FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 0

[FCC 79-373]

Delegation Authority for Commercial Time Standards

AGENCY: Federal Communications Commission.

ACTION: Order.

SUMMARY: This action modifies the limitations in the delegation standard, Section 0.281(a)(7)(i), as it relates to the amount of political advertising matter proposed in application for radio licenses. Pursuant to the delegation rule, the Broadcast Bureau staff must refer to the Commission all applications in which a specified limit on commercial time proposals is exceeded. The rule as amended here permits additional time for political advertising in excess of the specified limit on commercial matter.

EFFECTIVE DATE: June 25, 1979.

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

FOR FURTHER INFORMATION CONTACT: Mark N. Lipp, Broadcast Bureau, (202-632-7792).

SUPPLEMENTARY INFORMATION:

In the Matter of amendment of Part 0 of the Commission's rules concerning delegation authority for commercial time standards.

Adopted: June 7, 1979.

Released: June 13, 1979.

By the Commission: Commissioner Fogarty absent.

1. The Commission adopted a policy statement on April 26, 1976 (FCC-76-360), regarding the amount of time which can be devoted to political advertising in excess of the limits on commercial time for radio under the delegation standard in Section 0.281(a)(7)(i). We are taking this opportunity to codify that policy by amendment of our rules.

2. Section 0.281(a)(7)(i) provides that the staff has delegated authority to act on proposals for commercial time which do not exceed 18 minutes per hour, with exceptions up to 20 minutes per hour during no more than 10% of the station's total weekly hours of operation. Pursuant to the previously issued policy statement, the permissible limits for the proposal and for the exception have been extended during periods of high demand for political advertising by four additional minutes.[1] Also, instead of using the period of 10% of the station's total weekly hours of operation we now use the standard of 10% of the station's total operating hours in the applicable period when lowest-unit-charges[2] are mandated for political advertising. Thus in proposals pertaining to commercial matter, the new limits for delegated action by the staff during periods of high demand for political advertising are extended to permit up to an additional four minutes not to exceed 10% of the station's total operating hours in the lowest-unit-charge periods. In each case the additional time which must be devoted to purely political advertising applies both to non-seasonal (Section 0.281(a)(7)(i)) and seasonal (Section 0.281(a)(7)(ii)) markets. This change has not yet been incorporated into the delegation standard, Section 0.281(a)(7). The attached Appendix amends this section for the purpose of implementing the existing policy. The commencement of a separate rule making is not necessary to accomplish the amendment since the rule is procedural in nature. See Section 553(a)(3)(A) of the Administrative Procedure Act [5 U.S.C. 553(a)(3)(A)].

3. It is ordered, That effective June 25, 1979, Section 0.287(a)(7) of the Commission's Rules and Regulations is amended in the manner set forth in the Appendix.

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

Federal Communications Commission.

William J. Tricarico,

Secretary.

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. In Section 0.281, subparagraph (a)(7)(i) is amended, present subparagraph (a)(7)(iii) is redesignated (a)(7)(iv), and a new subparagraph (a)(7)(iii) is added to read as follows:

§ 0.281 Authority delegated.

* * * * *

(a) *Applications*

* * * * *

(7) *Programming:* commercial matter.

(i) Commercial AM and FM proposals in non-seasonal markets exceeding 18 minutes of commercial matter per hour, or providing for exceptions permitting in excess of 20 minutes of commercial matter per hour during 10 percent or more of the station's total weekly hours of operation.

(ii) * * *

(iii) During periods of high demand for political advertising proposals exceeding either: (a) an additional 4 minutes per hour of purely political advertising or (b) exceeding 10 percent of the station's total hours of operation in the applicable lowest-unit-charge period.

(iv) Commercial TV proposals exceeding 16 minutes of commercial matter per hour, or, during periods of high demand for political advertising, providing for exceptions permitting in excess of 20 minutes of commercial matter per hour during 10 percent or more of the station's total weekly hours of operation.

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[FR Doc. 79-18952 Filed 6-15-79; 8:45 am]

BILLING CODE 6712-01-M

[1] Previously the permissible excess time during periods of high political demand was 22 minutes where the excess over 20 minutes is used for purely political advertising.

[2] The lowest-unit-charge periods are specified as 45 days preceding the date of a primary or primary runoff election and 60 days preceding the date of a general or special election.

47 CFR Part 1

[Gen. Docket No. 79-137; FCC 79-331]

Processing of Contested Broadcast Applications; Revised Procedures

AGENCY: Federal Communications Commission.

ACTION: Report and Order—Gen. Docket No. 79-137.

SUMMARY: The FCC adopted a Report and Order revising Part 1 of its rules and procedures to expedite the processing of contested broadcast applications, prior to and after designation for hearing. The amended rules, in substance, simplify and shorten the cut-off lists; eliminate the sending of "deficiency letters" as part of the processing procedure, except where the staff needs further information; restrict the predesignation voluntary amendments of applications; eliminate the current provision for predesignation issue pleadings; and require pleadings affecting issues to be filed with the Administrative Law Judge after designation. The Commission also modified its procedures for handling applicant showings dealing with community ascertainment surveys and financial qualifications. In connection with evaluating ascertainment surveys of community needs, the Commission modified the standards to be applied to all existing and future contested and uncontested applications by returning to the earlier policy requirement of "substantial compliance." A separate public notice containing the Commission's modified policy in this regard is being issued in conjunction with the Report and Order. The Report contains a section on implementation of the new procedures, which is intended to accomplish an orderly and equitable transition to the new procedures for the

vast majority of pending and new applicants.

The actions resulted from recommendations in a report entitled "Evaluation of Operation of New Predesignation Procedures in Processing of Broadcast Applications," and consideration of written comments on the report and the participation by the Commission, its staff and the public in a public symposium on the report.

Reconsideration petitions may be filed on or before July 18, 1979.

EFFECTIVE DATE: June 18, 1979.

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

FOR FURTHER INFORMATION CONTACT: Jerold L. Jacobs at (202) 632-6485.

Report and Order

Adopted: June 1, 1979.
Released: June 8, 1979.

By the Commission: Commissioner Brown concurring and issuing a Statement; Commissioner Jones absent.

In the matter of: revised procedures for the Processing of Contested Broadcast Applications; Amendments of Part 1 of the Commission's rules, Gen. Docket No. 79-137.

I. Introduction and Background

1. In its Report and Order on Adjudicatory Reregulation (Docket No. 20626), adopted March 17, 1976 (58 FCC 2d 865) and published in the **Federal Register** on April 8, 1976 (41 FR 14865), the Commission amended its procedures governing processing of contested broadcast applications in order to "reduce unwarranted 'delay' in the performance of its (adjudicatory) functions." In the "Conclusion" to the Report and Order, the Commission stated that it would " * * * continue to * * * (monitor) our processes to evaluate the results of these changes as well as to discover other sources of delay which can be eliminated." (*Report and Order*, supra, at para. 43; 58 FCC 2d 865, 878). In an effort to learn how the revised procedures were actually functioning in practice, the Commission, in 1978, contracted for a study and evaluation of the operation of the new procedures, with particular regard to their impact on the handling of mutually exclusive and other contested broadcast applications.

2. After the Contractor, Max D. Paglin,[1] submitted his Report entitled *"Evaluation of Operation of New Predesignation Procedures in Processing of Broadcast Applications,"* the Commission scheduled consideration of the Report and its recommendations for the Agenda of its Open Meeting of March 15, 1979. Upon such consideration and review, the Commission concluded, tentatively, that adoption of the recommended revisions in its pre-designation and post-designation procedures would eliminate the delay problems which the Report found had been experienced and would improve the efficiency and effectiveness of its broadcast application processing system.

3. In light of the provisions of the Administrative Procedure Act exempting rules of procedure and practice from the notice and comment requirements of its Section 553 (see 5 U.S.C. 553(b)), it appeared that a rulemaking proceeding was not required before revised regulations of the nature recommended in the Report were adopted. Nevertheless, the Commission desired first to have the comments, on an informal but expedited basis, of interested organizations, government agencies and persons, including representatives of the Federal Communications Bar Association, the American Bar Association, the Association of Federal Communications Consulting Engineers and other practitioners, citizens organizations, the National Telecommunications and Information Administration (NTIA) (U.S. Department of Commerce), the Administrative Conference of the United States and interested Congressional Committee staffs.

4. Accordingly, the Commission issued a Public Notice, dated March 15, 1979 (FCC 79-159) [1a] releasing for informal public comment the Contractor's Report, together with an Executive Summary. Copies of the Report were sent to the above-mentioned groups for their information and comment, and it was stated in the Public Notice that additional copies were available for inspection and distribution in the Commission's Office of Public Affairs. The Notice requested that comments be submitted on or before April 6, 1979, in view of the existing situation with regard to application backlogs and delays, and the obvious need to take remedial action on an expedited basis. The Public Notice also stated the Commission's intention to hold a public symposium on April 17, 1979, after receipt of the written comments, to discuss the recommendations of the Report and to obtain, through a panel format, an exchange of views among the Commissioners, the staff, and outside groups on the proposed changes in the pre-designation and post-designation procedures.

5. Thereafter, by Public Notice dated March 22, 1979, the Commission announced that a public briefing session would be held on March 29 at the Commission's headquarters, in conjunction with the Federal Communications Bar Association's Continuing Legal Education Program. The briefing session was held as scheduled, at which the Contractor and members of the Commission's staff participated in answering questions and comments by the audience regarding the procedural revisions proposed in the Report, in an effort to assist those preparing to file written comments or intending to participate in the forthcoming symposium.

6. The Commission received written comments on the Report and its recommendations from thirteen organizations and interested practitioners and from two Government Agencies by the April 6th deadline.[2] Copies of the comments have been kept on file in the office of the Secretary for public inspection and reference.

7. On April 17, 1979, the Commission held a Public Symposium on the Report, as previously announced. The Commissioners were in attendance and participated in the questioning, and the presentations and colloquy were conducted by the Contractor and a panel composed of representatives of the Commission's Broadcast Bureau, the Office of Administrative Law Judges, the Federal Communications Bar Association and the American Bar Association. Following these presentations, other interested members of the Bar and the public were given an opportunity to comment on the Report's recommendations and to engage in an exchange of views with the panelists and the Commissioners. The proceedings were recorded and a

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[1] The Contractor, Mr. Paglin, has had extensive experience with the Federal Communications Commission, serving some 28 years in positions of varied responsibilities, including that of trial attorney in Common Carrier and Broadcast, legal assistant to a Commissioner, Assistant General Counsel for Litigation, General Counsel, Executive Director and Special Assistant for Administrative Procedure.

[1a] Copies of the Report and the Executive Summary will be available for inspection in the Office of Public Affairs, Room 202, at the Commission's headquarters.

[2] Comments have been received from: Federal Communications Bar Association; Association of Federal Communications Consulting Engineers; members of the Communications Committee, Administrative Law Section, American Bar Association (though not the organization's official position); National Association of Broadcasters; Association of Independent Television Stations, Inc.; National Telecommunications and Information Administration (NTIA); Administrative Conference of the U.S.; McKenna, Wilkinson & Kittner, Esqs.; Cohen & Berfield, Esqs.; Stambler & Shrinsky, Esqs. (Bruce Eisen, Esq.); James E. Greeley, Esq.; Media Access Project; Business Communications, Inc.; Office of Communication of the United Church of Christ (Earle K. Morre, Esq.).

transcript of the Symposium has been made a part of the public documentation in this matter. The written comments and the dialogue during the Symposium have afforded the Commission a valuable airing of views on the need for urgent revisions in the procedures by which contested broadcast applications are processed, in order to assure that the public's business is being handled efficiently and with dispatch. Some of the modifications suggested by the written and oral comments will be quite useful in accomplishing the objectives sought, and some will be adopted as indicated in more detail below.

