8. Alco-Analyzer Model 1000, Luckey Laboratories, Inc., San Bernardino, California.

Issued on: September 4, 1980.

Charles F. Livingston,

Associate Administrator, Traffic Safety Programs.

[FR Doc. 80-27677 Filed 9-10-80; 8:45 am]

BILLING CODE 4110-59-M

[Docket No. EX80-2; Notice 1]

Model A and Model T Motor Car Reproduction Corp.; Petition for Temporary Exemption From Federal Motor Vehicle Safety Standard

The Model A and Model T Motor Car Reproduction Corporation of Detroit, Michigan ("Model A" herein) has petitioned for a temporary exemption of three years for its "Shay Reproduction 55 Bird" replica passenger car from Federal Motor Vehicle Safety Standard No. 301, *Fuel System Integrity*, on grounds of substantial economic hardship.

This notice of receipt of a petition for a temporary exemption is published in accordance with the NHTSA regulations on this subject (49 CFR 555.7), and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

The Shay Reproduction 55 Bird is a replica of the 1955 Ford Thunderbird. Petitioner believes that production models will conform to all applicable Federal motor vehicle safety standards including Standard No. 301 but avers that it lacks funds to conduct all tests necessary to demonstrate compliance. The fuel system in the engine compartment is one used by Ford Motor Company on certain of its 1980 model year vehicles. The remaining part of the system employs fuel and vapor lines of current production materials and a fuel tank of 13 gauge aluminum material seam welded, similar in configuration to tanks used in most of today's passenger cars. Petitioner states that it would cost $240,000 to verify compliance with Standard 301, which would be burdensome since its pre-tax loss in the fiscal year ending March 31, 1980, was $300,000. The company manufactured 2000 of its other product, a Model A replica, in the year preceding filing of the petition.

In support of its petition, Model A argues that an exemption would be in the public interest since 290 employees would lose their jobs if the company has to cease operations (46% of these employees have been beneficiaries of Federal and State employment programs). The company's factory is located around Battle Creek, Michigan which has been designated as an area of economic hardship. The petitioner argues that denial would have unfortunate consequences both for the company and for its vendors.

Interested persons are invited to submit comments on the petition of Model A and Model T Motor Car Reproduction Corporation described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5108, 400 Seventh Street SW., Washington, D.C. 20590. It is requested but not required that five copies be submitted.

All comments received before the close of business on the comment closing date indicated below will be considered. The application and supporting materials, and all comments received, are available for examination in the docket both before and after the closing date will also be filed and will be considered to the extent possible. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: October 13, 1980.

(Sec. 3, Pub. L. 92-548, 86 Stat. 1159 (15 U.S.C. 1410); delegations of authority at 49 CFR 1.50 and 49 CFR 501.8)

Issued on September 2, 1980.

Michael M. Finkelstein,

Associate Administrator for Rulemaking.

[FR Doc. 80-27815 Filed 9-10-80; 8:45 am]

BILLING CODE 4910-59-M

Office of the Secretary

Privacy Act of 1974; Proposed Notices of System of Records

The Department of Transportation herewith publishes four new notices of systems of records and deletes one system notice which is no longer in operation.

Any person or agency may submit written comments on the proposed systems to the Privacy Act Officer (M-30), Room 7109 U.S. Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590. Comments must be received by October 20, 1980 to be considered.

If no comments are received, the proposed new systems will become effective on October 26, 1980. If comments are received, the comments will be considered and where adopted, the document will be republished with the changes.

Issued in Washington, D.C. on September 8, 1980.

Karen S. Lee,

Deputy Assistant Secretary for Administration.

Cancellation Notice

DOT/OST 60 "Medical Records of Participants in Study of Health Effects of Bicycling in Polluted Air" was dropped from the DOT Annual publication of Systems of Records February 21, 1980, in the **Federal Register** Vol 45, No 36, pages 11686-11788 because the project was completed by late 1979. The deletion announcement of DOT/OST 60 was inadvertently omitted; however, cancellation is official.

New Systems Proposed

The following four systems should be added to the Annual Publication referenced above when they become effective: DOT/OST 062, DOT/FAA 845 and 846, and DOT/NHTSA 470. Proposed systems notices are as follows:

DOT/OST 062

SYSTEM NAME:

Biographies of Key Officials Book DOT/OST.

SYSTEM LOCATION:

Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system of records contains information regarding DOT key officials. The key officials included in the book are subject to change because of personnel changes or at the request of the Secretary.

CATEGORIES OF RECORDS IN THE SYSTEM:

This record contains basic biographical information and pictures of persons holding key positions within the Department of Transportation.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To provide the Secretary with the professional experience and educational background of his/her key executives, which allows him/her to become more familiar with top executives.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM.

STORAGE:

These records are maintained in locked file cabinets in a locked room.

RETRIEVABILITY:

The book is indexed first by organization, then position title and name.

SAFEGUARDS:

Access to and use of this record is limited to the Secretary and to those persons whose official duties require such access. (Not releasable under the Freedom of Information Act without the permission of those individuals in the book.)

RETENTION AND DISPOSAL:

These records are destroyed one year after the person has left the covered position.

SYSTEM MANAGER(S) AND ADDRESS:

Mail Address: Department of Transportation, Office of the Secretary, Executive Personnel Management Division (M–13), 400 7th Street, S.W., Washington, D.C. 20590, Office Location: Nassif Building, Room 9103.

RECORD ACCESS PROCEDURE:

Employees who wish to gain access or contest their records should contact the System Manager(s).

NOTIFICATION PROCEDURES:

Contact System Manager.

RECORD SOURCE CATEGORIES:

Information in this system of records either comes from the individual to whom it applies or is derived from information he supplied.

