing specific reasons are given. For example, a substantial period of good conduct since the last disciplinary infraction in cases not involving new criminal conduct may be treated as a mitigating circumstance.

§ 2.20 [Amended]

2. Section 2.20 (Paroling policy guidelines) is amended to delete "Escape" as it is described in the *Low* and *Moderate* severity categories.

3. Section 2.28 is revised to consolidate in one rule each of the various mechanisms presently available to the Commission for reopening a previously decided case and revising its previous decision:

§ 2.28 Reopening of Cases

(a) *Favorable information.* Notwithstanding the appeal procedures of § 2.25 and § 2.26, the appropriate Regional Commissioner may, on his own motion, reopen a case at any time upon the receipt of new information of substantial significance favorable to the prisoner and may then take any action authorized under the provisions and procedures of § 2.25. Original jurisdiction cases may be reopened upon the motion of the appropriate Regional Commissioner under the procedures of § 2.17.

(b) *Institutional misconduct.* Consideration of disciplinary infractions and allegations of new criminal conduct occurring after the setting of a parole date are subject to the provisions of § 2.14 (in the case of a prisoner with a presumptive date) and § 2.34 (in the case of a prisoner with an effective date of parole).

(c) *Additional sentences.* If a prisoner receives an additional concurrent or consecutive federal sentence following his initial parole consideration, the Regional Commissioner shall reopen his case for a new initial hearing on the next regularly scheduled docket to consider the additional sentence and reevaluate the case. Such action shall void any presumptive or effective release date previously established.

(d) *Conviction after revocation.* Upon receipt of information subsequent to the revocation hearing that a prisoner whose parole has been revoked has sustained a new conviction for conduct while on parole, the Regional Commissioner may reopen the case pursuant to § 2.52(c)(2) for a spe-

cial reconsideration hearing on the next regularly scheduled docket to consider forfeiture of time spent on parole and such further action as may be appropriate. The entry of a new order shall void any presumptive or effective release date previously established.

(e) *Release planning.* When an effective date of parole has been set by the Commission, release on that date shall be conditioned upon the completion of a satisfactory plan for parole supervision. The appropriate Regional Commissioner may on his own motion reconsider any case prior to release and may reopen and advance or retard an effective parole date for purposes of release planning. Retardation without a hearing may not exceed 120 days.

(f) *New adverse information.* Upon receipt of new information adverse to a prisoner that is not covered by paragraphs (a-e) of this section, the Regional Commissioner may refer the case to the National Commissioners with his recommendation and vote to retard parole and schedule the case for a special reconsideration hearing. The decision to reopen the case shall be based on the concurrence of three out of five votes, and the hearing shall be conducted in accordance with the procedures set out in §§ 2.12 and 2.13. The entry of a new order following such hearing shall void the previously established release date.

4. Section 2.14 is amended as set forth below to clarify the procedures that will be followed in considering disciplinary infractions at interim review hearings for prisoners with presumptive parole dates. The sections of the rule that are not reprinted below remain unchanged. Paragraphs (a)(3)(iii), (a)(3)(iv), (b)(1), (b)(2)(ii) are revised to read as follows:

§ 2.14 Subsequent proceedings.

(a) *Interim proceedings.* * * *

(3) Following an interim hearing, the Commission may:

(iii) Retard or rescind a presumptive parole date for reason of disciplinary infractions. In a case in which disciplinary infractions have occurred, the interim hearing shall be conducted in accordance with the procedures of § 2.34(c)-(g). (Prior to each interim hearing, prisoners shall be notified on the progress report furnished by the Bureau of Prisons that any finding of misconduct by an Institutional Disciplinary Committee since the previous hearing will be considered for possible action under this subsection.)

(iv) If a presumptive date falls within six months after the date of an interim hearing, the Commission may treat the interim hearing as a pre-re-

lease review in lieu of the record review required by paragraph (b) of this section.

(b) *Pre-release reviews.* * * *

(1) At least 60 days prior to a presumptive parole date, the case shall be reviewed on the record, including a current institutional progress report.

(2) Following review, the Regional Commissioner may:

(ii) Approve and advance or retard a parole date for purpose of release planning as provided in § 2.28(e).

5. *Conforming amendments.* The following sections are revised as set forth below:

§ 2.12 [Amended]

A. Section 2.12(e) is amended to read as follows:

(e) A presumptive parole date shall be contingent upon an affirmative finding by the Commission that the prisoner has a continued record of good conduct and a suitable release plan and shall be subject to the provisions of §§ 2.14 and 2.28. In the case of a prisoner sentenced under the Narcotic Addict Rehabilitation Act, 18 U.S.C. 4254, a presumptive parole date shall also be contingent upon certification by the Surgeon General pursuant to § 2.3 of these rules. Consideration of disciplinary infractions in cases with presumptive parole dates may be deferred until the commencement of the next in-person hearing or the pre-release record review required by § 2.14(b). While prisoners are encouraged to earn the restoration of forfeited or withheld good time, the Commission will consider the prisoner's overall institutional record in determining whether the conditions of a presumptive parole date have been satisfied.

§ 2.15 [Amended]

B. Section 2.15 is amended to change the reference to § 2.28 to § 2.28(a).

§ 2.29 [Amended]

C. Section 2.29(c) is deleted, because its substance is contained in the new § 2.28(e). The present § 2.29(d) is therefore redesignated as § 2.29(c).

§ 2.30 [Revised]

D. Section 2.30 is revised to read as follows:

All paroles are ordered on the assumption that information from the prisoner has not been fraudulently given or withheld from the Commission. If evidence comes to the attention of the Commission that a prisoner willfully concealed or misrepresented information deemed significant, the Regional Commissioner may reopen

the case pursuant to § 2.28(f) for a hearing to determine whether such parole should be voided. Such action may be taken whether or not the prisoner has actually been released on parole. If such prisoner has been released on parole, the Commission or a member thereof may issue a summons or warrant for such prisoner.

Dated: January 10, 1979.