II. Findings of Contractor's Report on Pre-Designation Procedures in Processing Contested Broadcast Applications

8. Before proceeding to a discussion of the Report's findings and recommendations, it should be noted that the Report was given wide dissemination to those organizations and persons whose activities and interests would be affected by its proposals, and whose expertise would be most beneficial to the Commission in commenting on the proposed revised procedures. Thus, it would seem unnecessary to reiterate in detail the Report's findings and conclusions as to what happened under the current pre-designation procedures. In the interest of brevity, therefore, the Contractor's Report, together with its Executive Summary, will be incorporated by reference and made a part of the documentation associated with this Docket.

9. As has already been indicated, the Commission has reviewed the Report and its recommendations and has accepted it as a valid evaluation of the current situation regarding the processing of contested broadcast applications. A brief summary of the Report's findings and conclusions would, however, be useful at this point to serve as background for the more detailed discussion of, and determination on the specific recommendations for procedural revisions dealt with below.

10. One of the principal aspects of the Commission's 1976 adjudicatory re-regulation effort was the amendment of its rules pertaining to the processing of mutually exclusive broadcast applications. It established a new pre-designation procedure whereby competing applicants would perfect their applications within a specified period after the cut-off date for the filing of mutually exclusive applications, and would participate in the framing of issues against each other before the applications were designated for hearing. The declared objective of these new procedures was to "promote the expeditious and early preparation of cases * * * and to "* * * encourage (the) earliest possible specification of issues and disclosure of (competitive) positions." Although it was realized that the new procedures would impose "a greater burden on the processing line staff with attendant manpower implications," the Commission felt that:

> * * * greater emphasis on pre-designation procedures will result in substantial time savings during the hearing process. Moreover, early preparation of their own cases and analysis of their opponent's case should result in greatly increased numbers of buy-outs and mergers. This early analysis of the strengths and weaknesses of cases can be expected to encourage early settlement with accompanying savings in time and money expended during a hearing. (*Notice of Proposed Rulemaking, Docket 20626*, FCC 75-1250, 40 F.R. 54436, 54439, November 14, 1975).

The procedures were also designed to function as a part of other modifications of the rules providing for rigid time limits for responses to "deficiency letters" sent out in the initial processing of the applications, proposals for narrow framing of issues in the designation order, and the shift of jurisdiction over interlocutory petitions to enlarge, modify or delete hearing issues from the Review Board to the Administrative Law Judges.

11. The Contractor's study involved an extensive analysis of the new pre-designation procedures as they have actually functioned in operation, and was based on close examination of Commission records and data, and comprehensive interviews and conferences with Commission staff and practicing attorneys who have had actual experience with the pre-designation procedures. In essence, the Report concluded that the current procedures for processing contested broadcast applications have failed to accomplish their intended purpose of eliminating delay and simplifying and expediting the pre-designation process; and that, in fact, the new procedures have resulted in greater delays and may, if allowed to continue in their present form, result in a serious breakdown of the system.

12. Accordingly, the Report recommended that the present procedures be replaced by a streamlined, expedited system of processing contested broadcast applications which eliminates or replaces those elements in the process which have resulted in extensive delays amounting to two years or more before such applications are even reached for designation for hearing. The recommendation would, in substance, simplify and shorten cut-off lists; eliminate the sending of "deficiency letters" as part of the processing procedure, except where the staff needs further information; restrict the pre-designation voluntary amendments of applications; eliminate the current provision for pre-designation issue pleadings; require pleadings affecting issues to be filed with the Administrative Law Judge after designation; and encourage the issuance of brief Memoranda Opinions and Orders of designation for hearing.

13. The Report also suggested an innovative approach for the handling of community ascertainment surveys and financial qualifications, as a further step in expediting the process. The Contractor recommended consideration of a procedure whereby, after the applicant makes a satisfactory threshold showing in its application of compliance with the Commission's requirements and policies for conducting a proper community ascertainment survey and in demonstrating financial capability to build and operate the proposed station—which showing passes the muster of Commission review—these two factors would no longer be subject to the adversary pleading or hearing process, absent a strong and persuasive showing by other parties of misrepresentation, gross omission or later developing circumstances.

14. These recommendations will be considered in the light of the written comments and the views expressed during the Symposium.

III. Discussion of Report's Recommendations for Procedural Revisions; Consideration of Comments in Written Filings and at the Public Symposium

15. The comments which were filed were unanimous in commending the Commission for undertaking this effort to improve its processing of broadcast applications, and urged the Commission to adopt new procedures as soon as possible, taking into consideration the views expressed in some of the comments as to suggested modifications.

16. The specific recommendations in the Report will now be addressed substantially in the order in which they appeared in the document.

A. Revision of Processing Line Procedures

17. *Revision of Cut-off List Procedures*—The Report recommended that the existing cut-off list procedures and notices be repealed, and that there be substituted a simplified Public Notice system of publication of tenders, and, later, of acceptances for filing of applications. The Notice of Acceptance for Filing would contain an announcement that applications desiring to be considered as in conflict with those on the list, or petitions to deny, would have to be filed within a date certain and stated, i.e., that date being set on the basis of requiring filing within thirty days after publication in the **Federal Register**, plus "lag time" for transmittal to the **Federal Register** and publication.

18. The Federal Communications Bar Association (FCBA) approved of the proposal to revise the current cut-off procedures; however, they suggested that a specific cut-off date be specified in the Commission's Public Notice, i.e., 45 days from publication of the Notice of acceptance for filing of the lead application to govern the cut-off date for filing mutually exclusive applications and petitions to deny. They also contended that the Commission should delete the practice of publishing such Notices of Acceptance for Filing in the **Federal Register**, since it was not required by statute and only added a delaying factor. The Association of Independent Television Stations (AITV) also concurred in the proposal, but contended that the proposed time frame for preparation and filing of competing applications was too short, and that the Commission should provide at least 90 days from public notice of the *tender* of the first application for the filing of competing applications.

19. The Commission believes that the shortened cut-off list procedure recommended in the Report will serve to expedite the application processing system. It also agrees that specifying a date certain in the Commission's Public Notice for the filing of mutually exclusive applications and petitions to deny (which, in fact, was contemplated in the Report's recommendation) will be useful in alerting the interested segments of the public, and it will therefore incorporate this feature in the revised regulations. In order to make the modified process more effective and expeditious, the Commission will continue the present practice of periodic publication of notices regarding the tender of new applications and the acceptance of applications for filing, but will publish such lists on a more frequent basis.

20. During the Symposium, the additional suggestion was made by members of the Bar that the Commission consider dropping its current practice, as provided for in §§ 1.571–1.573 of the rules, of additionally publishing in the **Federal Register** the cut-off lists for AM, FM and TV applications. It was contended that the wide distribution of Commission public notices is sufficient to alert potentially interested persons and organizations, without the added delay of publication in the **Federal Register**, since the latter was not required by statute. It is true that our Public Notices are made available at Commission headquarters for distribution to the broadcast industry, the Bar, consulting engineers and the Washington offices of some citizens groups. In addition, our rules require the publication in local newspapers for specified repeated periods of announcements as to the filing of applications for new, modified or renewed broadcast facilities; and, where existing stations are the applicants, for broadcast announcements regarding the applications. These latter rules are obviously designed for the benefit and information of the local communities. The recommendations in the Report regarding expedited cut-off lists did not contemplate abandoning publication in the **Federal Register**, and we have no present information of the extent to which the **Federal Register**, is relied upon by the general public for information on the filing of broadcast applications. Although our Consumer Assistance Office maintains an extensive direct mailing list to citizens groups througout the Nation on Commission activities and action, broadcast application filings are not part of such releases. Accordingly, and in the present circumstances, we will continue our current practice and will publish in the **Federal Register** the proposed new Public Notices regarding acceptance of applications, with the proposed announcement of a specific cut-off date for filing mutually exclusive applications and petitions to deny. We will leave open for future inquiry the question of the feasibility of deleting from our Rules the requirement for additional publication in the **Federal Register**.

21. *Elimination of "Deficiency Letters"*—The Report found that the existing practice of sending "deficiency letters" to mutually exclusive applicants as part of the processing procedure, as provided in § 1.571(k), was another cause of extensive delay in the ultimate processing of these applications to designation for hearing. It was estimated, on the basis of the information gathered in the Report, that elimination of the need for the staff to send out "deficiency letters" to applicants, and await responses, amendments and further analysis, could save anywhere between 60 and 100 days of processing time. It was also felt that elimination of this practice would discourage the filing of so-called "skeleton" applications, and would eliminate the burden on the staff of having to review such applications and correspond with the applicant on the existence of defects in the applications which require correction. The elimination of the regular sending of deficiency letters, as part of the pre-designation process, would, of course, not preclude the Commission or the staff from requiring the applicant to submit additional information where necessary, as prescribed by Section 308 of the Communications Act and § 1.514(b) of the rules. The Report also referred to the present practice of sending letters out on uncontested applications where further information was required or where the applications, as filed, were incomplete or insufficient, in order to permit these applicants to amend or cure the problem by further submissions. It was proposed that the Commission's present policy and practice in these types of unopposed applications be continued, in the discretion of the staff, so as to assist the applicant in obtaining a grant and instituting a new or expanded service in the community, where there is no opposition or conflict.

22. These proposals regarding the elimination of deficiency letters were strongly endorsed by FCBA in their written comments and in the Public Symposium; however, they stated that their position was based on the assumption that Commission requirements would be spelled out with clarity so that applicants would have sufficient information to file complete and adequate applications. There were further comments in the Symposium by one participant that the Commission should provide for at least one letter notice to the applicant as to the deficiencies in his proposal, but that thereafter he should be bound by his submissions.

23. The Commission will adopt the proposal as recommended in the Report, since we agree that elimination of the deficiency letters will not only discourage the filing of less than optimum applications, once the industry realizes that the staff will no longer be required to point out errors in the application, but it will also serve to

expedite the process. We are convinced from the contents of the Contractor's Report that the deficiency letters have been the cause of much delay, and their elimination should serve to expedite the application processing considerably. Accordingly, the rules will be amended to eliminate for the future the sending of deficiency letters in contested application situations. The staff will be given discretion to continue their present practices with regard to unopposed applications, where the circumstances appear to warrant such efforts.

24. *Revision of Application Amendment Procedures Pre-Designation and Post-Designation*—The Report detailed the reasons for the long delays experienced under the current amendment procedures, due to the back-logs, the extended time lags between cut-off and designation for hearing and the provisions of the rules (§ 1.522) allowing amendments prior to designation for hearing. It was found that, during the protracted period while the applications were pending, involving as much as a year or two, the applicants filed numerous amendments, due to changes in circumstances or to respond to opponents' issue petitions alleging defects in their applications. This then necessitated repetitive processing by the staff to re-examine the amended application to determine whether new matters were raised requiring additional deficiency letters or the specification of issues for hearing. Opposing applicants were likewise then required to scrutinize carefully the amended application to re-assess the competitive posture. In the latter situation, the amendments were sometimes followed by new petitions requesting additional issues on alleged defects in their opponent's amended cases, and this then led to a new cycle of cross pleadings, again requiring further consideration and evaluation by the staff. Even though these subsequent pleadings were not authorized by the rules, there appeared, in the early experience under the new procedures, to be no way to cut them off, short of Commission action designating the matter for hearing, particularly when the pleadings were usually accompanied by requests for waiver of the rules, which had to be entertained.