DOT/FAA 845

SYSTEM NAME:

Correspondence Control and Information System, DOT/FAA

SYSTEM LOCATION:

Federal Aviation Administration, Office of the Administrator, Administrative Staff, 800 Independence Ave, S.W., Washington, D.C. 20591.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who write, or are referred in writing by a second party, to the Administrator, to the Deputy Administrator, and their immediate offices; individuals who write, or are referred in writng by a second party to the Secretary, to the Deputy Secretary, to the Deputy Under Secretary and their immediate offices and the correspondence which has been referred to the Federal Aviation Administration; individuals who are the subject of an action requiring approval or action by one of the forenamed, such as appeals, actions, training, awards, foreign travel, promotions, selections, grievances, description, application of waivers from the Federal Aviation Administration.

CATEGORIES OF RECORDS IN THE SYSTEM:

Correspondence submitted by, or on behalf of, an individual, including resumes, letters of reference, etc; responses to such correspondence; staff recommendations on actions requiring approval or action by the Administrator, the Deputy Administrator, the Secretary, the Deputy Secretary, and the Deputy Under Secretary.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Referral to the appropriate action office within or outside the Department or agency for preparation of a response.

Referral to the appropriate agency for actions involving matters of law, or regulations beyond the responsibility of the agency or Department such as the Department of Justice in matters of law enforcement.

As a data source for management information, such as briefing material on hearings, trend analysis, responsiveness, etc.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM.

STORAGE:

Computer Magnetic disk.

RETRIEVABILITY:

Access is by suspense date, correspondence date, subject matter, senders name, referring individual, action office, and type.

SAFEGUARDS:

Terminal access through the system's software is limited to the Administrator's Administrative Staff.

RETENTION AND DISPOSAL:

Hard-copy records are transferred to the Federal Records Center when three years old to be destroyed when ten years old.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Administrative Staff, Office of the Administrator, Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, D.C. 20591.

NOTIFICATION PROCEDURE:

Individuals wishing to know if their records appear in this system of records may inquire in person or in writing to the System Manager.

RECORD ACCESS PROCEDURES:

Individuals who desire access to the information about themselves in this system of records should contact or address their inquiries to the System Manager.

CONTESTING RECORD PROCEDURES:

Individuals who desire to contest information about themselves contained in this system of records should contact or address their inquiries to the Administrator, or his delegate, at the following address: Federal Aviation Administration, Office of the Administrator, 800 Independence Avenue, S.W., Washington, D.C. 20591.

RECORD SOURCE CATEGORIES:

Correspondence from individuals, their representatives, or sponsors. Response to incoming correspondence. Related material for background as appropriate.

DOT/FAA 846

SYSTEM NAME:

Airport Solicitation Permit Application File, DOT/FAA

SYSTEM LOCATION:

Federal Aviation Administration, Operations Office, Washington National Airport, Washington, D.C. 20001.

Federal Aviation Administration, Operations Office, Dulles International Airport, Washington, D.C. 20041.

CATEGORIES OF RECORDS IN THE SYSTEM:

Completed applications for Airport Solicitation Permits; documentation of each solicitor's authority to represent the organization for which he or she claims to be soliciting.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for the operation of this system is Public Law 96–193, enacted February 18, 1980.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Preparation and issuance of Airport Solicitation Permits, which indicate the solicitor's name and the organization for which he is soliciting. Permits will be issued by airport operations personnel.

Disclosure to members of the public upon request, to permit the public to be informed as to who is soliciting at the airport and for what cause.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM.

STORAGE:

Application forms and any attached documentation are retained at the Operations Offices of National and Dulles Airports.

RETRIEVABILITY:

Applications are maintained in chronological order, not by name. There is no means for retrieval of records pertaining to a particular individual other than manual search of the entire file.

SAFEGUARDS:

The file is in the custody of the Duty Operations Officer.

RETENTION AND DISPOSAL:

Applications will normally be destroyed within 60 days of the date submitted.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Operations Division, Washington National Airport, Federal Aviation Administration, Washington National Airport, Washington, D.C. 20001.

Chief, Operations Division, Dulles International Airport, Federal Aviation Administration, Dulles International Airport, Washington, D.C. 20041.

NOTIFICATION PROCEDURE:

Individuals wishing to know if their records appear in this system of records may inquire in person or in writing to the System Manager.

RECORD ACCESS PROCEDURES:

Individuals who desire access to the information about themselves in this system of records should contact or address their inquiries to the System Manager.

CONTESTING RECORD PROCEDURES:

Same as "Record access procedures."

RECORD SOURCE CATEGORIES:

Application forms and related documentation furnished by airport solicitors.

DOT/NHTSA 470

SYSTEM NAME:

Unreported Accident Survey, DOT/NHTSA.

SYSTEM LOCATION:

Westat, Inc., 11600 Nebel Street, Rockville, Maryland 20852.

CATEGORY OF INDIVIDUALS COVERED BY THE SYSTEM:

Licensed drivers living in households with telephones.

CATEGORY OF RECORDS IN THE SYSTEM:

Characteristics of drivers and motor vehicles involved in unreported accidents, including the environmental, vehicle and driver condition, and their severity in terms of injury and damage.

ROUTINE USES OF RECORDS IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The data will be used by the contractor to develop estimates of the frequency and severity of injury and property damage resulting from unreported accidents nationwide. The records will also be used to determine the need for periodic surveys of unreported accidents by comparing their characteristics with those reported accidents. If the data vary significantly, additional analysis will be necessary to ensure the continuing validity of agency records. Personal identifiers will be used initially to perform a quality control review of the data. Following completion of the interview stage (approximately three months), identifiers will be deleted and information will be maintained in a sanitized file.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM.

STORAGE:

Responses will be maintained initially on hard copy files, then on magnetic tape after personal identifiers have been removed.

RETRIEVABILITY:

Personal name with an assigned sequence number.

SAFEGUARDS:

Files are stored in locked cabinets within a secured area. Only individuals with the "need to know" are allowed access to this file.

RETENTION AND DISPOSAL:

File will be retrievable by personal name for approximately three months after the interview stage. After that, the sanitized file will be maintained for duration of the contract (about two years) and destroyed following contract completion.