CECIL C. McCALL,
Chairman,

United States Parole Commission.
[FR Doc. 79-1346 Filed 1-15-79; 8:45 am]

[4410-01-M]

PART 2—PAROLE, RELEASE, SUPERVISION AND RECOMMITMENT OF PRISONERS, YOUTH OFFENDERS AND JUVENILE DELINQUENTS

Paroling, Recommitting and Supervising Federal Prisoners

AGENCY: United States Parole Commission.

ACTION: Final rule.

SUMMARY: This document makes a number of changes in the Commission's rules that govern delegation of authority to conduct hearings to hearing examiners and panels of hearing examiners. The present changes reflect certain provisions of the Commission's enabling statute and legislative history that permit delegation of such authority to a single hearing officer in the case of local revocation hearings.

EFFECTIVE DATE: March 5, 1979.

FOR FURTHER INFORMATION, CONTACT:

Michael A Stover, Office of the General Counsel, U.S. Parole Commission, 320 First Street, Northwest, Washington, D.C. 20537, phone, (202) 724-3092.

SUPPLEMENTARY INFORMATION: Specific reference is made to 18 U.S.C. 4203(c) (2) and (3), as well as 2 U.S. CODE CONG. & ADMIN. NEWS at page 355 (1976).

These amendments will clarify the Commission's present practice of delegating authority, pursuant to the above-cited references, to a single hearing examiner to conduct local revocation hearings, with another hearing examiner reviewing the case on the record and joining his vote to that of the examiner conducting the hearing to produce a panel recommendation.

Accordingly, pursuant to 18 U.S.C. 4203(a)(1) and 4204(a)(6), Title 28, Code of Federal Regulations, is amended as set forth below:

1. Section 2.23 is revised to read as follows:

§ 2.23 Delegation to hearing examiners.

(a) There is hereby delegated to hearing examiners the authority necessary to conduct hearings and make recommendations relative to the grant or denial of parole or reparole, revocation or reinstatement of parole or mandatory release, and conditions of parole. Hearings shall be conducted by a panel of two hearing examiners, except where specifically provided that a hearing may be conducted by a single hearing examiner or other official designated by the Regional Commissioner.

(b) The concurrence of two examiners shall be required for a panel recommendation. If a hearing is conducted by a single examiner (or other official), the case shall be reviewed on the record by an additional examiner or examiners for the required vote or votes.

(c) In the event of a divided recommendation by a panel, the regional Administrative Hearing Examiner shall vote. If the Administrative Hearing Examiner is serving as a member of a hearing examiner panel or is otherwise unavailable, cases requiring his action under this paragraph will be referred to another hearing examiner.

(d) A recommendation of a hearing examiner panel shall become an effective Commission decision upon review and docketing at the Regional Office, unless action is initiated by the Regional Commissioner pursuant to § 2.24.

2. Section 2.49(e) is revised as follows:

§ 2.49 Place of revocation hearing.

(e) A local revocation hearing shall be scheduled to be held within sixty days of the probable cause determination. Institutional revocation hearings shall be scheduled to be held within ninety days of the date of the execution of the violator warrant upon which the parolee was taken. However, if a parolee requests and receives any postponement or consents to a postponed revocation proceeding, or if a parolee by his actions otherwise precludes the prompt conduct of such proceedings, the above-stated time limits may be extended. A local revocation hearing may be conducted by a hearing examiner, hearing examiner panel, or other official designated by the Regional Commissioner.

§ 2.50 [Amended]

3. Section 2.50 is amended as follows:

Paragraph (a) is deleted and the remaining subsections are redesignated as follows:

- (b) Becomes (a); and the term "parolee" is substituted for "prisoner".
- (c) Becomes (b).
- (d) Becomes (c).
- (e) Becomes (d).
- (f) Becomes (e).

In addition, a new paragraph (f) is added to contain the last sentence of former paragraph (a):

(f) A revocation decision may be appealed under the provisions of § 2.25 and § 2.26, or § 2.27 as applicable.

Dated: January 5, 1979.

CECIL C. McCALL,
Chairman, United States
Parole Commission.

[FR Doc. 79-1343 Filed 1-15-79; 8:45 am]

[4410-01-M]

PART 2—PAROLE, RELEASE, SUPERVISION AND RECOMMITMENT OF PRISONERS, YOUTH OFFENDERS AND JUVENILE DELINQUENTS

Paroling, Recommitting and Supervising Federal Prisoners

AGENCY: United States Parole Commission.

ACTION: Final rule.

SUMMARY: This document contains miscellaneous amendments to the Commission's rules that correct a number of editorial and typographical errors. No substantive changes to the meaning of any of the rules are effected by these amendments.

EFFECTIVE DATE: March 5, 1979.

FOR FURTHER INFORMATION CONTACT:

Michael A. Stover, Office of the General Counsel, U.S. Parole Commission, 320 First Street, Northwest, Washington, D.C. 20537; Phone (202) 724-1991.

SUPPLEMENTARY INFORMATION: On a recent nation-wide staff training session, a number of drafting problems and typographical errors were uncovered in the Commission's rules. The following amendments are being made in the interest of clarity.

Accordingly, pursuant to 18 U.S.C. 4203(a)(1) and 4204(a)(6), Title 28, Code of Federal Regulations, is amended as set forth below:

I. TABLE OF CONTENTS

Five section headings are amended both in the Table of Contents and in the body of the rules to read as follows:

Sec.

- 2.41 Travel approval.
- 2.48 Early termination.
- 2.48 Revocation: Preliminary interview.
- 2.52 Revocation decisions.
- 2.54 Reviews pursuant to 18 U.S.C. 4215(c).

§ 2.2 [Amended]

2. In § 2.2 *Eligibility for Parole: Adult Sentences*, paragraph (b) is amended to change the first reference to 18 U.S.C. 4205(a)(1) to read 18 U.S.C. 4205(b)(1).