25. Another problem involved in the Commission's liberal amendment policy in mutually exclusive broadcast cases was expressed in terms of presenting a conflict of two public interest objectives—i.e., on the one hand, the Commission's desire to have a choice among applicants whose qualifications represented the optimum in ultimate service to the public; but, conversely, the liberal allowance of amendments encourages the filing initially of "skeleton applications" and constantly changes "the litigation facts," thus interfering with an early stabilization of the comparative factual situation which must ultimately go to hearing. The inevitable result of "the system" was to create more and more delay.

26. In the face of these circumstances, the Report recommended a substantial change in the voluntary amendment procedure. It recommended that the § 1.522 procedures for amendments to applications prior to hearing be revised to permit "amendments as of right" in only two situation—first, within a specified period (approximately 30–45 days) after public notice in the **Federal Register** of the acceptance for filing of the last-filed mutually exclusive application (i.e., pre-designation); and, second, within a similar specified period after publication in the **Federal Register** of the Order of Designation for Hearing (i.e., post-designation). The Report proposed that, with regard to pre-designation amendments, the Public Notice of Acceptance for Filing of applications mutually exclusive with the first filed applicants would have until a date certain and stated to file amendments as of right to their respective applications. With regard to post-designation amendments, the Report proposed that the Designation Order would specify a date of which the parties could file amendments to respond to hearing issued raised in the Order, that date being similarly between 30–45 days after publication in the **Federal Register.** The resolution of such issues would then be handled, as at present, by the Administrative Law Judge by way of motion for summary decision or other appropriate procedure. All other amendments were to be submitted to the presiding Administrative Law Judge, by petition for leave to amend, showing good cause.

27. It was also proposed in the Report that amendments required by § 1.65, to update an application, will be allowed at times other than those specified above, provided that no comparative advantage is claimed thereby; and, further, that amendments ordered by the Commission, pursuant to § 1.514(b), were not to be affected by these proposals. The objective of these restricted amendment rights was to discourage the filing of minimally acceptable applications and to eliminate the burden on the staff of having to review and analyze the applications repeatedly, each time they were amended, to see whether they raised new issues.

28. In their written comments to the Report, the Federal Communications Bar Association agreed in principle with the need for restricting voluntary amendments to pending applications, but disagreed with the proposal for a fixed period allowing amendments as of right following designation and allowing amendments as of right after the cut-off date. The Bar Association asserted that amendments should be allowed in both instances only for good cause shown, it being of the view that the "as of right" phrase might encourage post-designation amendments beyond those necessary to address matters of basic qualifications *first* raised in the designation order. A further comment by a member of the Bar in his written filing recommended that all amendments pertaining to basic qualifications should be permitted as of right until 30 days after designation. During the Symposium, a member of the Bar urged that amendments be allowed prior to designation, after advice from the staff in a deficiency letter, but that the applicant not be permitted to offer amendments regarding his basic qualifications after the matter was designation for hearing.

29. We have considered the proposals in the Report regarding pre-designation and post-designation amendments, and we propose to adopt the Report's recommendations regarding the restriction of amendments during the pre-designation phase of the pendency of the application. As is indicated in the Report in some detail, there is an urgent need, in the interests of expedition, to have a "stable application situation" for the staff to be able to work on the application as early as possible.[3] Likewise, we agree with the position taken in the Report as to the need to discourage the filing of "skeleton applications" and the need to avoid having the staff repeatedly review constantly amended applications. On the other hand, the proposal to allow one opportunity for amendment to any of the applications after the deadline for filing petitions against any *later* filed application[s] represents an effort to give the first filed applicant at least a fair opportunity to amend his application, after the filing by the competitor, but still to limit the filing of repeated amendments. We also agree

[3] In this connection, and because of past abuses, as also indicated in the Report, we are authorizing the staff hereafter to return without consideration unauthorized amendments and other pleadings not authorized by our Rules. Any late filed pre-designation amendment will be considered only upon a showing of good cause.

that, in the circumstances, the current requirements of §§ 1.65 and 1.514 of our rules will still apply in order to have the applicants keep their applications updated in accordance with then prevailing circumstances.

30. With regard to the proposals for revision in the post-designation procedures, the current system, which allows amendments of applications within 15 days after publication of the hearing order, is designed to eliminate the necessity for evidentiary hearings on designated issues which can be cured by amendments. On the other hand, as is indicated in the Report, there is also a need to secure a stable situation as soon as possible, so that the parties and the staff can proceed with the hearing on the remaining and necessary issues. We are inclined, however, to agree with the comments of FCBA that the Report's original proposal of automatic amendments after issuance of a hearing order, standing along, might still encourage the parties to file amendments on matters other than those first raised in the designation order. It would seem that this would also serve to defeat the efforts in the other proposals to encourage the initial filing of the best possible and most complete application. Nevertheless, we would want to accelerate and expedite the hearing process, and it is our view that setting a time limit after the designation order is issued for filing such amendments would enhance and expedite the process.

31. We will therefore adopt a modification of the Report's original proposal regarding the allowance of amendments post-designation—i.e., amendments will be allowed after the issuance of the designation order but must be filed within 30 days after publication of the order in the **Federal Register**, or a date certain to be specified in the order. A petition for leave to file an amendment which is not limited to an attempt to resolve an issue first raised in the designation order must be based on a showing of good cause. As is currently the practice, the petition for leave to amend, after designation, would be presented to the Administrative Law Judge for action; thereafter, an appropriate motion for summary decision or deletion of the issue after allowance of the amendment would be in order.

B. *Revision of Procedures for Handling Hearing Issues*

32. The Report describes in considerable detail how the 1976 procedures providing for pre-designation cross pleading on issues actually functioned in operation, the delay problems which were experienced, the inordinate level of litigiousness which the procedures seemed to encourage, the lack of decisional significance of many of the issues parties attempted to raise against their opponents, and the virtual defeat of the objectives originally intended of expediting the process. The Report also refers to the Commission's own ultimate realization of the abuses to which the new pre-designation issued pleading process had been put when, in the *Indianapolis* multi-party designation Order (In re *Peoples Broadcasting Corporation*, et. al., BC Docket Nos. 78–243–247), the Commission felt compelled to admonish the parties regarding the filing of petitions in the proceeding which were:

> * * * characterized by large numbers of unsupported requests for issues as well as numerous requests which can only be described as frivolous. Though totally without merit, these requests must be answered by opposing counsel, analyzed by our staff and ultimately considered by us. The time and energy wasted in this process in large part defeat the very aims which our new procedures seek to achieve * * *. (*Peoples Broadcasting, supra*, FCC 78–511, at para. 36; 68 FCC 2d——).

33. The Report pointed out the particularly adverse effect of these new procedures on those applicants with a high level of public interest qualifications (as traditionally recognized by the Commission and the Courts) but with limited resources. The opinion was expressed by practitioners that the pre-designation pleading procedures lent themselves to potential abuse by allowing one party, with substantial resources at his disposal, to "plead the others to death"; and that the process itself, in a hotly contested multi-party case, could force the withdrawal of the small, locally-owned and integrated, non-media applicant, or others who had ownership by minorities seeking entry into the field, even before the process had served its ultimate purpose of selection of the applicant who would best serve the public interest, based upon an adjudicatory record.

34. The Report accordingly recommended that the existing procedures for pre-designation pleadings and cross-pleadings to specify issues against opponents in mutually-exclusive and contested broadcast application cases (§§ 1.584 and 1.229) be repealed. To the limited extent that petitions to deny or motions to dismiss were filed against opponents' applications, they would be handled by the staff in the course of processing the applications upon the issues to be designated for hearing. The Report recommended that all pleadings relating to motions to enlarge, modify, or delete issues are then to be presented, after designation, to the presiding Administrative Law Judge, in accordance with § 1.243(K) of the rules.

35. The comments, with one exception, strongly endorsed the proposal to repeal the existing procedures regarding pre-designation issue pleading, contending that the current system contributed to extensive delays. The Comments also supported the recommendations that the presiding officers, who had familiarity with, and control of the case should handle the issues problem, and that the more significant ALJ rulings on such matters should be published in the manner and for the reasons described in the Report. The sole objection (by the Association of Independent Television Stations) was based on their contention that parties should have the opportunity, through the adversary process, to challenge defects in an opponent's case.

36. The Commission is persuaded by the Report and the comments that the pre-designation issue pleading process has not only not accomplished its original purposes—of expediting cases, simplifying issues and encouraging settlements—but has had the opposite effect. As the Report points out, the first two contested cases to go through the entire process from filing to designation under the new procedures (Vancouver and Indianapolis) [4] took two years for processing and involved a voluminous proliferation of pleadings on contested issues, amendments, etc. But when the Commission came to consider the cases on designation, the hearing Order rejected all but a handful of the issues requested by the parties as not being decisionally significant.

37. Accordingly, we accept the Report's recommendation and the urgings of the comments, and will direct the deletion of the pre-designation issue pleading procedures in all pending cases and in all future cases.[5] The rules will be revised as required. Parties will have an opportunity to renew requests for issues, where warranted, to the Administrative Law Judge, after designation, as indicated below. We would expect, however, that such requests would be limited to matters of substantial decisional significance. Petitions to deny

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[4] In re *Rose Broadcasting Company*, et al., BC Docket Nos. 78–209, 211–212 (Vancouver); and *Peoples Broadcasting Corporation*, et al., BC Docket Nos. 78–243–247 (Indianapolis).

[5] The actual implementation of the revised procedures in pending cases is set forth below in Section IV of this Report and Order.

and motions to dismiss filed against applications, and other informal objections, will be handled by the staff in the course of application processing, as at present.[6]

38. All pleadings relating to motions to enlarge, modify or delete hearing issues are to be presented, after designation, to the presiding Administrative Law Judge in accordance with the existing § 1.243(k) of the rules, preferably at the pre-hearing conference stage and within 30 days after the designation order has been published in the **Federal Register**. The new procedures regarding post-designation settlement of the hearing issues shall become a part of the pre-hearing procedures methodology, set forth in §§ 1.246–1.251 and 1.291–1.298 (Interlocutory Actions in Hearing Proceedings). No other revisions of the regulations would appear to be required, for the authority presently exists in the Administrative Procedure Act and the Commission's Regulations for the ALJs to handle the hearing issues in the manner proposed.

39. It is contemplated that the Administrative Law Judges, using their existing authority, would make full use of the available and appropriate pre-hearing techniques, such as informal conferences, oral arguments, and submission by the parties of memoranda of law, to dispose expeditiously of all pending pleadings involving issues prior to the commencement of the evidentiary hearing. We would expect that such disposition would not only take cognizance of Commission policy as contained in the *Fidelity* and *Atlantic Broadcasting* cases, referred to more fully below, but would also apply strictly the test of substantial decisional significance to the outcome of the case, in ruling on requests for issues.

40. The Report also made the point, with which we agree, that in order that the effectiveness of the Commission's review process be enhanced, ALJ rulings on decisionally significant matters or complex issues at the interlocutory stage should normally be contained in written orders. However, in the interests of expedition, ALJs should be encouraged to avail themselves, where appropriate, of the discretion afforded by § 1.298(b), which provides that:

> In the discretion of the presiding officer, rulings on interlocutory matters may be made orally at the hearing. The presiding officer may, in his discretion, state his reasons on the record or subsequently issue a written statement of the reasons for his ruling, either separately or as part of the initial decision.

41. The Report also referred to the probable need for an expanded and regularized system of publishing those Memoranda Opinions and Orders by Administrative Law Judges on significant interlocutory matters. It was thought that, with the proposed expansion of consideration of issue pleadings by ALJs, there would be an increase in the number of rulings which might be useful as guides in other cases, both to other presiding officers and to the Bar, although not binding as precedent as such. It was also felt that publication and distribution of the more significant rulings might serve to advance consistency amongst ALJs in ruling on pleadings which involved similar problems.