SYSTEM MANGER(S) AND ADDRESS:

Chief, Information Systems Division, NRD–33, National Center for Statistics and Analysis, Room 6117, 400 7th Street, S.W., Washington, D.C. 20590.

NOTIFICATION PROCEDURE:

Apply to System Manager.

RECORD ACCESS PROCEDURES:

Apply to System Manager.

CONTESTING RECORD PROCEDURES:

Apply to System Manager.

RECORD SOURCE CATEGORIES:

Responses of household members to telephone inquiries.

[FR Doc. 80–28003 Filed 9–10–80; 8:45 am]
BILLING CODE 4910–62–M

VETERANS ADMINISTRATION

Station Committee on Educational Allowances; Meeting

Notice is hereby given pursuant to Section V, Review Procedure and Hearing Rules, Station Committee on Educational Allowances that on October 15, 1980, at 10:00 a.m., the Veterans Administration Regional Office, Columbia, South Carolina Station Committee on Educational Allowances shall at Room 531, Conference Room, Fifth Floor, VA Regional Office, 1801 Assembly Street, Columbia, South Carolina, conduct a hearing to determine whether Veterans Administration benefits to all eligible persons enrolled in Patterson's School of Barbering, 2353 Stark Street, Columbia, South Carolina, 29205, should be discontinued as provided in 38 CFR 21.4134, because a requirement of law is not being met or a provision of the law has been violated. All interested persons shall be permitted to attend, appear before, or file statements with the committee at that time and place.

Dated: September 2, 1980.

R. Stedman Sloan, Jr.,

Director, VA Regional Office.

[FR Doc. 80–27895 Filed 9–10–80; 8:45 am]
BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 45, No. 178
Thursday, September 11, 1980

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94–409) 5 U.S.C. 552b(e)(3).

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1

FEDERAL DEPOSIT INSURANCE CORPORATION.

Notice of agency meeting.

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 2:00 p.m. on Monday, September 15, 1980, to consider the following matters:

Disposition of minutes of previous meetings.

Memorandum and Resolution re: Conforming Amendments to Part 335 of the Corporation's rules and regulations (Required by Section 12(i) of the Securities Exchange Act of 1934).

Memorandum and Resolution re: Delegations of Authority—Division of Liquidation.

Reports of committees and officers:

Minutes of the actions approved by the Committee on Liquidations, Loans and Purchases of Assets pursuant to authority delegated by the Board of Directors.

Reports of the Director of the Division of Bank Supervision with respect to applications or requests approved by him and the various Regional Directors pursuant to authority delegated by the Board of Directors.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550 17th Street, N.W., Washington, D.C.

Requests for information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 389–4425.

Dated: September 8, 1980.

Federal Deposit Insurance Corporation.
Hoyle L. Robinson,
Executive Secretary.

[S–1676–80 Filed 9–9–80; 11:09 am]
BILLING CODE 6714–01–M

2

FEDERAL DEPOSIT INSURANCE CORPORATION.

Notice of agency meeting.

Pursuant to the provsions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 2:30 p.m. on Monday, September 15, 1980, the Federal Deposit Insurance Corporation's Board of Directors will meet in closed session, by vote of the Board of Directors pursuant to sections 552b(c)(2), (c)(4),(c)(6), (c)(8),(c)(9)(A)(ii), and (c)(9)(B) of Title 5, United States Code, to consider the following matters:

Applications for Federal deposit insurance:

The Cape Cod Five Cents Savings Bank, an operating noninsured mutual savings bank, located in Harwich Port, Massachusetts, for Federal deposit insurance.

Gotham Bank of New York, a proposed new bank, to be located at 1412 Broadway, New York (Manhattan), New York, for Federal deposit insurance.

Stewardship Bank of Oregon, a proposed new bank, to be located at 1918 N.E. 181st Avenue, Multnomah County (P.O. Portland), Oregon, for Federal deposit insurance.

Empire State Bank of Layton, a proposed new bank, to be located at 1275 North Hill Field Road, Layton, Utah, for Federal deposity insurance.

Request for consent to retan assets at branch:

National Bank of Greece, S.A., Chicago, Illinois.

Notice of acquisition of control:

Pioner Bank, Salt Lake City, Utah.

Recommendations regarding the liquidation of a bank's assets acquired by the Corporation in its capacity as receiver, liquidator, or liquidating agent of those assets:

Case No. 44–439–SR (Amended)—Citizens State Bank, Carrizo Springs, Texas.

Case No. 44,451–SR—American Bank & Trust Company, New York, New York.

Case No. 44,459–SR—Bank of Lake Helen, Lake Helen, Florida.

Case No. 44,460–VR—United States National Bank, San Diego, Calif.

Appeal, pursuant to the Freedom of Information Act, from the Corporation's earlier partial denial of a request for records.

Recommendations with respect to the initiation, termination, or conduct of administrative enforcement proceedings (cease-and-desist proceedings, termination-of-insurance proceedings, suspension or removal proceedings, or assessment of civil money penalties) against certain insured banks or officers, directors, employees, agents, or other persons participating in the conduct of the affairs thereof:

Names of persons and names and locations of banks authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(6), (c)(8), and (c)(9)(A)(ii).

Personnel actions regarding appointments, promotions, administrative pay increases, reassignments, retirements, separations, removals, etc.:

Names of employees authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(2) and (c)(6) of the "Government in Sunshine Act" (5 U.S.C. 552b(c)(2) and (c)(6)).

The meeting will be held in the Board Room on the Sixth floor of the FDIC Building located at 550—17th Street, N.W., Washington, D.C.

Requests for information concerning the meeting may be directed to the Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 389–4425.

Dated: September 8, 1980.

Federal Deposit Insurance Corporation.
Hoyle L. Robinson,
Executive Secretary.

[S–1677–80 Filed 9–9–80; 11:10 am]
BILLING CODE 6714–01–M

3

FEDERAL DEPOSIT INSURANCE CORPORATION.

Notice of Changes in Subject Matter of Agency Meeting.