§ 2.7 [Amended]

3. In § 2.7 *Committed Fines*, in paragraph (b), the last sentence is revised to read:

(b) * * * If the chief executive officer of the institution or U.S. Magistrate shall find that retention by the prisoner of any part of his assets is reasonably necessary for his support or that of his family, the prisoner upon taking the prescribed oath concerning his assets, shall be discharged from the commitment obligation of the committed fine sentence upon payment on account of his fine of that portion of his assets in excess of the amount found to be reasonably necessary for his support or that of his family.

The above changes "or that portion" to "of that portion" and deletes an unnecessary "of".

4. Section 2.8 *Mental competency proceedings*, is revised to read as follows:

§ 2.8 Mental Competency Proceedings.

(a) Whenever a prisoner (or parolee) is scheduled for a hearing in accordance with the provisions of this part and reasonable doubt exists as to his mental competency, i.e., his ability to understand the nature of and participate in scheduled proceedings, a preliminary inquiry to determine his mental competency shall be conducted by the hearing panel, hearing examiner or other official (including a U.S. Probation Officer) designated by the Regional Commissioner.

(b) The hearing examiner(s) or designated official shall receive oral or written psychiatric or psychological testimony and other evidence that may be available. A preliminary determination of mental competency shall be made upon the testimony, evidence, and personal observation of the prisoner (or parolee). If the examiner(s) or designated official determines that the prisoner is mentally competent, the previously scheduled hearing shall be held. If they determine that the prisoner is not mentally competent, the previously scheduled hearing shall be temporarily postponed.

(c) Whenever the hearing examiner(s) or designated official determine that a prisoner is incompetent and postpone the previously scheduled hearing, they shall forward the record of the preliminary hearing with their findings to the Regional Commissioner for review. If the Regional Commissioner concurs with their findings, he shall order the temporarily postponed hearing to be postponed indefinitely until such time as it is determined that the prisoner has recovered sufficiently to understand the nature of an participate in the proceedings, and in the case of a parolee may order such parolee transferred to a Bureau of Prisons facility for further examination. In any such case, the Regional Commissioner shall require a progress report on the mental health of the prisoner at least every 6 months. When the Regional Commissioner determines that the prisoner has recovered sufficiently, he shall reschedule the hearing for the earliest feasible date.

(d) If the Regional Commissioner disagrees with the findings of the hearing examiner(s) or designated official as to the mental competency of the prisoner, he shall take such action as he deems appropriate.

§ 2.27 [Amended]

5. In § 2.27 *Appeal of original jurisdiction cases* paragraph (a) is revised to clarify the consequence of a tie vote by the Commissioners:

(a) Cases decided under the procedure specified in § 2.17 may be appealed within thirty days of the date of the decision on a form provided for this purpose. Appeals will be reviewed at the next regularly scheduled meeting of the Commission provided they are received thirty days in advance of such meeting. Appeals received in the office of the Commission's National Appeals Board in Washington, D.C., less than thirty days in advance of a regularly scheduled meeting will be reviewed at the next regularly scheduled meeting thereafter. A quorum of five commissioners shall be required and decisions shall be by majority vote. In the case of a tie vote, the previous decision shall stand. This appellate decision shall be final.

§ 2.32 [Amended]

6. In § 2.32 *Parole to local or immigration detainees* paragraph (a)(2) is revised to read as follows:

(a) * * *

(2) "Parole to the actual physical custody of the detaining authorities or an approved plan." In this event, release is to be effected regardless of whether the detaining officials take the prisoner into custody, providing

there is an acceptable plan for community supervision.

Paragraph (b) is revised to delete the words "or not" as redundant:

(b) When the Commission wishes to parole a prisoner subject to a detainer filed by Federal immigration officials, the Commission shall order the following: "Parole to the actual physical custody of the immigration authorities or an approved plan." In this event, release is to be effected regardless of whether immigration officials take the prisoner into custody, providing there is an acceptable plan for community supervision.

7. Section 2.38 *Community Supervision by United States Probation Officers* is revised to clarify the reference to mandatory releasees as persons released "as if on parole" pursuant to 18 U.S.C. 4164:

§ 2.38 *Community Supervision by United States Probation Officers.*

(a) Pursuant to sections 3655 and 4203(b)(4) of Title 18 of the United States Code, United States Probation Officers shall provide such parole services as the Commission may request. In conformity with the foregoing, probation officers function as parole officers and provide supervision to persons released by parole or as if on parole (mandatory release) under the Commission's jurisdiction.

(b) A parolee may be transferred to a new district of supervision with the permission of the probation officers of both the transferring and receiving district, provided such transfer is not contrary to instructions from the Commission.

§ 2.42 [Amended]

8. In § 2.42 *Probation Officer's Reports to Commission*, is amended to delete the words "or mandatory releasee" as unnecessary, since the Commission has defined at § 2.1(g) that when it uses the term "parolee", it refers to both parolees and "mandatory releasees".

§ 2.43 [Amended]

9. In § 2.43 *Early termination* subparagraphs (2) and (3) of paragraph (a) are revised to read as follows:

(a) * * *

(2) Two years after release on supervision, and at least annually thereafter, the Commission shall review the status of the parolee to determine the need for continued supervision. In calculating such two-year period there shall not be included any period of release on parole prior to the most

recent such release, nor any period served in confinement on any other sentence.

(3) Five years after release on supervision, the Commission shall terminate supervision over such parolee unless it is determined, after a hearing conducted in accordance with the procedures prescribed in 18 U.S.C. 4214(a)(2), that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law. Such hearing may be conducted by a hearing examiner or other official designated by the Regional Commissioner.

§ 2.46 [Amended]

10. In § 2.46 *Execution of warrant and service of summons* paragraph (a) is amended to substitute "parolee" for "prisoner".

§ 2.47 [Amended]

11. In § 2.47 *Warrant placed as a detainer and dispositional review* subparagraph (3) of paragraph (b) is revised to read as follows:

(b) * * *

(3) Order a revocation hearing to be conducted at the institution in which the parolee is confined by a hearing examiner or an official designated by the Regional Commissioner.

§ 2.48 [Amended]

12. In § 2.48 *Revocation; preliminary interview* is amended to substitute the term "parolee" wherever the term "prisoner" now appears (paragraphs (b), (c) and (g)).