42. We note that, after the comments and the discussion during the Symposium along these lines, the Office of Administrative Law Judges made arrangements, which were announced in a Public Notice, dated April 23, 1979 (P.N. 16682), to establish a file in the FCC Library for ready inspection containing a copy of each Order and each Memorandum Opinion and Order issued by the Administrative Law Judges. However, we believe that the recommendations in the Report for publication and distribution of significant rulings may better achieve the intended objectives. We will therefore direct the Executive Director, acting in conjunction with the Office of Administrative Law Judges and the Office of Public Affairs, to oversee the establishment of procedures to carry out these purposes in a manner they deem most efficient and cost-effective.

C. Reiteration of Commission Policy on Post-Designation Modification of Hearing Issues

43. The Report pointed out that as a central part of the proposed revised system of handling post-designation hearing issues, it was required that the Commission reiterate the policies expressed in *Fidelity Radio, Inc.*, 1 FCC 2d 661 (1965) and *Atlantic Broadcasting Co.*, 5 FCC 2d 717 (1966). Those cases established the parameters of the authority of the Review Board (and now, presumably, the ALJs) to consider or permit the enlargement, modification or deletion of hearing issues. The Commission there directed that subordinate officials should look to see whether specific reasons were stated for its action or inaction in a designation order; and that if the designation order contained a reasoned analysis of a particular matter, the subordinate officials were to be bound by that analysis, in the absence of additional information on the subject previously unknown to the Commission. However, where the designation order did not contain such reasoned analysis with respect to the merits of the particular matter, the subordinate official was to make such an analysis and rule on the merits of the petition so that the hearing could be conducted in an expeditious manner.

44. The Report recommended that if the Commission should adopt the recommendations for a simplified, streamlined designation process and for allowing the Administrative Law Judges to handle all post-designation petitions seeking to modify the issues designated for hearing, the principles of *Fidelity* and *Atlantic* should be re-emphasized as controlling in the circumstances, so as to preclude unnecessary relitigation of matters dealt with in the hearing Order. It was contemplated that staff review and Commission consideration of the application, its amendments and any pleadings filed, as expressed in the Memorandum Opinion and Order of designation for hearing would, in the interest of expedition, be observed at the further levels of litigation as dispositive, in the absence of demonstrated showings of information or data which were not before the Commission at the time of designation. The Report also recommended that, with the deletion of the pre-designation issue pleadings procedure, the Commission's order designating the applications for hearing could be quite brief and concise, thereby eliminating some of the delay encountered in the preparation of lengthy Memorandum Opinions required under the previous procedures.

45. The comments filed by FCBA and ABA supported the principle of continued emphasis on *Fidelity* and *Atlantic*. However, they were concerned that the additional recommendation for brief designation orders might work at cross purposes with the objectives of *Fidelity* and *Atlantic* to preclude further litigation. They recommended that the Memorandum Opinions and Orders of designation for hearing should continue the practice of "reasoned analysis" so as to serve the original objectives of the *Fidelity* case; and, further, that where there was no reasoned analysis in the designation order, the parties should be permitted to request issues before the Administrative Law Judge.

46. The Commission believes the discussion in the comments to be well taken. It proposes to direct the Broadcast Bureau processing staff to handle the preparation of designation

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[6] To discourage needless filings, the rules will also be amended to emphasize that the failure to file an opposition or a reply to a petition or motion will not necessarily be construed as an admission of any fact or argument contained in a pleading.

orders with precision, dealing with the issues presented in a concise manner; but, at the same time, fully discussing the bases and rationale for rejecting an issue requested, for example, in a petition to deny. Likewise, there should be similar treatment of the "reasons then obtaining" for designating an issue for hearing, based on the application and other information before the staff for review. We would expect that a thorough staff review of the application would permit the making of findings indicating those areas where the applicant had made a satisfactory showing of compliance with Commission regulations and policies and so concluding in the designation order. Where an unresolved issue was presented, the reasons for including it as a ground for hearing would similarly be set out in the terms expressed in *Fidelity*. We do not necessarily see any conflict between adhering to the principles of *Fidelity*, where required, and the preparation of succinct findings in a Memorandum Opinion and Order designating a matter for hearing.

D. Revised Procedures for Review of Community Ascertainment Surveys and Financial Qualifications

47. These recommendations of the Report for revised approaches to the handling of ascertainment of community needs and financial qualifications sparked the most intense interest in the written comments and the Public Symposium. It should be noted that the Report prefaced its discussion and recommendations in these areas with a reference to the recent and current discussions and writings, as well as proposed legislation, relating to proposals for "deregulation" of radio broadcast stations in various contexts, including reassessing the need for ascertainment surveys; substantial revision in the comparative hearing process; and other proposals for "modernizing" and improving the regulatory system governing the licensing of broadcast stations. The Report stated that, until such time as the Commission issued revised policy formulations which were upheld by the Courts, or until legislation was passed, there were a number of specific procedural and organizational proposals which could be considered as interim measures designed to expedite the processing system. These measures would deal with the manner in which certain of the qualifying and comparative criteria are reviewed by the staff and litigated by the parties.

48. The Report stated further that its study and experience had shown that a great deal of adversarial time and effort was being spent on certain of the qualification factors which perhaps ought not to be the subject of contention amongst the contesting applicants in a multi-party case. Two of the qualification and comparative factors which the Report contended would lend themselves to new approaches were the community ascertainment surveys and financial qualifications.

49. *Revised Procedure for Review of Community Ascertainment Surveys*—At present, the Commission policies in this area are contained in its Regulations, Application Forms and in its *Primer on Ascertainment of Community Problems by Broadcast Applicants*, published in February 1971 (27 FCC 2d 650) after a rulemaking proceeding.

50. The Report found that, under the existing pre-designation procedures and issue pleading, the ascertainment surveys are often the subject of minute item-by-item attack by opponents as to sufficiency, compliance with Commission requirement and precedent, etc., as well as cross-examination during the hearing. Even after hearing and Initial Decision, questions as to the adequacy of the survey conducted by the Initial Decision grantee and compliance with the requirements of the *Primer* and its interpretations have been the subject of extensive review by the Review Board.

51. The Report therefore suggested that, until the Commission modifies its policies regarding the need for community needs ascertainment by radio and TV broadcast stations, consideration be given to a revision of its procedures so as to remove the community ascertainment survey showing from the adversary arena. Under the suggested revised procedure, applicants would be required to make a threshold showing in their applications of compliance with the basic requirements laid down by the Commission in the *Primer* as to the method of conducting a satisfactory and sufficient ascertainment survey and formulating the program proposal thereon, in the same manner as is presently required, with whatever extensions or modifications the Commission thought necessary in the light of past and recent experience. The applicants' showing in this area would then be examined for acceptability by the staff in its initial processing. If found deficient, an issue on ascertainment would be included in the hearing order; and, if not cured by post-designation amendment, the issue would go to evidentiary hearing. If found, however, to be satisfactory, the ascertainment survey could not then be made the subject of adversary pleading or testimony at the hearing stage, short of a persuasive showing, by motion before the ALJ to enlarge issues, of misrepresentation or gross omission of some decisionally significant area which would make the survey totally unacceptable, on the basis of facts not theretofore known to the Commission or the parties or not apparent on the face of the application. In other words, once an applicant has met the Commission's basic requirements, a competing party should be placed under a heavy burden of demonstrating that an ascertainment issue was critical to a valid decision in the case, before it could be added to the hearing. Any attempt to add a "comparative ascertainment efforts" issue, which has only rarely been done in the past, should likewise be required to demonstrate its vital role in the outcome of the case. The Report asserted that removal of the ascertainment process from the adversarial mode to a situation where only the applicant and the staff are involved would represent a substantial saving in time, money and effort over the existing procedure to the great benefit of the public and the Commission.

52. The written comments filed by FCBA, NAB, ABA and NTIA, and the discussions at the Symposium generally supported the approach and objectives of the Report's recommendation as a laudable effort to remove the ascertainment factor from the adversary arena, in the interests of eliminating delay and expediting the processing of contested broadcast applications. However, the thrust of the reaction from both the Commission staff and outside groups was that a critical element necessary for the success of expedited procedures here was that the Commission should reconsider its policy in *Voice of Dixie, Inc.* [7] In that case, the Commission indicated that it would require strict compliance with the requirements of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). The comments stressed that, in order that the community ascertainment showings not be subjected to unnecessary litigation and time consuming delays for even trivial variations, the Commission should indicate that it was reconsidering the *Voice of Dixie* policy; and that it should direct the staff to return to the earlier standard that substantial compliance with the requirements of the primer

[7] *Voice of Dixie, Inc.*, 45 FCC 2d 1027 (1974); reconsideration denied, 47 FCC 2d 526 (1974).

would be the test for examining ascertainment showings to determine satisfactory compliance with Commission policy. It was pointed out that, as indicated in the Report, the ascertainment showings had been the source of much "nitpicking" in competitive multi-party cases, to no decisional avail but with considerable delay as a consequence. Accordingly, the parties urged the Commission to reconsider the policy declared in *Voice of Dixie*.

53. The Commission has given this matter very careful consideration, because of its importance in the efficient conduct of our adjudicatory process. We are likewise cognizant of contemporary efforts, of a related nature, which we have recently been considering in an effort to improve the entire process of the regulation of broadcast licensing. Indeed, on May 8, 1979, the Commission held an extensive open meeting in which it discussed with its staff the various possibilities of looking toward potential elimination of certain regulatory requirements in radio broadcasting.[8]

54. Upon such consideration we are convinced that, in the current circumstances, the regulatory process will, in fact, be improved and enhanced if we adopt the recommendations in the Report regarding the future procedures for the review of community ascertainment surveys, and if we reconsider the impact of some of our past regulatory policies. We will, however, adopt a modification of the criteria referred to in the Report's recommendation, described in para. 51, above. The test to be used regarding the nature of the showing required to reopen the question of the adequacy of the ascertainment survey, by way of a motion to enlarge issues, will be limited to misrepresentation or gross omission of some decisionally significant area which would make the survey totally unacceptable. As to our past regulatory policies, we have determined, from the contents of the Report and the presentations in the comments and the Symposium, that our policy in *Voice of Dixie*, requiring strict compliance with the *Primer* on ascertainment, should no longer be the criterion for passing upon the adequacy of an applicant's showing in this regard. Rather, we will return to the previous body of precedent which identified substantial compliance as being sufficient.[9] These criteria shall be applied at all levels of the adjudicatory process hereafter and to all pending applications and proceedings where the question arises.

55. For the guidance of all concerned, and for their more immediate reference and information, a separate Policy Statement will be issued encompassing these determinations. In light of the broad distribution of the Report and its recommendations in these areas, and the extensive comments by interested parties, we see no need for further notice and comment proceedings before implementing these new criteria. This Report and Order and the Policy Statement will, of course, be published in the **Federal Register**. Should there be any substantial need, the statute and our own procedures provide for the filing of petitions for reconsideration, though we must observe that a persuasive showing will need to be made as to why the matter should be reconsidered in these circumstances.

56. *Revised Procedure for Review of Financial Qualifications*—The Report recommended that a similar approach, as with ascertainment, be considered in the area of financial qualifications. Although the Communications Act provides that the Commission may make an affirmative finding that the applicant is financially qualified to construct the proposed station, the Commission's policies as to what showings are required to meet the basic test of financial qualifications have varied over time.[10]

57. Further, the Report stated that, although the applicant's financial showing is not one of the categories of comparative criteria in multi-party contested cases, the pre-designation issue pleading procedures have permitted some competing parties to attempt to raise questions about their opponent's finances which can only be characterized as litigation over trivia. The Report asserted that, after an applicant had passed the muster of staff review of his financial showing, the minute adversarial examination of his finances by his opponents, whether in the pre-designation stage or at the hearing, had proven not only to be non-productive in most instances, but had prejudiced those applicants who had limited resources to begin with, such as the small aspirants and minority groups. The question was therefore asked: Should not the factor of financial qualifications be a matter solely between the Commission and the applicant, since it is not likely to be a basis for comparative or relative merit, once the basic financial requirements for construction and operation are met. The Report accordingly recommended that financial qualification should not be made the subject of hearing issues as adversarial pleading, unless the initial staff review of the application indicated that the applicant was, in fact, incapable of effectuating his proposal, or if a persuasive and convincing showing to the same effect was made by an opponent after designation.