Pursuant to the provisions of subsection (e)(2) of the "Government in the Sunshine Act" (5 U.S.C. 552b(e)(2)), notice is hereby given that at its closed meeting held at 11:30 a.m. on Monday, September 8, 1980, the Corporation's Board of Directors determined, on motion of Chairman Irvine H. Sprague, seconded by Director William M. Isaac (Appointive), concurred in by Director John G. Heimann (Comptroller of the

Currency), that Corporation business required the addition to the agenda for consideration at the meeting, on less than seven days' notice to the public, of the following matters:

Recommendation regarding the liquidation of assets acquired by the Corporation from The Mission State Bank and Trust Company, Mission, Kansas (Case No. 44,463–L).

Recommendations regarding First Pennsylvania Bank N.A., Bala-Cynwyd, Pennsylvania and First Pennsylvania Corporation, Philadelphia, Pennsylvania.

The Board further determined, by that same majority vote, that no earlier notice of the changes in the subject matter of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4) and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(4) and (c)(9)(B)).

Dated: September 8, 1980.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[S–1678–80 Filed 9–9–80; 11:13 am]

BILLING CODE 6714–01–M

4

FEDERAL ELECTION COMMISSION.

DATE AND TIME: Tuesday, September 16, 1980 at 10 a.m.

PLACE: 1325 K Street NW., Washington, D.C.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Personnel, Litigation, Audits, Audit and Complaince Thresholds.

DATE AND TIME: Wednesday, September 17, 1980 at 10 a.m.

PLACE: 1325 K Street NW., Washington, D.C.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Any matters not concluded on September 16, 1980.

DATE AND TIME: Thursday, September 18, 1980 at 10 a.m.

PLACE: 1325 K Street NW., Washington, D.C. (fifth floor).

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Setting of dates for future meetings.
Correction and approval of minutes.
Certifications
Advisory Opinions:
Draft AO 1980–94—John W. Kerr, Jr., Treasurer, Whitehurst for Congress Committee.
Draft AO 1980–95—Daniel L. Murphy, President, First National Bank of Florida.
Draft AO 1980–100—William B. Deyo, Jr., Revere Sugar Corporation.
1980 Election and related matters.
Appropriations and budget.
Pending legislation.
Classification actions.
Routine administrative matters.

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Public Information Officer, telephone: 202–523–4065.

Marjorie W. Emmons,

Secretary to the Commission.

[S–1681–80 Filed 9–9–80; 11:09 am]

BILLING CODE 6714–01–M

5

INTERNATIONAL TRADE COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 45 FR 582967, September 2, 1980.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10 a.m., Tuesday, September 9, 1980.

CHANGES IN THE MEETING: Emergency action to close a portion of the meeting originally announced as open to the public.

Pursuant to the specific exemptions of 5 U.S.C. 552b(c)(4) and in conformity with 19 C.F.R. 201.36(b)(4), Commissioners Alberger, Calhoun, Moore, Bedell, and Stern voted by action jacket OPZ–80–143 to hold the briefing with respect to Item No. 5 [Investigation 303–TA–14 [Preliminary] (Animal Identification Tags from New Zealand)—briefing and vote] in closed session.

Commissioners Alberger, Calhoun, Moore, Bedell, and Stern also determined, pursuant to 19 C.F.R. 201.37(b) that Commission business requires the change in the determination of the Commission to open or close this portion of the meeting and directed the issuance of this notice at the earliest practicable time.

CONTACT PERSON FOR MORE INFORMATION: Kenneth M. Mason, Secretary (202) 523–0161.

[S–1675–80 Filed 9–9–80; 9:55 am]

BILLING CODE 7020–02–M

6

NUCLEAR REGULATORY COMMISSION.

DATE: Monday, September 8, 1980.

PLACE: Commissioner's conference room, 1717 H Street NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED:

4 p.m.

1. Discussion of Commission Program to Review Operating License Applications (approximately 2 hours, public meeting).

ADDITIONAL INFORMATION: By vote of 3–0 (Commissioner Gilinsky not present) on September 8, the Commission determined pursuant to 5 U.S.C. 552b(e)(1) and § 9.107(a) of the Commission's rules that Commission business requires that the above agenda item be held on less than one week's notice to the public.

CONTACT PERSON FOR MORE INFORMATION: Walter Magee (202) 634–1410.

AUTOMATIC TELEPHONE ANSWERING SERVICE FOR SCHEDULE UPDATE: (202) 634–1498.

Those planning to attend a meeting should reverify the status on the day of the meeting.

Roger M. Tweed,

Office of the Secretary.

[S–1680–80 Filed 9–9–80; 2:37 am]

BILLING CODE 7590–01–M

Reader Aids

Federal Register

Vol. 45, No. 178

Thursday, September 11, 1980

INFORMATION AND ASSISTANCE

Questions and requests for specific information may be directed to the following numbers. General inquiries may be made by dialing 202-523-5240.

Federal Register, Daily Issue:

202-783-3238	Subscription orders and problems (GPO)
	"Dial-a-Reg" (recorded summary of highlighted documents appearing in next day's issue):
202-523-5022	Washington, D.C.
312-663-0884	Chicago, Ill.
213-688-6694	Los Angeles, Calif.
202-523-3187	Scheduling of documents for publication
523-5240	Photo copies of documents appearing in the Federal Register
523-5237	Corrections
633-6930	Public Inspection Desk
523-5227	Index and Finding Aids
523-5235	Public Briefings: "How To Use the Federal Register."

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523-3419	
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523-5227	Index and Finding Aids

Presidential Documents:

523-5233	Executive Orders and Proclamations
523-5235	Public Papers of the Presidents, and Weekly Compilation of Presidential Documents

Public Laws:

523-5266 -5282	Public Law Numbers and Dates, Slip Laws, U.S. Statutes at Large, and Index
275-3030	Slip Law Orders (GPO)

Other Publications and Services:

523-5239	TTY for the Deaf
523-5230	U.S. Government Manual
523-3408	Automation
523-4534	Special Projects
523-3517	Privacy Act Compilation

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AGENCY PUBLICATION ON ASSIGNED DAYS OF THE WEEK

The following agencies have agreed to publish all documents on two assigned days of the week (Monday/Thursday or Tuesday/Friday). This is a voluntary program. (See OFR NOTICE FR 32914, August 6, 1976.)