In addition, paragraph (f) is revised to read as follows (by substituting "by a parolee" for the phrase "on parole or mandatory release"):

(f) Conviction as probable cause: Conviction of a Federal, State, or local crime committed subsequent to release by a parolee shall constitute probable cause for the purpose of this section and no preliminary interview shall be conducted unless otherwise ordered by the Regional Commissioner.

§ 2.49 [Amended]

13. Section 2.49 *Place of revocation hearing* is amended to substitute the term "parolee" wherever the term "prisoner" now appears (paragraphs (a), (c), and (d)).

In addition, paragraph (c) is revised to read as follows:

(c) A parolee who voluntarily waives his right to a local revocation hearing, or who admits any violation of the conditions of his release, or who is retaken following conviction of a new crime, shall be given a revocation hearing upon his return to a Federal institution. However, the Regional Commissioner may, on his own motion, designate a case for a local revocation hearing.

Finally, the reference in paragraph (d) to § 2.48(d)(2) is corrected to read "§ 2.48(e)(2)".

§ 2.52 [Amended]

14. In § 2.52 *Revocation decisions*, the third sentence of paragraph (c)(2) is revised to read as follows (deleting the parenthetical phrase "in which the Commission makes an independ-

ent finding of violation of conditions of parole" as redundant):

(c) * * *
(2) * * * If such conviction occurs subsequent to a revocation hearing, the Commission may reopen the case and schedule a further hearing relative to time forfeiture and such further disposition as may be appropriate.

§ 2.56 [Amended]

15. In § 2.56 *Special parole terms*, paragraph (a) is revised to read as follows:

(a) The Drug Abuse Prevention and Control Act, 21 U.S.C. Sections 801 to 966, provides that, on conviction of certain offenses, mandatory "special parole terms" must be imposed by the court as part of the sentence. This term is an additional period of supervision which commences upon completion of any period on parole or mandatory release supervision from the regular sentence; or if the prisoner is re-

leased without supervision, commences upon such release.

In paragraph (c) the term "parolee" is substituted for the term "releasee" in the two instances it occurs, and the phrase "he will" becomes "he may". In addition, the phrase "of his basic supervision period" is deleted.

In paragraph (d) "the prisoner" becomes "a prisoner" and the term "inmate" becomes "prisoner".

The first sentence of paragraph (e) is revised to read as follows:

(e) If regular parole or mandatory release supervision is terminated under § 2.43, the Special Parole Term commences to run at that point in time. * * *

Dated: January 5, 1979.

CECIL C. MCCALL,
Chairman, United States
Parole Commission.

[FR Doc. 79-1344 Filed 1-12-79; 8:45 am]

Registered
Proprietor

TUESDAY, JANUARY 16, 1979

PART VII



**FEDERAL
COMMUNICATIONS
COMMISSION**

**RADIO BROADCAST
SERVICES**

**Rules Changes Relating to
Noncommercial Educational FM
Broadcast Stations**

[6712-01-M]

Title 47—Telecommunication

CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION

[Docket No. 20735; RM-1974; RM-2655; FCC 78-919]

PART 73—RADIO BROADCAST SERVICES

Rules Changes Relating to Noncommercial Educational FM Broadcast Stations

AGENCY: Federal Communications Commission.

ACTION: Memorandum Opinion and Order.

SUMMARY: In response to several petitions for reconsideration the Commission issued a Memorandum Opinion and Order relaxing one aspect of the recently adopted rule regarding minimum operating schedule for noncommercial educational FM stations and affirmed the other changes in the rules affecting these stations. In addition, the Memorandum Opinion and Order clarified and explained certain other aspects of the earlier decision.

EFFECTIVE DATE: February 21, 1979.

ADDRESSES: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT:

Jonathan David, Broadcast Bureau (202-632-7792).

SUPPLEMENTARY INFORMATION:

Adopted: December 21, 1978.

Released: January 11, 1979.

In the matter of changes in the rules relating to noncommercial education FM Broadcast Stations; Memorandum opinion and order [see also 43 FR 47975, October 18, 1978].

1. The purpose of this document is to respond to the issues raised in the petitions for reconsideration¹ of the actions taken in the *Second Report and Order*² in this proceeding.

¹Formal petitions for reconsideration were filed by the Intercollegiate Broadcasting System, Inc. ("IBC"), the American Council on Education ("ACE") and Westchester Community College ("Westchester"), Bryant College, Ossining High School and Abraham Baldwin Agricultural College filed informal requests for reconsideration. The National Federation of Community Broadcasters opposed reconsideration and Westchester replied to this opposition.

²The document was adopted by the Commission on June 7, 1978. It was released by it on September 1, 1978, and published in the *FEDERAL REGISTER* on September 6, 1978, 43 FR 39704.

2. In the *Notice of Proposed Rule Making* in this proceeding, 41 FR 16973 (March 17, 1976), the Commission raised a number of issues concerning possible improvements in the manner in which noncommercial educational FM stations operate on the 20 FM channels (Channels 201-220)³ set aside for such use. Based upon the record developed in this proceeding and the Commission's experience in licensing these stations, the Commission concluded that certain rule changes were necessary. These changes were made in the *Second Report and Order*. Other matters continue under consideration in the proceeding and await further action by the Commission.⁴

3. The central reason which led the Commission to initiate this proceeding and to take the actions it did was its concern that these channels were not being used in an effective and efficient manner. Interest in such stations had grown with the result that in many parts of the country there was no available spectrum space to accommodate new educational FM stations or increases in coverage by existing stations. The pattern of use, however, appeared to be an inefficient one. The Commission concluded that it was important to encourage improved efficiency since large portions of the country did not receive noncommercial educational FM service. With these points in mind the Commission attempted to find ways of improving the pattern of channel use.

4. In addition to its concern about these allocations issues, the Commission had been troubled by the fact that many existing stations operated only a few hours per day even though all were licensed to operate 24 hours per day. In fact, some were known to be off the air for extended periods, operating only a few hours per week when they were on the air. This created a particular problem since there often was no open frequency space for new stations. Thus, as matters then stood, there was no opportunity for someone else to step forward to provide the needed service during hours when the existing station was off the air. In the *Second Report and Order* the Commission dealt with both of these areas of concern and was able to take actions which were designed to improve the efficiency of educational FM channel usage.