58. The Report therefore proposed that the Commission consider adopting a procedure similar to that suggested above for ascertainment, whereby the financial qualification showing would be removed from adversary contention, absent the demonstrated existence of defects in the applicant's proposal. In like manner, the mutually-exclusive applicants would be required to make a threshold showing in their applications of compliance with the Commission's requirements, as contained in its application forms and declared policies, of financial capability to construct and operate the proposed station. This showing would then be reviewed by the staff in the course of processing the applications; if found to be satisfactory, the statutory findings to the effect that the applicants are financially qualified would be recited in the designation order, and that would dispose of that qualification factor. If the staff review showed the applicant's financial proposal to be defective, a hearing issue in that regard would be specified, and if not cured by post-designation amendment, the issue would go to evidentiary hearing. Parties would be limited in raising questions about an opponent's financial qualifications to demonstrating in a persuasive and convincing manner, by motions before the ALJ to enlarge issues, that the opponent's proposal could not be realistically effectuated. Such motions would be based primarily on facts not apparent on the face of the application and its supporting documents or not theretofore known to the Commission or the parties. Under such a system, the Report contended, the application process should be far more efficient and expeditious, and, equally if not more important, the community should get its new service instituted more rapidly than at present.

[8] See FCC News Release, May 8, 1979 (Mimeo No. 17390) entitled "FCC to Consider Full Range of Deregulation Options for Radio Broadcasting."

[9] *Greenfield Broadcasting Corp.*, 30 FCC 2d 774, 22 RR 2d 497 (1971); *New Broadcasting Corp.*, 37 FCC 2d 662, 25 RR 2d 561 (1972); *Mahoning Valley Broadcasting Corp.*, 39 FCC 2d 52, 25 RR 2d 873 (1972); *The Evening News Association*, 35 FCC 2d 366, 24 RR 2d 667 (1972); *The Outlet Co.*, 38 FCC 2d 355, 25 RR 2d 1077 (1972); and *RadiOhio, Inc.*, 38 FCC 2d 721, 26 RR 2d 327 (1972).

[10] See, e.g. Commission Public Notice, May 11, 1979, FCC 79-299, "New Financial Qualifications Standard For Broadcast Television Applicants," where the Commission changed the financial showing requirement for construction and operating costs from one year without revenues (the *Ultravision* test) to a 90 day requirement for new applicants.

59. The comments, with one exception, likewise supported the Report's recommendation on handling the financial qualifications factor, as did the presentations in the Symposium. We agree with the findings in the Report regarding the problems created by our current procedures in this area, and we will adopt the recommendation to institute the "threshold showings" criterion set forth in the Report.

60. To the extent that parties wish to contest the adequacy or correctness of the staff's initial conclusions as to the applicant's financial capabilities—using the Commission's financial requirements policy test—they will have the opportunity to present their contentions to the Administrative Law Judge by way of petitions to enlarge issues. The test to be used regarding the nature of the showing required to reopen the question of the adequacy of the applicant's finances will be similar to the criterion set forth in para. 54, above, *i.e.*, will be limited to a showing of misrepresentation or gross omission of some decisionally significant item which would render the proposal totally defective.

61. In this regard, some of the comments emphasized the need for the Commission to make substantive changes in its policies and to afford the industry with clearer guidelines, in these and other areas, as a means of enhancing the process. As indicated above, the Commission is currently in the process of re-examining the entire spectrum of its regulatory policies in broadcast licensing. We are of the opinion that any such revisions of substantive policy should await the completion of the Commission's deliberations in these areas. Meanwhile, we believe that a useful first step can be taken by adopting the revised procedures recommended in the Report for limiting the adversarial use of the community ascertainment and financial qualification factors, except in the circumstances indicated.

IV. Implementation of Revised Procedures

62. One remaining problem to be addressed is the manner and extent to which the revised procedures we are adopting are to be applied to pending applications which are already somewhere in the processing "pipeline," and which have been the subject of varying degrees and steps of processing.

63. We believe that the most orderly and equitable transition for the vast majority of applicants will result by applying the new procedures as follows:

(1) If an application has been accepted for filing under the existing procedures but has not yet appeared on a cut-off list, it will be placed on a new "Public Notice of Acceptance for Filing," and the time to file competing applications or petitions to deny will be specified in the Notice.

(2) If an application has already appeared on a cut-off list, and a competing application has been filed and accepted, but there has been no notification under existing §§ 1.522 and 1.584 of the rules of deadlines for filing amendments and issue pleadings, such applicants when reached for processing will be notified on an *ad hoc* basis and be given an opportunity to file amendments but not issue pleadings.

(3) Those mutually exclusive applications as to which deadlines have passed for the filing of amendments and issue pleadings under existing §§ 1.522 and 1.584 of the Rules, will be designated for hearing without further opportunity for pre-designation amendment.

(4) Applications tendered for filing but not yet accepted and all future applications will be fully subject to the new procedures.

64. Any questions concerning the procedural status of any case should be directly addressed to the processing staff of the Broadcast Bureau's Broadcast Facilities Division (tel. no. (202) 632-6485).

65. In addition, it should be noted that those applications filed prior to the effective date of the 1976 adjudicatory re-regulation rules, i.e., July 1, 1976 (as later amended) were to be governed by the prior procedures which, among other things, allowed only 15 days for amendments after designation for hearing. In the interest of uniform treatment, we will provide that *all* pending applications not yet designated for hearing will be afforded the post-designation amendment rights allowed under the new procedures.

66. With the adoption of the categories for implementation suggested above, the transition to the new and improved procedures for processing contested broadcast applications will be hastened.

V. Administrative and Personnel Resource Impact of Revised Procedures

67. In the course of his study, the Contractor presented the Commission with some separate data and recommendations dealing with the problems of staff resources and workload in the Broadcast Facilities Division devoted to application processing, in the Hearing Division and in the Office of Administrative Law Judges.

68. It was pointed out that, with the adoption of the expediting procedures which were recommended, it was likely that many more contested cases would be designated for hearing in a shorter period of time than at present. There was some apprehension expressed that caseloads for the Hearing Division and individual ALJs may be substantially increased when the backlogged applications begin to come through for hearing which might again result in delays, particularly in multi-party cases. The revised procedures on handling hearing issues might have a similar effect. Whether the latter would necessarily result in greater delays is not so certain, since no new responsibilities are being introduced. The Administrative Law Judges and the Hearing Division are already handling a considerable amount of such interlocutory matters as petitions on amendments and issues as part of the hearing process. In addition, we are confident that the proper use by the presiding officer of the available authority and techniques for control and expeditious handling of the hearing will serve to expedite the hearings and prevent undue delays. Likewise, the observance of discipline and restraint in all levels of processing, trial and review in the adjudicatory process—that is, a concentration on matters of substance and issues of vital decisional significance—is essential to the successful operation of these new procedures.

69. Nevertheless, to assure that the process does not again result in extensive delays, we are directing that an interim management oversight mechanism be set up, by the Executive Director working in conjunction with the Broadcast Bureau and the Office of Administrative Law Judges, to monitor the flow of cases being designated for hearing, the individual caseload levels and the phased progress of the hearings at the ALJ stage. Then, if it appears that hearing cases are getting bogged down or unduly delayed at certain stages because either the Hearing Division or the ALJs are becoming overburdened by their caseloads, the Commission will be in a position to take prompt steps to remedy the situation. Depending upon the needs shown to exist, such measures might take the form of emergency personnel assistance or more permanent organizational, procedural or personnel undertakings. We will expect the staff to keep us advised periodically of developments in the in the operation of the new procedures.

VI. Conclusion

70. During the Symposium, several of the participants expressed some skepticism as to the possible success of the recommeded procedures in accomplishing their objective of expediting the process. Their opinions were based on what they perceived as an unrealistic reliance on cooperation by the parties and their counsel in implementing the new procedures. Their position was that counsel's duty to his client required him to exhaust every available remedy and procedural device to fully protect the client's interests; thus, efforts to restrict his right to file pleadings on his client's behalf may not be successful.

71. The Report recites at length the consequences of our current procedures which have allowed just such latitude, probably because of concern for the requirements of "due process." Interviewees were quoted as characterizing the resultant delays of two years or more encountered in the processing of contested applications as "unconscionable," as well they might. We feel it incumbent upon us to observe, in response, that underlying all attempts at improvement in procedures, including those recommended in the Report, is the urgent need for the exercise of discipline and restraint by all concerned in the process. As the Report correctly points out, the public is entitled to have the Commission carry out its statutory mandate to "* * * conduct its proceedings in such manner as will best conduce to the proper dispatch of its business and to the ends of justice * * *" (Communications Act, Section 4(j).) To subject applicants and the public to delays of the magnitude shown in the Report, if it results from inefficiencies, inadequacies or defects in the process itself, amounts to an abnegation of the Commission's responsibility to serve the public. We believe that the effective and expeditious dispatch of the Commission's business is, in itself, an integral part of the public interest.

72. In the exigencies of the current situation of backlogs and delays, those who would use the Commission's process must recognize that practices and procedures originating in earlier and less critical eras must sometimes give way to the larger needs of the public interest, particularly at a time when the Commission's resources are burdened almost to the breaking point. The administrative hearing process itself, as well as some of its component parts, have come under attack as no longer serving their original purposes as an efficient method of regulatory decision-making. The time-honored procedures of trial-type evidentiary hearings, with extensive pleadings, discovery, cross-examination, etc., have been criticized as an outmoded mechanishm for the resolution of issues presented to administrative agencies. In our 1976 adjudicatory re-regulation revisions, we took a number of steps which were designed to improve the hearing process. But, however that debate may ultimately be settled, by legislation or otherwise, it is clear that our procedures for handling contested broadcast applications can no longer be saddled with a philosophy of "trial by combat."

73. We agree with the Report's admonition that the pressures of current and future backlogs, and the urgency of seeking reforms to expedite the application process, require self-restraint; that the parties' showings and the Commission's consideration of "the record"—in all phases of application processing, hearings and the review stages— should be limited to matters of substance and to issues of fundamental decisional significance. To quote the Report, "What has been referred to as the 'flyspecking' of applications and evidentiary showings and lengthy litigation over frivolities should not be condoned, either by the ALJs, the Review Board or the Commission itself * * *" (Report, p. 40).

74. We would hope and expect that practitioners before the Commission and our staff will, in fact, lend their best efforts to this joint undertaking in our common interest and that of the public. The Commission, for its part, will give its utmost cooperation in attempting to assure the success of these and simular recommendations which will lead to reform and improvements in our procedures. We would welcome the assistance of all interested persons and organizations in a continuing effort to make the Commission's procedures more efficient and effective.

75. For the purposes of this particular proceeding, and to implement the revisions in procedures which the Commission is here adopting, there is attached an Appendix containing the specific amendments to our rules of practice and procedure designed to carry out the determinations of this Report and Order.

76. Authority for adoption of the amendments set out in the attached Appendix below is contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r). Because the amendments are procedural in nature, the prior notice and effective date provisions of 5 U.S.C. 553 are inapplicable.

77. Accordingly, it is ordered, effective June 18, 1979, that Part 1 of the rules is amended as set out in the Appendix below.