Monday	Tuesday	Wednesday	Thursday	Friday
DOT/SECRETARY	USDA/ASCS		DOT/SECRETARY	USDA/ASCS
DOT/COAST GUARD	USDA/FNS		DOT/COAST GUARD	USDA/FNS
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DOT/RSPA	HHS/FDA		DOT/RSPA	HHS/FDA
DOT/SLSDC			DOT/SLSDC	
DOT/UMTA			DOT/UMTA	
CSA			CSA	

Documents normally scheduled for publication on a day that will be a Federal holiday will be published the next work day following the holiday.
Comments on this program are still invited.
Comments should be submitted to the Day-of-the-Week Program Coordinator, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408

NOTE: As of September 2, 1980, documents from the Animal and Plant Health Inspection Service, Department of Agriculture, will no longer be assigned to the Tuesday/Friday publication schedule.

REMINDERS

The "reminders" below identify documents that appeared in issues of the **Federal Register** 15 days or more ago. Inclusion or exclusion from this list has no legal significance.

Rules Going Into Effect Today

ENERGY DEPARTMENT

Conservation and Solar Energy Office—

53714 8–12–80 / Energy conservation; test procedures for furnaces

HOUSING AND URBAN DEVELOPMENT

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50731 7–31–80 / Mortgage and loan insurance programs; amendments to make section 8 replacement reserve provisions applicable to HUD-insured section 8 projects

50731, 51771 7–31–80 / Mortgage and loan insurance programs; section 8 replacement reserve provisions applicable to HUD-insured section 8 projects

50732 7–31–80 / Mortgage and loan insurance programs; limitation on distributions provisions applicable to HUD-insured section 8 projects

50734 7–31–80 / Mortgage insurance and interest reduction payment for rental projects; rental assistance payments, non-insured 236 projects

Government National Mortgage Association—

50734 7–31–80 / Combination mobile home and lot loans; mortgage-backed securities program

40556 6–13–80 / Guaranty of mortgage-backed securities; issuers' securities marketing and trading activities

List of Public Laws

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This is a continuing listing of public bills from the current session of Congress which have become Federal Laws. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (telephone 202–275–3030).

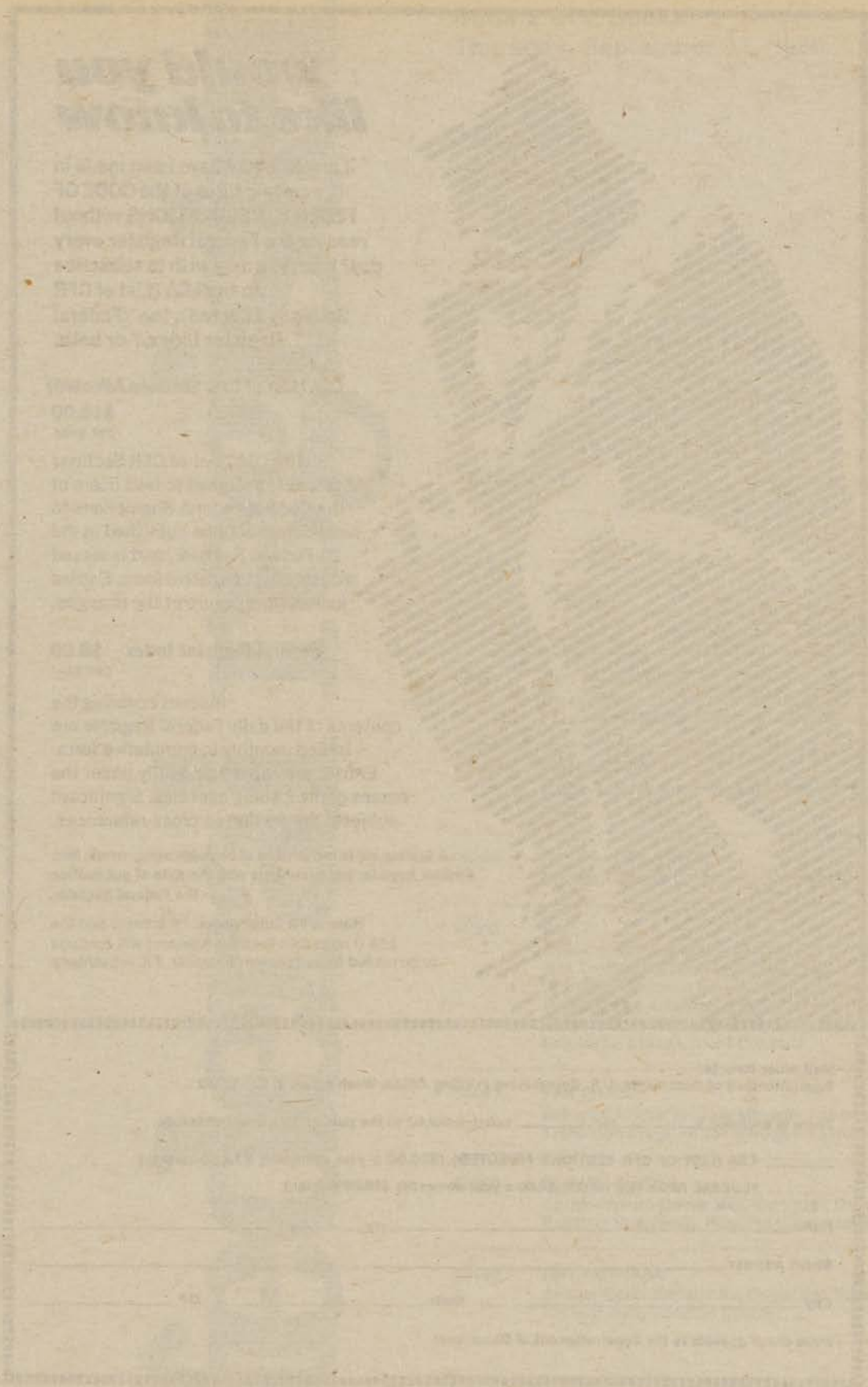
H.R. 8010 / Pub. L. 96–341 To amend the Comprehensive Employment and Training Act to designate a Job Corps Center as the "Earle C. Clements Job Corps Center". (Sept. 8, 1980; 94 Stat. 1076) Price: $1.