5. One of the problems had arisen because the assignment of stations

³Paragraphs 3 through 8 of the *Notice of Proposed Rule Making* discuss the history of noncommercial FM broadcasting and rule making actions dealing with the establishment and operation of these stations on 20 reserved FM channels.

⁴These include the possible establishment of a Table of Assignments and the other matters discussed in the *Further Notice of Proposed Rule Making*, 43 FR 27682 (1978).

had proceeded on a demand system without any attempt (except more recently in the Mexican border area) to have a Table of Assignments of channels to particular localities or, in any part of the country, to require the use of at least minimum facilities. The consequence was an inefficient pattern of assignments. One of the largest problems centered on the effect 10-watt stations had in precluding the establishment or extension of operations to bring service where it was needed. On the other hand, the Commission recognized the service these stations provided. Thus, it did not want 10-watt operations off the air so long as another way could be found to deal with the problem.⁵ In coming to grips with this issue the Commission operated with two sets of concerns in mind. The first was the inefficiency point, but the other was a sense of fairness to the 10-watt stations—built and operated in good faith—and to their listeners. How, the Commission wanted to know, could recognition be given to both sets of concerns. The Commission's response was to devise a system which it expected to provide for the continued existence of 10-watt stations in virtually all cases but which attempted to minimize their negative impact on allocations by requiring them to change channel and by ending their protection against interference. For the 10-watt stations not wishing to change channel, time was provided so that they could avoid this process by increasing power to the Class A minimum of 100 watts. They were given about a year and a half in which to file for such an increase. Then, commencing with the group of renewal applications to be filed on February 1, 1980, for licenses expiring on June 1, 1980, special channel change procedures were to be followed.

6. The goal was for as many 10-watt stations as possible to move to open space on commercial channels,⁶ subject to a requirement that no interference be caused to any commercial FM station. If this could not be done, the 10-watt station would be required to

⁵At first, it appeared possible that no satisfactory alternative was available. Years ago we warned of the possible need to end 10-watt operations. Thus, in rule making Docket 14185 we observed that "In our view, . . . the time may well be at hand when proper use of the increasingly crowded educational FM band requires restrictions on the future authorization and continuance of 10-watt operations . . ." 31 FR 14755 at 14756 (1966). Although no action was taken on this issue in Docket 14185, the issue remained an important one. In fact, recent developments have given it a greater sense of urgency.

⁶At this point it is not yet clear how this process will function in the Canadian and Mexican border areas—see paragraph 29 of the *Second Report and Order* and § 73.512(a)(1) of the rules.

move to the newly created FM Channel 200 (87.9 MHz). If neither of these approaches could be followed, the 10-watt station would be required to move to the reserved educational channel where it would cause the least amount of preclusion to the establishment of new stations or power increases by existing stations. In the latter case, those already on that channel could remain there. Each station would go through this process as its renewal date approached, so that the changeover process would take three years.⁷ In the meantime, no new 10-watt stations would be established, as a "freeze" on such filings had been imposed by the *First Report and Order* in this proceeding. As will be discussed, several parties object to at least some of these requirements which were applied to 10-watt stations.

7. Just as with the channel use question, the issue of a minimum operating schedule involved balancing conflicting interests. On the one hand, the Commission was concerned that a number of stations operated only a few hours per week. At the same time, it recognized that there would be a severe impact on these stations if a too stringent requirement were invoked. In fact, such a requirement might force some stations off the air. To avoid such a result the Commission decided to enact a rather limited minimum operating schedule requirement of 36 hours per week (consisting of at least 5 hours per day on at least 6 days of the week).⁸ Necessarily, this requirement by itself could offer only partial response to the concern about limited hours of operation. This led the Commission to conclude that something else was needed to encourage greater use of the channel by the existing licensees. The Commission decided upon rules to foster time sharing which make it possible for another eligible entity to share the frequency on a time-sharing basis if the original licensee did not effectively use its licensed hours. Under the rule adopted, licensees desiring to avoid the possibility of time sharing had to operate 12 hours per day every day of the year. The minimum schedule requirement is scheduled to go into effect on January 1, 1979, and mandatory time sharing becomes possible if the 12 hour per day requirement is not met by January 1, 1980.⁹

8. Although some of the actions taken by the Commission form the

subject matter of the petitions for reconsideration, others have provoked no response. Thus, while the process of channel changes has received some criticism, the idea that commercial channels would be used has not. Nor did the creation of Channel 200 or its use for 10-watt stations give rise to objection. Similarly, the engineering standards for Channel 200 received no mention. Finally, the idea of a minimum schedule of some variety was not disputed. Nor was using a share-time concept. Points of contention about these latter points, however, did remain.

9. In effect, three basic objections were raised to the actions taken. The first was procedural in nature and was directed to the adequacy of the Commission's notice and invitation to comment. Substantively, there were two basic objections: first, that our actions to deal with the 10-watt situation imposed an unfair or excessive burden on these stations and, second, that aspects of the minimum operating schedule and share-time requirements posed similar problems of burdensomeness. These arguments will be discussed in the order mentioned. Then, we will discuss other points in the *Second Report and Order* which require clarification even though no reconsideration issue, as such, has been raised. We think that the clarification we offer will prove helpful to parties affected by our decision.

10. In filing its petition for reconsideration, Westchester explains that it only recently obtained a construction permit and did not begin broadcasting until early 1978. Noting that it was not represented by legal counsel when comments were being sought in this proceeding, Westchester indicated that it had not been able to participate by filing comments. It asserts that it should be given that opportunity now. In Westchester's view, the Commission's procedural approach to the case was inadequate. It asserts that the Commission should have affirmatively sought out the views of affected parties, especially in view of what it sees as the consequence of the Commission's action, a possible death knell for many Class D stations. According to Westchester, the small stations most affected by the rule changes were unable to make their views effectively known, with the result that the decision making process was undermined.