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

Federal Communications Commission.[11]

William J. Tricarico,

Secretary.

Appendix

Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 1.227(b)(1) is revised to read as follows:

§ 1.227 Consolidations.

(a) * * *

* * * * *

(b)(1) In broadcast cases, except as provided in subparagraph (5) of this paragraph, no application will be consolidated for hearing with a previously filed application or applications unless such application, or such application as amended, if amended so as to require a new file number, is substantially complete and tendered for filing by the close of business on the day preceding the day designated by Public Notice published in the **Federal Register** as the day any one of the previously filed applications is available and ready for processing.

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2. Section 1.229 (b) and (d) are revised to read as follows:

§ 1.229 Motions to enlarge, change, or delete issues.

(a) * * *

* * * * *

(b) Such motions must be filed within 15 days after the issues in the hearing have been published in the **Federal Register**. In comparative broadcast proceedings (including comparative renewal proceedings), however, such motions shall be filed within 30 days after the designation order has been published in the **Federal Register**. Any person desiring to file a motion to modify the issues after expiration of the above specified periods shall set forth the reason why it was not possible to file the motion within the prescribed period. Except as provided in paragraph (c) of this section, the motion will be granted only if good cause in shown for the delay in filing. Motions for modification of issues which are based on new facts or newly discovered facts

[11] See attached Concurring Statement of Commissioner Brown.

shall be filed within 15 days after such facts are discovered by the moving party.

* * * * *

(d) Such motions, opposition 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 or persons having personal knowledge thereof. The failure to file an opposition or a reply will not necessarily be construed as an admission of any fact or argument contained in a pleading.

3. In § 1.522, paragraph (a)(2) and paragraph (b)(2) are revised, and Note 1 is added as follows:

§ 1.522 Amendment of applications.

(a) * * *

(2) Subject to the provisions of §§ 1.525, 1.571(j), 1.572(b), 1.573(b), and 1.580, mutually exclusive broadcast applications may be amended as a matter of right by the date specified (not less than 30 days after publication) in the FCC's public notice announcing the acceptance for filing of the last-filed mutually exclusive application. Subsequent amendments prior to designation of the proceeding for hearing will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 1.514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration.

(b) * * *

(2) In comparative broadcast cases (including comparative renewal proceedings), amendments relating to issues first raised in the designation order may be filed as a matter of right within 30 days after that Order is published in the **Federal Register**, or by a date certain to be specified in the Order.

* * * * *

Note 1—When two or more broadcast applications are tendered for filing which are mutually exclusive with each other but not in conflict with any previously filed applications which have been accepted for filing, the FCC, where appropriate, will announce acceptance of the earliest tendered application and place the later filed application or applications on a subsequent public notice of acceptance for filing in order to establish a deadline for the filing of amendments as a matter of right for all applicants in the group.

4. Section 1.564(c) is revised to read as follows:

§ 1.564 Acceptance of applications.

* * * * *

(c) At regular intervals the FCC will issue a Public Notice listing all applications and major amendments thereto which have been accepted for filing. Pursuant to §§ 1.571(c), 1.572(c), and 1.573(d), such notice shall be published in the **Federal Register** and shall establish a cut-off date (no less than 30 days from the date of publication) for the filing of mutually exclusive applications and petitions to deny. However, no application will be accepted for filing until a statement establishing compliance with the local notice requirements of § 1.580 has been received by the FCC.

5. In § 1.571, paragraph (a) and subparagraph (a)(1) are revised; subparagraph (a)(3) is deleted; paragraph (c) is revised; and paragraph (d) is deleted and designated [reserved].

§ 1.571 Processing of standard broadcast applications.

(a) Applications for AM broadcast facilities are divided into two groups.

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change is any increase in power, or any change in frequency, hours of operation, or station location: *Provided, however,* That the FCC may, within 15 days after the acceptance for filing of any other application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore is subject to the provisions of §§ 1.580 and 1.1111 pertaining to major changes.

* * * * *

(3) [Deleted]

* * * * *

(c) Applications for new stations or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first. Thus, the file number determines the order in which the staff's work is begun on a particular application or group of conflicting applications. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the Commission will periodically publish in the **Federal Register** a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and petitions to deny the listed applications must be filed.

(d) [Reserved]

* * * * *

6. Section 1.572(c) is revised to read as follows:

§ 1.572 Processing of television broadcast applications.

* * * * *

(c) Applications for television stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically publish in the **Federal Register** a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and petitions to deny the listed applications must be filed.

* * * * *

7. Section 1.573(d) is revised to read as follows:

§ 1.573 Processing of FM and noncommercial educational FM broadcast applications.

* * * * *

(d) Applications for FM broadcast stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically publish in the **Federal Register** a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and petitions to deny the listed applications must be filed.

* * * * *

8. In § 1.580, the section title is revised and paragraphs (i) and (j) are deleted

and reserved and redesignated as § 1.584 (see item 9 below).

§ 1.580 Local Notice of the filing of broadcast applications.

* * * * *

(i) [Reserved]

(j) [Reserved]

* * * * *

9. Section 1.584 is retained as a Section number, but the title "Pleadings to Specify Issues" is deleted. The new title is "Petitions to Deny" and the new rule text reads as follows:

§ 1.584 Petitions to deny.

(a) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or if amended so as to require a new file number pursuant to §§ 1.571(j), 1.572(b), 1.573(b) or § 1.574(b)) for which local notice pursuant to § 1.580 is required: *Provided*, Such petitions are filed prior to the day such applications are granted or designated for hearing; but where the FCC issues a public notice pursuant to the provisions of §§ 1.571(c), 1.572(c) or § 1.573(d), establishing a "cut-off" date, such petitions must be filed by the date specified. In the case of applications for renewal of license, petitions to deny may be filed at any time up to the last day for filing mutually exclusive applications under § 1.516(e). Requests for extension of time to file petitions to deny applications for new broadcast stations or major changes in the facilities of existing stations or applications for renewal of license will not be granted unless all parties concerned, including the applicant, consent to such requests, or unless a compelling showing can be made that unusual circumstances make the filing of a timely petition impossible and the granting of an extension warranted.

(b) The applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition in which allegations of fact or denials thereof shall be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such oppositions and replies shall be those provided in § 1.45 except that as to a petition to deny an application for renewal of license, an opposition thereto may be filed within 30 days after the petition to deny is filed, and the party that filed the petition to deny may reply to the opposition within 20 days after the opposition is due or within 20 days after the opposition is filed, whichever is longer. The failure to file an opposition or a reply will not necessarily be construed as an admission of any fact or argument contained in a pleading.

(c) Untimely petitions to deny, as well as other pleadings in the nature of a petition to deny, and any other pleadings or supplements which do not lie as a matter of law or are otherwise procedurally defective, are subject to return by the FCC's staff without consideration.

10. In § 1.591, Note 1 is deleted, and paragraphs (b) and (c) are revised to read as follows:

§ 1.591 Grants without hearing of authorizations other than licenses pursuant to construction permits.

* * * * *

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the FCC will not consider any other application, or any application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete and tendered for filing by: (1) The close of business on the day preceding the day designated by Public Notice published in the **Federal Register** as the day the listed application is to be available and ready for processing; or (2) the date prescribed in § 1.516(e) in the case of applications which are mutually exclusive with applications for renewal of license of broadcast stations.

(c) If a petition to deny the application has been filed in accordance with § 1.584 and the FCC makes the grant in accordance with paragraph (a) of this section, the FCC will deny the petition and issue a concise statement setting forth the reasons for denial and disposing of all substantial issues raised by the petition.

Concurring Statement of Commissioner Tyrone Brown

Re: Revised Procedures for the Processing of Contested Broadcast Applications; Amendments of Part 73 of the Commission's Rules

I fully support the thrust of the Commission's action in adopting revised rules and procedures to expedite the processing of contested broadcast applications for new facilities. By adopting the recommendations of the Contractor's Report we will, in substance, simplify and shorten the current cut-off list procedures; eliminate the sending of "deficiency letters" as part of the processing procedures, except where the staff needs further information; restrict the pre-designation voluntary amendment of applications; eliminate the current provision for predesignation issue pleadings; and require pleadings affecting issues to be filed with the Administrative Law Judge after designation.

I applaud the efforts and results of the Contractor, Max Paglin, who has performed yeoman's work and has produced a truly important procedural reform embodied in one of the best written documents I have seen in my tenure as a Commissioner. The current procedures encourage delay and waste of Commission and party resources and also have an adverse impact on applicants and petitioners who do not possess deep pockets. The procedural changes the Contractor recommends can be expected to ameliorate these problems and make a substantial dent in our current backlog of applications for new broadcast facilities. I endorse this part of the "Paglin Report" without reservation.

The second portion of the Contractor's Report causes me some concern and is the impetus for this concurring statement. Under the revised "procedures" adopted today, the Commission changes the groundrules for handling the review of applicants' community ascertainment and financial qualifications showings. Under the new procedures, applicants need only make a threshold showing of substantial compliance with FCC policies and rules to pass initial Commission muster.

Several points are worth emphasizing. First, the procedures and polices we have adopted today apply only to applications for *new* broadcast facilities against which mutually-exclusive applications or petitions to deny are filed. Except to the extent certain filing deadlines are conformed, no changes are intended in the procedures or policies applied to renewal applications.

Second, the requirement of a threshold showing of "substantial compliance" for *financial* showings causes me little concern because the adequacy of such showings is fairly easy to determine and we have been applying a "substantial compliance" test. However, the same is not the case with ascertainment.

At least since the decision in *Voice of Dixie, Inc.* 45 FCC 2d 1027, *recon. denied*, 47 FCC 2d 526 (1974), the Commission has applied a "strict compliance" test to measure the adequacy of ascertainment showings submitted by applicants for new facilities. The procedures adopted today purport to return to the pre-*Voice of Dixie* "substantial compliance" test as a measure of the adequacy of an applicant's ascertainment showing. Based upon the comments made on the Paglin proposals and my understanding of the standards applied before the *Voice of Dixie* case, I would have no problem with reversing that case and returning to a policy of "substantial compliance." In my opinion, the real purpose of ascertainment is to require that broadcasters have contact and dialogue with their communities. The mechanistic approach to ascertainment, and therefore the nit-picking approach to challenging ascertainment, serve no real purpose. Thus substantial compliance with the purpose of ascertainment should be all that we need require.

However, we must make clear what we mean by substantial compliance. There may be some confusion about the standard to be applied by our staff and in the adjudicative process in determining whether there has been substantial compliance. This is so because, while the test is intended to be that applied before the *Voice of Dixie* decision, the Report and Order adopted today suggests otherwise in at least one passage. In adopting the Contractor's recommendation (with minor modifications) we noted that:

"The test to be used regarding the showing required to reopen the question of the adequacy of the ascertainment survey, by way of motion to enlarge issues, will be limited to *misrepresentation* or *gross omission* of some *decisionally significant* area which would make the survey *totally unacceptable*." (Par. 54; emphasis added).

My initial opinion was that this standard for *review* of the staff's action was one which would permit acceptance of ascertainment showings only minimally complying with the *Primer* and other Commission policies. For if the staff determined that the application substantially complied with our policies (a determination in which "only the applicant and the staff are involved") even if it did not, it seemed to me that a review standard requiring a showing of "misrepresentation or gross omission of some decisionally significant area which would make the survey totally unacceptable" in most instances precluded any further examination of the showing.

However, to the extent that that language suggested a standard other than that which existed prior to *Voice of Dixie*, it is not so intended by the Commission. In discussion at the meeting at which we adopted this Report the staff assured us that the review standard permitted an ALJ to enlarge issues if a showing was made that the applicant's ascertainment survey did not substantially comply with our policies. And the tests for substantial compliance are those applied before the *Voice of Dixie case*. (See *Report and Order*, note 9). Also reassuring are subsequent passages in the Report and Order at paragraph 54: "(W)e will return to the previous body of precedent which identified substantial compliance as being sufficient. These criteria shall be applied *at all levels of the adjudicative process* * * *" (emphasis added).