H.R. 6974 / Pub. L. 96–342 Department of Defense Authorization Act, 1981 (Sept. 8, 1980; 94 Stat. 1077) Price: $2.25.

H.R. 5168 / Pub. L. 96–343 Military Personnel and Compensation Amendments of 1980 (Sept. 8, 1980; 94 Stat. 1123) Price: $1.25.

S. 2680 / Pub. L. 96–344 To improve the administration of the Historic Sites, Buildings and Antiquities Act of 1935 (49 Stat. 666) (Sept. 8, 1980; 94 Stat. 1133) Price: $1.

H.R. 5892 / Pub. L. 96–345 Wind Energy Systems Act of 1980 (Sept. 8, 1980; 94 Stat. 1139) Price: $1.25.





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Part II

Department of Transportation

Federal Aviation Administration

Airworthiness Review Program; Amendment No. 8A: Aircraft, Engine, and Propeller Airworthiness, and Procedural Amendments

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 11, 21, 23, 25, 27, 29, 31, 33, 35, 43, 45, and 91

[Docket Nos. 14779 and 14324; Amendments Nos. 11-20; 21-51; 23-26; 25-54; 27-18; 29-20; 31-4; 33-9; 35-5; 43-20; 45-12; and 91-167]

Airworthiness Review Program; Amendment No. 8A: Aircraft, Engine, and Propeller Airworthiness, and Procedural Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: These amendments to the Federal Aviation Regulations update and improve the airworthiness standards applicable to the type certification of aircraft, engines, propellers, related operating rules, and procedural requirements. These amendments are part of the Airworthiness Review Program.

EFFECTIVE DATE: October 14, 1980.

FOR FURTHER INFORMATION CONTACT: Marvin J. Walker, Regulatory Review Branch, AVS-22, Safety Regulations Staff, Associate Administrator for Aviation Standards, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, D.C. 20591; Telephone: (202) 755-8714.

SUPPLEMENTARY INFORMATION: These amendments are the ninth and last in a series of amendments issued as part of the Airworthiness Review Program.

The following amendments have previously been issued as part of this program:

Title and Federal Register (FR) Citation

Amendment No. 1: Form Number and Clarifying Revisions (40 FR 2576; Jan. 14, 1975)

Amendment No. 2: Rotorcraft Anticollision Light Standards (41 FR 5290; Feb. 5, 1976)

Amendment No. 3: Miscellaneous Amendments (41 FR 55454; Dec. 20, 1976)

Amendment No. 4: Powerplant Amendments (42 FR 15034; March 17, 1977)

Amendment No. 5: Equipment and Systems Amendments (42 FR 36960; July 18, 1977)

Amendment No. 6: Flight Amendments (43 FR 2302; Jan. 16, 1978)

Amendment No. 7: Airframe Amendments (43 FR 50578; Oct. 30, 1978)

Amendment No. 8: Cabin Safety and Flight Attendant Amendments (45 FR 7750; Feb. 4, 1980)

These amendments are for the most part based on Notice 75-31 which was published in the **Federal Register** on July 11, 1975 (40 FR 29410), as well as a number of proposals contained in the following notices of proposed rule making: Notice 75-10 (40 FR 10802; March 7, 1975); Notice 75-19 (40 FR 21866; May 19, 1975); and Notice 75-26 (40 FR 24802; June 10, 1975). Amendments based on the latter three notices have already been issued as a part of the Airworthiness Review Program, specifically those titled Miscellaneous Amendments, Powerplant Amendments, and Airframe Amendments, respectively. Final action on certain of the proposals was deferred, however, at the time the amendments were issued as further consideration and review of these proposals was considered necessary. In other cases, final action was deferred so that they could be considered together with related proposals contained in other notices.

Certain proposals identified as Group 2 in Appendix I to Notice 75-31 were deferred to be dealt with in a later notice as a part of the Airworthiness Review Program. These proposals all addressed the concept of periodically updating the certification basis of airplane models in long-term production. Such recertification every five or ten years would be intended to ensure that the level of safety of all airplanes in service keep pace with the current level of safety expectations. The FAA has now determined that these proposals more appropriately should be examined as a separate issue in a future regulatory action. Accordingly, the proposals identified as Group 2 in Appendix 1 to Notice 75-31 are being dropped from the Airworthiness Review Program.

Proposals relating to cabin safety and flight attendants, which are identified in this amendment, were extracted from Notice 75-31 (40 FR 29410; July 11, 1975) and handled on an expedited basis. Those rules were published in the Cabin Safety and Flight Attendant Amendments (45 FR 7750; February 4, 1980).

Interested persons have been given an opportunity to participate in the making of these amendments and due consideration has been given to all matters presented. The proposals and comments are discussed below. Substantive changes and changes of an editorial and clarifying nature have been made to the proposed rules based upon relevant comments received and further review within the FAA. Except for minor editorial and clarifying changes and the substantive changes discussed below, these amendments and the reasons for them are the same as those contained in Notices 75-10, 75-19, 75-26, and 75-31.

Discussion of Comments

The following discussions are keyed to the like-numbered proposals contained in Notices 75-10, 75-19, 75-26, and 75-31, and are presented in the same order as the corresponding amendments found in the rules portion of this document.