11. The NRCB opposition disputes Westchester in these regards. NRCB states that in the one year period during which comments were being received by the Commission, there was extensive discussion in the educational radio community, with IBS playing a key role in the proceeding on behalf of its low-power member stations. NRCB

insists that contrary to Westchester's assertions, there have been extensive filings on behalf of 10-watt stations. More, in fact, it says, than on behalf of any other definable group. NRCB also disputes Westchester's contention that the Commission did not consider the alternatives Westchester now urges upon us. NRCB insists that the Commission did consider just such proposals as these or their equivalent.

12. Westchester's reply again argued that the Commission did not consider all of the alternative proposals mentioned in the petition for reconsideration. To the extent such proposals were considered, it contended that the Commission did not give adequate reasons for rejecting the alternatives it did not follow or for deciding the case as it did.¹⁰

13. We cannot agree with Westchester that the Commission did not take the necessary procedural steps to adopt these rules. First of all, on the question of adequacy of notice, we followed all legally required procedures through publication in the *FEDERAL REGISTER*. However, we did not limit ourselves to this form of notification. The *Notice of Proposed Rule Making* and/or the News Release about it were given wide dissemination to various interested individuals and groups. That is not to say that we singled out Westchester for separate attention, but the Commission was under no obligation to do so. Westchester's failure to have legal counsel at the time and its inability to participate at the time are matters for which it must assume responsibility. They do not affect the adequacy of the Commission's notice at all. We would have welcomed Westchester's participation, but it cannot avoid the consequence of its own failure to file. Even without this filing, the record was a full and complete one. As NRCB observed, many other 10-watt stations did respond with much the same viewpoint as Westchester's. Clearly the record included—and the Commission fully considered—the views of 10-watt stations. Also, in considering the views of 10-watt stations, it is not necessary for us to have listed every single alternative that each party offered or might have offered. The record clearly shows that we did consider their arguments and thoughtfully balanced the competing interests involved in reaching our deci-

¹⁰ Westchester also responded to a remark in the NRCB filing which referred to the holding of discussions and debates on this subject. Westchester does not think such discussions can be relied on if they were between the parties. It expressed the hope that such discussions would not have been between the Commission and parties to the proceeding, as that would have involved what it sees as improper *ex parte* contacts. We do not understand NRCB to have intended any such reference.

⁷ Discussion of the standards applied to the channel change process and other technical aspects of these requirements is contained in paragraphs 23-32 of the *Second Report and Order*.

⁸ The minimum operating schedule, on the other hand, did not apply to stations licensed to educational institutions when the school in question was in recess or vacation.

⁹ Earlier, voluntary, time sharing was also encouraged.

sion. Even a casual reading of the decision indicates that we gave great weight to the concerns of the 10-watt stations, a fact which will become clear in the discussion below.

14. Westchester, IBS and ACE all express concern about the impact our action could have on 10-watt stations. Westchester asserts that the rules may be the death knell for Class D stations.¹¹ Westchester suggests five alternatives that it thinks could have been used to better effect than the procedures chosen by the Commission. Under the first, stations would be classified according to the number of people living inside their 1 mV/m coverage area. It suggests that those in what it calls the Class D category (under 1,000 persons) and the Class C category (1,000-10,000 persons) could be treated as secondary stations. Westchester asserts that this approach is preferable, arguing that it is more sensible to use a standard based on people (rather than area) served. Alternative 2 would premise the classification on the number of hours operated, with those in Class D (36 hours per week) and Class C (36 to 60 hours per week) treated as secondary. Alternative 3 would use a combination of alternatives one and two. Alternative 4 would use the factor of public service or public affairs programming as well as the previously mentioned factors in determining the classification. Finally, under Alternative 5, Westchester would follow a variation on the Commission's approach (that is one based on the station's facilities) but would employ the station's effective radiated power and antenna height to determine the stations affected.¹²

15. We cannot agree that Westchester's classification systems, whatever their descriptive value, would offer any benefits in terms of responding to the Commission's concern about effi-

cient frequency usage. Contrary to Westchester's view expressed in Alternative 1, there is no necessary correlation between the number of persons served and the efficiency of the operation in question. Westchester ignores the fact that often high power stations represent the only way to bring educational FM service to a large sparsely settled area. Westchester's approach would put such operations at a severe disadvantage compared to a low power operation in a more densely populated area. While this latter calculation based on numbers served at first glance seems efficient, it only masks the inate inefficiency of the 10-watt station's coverage when compared to its potential for causing interference. The result of labeling the inefficient as efficient is to preclude taking steps to improve matters. Consequently, Alternative 1 must be rejected.

16. We agree that consideration of the hours of operation is important, but we do not agree with Alternative 2 which would use this to determine which station operates on which channel. The engineering inefficiency remains even if the station operates many hours. We believe our approach could bring fuller use of available hours without confusing two separate issues. Because of our rejection of Alternatives 1 and 2, Alternative 3 which is a combination of the other two also must be rejected. Likewise, we are unpersuaded by Westchester's suggestion (Alternative 4) that we base the classification system on the amount of public service programming. Aside from the obvious problems involved in entering the sensitive programming area at all, the method would not function effectively. Necessarily, the station's classification would change as did its program percentages, creating uncertainty. The only way to avoid this—namely to require that the percentages be fixed—raises its own problems. The last suggestion (Alternative 5), to use effective radiated power rather than transmitter power output for the determination is really little different from what the Commission did use. Under the Commission's approach, the rules are applied to Class D stations (that is, those with a transmitter power output of 10 watts). If the station already has an ERP that far exceeds 10 watts, then the consequence is that it would face a lesser burden in increasing power to avoid the necessity to change channel. Although the particulars of our requirements are not the same as Westchester's, we do classify stations based on effective radiated power and then add a final category of Class D (secondary) stations.

17. One final observation needs to be made about Westchester's pleading.

Contrary to its assertion on reconsideration, there is no obligation on the part of the Commission to carry the burden of proof to convince that party of the basis for not adopting its suggestions. The burden is on Westchester here to demonstrate error or at least to persuade the Commission of the superiority of its method. Clearly, it has not met its burden.