I am also concerned that insufficient notice was given to interested parties about the change in the Commission's policy regarding the acceptability of ascertainment showings. The focus of the Report and the discussions both outside and within the Commission have been on the procedural aspects of the Report and the efforts to ameliorate the backlog in applications for new broadcast facilities. Since the procedural changes as well as the Commission's reversal of the *Voice of Dixie* policy apply to petitions to deny new applications, I considered urging the Commission to submit the Report for further public comment with a special emphasis put on the ascertainment issue.

I am persuaded, however, that the backlog situation in processing our new applications compels us to move as quickly as possible and that we have technically complied with all notice and comment requirements. Moreover, those interested groups which have not commented in this proceeding but might have done so if it were clear that a change in the ascertainment compliance standard was intended, still have an opportunity to comment by filing for reconsideration of the Commission's action.

One final point. The changes made today are procedural in nature and are not intended to eliminate the substantive ascertainment requirements or the procedural requirements of the *Primer*. *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). Nor are they intended to denigrate the requirement of substantial compliance with the *Primer*. Finally they are not intended to affect the ascertainment showings required of renewal applicants who are subject to the renewal *Primer*. *Ascertainment of Community Problems by Renewal Applicants*, 57 FCC 2d 248 (1975), *recon. granted in part*, 61 FCC 2d 1 (1976). The Commission is looking into the substance of ascertainment and the *Primer* requirements in another proceeding. I am sure the Commission intends the staff to apply the existing rules in the interim, and interested parties should be guided accordingly.

[FR Doc. 79-18916 Filed 6-15-79; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

Materials Transportation Bureau

General Information, Regulations, and Definitions; Matter Incorporated by Reference

[Docket No. HM-22; Amdt. No. 171-48]

49 CFR Part 171

AGENCY: Materials Transportation Bureau (MTB), Research and Special Programs Administration, DOT.

ACTION: Final rule.

SUMMARY: The purpose of this amendment is to update the reference in 49 CFR 171.7(d)(1) to the ASME Boiler and Pressure Vessel Code in order to recognize the 1977 edition of the ASME Code and the addenda thereto through December 31, 1978.

EFFECTIVE DATE: July 18, 1979.

FOR FURTHER INFORMATION CONTACT: Delmer F. Billings, Standards Division, Office of Hazardous Materials Regulation, Department of Transportation, 2100 Second Street, S.W., Washington, D.C., 20590, telephone 202-755-4902.

SUPPLEMENTARY INFORMATION: On April 23, 1979, the MTB published a notice of proposed rulemaking in the **Federal Register** (44 FR 23880), proposing to update the ASME code reference in § 171.7(d). The basis for this proposal was a petition from the Compressed Gas Association requesting that the reference be updated to reflect current improvements in the standard. The MTB has reviewed the complete standard and concurs with the improvements except for the provisions on ultrasonic testing of welds (paragraph UW-11(a)(7)).

Since publication of this notice, the MTB has not received any comments on this docket. Therefore, the ASME code through 1977 and the addenda published thereto through December 31, 1978, will be referenced in § 171.7(d) with the exception of paragraph UW-11(a)(7) as proposed by the notice.

In consideration of the foregoing, Title 49, Code of Federal Regulations, § 171.7(d)(1) is revised to read as follows:

§ 171.7 Matter incorporated by reference.

* * * * *

(d) * * *

(1) ASME Code means section VIII (Division I) and IX of the 1977 edition of the "American Society of Mechanical Engineers Boiler and Pressure Vessel Code, " and addenda thereto through December 31, 1978, except paragraph UW-11(a)(7) of the code does not apply.

* * * * *

(49 U.S.C. 1803, 1804, 1808; 49 CFR 1.53 and App. A to Part 1)

Note.—The Materials Transportation Bureau has determined that this final rule will not result in a major economic impact under the terms of Executive Order 12044 and DOT implementing procedures (44 FR 11034), nor an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321 et seq.). A regulatory evaluation is available in the docket.

Issued in Washington, D. C. On June 7, 1979.

L. D. Santman,

Director, Materials Transportation Bureau.

[FR Doc. 79-18882 Filed 6-15-79; 8:45 am]

BILLING CODE 4910-60-M

Federal Highway Administration

49 CFR Part 395

[BMCS Docket No. MC-86; Amdt. No. 78-6]

Drivers Declared Out of Service

AGENCY: Federal Highway Administration, DOT.

ACTION: Final rule.

SUMMARY: The Federal Motor Carrier Safety Regulations (FMCSR) are being amended by changing the criteria by which a driver may be placed out of service. With some exceptions, upon detection, a driver will be declared out of service for 8 consecutive hours for not having drivers' logs current on the day of examination and the prior 7 consecutive days. In the past, drivers who complied with the request to produce a log and who were found to be

in violation of the hours of service rule were removed from service, while drivers who failed to produce a log were usually given a citation since no out of service criteria were violated. Thus, these drivers were allowed to continue highway operations in a possibly fatigued state. With this change, drivers failing to produce current logs will be placed out of service and not be allowed to continue driving on the highways.

EFFECTIVE DATE: June 18, 1979.

FOR FURTHER INFORMATION CONTACT: Mr. Gerald J. Davis, Chief, Driver Requirements Branch, Regulations Division, Bureau of Motor Carrier Safety, (202) 426-9767, or Mr. Gerald M. Tierney, Attorney, Motor Carrier and Highway Safety Law Division, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m., Monday through Friday.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Rulemaking (NPRM) was published on March 8, 1979, at 44 FR 12717 setting forth a proposal to declare a driver out of service for 8 consecutive hours for not having produced a driver's log current on the day of examination and the prior 7 consecutive days. An exception was provided in the event that the only failing was not having a log current on the day of examination and the prior day. In those instances, it was proposed that the driver would be given the opportunity to update the logs to the current duty status. Essentially, the earlier proposal is being adopted.

Background

Under prior requirements, drivers who failed to produce logs upon request of a special agent of the Federal Highway Administration (FHWA) were not placed out of service but were merely cited for a violation of the hours of service regulations. Thus, in certain circumstances, the intent of the present hours of service regulations, which are designed to protect the driver and the motoring public by removing fatigued drivers from operating on the highways, was circumvented.

Upon review, several sources indicated that a problem existed in the area relating fatigued drivers, non-current logs and excessive driving times. For instance, the Bureau of Motor Carrier Safety (BMCS) statistics for 1976 and 1977 indicated that a significant percentage of drivers did not have current logs. Of the driver violations found during roadside inspections in the year 1976, 20 percent were categorized as "no log" violations and 11 percent were categorized as "log not current" violations. Similarly, in 1977, 19 percent were categorized as "no log" violations and 13 percent were categorized as "log not current" violations. In addition, it had come to our attention that several States having hours of service requirements also suspected that drivers were exceeding the driving limitations of the States. Moreover, the Department of California Highway Patrol has proposed a statute for introduction regarding drivers' hours of service. The California statute is intended to give a traffic officer authorization to place out of service a driver who does not possess records or who has exceeded the hours of service requirements. The proposed statute which provides for presumption of a violation of driving limits when records are not made available upon demand by authorized personnel should result in placing these drivers out of service for an appropriate rest period.

Comments to the NPRM

Approximately 40 comments were received concerning this proposal. These comments have been carefully considered. Approximately 60 percent of the respondents were in favor of the proposal indicating that this action would improve consistent enforcement of the FMCSR.

The Director believes, on the basis of information provided in this rulemaking, that there is a strong possibility that drivers who do not prepare the driver's log and violate hours of service requirements pose a threat to other users of the highway. The objective of the logging requirements is to permit drivers, carriers, and responsible Federal and State authorities to monitor the hours of service to ensure that drivers do not work or drive for longer periods than are permitted. The FMCSR limit the number of hours a driver may work or drive within any specific period. The purpose of the limitation of hours of service is to remove from the highways the risks to safety posed by a fatigued driver and thus help to ensure that people are not needlessly killed or injured in highway accidents caused by fatigued drivers of commercial trucks and buses. Neither a driver nor a carrier can ensure compliance with the hours of service rules unless there is a continuous record of the time the driver spent on the job. The Regulations require drivers to keep a record of their working and driving time in the form of a driver's log.

Some respondents commented that the proposal would discriminate between classes of drivers. For instance it was explained that self-employed drivers could suffer a direct economic penalty when placed out of service for 8 hours, while a driver employed by a carrier under an hourly rate would suffer no economic loss. The purpose of the proposed rule is not, indiscriminately penalize different classes of drivers monetarily or otherwise, but to remove from the highway those drivers that are likely to be operating in a fatigued condition. The Director is aware that various drivers will be affected differently. However, once a self-employed driver has been placed out of service for not having a driver's log, the proposed rule should serve as a deterrent to future noncompliance of the logging requirements.

Many commenters indicated that placing the drivers out of service would delay the freight being transported for an 8-hour period and indicated that such a delay would pose security problems for most commodities transported, and additional problems in the transportation of perishable goods. Questions were also raised concerning the responsibility for delayed claims filed against the motor carrier. At the present time, the FMCSR provide for two basic out of service actions. One involves placing a motor vehicle out of service for being operated in an imminently hazardous condition. The second involves placing drivers out of service for exceeding the hours of service requirements. When vehicles are placed out of service, the vehicle cannot be operated until designated repairs are accomplished. The driver is free to continue driving as long as the driver does not operate the vehicle declared out of service. When a driver has been placed out of service for violation of the driver out of service rules, the driver may not drive until in compliance with the hours of service requirements. However, the vehicle can be driven by another qualified driver to destination or to any point designated by the motor carrier. The only requirement posed by the current proposal is that the driver who is in violation of the logging requirements not drive until 8 hours off duty have accumulated.

Some respondents indicated that the change was unfair to operating motor carriers since the requirement of preparing a driver's log is basically the responsibility of the driver and placing the driver out of service, which delays the freight, places an undue burden upon the operating motor carrier and for this reason, the proposal should not be adopted. This argument is invalid. The present logging requirements found in §§ 395.8 and 395.9 of the FMCSR make it clear that the preparation of the driver's logs is a dual responsibility involving the driver and the carrier. The Regulation requires a driver to prepare the log. In addition, the motor carrier has the responsibility to ensure that its drivers prepare the required logs. The driver is in many ways an extension of the motor carrier, and to separate the driver's from the carrier's responsibilities in log preparation is unreasonable. Failure of drivers to prepare logs or falsification of the entries makes both the carrier and the driver liable to prosecution. Affirmative action is required by the motor carrier to ensure that its employees follow the required regulations.

Concern was expressed by some commenters about drivers who do not have their log book with them at the time of the inspection because they are not required to prepare a log or because they may have lost their log book on the current trip. The proposed requirement that a driver be placed out of service for not having a log would only apply to drivers who are required to prepare logs. There are currently exemptions contained in the Safety Regulations for preparation of the driver's log and they are not affected by this change. For example, logs are not required for regularly employed drivers operating within a 50-mile radius of there terminal where they report for work, for certain drivers of lightweight vehicles or for drivers operating in the State of Hawaii. Also, drivers who are used for the first time or intermittently are not required to have logs available for the preceeding 7 days. A driver would not be placed out of service for failure to prepare the log if in one of the exempt categories. A driver who is required to prepare a log and fails to produce one, for any reason, including that the log was lost will be placed out of service.