Proposal 8-1. The proposal to amend § 1.1 in order to transfer the definitions for rated power and thrust to a new § 33.6 is withdrawn. It is considered that such a change may introduce confusion in the administration of aircraft certification rules. See also Proposal 8-94.

Proposal 8-2. Several commenters object to proposed § 21.16(a) which would delete reference to a "novel and unusual design feature" as a necessary condition for the Administrator to issue special conditions. Special conditions become a part of the designated applicable regulations for type certification of a particular product (aircraft, aircraft engine, or propeller).

One commenter indicates that the proposed revision is unjustified and would lead to indiscriminate rule making, and that instead of simplifying the administration of the requirements it would introduce complexity. Another commenter claims that adoption of proposed § 21.16(a) would introduce uncertainty into design requirements.

One commenter suggests that in lieu of revising § 21.16, the FAA should perform a study of § 21.21(b)(2). (Section 21.21(b)(2) provides for denial of a type certificate if an unsafe feature or characteristic exists in the design under consideration. Before adoption of § 21.16, FAA used § 21.21(b)(2) to issue special conditions in letter form.) This commenter suggests that if § 21.21(b)(2) were to continue to be used to issue special conditions to cover an unsafe design feature or characteristic that is not "novel or unusual," it must be equally applicable to a condition that exists on more than one (earlier certificated) product, further stating that the other product or products must then have been type certificated using existing rules which did not adequately cover the unsafe design feature or characteristic. On this premise, the same commenter asks several relevant questions. When § 21.21(b)(2) is applied, does the FAA make it retroactive to the other involved models? Are Airworthiness Directives (Part 39)

issued? Why wasn't a special condition issued against the first applicant when the condition was, in fact, novel or unusual? Why was this not followed by a notice of proposed rule making for future application?

These comments and questions caused the FAA to completely reevaluate its practices in designating the applicable regulations for type certification under § 21.17(a), commonly referred to as defining a "type certification basis."

After further consideration of the comments received as well as FAA practice in designating the applicable regulations, and the objectives of proposed § 21.16, the FAA agrees that this proposal should be withdrawn because of the potential for possible abuse of general rulemaking procedures, of the requirements of the Administrative Procedure Act, and the intent of Executive Order 12044. As explained below, the objectives of proposed § 21.16 will be satisfied by the application of a new FAA policy affecting the designation of applicable regulations for the type certification of new aircraft, aircraft engines, and propeller designs. These future practices are consistent with the FAA General Rule-Making Procedures of Part 11, the Administrative Procedure Act, and Executive Order 12044.

Section 21.16 is one paragraph of a number of paragraphs used to define the type certification basis of a new product. Companion paragraphs of importance to this discussion include §§ 21.17 and 21.21. Section 21.17(a) provides that the applicable airworthiness standards are (1) those requirements of this subchapter that are effective on the date of application for a type certificate, unless otherwise specified by the Administrator or unless compliance with later effective amendments is elected by the applicant or required by special retroactive regulations (e.g., § 25.2), and (2) any special conditions prescribed by the Administrator in accordance with § 21.16. Section 21.16 provides for the issuance of special conditions when the Administrator finds that the existing airworthiness standards do not contain adequate or appropriate safety standards *because of novel or unusual design features* of the product to be type certificated. Section 21.21(b)(1) permits noncompliance with specific provisions of the airworthiness standards when there are compensating factors that provide an equivalent level of safety. Such determinations are commonly referred to as "equivalent safety findings." Section 21.21(b)(2) provides for the denial of a type certificate, notwithstanding a showing of compliance with the applicable airworthiness standards designated in accordance with § 21.17, if the Administrator finds an unsafe feature or characteristic or the product for the category in which certification is requested.

Sections 21.16, 21.17, and 21.21, taken together with FAA policy in designating the applicable regulations must recognize and balance four important considerations: (1) The FAA has an obligation under Section 601 of the Federal Aviation Act of 1958 to keep the airworthiness standards of this subchapter (i.e., FARs 23, 25, 27, 29, 31, 33, and 35) as current as practicable; (2) the type certificate applicant has a right and a need to know, in very specific terms, what the applicable airworthiness standards will be in order to finalize the detail design of its product and to enable the applicant to make reasonable performance guarantees to its potential customers; (3) in the interests of safety, rapid technological advances presently being made by the civil aircraft industry require that the FAA be able to issue special conditions to address truly novel or unusual design features that it has, as yet, not had an adequate opportunity to envisage in the airworthiness standards through the general rulemaking process; and (4) because the airworthiness standards of this subchapter are intentionally objective in nature to allow flexibility in design, the FAA must retain the prerogatives both to make equivalent safety findings and to deny a type certificate whenever an unsafe design feature or characteristic is found during the type certification process.

The phrase "novel or unusual" as used in § 21.16 is a very relative term. As used hereafter in applying § 21.16 to justify the issuance of special conditions, "novel or unusual" will be taken with respect to the state of technology envisaged by the applicable airworthiness standards of this subchapter. It must be recognized that in some areas which will vary from time to time the state of the regulations may somewhat lag the state of the art in new design because of the rapidity in which the state of the art is advancing in civil aeronautical design and because of the time required to develop the experience base needed by the FAA to proceed with general rule making. Applicants for type certification of a new design have the opportunity to mitigate the impact of not knowing the precise airworthiness standards to be applied for "novel or unusual design features" by consulting with the FAA early in their certification planning when such features are suspected or known by the applicant to exist. It should also be recognized that, because of the intentional objective nature of the airworthiness standards of this subchapter, many new design features which might be thought of as "novel or unusual design features" may already be adequately covered by existing regulations, thus obviating the need to issue special conditions.