18. The principal thrust of the IBS petition is that the Commission has not given adequate recognition to the importance of Class D stations.¹³ According to IBS, without an independent study of problem service by various stations, spectrum efficiency alone is not a sufficient basis for the Commission's actions. IBS contends that local service is the essence of broadcasting, and it asserts that urban areas are best served by a mix of high and low power educational FM stations. Even in rural areas where wider coverage might be thought appropriate, IBS fears that local concerns could be subordinated to national or regional ones. In addition, IBS is concerned that following the requirements of the newly adopted Commission rules could be burdensome to 10-watt stations, many of which it says are operated with volunteer staffs. Because of its opinions of the possible impact of the rules, IBS suggests that the Commission change its mind and follow an alternative approach.

19. In the engineering area IBS would require 10-watt stations to move *only* when they are blocking the establishment of a *new* higher powered station and only *after* the requisite construction permit for the station has been granted. Also, under IBS's system, the permittee for the higher power station would have to pay the costs of the 10-watt station's channel change. IBS feels that the higher power stations are better able to absorb the costs, if the change needs to be made, and that changes in frequency should not be required absent a showing of need. Rather than delay establishment of such higher power stations, IBS believes that the result of its suggestion would be a reduction in the flow of channel change proposals and that this might improve the speed in which applications for higher power stations are processed.

20. Although it opposes most aspects of reconsideration, NRCB does agree with making one change. NRCB would allow 10-watt stations to remain on their present channels if they can show that one or more channels are available for full power operation in their cities of license. NRCB believes that in some areas channel space is available and does not think it neces-

¹¹This statement appears to be connected to its incorrect reading of the provisions of § 73.512. That rule does not require a 10-watt station unable to move to the commercial part of the FM band or to Channel 200 to leave the air if another station wishes to "push them aside." Instead, that rule simply states that Class D stations remaining on the educational channels (that is, those which have not moved to a commercial channel or Channel 200) are not protected against interference. The reference in paragraph (d) to termination of operation if interference results has relevance only to Channel 200 or the commercial FM channels. In the latter case, there is a possibility that changes in FM stations or assignments could produce such a consequence, but as we noted in paragraph 27, we hope this would be rare indeed. It is even less likely to affect those moving to Channel 200. To clarify matters we are making an editorial change in the rule.

¹²The Commission's method was to apply the channel change requirement to Class D stations, that is, those which operate with 10-watts transmitter power output.

¹³Many of the same points are echoed in the ACE petition as well as in the informal filings.

sary to require changes in channel in such cases.

21. The issue of when to call for a change in frequency was one of the most difficult we had to resolve. Although we were concerned about the impact on 10-watt stations of being asked to move in advance of the expression of need, we concluded that any other system would not be feasible. We have examined the matter and again been forced to conclude that the alternatives are not satisfactory. For example, it would introduce great delays in waiting for the change process to take place if it could not begin until the specific request were filed. Our experience with changes in channels of existing commercial FM stations suggest that years can go by before the change takes place. Perhaps even worse, doing as we have been urged would not permit any long-range or overall planning of spectrum use. It would be a hit-or-miss, individual case, approach. Our experience has shown that this cannot be relied on to produce the best results. There is another problem with IBS' proposal. It makes no provision for applications to increase the facilities of existing stations. Such extensions of coverage to unserved areas is a vital matter. While the NRCB methodology involves less of a problem in these regards, it offers less relief to 10-watt stations and in fact imposes the biggest part of the anticipated burden of the channel change process: The need to conduct the professional engineering study.

22. The reimbursement concept appears attractive at first blush, but there would be no way to arrange reimbursement in advance of proposed use nor any way to apportion the relative share of benefits derived to the present and future beneficiaries. Also, since the time of any such reimbursement could be delayed until the party stepped forward, it would be of little benefit to the station at the time it made the change. Finally, there is one point IBS ignores. If we wait, as it suggests, there might well be no channel available to which to move. This would present the Commission with a direct choice between the 10-watt operation's continuation and the more powerful station's establishment. The disadvantage to 10-watt stations of being caught in such a predicament is obvious. In fact, then, our method may provide the 10-watt stations with greater protection and greater confidence in being able to continue operating.

23. The Commission has no desire to terminate the operation of 10-watt stations, and as explained above in footnote 11, Section 73.512 needs to be clarified to make it clear that the Commission has taken every possible step to protect the ability of these stations to continue their operation. Even

so, it must be recognized that there will be costs and inconveniences for stations having to change channel. We hope that they will be modest. The costs of increasing to 100 watts or to change channel are relatively low to start. One way of reducing costs further would be for all affected stations in an area to join in a study of how best to work out the necessary changes. In this way, they could reduce costs by sharing the expenses for the engineering studies involved. Although we have tried to be mindful of the costs, we cannot ignore the importance of substantial gains which can be made possible through use of this process. We have already received a filing which verifies our belief that 10-watt stations will fit nicely in open spaces in the commercial FM band. With all of these points in mind it becomes clear that the private interest of these licensees in remaining where they are cannot be permitted to obscure the public interest benefits in following the approach outlined in the new rules, and they will be affirmed, with the clarification noted above.

24. IBS, ACE and others have taken issue with our operating schedule requirement. ACE supports our providing an exemption for vacations and recess periods as school stations, but it asserts that this alone is inadequate. In its view, recognition also needs to be given to the fact that a majority of full-time students may not be in attendance even though the school is itself technically in session. ACE would count summer sessions and other examples as vacation periods under the rule so that the station would not have to be on the air then at all. It also urges us to permit an averaging of the hours operated over the year for the purpose of meeting the 12 hour per day level necessary to avoid time sharing.¹⁴ IBS expressed similar views on both points in its pleading. In addition, in the informal filings and otherwise, the Commission has repeatedly heard from licensees connected with primary and secondary education that the six-day-a-week requirement would have disastrous effects. They point out that not only are schools not in session on Saturday or Sunday but that the buildings themselves are closed. They insist that opening a building solely to operate the station would introduce great costs in addition to those necessary for operation of the station itself. Some licensees even question whether they would even be able to gain entry to these (perhaps even unheated) buildings. Thus, we are asked to interpret the weekend as vacation period under

¹⁴A typographical error, corrected through issuance of an *Errata* on October 12, 1978, pointed out that the Commission did not intend to permit such averaging.

the present language of the rule or to take other steps to give recognition to this problem. In addition, several parties have informally opposed the 36-hour minimum schedule itself and asked us to remove this requirement or at least reduce it from the present 36 hours.