A driver failing to have a log current on the day of examination and the prior day, but who has completed logs up to that time, will not be placed out of service but will be given the opportunity to prepare the logs to current status prior to continued examination. Several commenters stated for a shorter exception period. One commenter states this exception seemed to minimize the importance of current logs. Another added "If the log examination is made later in the day, the driver could be nearly 48 hours behind. Since the purpose of the log is to monitor actively and remove fatigued drivers from highways, this grant of an exemption period would not be stringent enought to prohibit a driver from failing to keep the log current." In an effort to determine if these comments have merit, it is the BMCS intention to evaluate the effects of this out of service criteria change during the summer months of 1979. If the results of the data so indicate, further rulemaking action will be considered.

One commenter indicated that a driver could be placed in double jeopardy, if the driver did not have logs and was placed out of service first by a Federal agent and then by State authorities which have adopted the FMCSR. This should not happen. Once a driver has been declared out of service by Federal authorities for failure to prepare the log, the driver may not reenter service until having been off duty for 8 consecutive hours and is in compliance with the logging requirements.

It has been requested that further consideration be given to placing drivers out of service who are transporting passengers. A bus driver who is on an extended charter or special operation and is placed out of service will cause undue hardships on passengers by causing a delay in transportation and could create serious problems concerning other factors such as hotel reservations and similar services. When a bus driver is placed out of service, consideration is usually given to the passengers. Bus inspections are normally performed at terminals or other locations where rest facilities are usually available to the passengers. The transportation of passengers, by its very nature, should impose upon the motor carrier and its driver a strong obligation to ensure that its operation is in full compliance. The consequences involving bus accidents cannot be minimized by providing an exemption in this rule by arguing that it may cause inconvenience to passengers. In addition, in 1977, only 6 drivers were cited for failing to prepare a daily log while transporting passengers.

Commenters addressed notification of the carriers in certain instances and questioned whether our policy in this matter has changed. It has not. The authority to declare drivers out of service as specified in § 395.13 authorizes the appropriate representatives of the Federal Highway Administration to notify motor carriers that drivers have been placed out of service. This does not imply that when drivers are placed out of service that the motor carrier will be contacted in each and every instance. It has been the policy of this Administration to notify carriers when their vehicles or drivers have been declared out of service only in specific cases. These instances involved vehicles transporting hazardous materials requiring the vehicle to be attended, vehicles transporting perishable commodities, tank vehicles transporting commodities requiring temperature control, vehicles transporting livestock, and instances which prevent the driver from returning to driving duties during the same day after having been placed out of service.

The majority of comments to this docket support the proposed change. Several drivers were in favor of this rule change. As one driver pointed out, an injustice is done to the conscientious driver who keeps an up-to-date log, if we continue to let other drivers continue in highway operations when only a citation is issued for no log. Another driver commented that this change would eventually eliminate no log drivers or cheaters and would help to remove fatigued drivers from the highway. Also, many carriers strongly supported the changes and indicated that they felt it will help them maintain the type of control necessary to keep operations legal and fatigued drivers off the road. The International Brotherhood of Teamsters applauded the effort and indicated that since we are not changing the basic hours of service requirements there will be no undue burden placed upon carriers or drivers. Also, the American Trucking Association, Inc., supported the change.

Rule Discussion

The FHWA is amending the FMCSR, with respect to the out of service criteria, to declare a driver out of service for failing to have a driver's log current on the day of examination and for the prior 7 consecutive days. An exception will be provided to the above in the event that the only failure is not having a log current on the day of examination and the prior day. In these instances the driver will be given the opportunity to prepare the logs to current status. Provided the driver does not refuse to prepare current logs and no other out of service criteria are violated, the driver may continue to drive.

A driver placed out of service would not be allowed to remain on duty. To the contrary, the driver would be required to be off duty for 8 consecutive hours to have the opportunity to obtain adequate rest before again operating a heavy commercial vehicle on our highways. When applicable, the consecutive 8 hour off duty period may include sleeper berth time.

An exception to this procedure would be invoked, and is provided in the rule change, for drivers transporting hazardous materials subject to § 397.5.

which requires the vehicle to be attended.

To determine the exact nature of the out of service violation, it is required that the driver explain the reason for being placed out of service in the remarks section of the log as provided in § 395.8(o).

This Final Rule is intended to further encourage drivers to maintain current logs and provide the FHWA with a more consistent rule designed to remove the potentially unsafe and fatigued driver from the public highway. A copy of the Final Regulatory Evaluation accompanying this rule, which examines the need for this regulatory action and assesses its potential impacts, is available in the public docket for review. As indicated later in this document, the FHWA has determined that the economic consequences of the Final Rule are not significant.

Accordingly, the Federal Motor Carrier Safety Regulations are amended as follows:

1. 49 CFR 395.13 is revised to read:

§ 395.13 Drivers declared out of service.

(a) Authority to declare drivers Out of Service. Every special agent of the Federal Highway Administration (as defined in Appendix B to this subchapter) is authorized to declare a driver out of service and to notify the motor carrier of that declaration, upon finding at the time and place of examination that the driver has violated the out of service criteria as set forth in paragraph (b) of this section.

(b) *Out of Service critieria.* (1) No driver shall drive or remain on duty in excess of the maximum periods permitted in this part.

(2) No driver, if required to have a driver's log under §§ 395.8 and 395.9, shall fail to have a log current on the day of examination and for the prior 7 consecutive days. Exception: A driver failing only to have possession of a log current on the day of examination and the prior day, but has completed logs up to that time, will be given the opportunity to prepare logs to current status.

(c) *Responsibilities of the motor carrier.* (1) No motor carrier shall:

(i) Require or permit a driver who has been declared out of service to operate a motor vehicle until that driver may lawfully do so under the rules in this part.

(ii) Require a driver who has been declared out of service for failure to prepare a daily log to operate a motor vehicle until that driver has been off duty for 8 consecutive hours and is in compliance with §§ 395.8 and 395.9. The consecutive 8-hour off-duty period may include sleeper berth time.

(2) A motor carrier shall complete the appropriate portion of the form provided and deliver the copy of the form either personally or by mail to the Director, Regional Motor Carrier Safety Office, Federal Highway Administration, at the address specified upon the form within 15 days following the date of examination. If a motor carrier sends the form to the Director by mail, delivery is made upon the date when it, or the envelope containing it, is postmarked.

(d) *Responsibilities of the driver.* (1) No driver who has been declared out of service shall operate a motor vehicle until that driver may lawfully do so under the rules in this Part.

(2) No driver who has been declared out of service, for failing to prepare a driver's log, shall operate a motor vehicle until having been off duty for 8 consecutive hours and is in compliance with §§ 395.8 and 395.9.

(3) A driver to whom a form has been tendered declaring the driver out of service shall within 24 hours thereafter deliver or mail the copy to a person or place designated by motor carrier to receive it.

(4) Section 395.13 does not alter the hazardous materials requirements prescribed in § 397.5 pertaining to attendance and surveillance of motor vehicles.

2. 49 CFR 395.8(o) is amended by adding the following sentence at the end of the present rule:

§ 395.8 Remarks.

(o) * * * Explain the reason for being placed out of service, pursuant to § 395.13.

Note.—The Federal Highway Administration has determined that this document does not contain a significant proposal according to the criteria established by the Department of Transportation pursuant to Executive Order 12044. A regulatory evaluation is available for inspection in the public docket and may be obtained by contacting Mr. Gerald J. Davis of the program office at the address specified above.

(49 U.S.C. 304, 1655(e); 49 CFR 1.48 and 301.60.)

Issued on: June 8, 1979.

Howard L. Anderson,

Associate Administrator for Safety.

[FR Doc. 79-18923 Filed 6-15-79; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

Taking of Marine Mammals Incidental to Commercial Fishing Operations—Permits, Etc.

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Interim final regulation.

SUMMARY: The intent of the amendment is to clarify the period during which observers remain aboard tuna purse seiners by defining the term "completed vessel trip" in regulations governing the taking of marine mammals incidental to tuna purse seine fishing in the eastern tropical Pacific Ocean during 1978, 1979, and 1980.

DATES: This regulation is effective June 18, 1979. Written comments may be submitted on or before July 18, 1979. Requests for a public hearing and justification for such a request must be received by July 9, 1979.

ADDRESSES: Submit comments and hearing requests to the Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street NW., Washington, D.C. 20235.

FOR FURTHER INFORMATION CONTACT: William P. Jensen, Marine Mammal Program Manager, National Marine Fisheries Service, 3300 Whitehaven Street NW., Washington, D.C. 20235, telephone 202-634-7461.

SUPPLEMENTARY INFORMATION: Regulations governing the taking of marine mammals incidental to tuna purse seine fishing in the eastern tropical Pacific Ocean during 1978, 1979, and 1980 limit the incidental mortality of marine mammals permitted under the general permit. Annual mortality is estimated in accordance with methodology published in the **Federal Register** on October 4, 1976, March 11, 1977, and May 4, 1977 (41FR43726, 42FR13574, and 42FR22573), respectively.

This methodology utilizes kill-per-trip data for completed trips carrying NMFS observers and kill-per-day data reported by radio from observed vessels at sea.

The placement of observers on tuna vessels is designed to obtain a statistically valid sample for estimating total porpoise mortality. One hundred thirty completed trips annually is considered a valid sample, however, a trip has not been defined for purposes of establishing when a trip is complete. Because of the importance of establishing what constitutes a completed trip, a clarifying definition is being promulgated which obligates a vessel certificate holder to carry an observer until the vessel returns to port and unloads more than 400 tons of any species of tuna or unloads an amount of any species of tuna equivalent to one-half of the vessels carrying capacity or has spent 40 days or more at sea from the date of departure. The regulations also provide that the NMFS regional director may give exemptions to the requirements for good cause.

The clarifying definition is being promulgated to be effective immediately to prevent any misunderstandings that may arise concerning fulfillment of the obligation to carry an observer. The efficient operation of the observer program is critical for monitoring the porpoise quotas. Good cause for waiver of the normal 30 day period between publication and the effective data therefore exists. However, public comment on the regulation will be accepted for 30 days after publication of the definition.

Under Executive Order 12044 (43FR23170) and Department of Commerce Administrative Order 218-7 (44FR2082), the Assistant Administrator for Fisheries has made an initial determination that this is not a significant regulation.

The primary author of this rulemaking is Mr. William P. Jensen, Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, (202) 634-7461.

Regulation Promulgation

Accordingly, 50 CFR Chapter II, Part 216 is amended by revising § 216.24(d)(2)(iii)(A) to read as follows:

§ 216.24 Taking and related acts incidental to commercial fishing operations.

* * * * *

(d) * * *

(2) * * *

(iii) * * *

(A) The vessel certificate holder of each certificated vessel, who has been notified via certified letter from the National Marine Fisheries Service that he is required to carry an observer, shall notify the field office, Southwest Region, National Marine Fisheries Service, San Diego, California, telephone 714-293-6540 at least five days in advance of the vessel's departure on a fishing voyage to allow for observer placement. After a fishing voyage is initiated, the vessel certificate holder is obligated to carry an observer until the vessel returns to port and unloads more than 400 tons of any species of tuna or unloads an amount of any species of tuna equivalent to one-half of the vessel's carrying capacity; or has spent 40 days or more at sea from the date of departure. Further, the Regional Director, Southwest Region, may consider special circumstances for exemptions to this definition, provided written requests clearly describing the circumstances are received at least ten (10) days prior to the termination or the initiation of a fishing voyage. A response to the written request will be made by the Regional Director within five (5) days after receipt of the request. A vessel whose vessel certificate holder has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.

* * * * *

Dated: June 11, 1979.

Winfred H. Meibohm,

Executive Director, National Marine Fisheries Service.

[FR Doc. 79-18876 Filed 6-15-79; 8:45 am]

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