25. Our choice of the 36-hour minimum was based on our wish to use a low initial requirement combined with an incentive for additional hours through use of the time-sharing mechanism. The vacation exemption, too, was designed to avoid a severe initial impact. We did not think it was realistic to expect them to operate when the school is not in session. Although there are legitimate public concerns when a station is off the air for the entire weekend, no matter how good the cause, part of that concern is mollified by time sharing. Even more to the point, if we could accept the station's being off the air for the much longer period of a summer vacation, then there is no reason to refuse to accept the weekend as well. On reflection we agree that the same reasoning that supports the vacation exemption supports allowing 5-day a week operation for these stations instead of the present 6. Therefore, we will change the rule to permit them to reach the 36-hour level through operation on 5 days of the week.

26. We are not persuaded, however, by the suggestion that we exempt summer sessions and other times when the school is in operation but a majority of full-time students may not be in attendance. Unlike recess periods, the staff is on hand in summer sessions, the buildings are open, and at least some (if not all) of the students are on hand. We cannot agree that an exemption should automatically apply to these cases and we will reject that part of the petitions.

27. Finally, we turn to the few informal objections to the time sharing requirement which we have received. Time sharing comes into play if the station does not operate 12 hours per day year-round. This requirement was adopted based on our view that recognition must be given to the extreme scarcity of spectrum space and the need to use it in an effective manner. As pointed out here and explained at length in paragraphs 33-50 of the *Second Report and Order*, we thought it best not to do this through imposing a stringent minimum schedule obligation. Instead, we decided to give stations time (until 1980) to develop a full schedule and then, and only then, to call for time sharing if the station did not reach an essentially full-time use of the frequency. Nothing more than sharing is involved. The original licensee does not lose its license. The only effect is to require it to share its

frequency so that it can be given effective use. To exempt vacation periods from this requirement would defeat the goal we are striving to achieve as the use of a vacation exemption is not consistent with the concept of full-time use. Stations cannot have it both ways. If they want the frequency to be theirs alone, they must be ready to use it to the reasonable level we specified, a level which if anything is a lenient one. If they do not, they should not be in a position to preclude another from offering additional hours of service. Therefore, these requests will be denied.

28. The NRCB opposition drew our attention to one point which needs clarification. At one place in the *Second Report and Order* we indicated that 10-watt stations had until January 1, 1980, to file the necessary application to increase facilities to the 100-watt level and thus avoid the channel change process. Elsewhere, we indicated that renewals would be granted for a license with secondary status. To NRCB there appears to be a conflict between the two. Our intention was to grant all renewals on a secondary basis and to provide an opportunity to increase facilities. It was not our intention to guarantee the ability of every 10-watt station to be able to increase, and a number already are barred from doing so by interference considerations. Rather, the period for filing a power increase had as its purpose providing a method of avoiding the need to change channel. Its purpose was not to protect 10-watt stations against receiving interference. While we did agree to exempt stations from the need to change channels if they reached the 100 watt level, that decision was not based on the efficiency of

a 100-watt station. Rather, it represented the Commission's willingness to permit this lesser inefficiency under the circumstances. As a result, we cannot follow NRCB's urgings and protect the ability to increase to the 100-watt level when doing so may foreclose another much more efficient operation.

29. *Accordingly, it is ordered*, That effective February 21, 1979, Part 73, of the Commission's rules and regulations is amended as set forth below. Authority for this action is found in Sections 4(i), and 303(r) of the Communications Act of 1934, as amended.

30. *It is further ordered*, That the petitions for reconsideration are granted to the extent indicated and in all other respects are denied.

(Secs. 4, 303, 48 stat., as amended, 1066, 1082; (47 U.S.C. 154, 303).)

FEDERAL COMMUNICATIONS
COMMISSION,

WILLIAM J. TRICARICO,
Secretary.

1. Section 73.512(d) is amended to read as follows:

§ 73.512 Special procedures applicable to
Class D noncommercial educational
stations.

• • • • •
(d) Class D noncommercial educational (secondary) stations (see § 73.506(a)(2)) will be permitted to continue to operate only so long as no interference (as defined in § 73.509) is caused to any TV or commercial FM broadcast station. In the event that

the Class D (secondary) station would cause interference to a TV or commercial FM broadcast station after that Class D (secondary) station is authorized, the Class D (secondary) station must cease operation when program tests for the TV or commercial FM broadcast station are authorized. The Class D (secondary) station may apply for a construction permit (see § 1.533(a)(6)) to change to another frequency or antenna site where it would not cause interference (as defined in § 73.509). If the Class D (secondary) station must cease operation before the construction permit is granted, an application for temporary authorization (pursuant to § 1.542 and 47 U.S.C. 309(f)) to operate with the proposed facilities may be submitted; where appropriate, such temporary authorization can be granted.

2. Section 73.561(a) is amended to read as follows:

§ 73.561 Operating schedule; time sharing.

(a) All noncommercial educational FM stations will be licensed for unlimited time operation except those stations operating under a time sharing arrangement. Beginning January 1, 1979, all noncommercial educational FM stations are required to operate at least 36 hours per week, consisting of at least 5 hours of operation per day on at least 6 days of the week; however, stations licensed to educational institutions are not required to operate on Saturday or Sunday or to observe the minimum operating requirements during those days designated on the official school calendar as vacation or recess periods.

• • • • •
[FR Doc. 79-1471 Filed 1-15-79; 8:45 am]