Henceforth, the special condition will not be issued for general upgrading of the applicable airworthiness standards when novel or unusual design features are not involved. Whenever the FAA determines that an upgrading of the airworthiness standards of this subchapter is warranted, the upgrading will be promulgated as an amendment to this subchapter consistent with the general rulemaking procedures of FAR Part 11, the Administrative Procedure Act, and Executive Order 12044. Should the FAA conclude that there is a compelling safety need to apply a proposed amendment retroactively to designs already type certificated or to designs for which a type certificate application is in progress, the retroactive aspects of the proposed amendment, if supportable by a regulatory analysis completed in accordance with Executive Order 12044, will be announced in the notice of proposed rule making for that amendment. Public comments on the proposed retroactive aspects will be considered in determining the applicability of the adopted rule.

A number of products for which special conditions have not as yet been issued are undergoing type certification at the time of this amendment. Should the FAA conclude that recent or future amendments to this subchapter should be applied to these products that would not otherwise be applicable under § 21.17 (a) (1) then an amendment to require retroactive application will be proposed and acted upon through the general rulemaking process explained above, in lieu of issuing special conditions under § 21.16.

Also, the provisions of § 21.21(b)(2) will no longer be used to justify the issuance of special conditions. However, just as an Airworthiness Directive may be issued under Part 39 to require the correction of an unsafe condition that is likely to exist or develop in a product of the same type design, notwithstanding a showing of compliance with the applicable airworthiness standards, § 21.21(b)(2) may continue to be used to deny issuance of a type certificate if a similar unsafe feature or characteristic

is found during the type certification process, notwithstanding a showing of compliance with requirements designated by § 21.17. The unsafe features and characteristics envisaged by § 21.21 (b) (2) are those related to specific design configuration or product characteristics of a particular design, that one would not normally expect the applicable airworthiness standards to specifically preclude because of their intentionally objective nature.

It is the practice of the FAA to develop and publish a Type Certificate Data Sheet as an integral part of each type certificate. The type certification basis is recorded on the Type Certificate Data Sheet for public information. In the future the type certification basis statement will indentify not only the applicable regulation, including special conditions, but also will identify all exemptions issued pursuant to Part 11, together with "equivalent safety findings" made in accordance with § 21.21 (b) (1).

For the above reasons, Proposal 8–2 is withdrawn.

In considering its disposition of the proposal to amend § 21.16 (a), the FAA realizes that a "novel or unusual design feature" today may become a common design feature of the future. The issuance of a like special condition for several product designs will most likely compel general rule making on that subject and the history of that special condition could have a very strong influence on thinking when general rule making is initiated. Also, although special conditions are regulations on particular product applicability, they are issued only in the interest of public safety. For these reasons, Part 11, and § 21.16 of Part 21 are amended to require special conditions to be issued in accordance with the existing general rule-making procedures. As is now the case, a docket will continue to be maintained for each set of special conditions, and all material in the docket will continue to be available for public review.

Proposal 8–3. This proposal is one of a group of proposals dealing with the establishment of Instructions for Continued Airworthiness and the responsibilities of maintenance personnel and aircraft operators with respect to those instructions. The group is made up of the following proposals: 8–3, 8–5, 8–21, 8–25, 8–58, 8–62, 8–64, 8–67, 8–77, 8–80, 8–89, 8–91, 8–92, 8–93, 8–97, 8–98, 8–99, 8–104, 8–106, 8–107, 8–110, and 8–111.

A commenter representing a number of scheduled air carriers objects to the requirement in § 21.31(c) that the type design include the Airworthiness Limitations section of the Instructions for Continued Airworthiness because of the information to be included in that section. Although this commenter does not object to including mandatory replacement times for life-limited parts in the Airworthiness Limitations section, the commenter strongly objects to including inspection intervals and related procedures. Under proposed §§ 43.16 and 91.163(c), the commenter points out, air carriers would be required to comply with these maintenance-related airworthiness limitations. The FAA does not agree that inspection intervals and related procedures can be omitted from the Airworthiness Limitations section of the Instructions for Continued Airworthiness. For example, the proposed Airworthiness Limitations section on a transport category airplane must contain mandatory inspection intervals and related procedures because the damage-tolerance concept described in § 25.571 is predicated upon the use of such inspections to detect initial cracks in principal structural elements before crack growth under repeated loads could progress to a degree which would cause catastrophic failure of the ariplane. However, the FAA does agree that §§ 43.16 and 91.163(c) should permit modification of these intervals and procedures by other FAA approved methods. Accordingly, inspection programs approved under §§ 121.25(b), 121.45, 121.367, 123.21(b), 127.13(b), 127.133, 135.5, 135.17, 135.419, 135.421, and 135.425, as defined by approved operations specifications, or an inspection program approved under § 91.217(e) constitute acceptable alternatives. The appendices to Parts 23, 25, 29, 31, 33, and 35 as adopted in this amendment require the applicant to specify (in the Airworthiness Limitations section) mandatory replacement times, inspection intervals, and related procedures. Sections 43.16 and 91.163(c) have been revised to show that only the inspection times and procedures may be adjusted under approved alternative programs.

A commenter objects to § 21.31(c), which in general is applicable to manufacturers, since continued airworthiness, which is covered in the paragraph, is the responsibility of the operator. Because this comment pertains more directly to § 21.50, it is dealt with in conjunction with Proposal 8–5.

In addition to comments relating to the Instructions for Continued Airworthiness, a commenter objects to § 21.31(a) because the proposal to include a list of drawings and specifications in the type design was not mentioned at the Airworthiness Review Conference. In fact, this proposal did appear as an FAA comment on Proposal No. 565 in the Committee I Workbook (titled "Procedures and Special Subjects") made available to all participants at the conference, and may be found in the docket.

Several commenters object to § 21.31(d) because including analyses in the type design— (1) would be redundant, since it is already required as part of the substantiating data; (2) is unnecessary, since the drawings and specifications required under current § 21.31(a) provide the general information needed by the FAA; and (3) introduces the possibility that the FAA would require the manufacturer to provide any and all data used to prepare the drawings and specifications, thereby delaying type certification. The FAA agrees that proposed § 21.31(d) would serve no useful purpose and it is withdrawn.

Proposal 8–4. A commenter objects that § 21.35(b)(2) eliminates flight testing for reliability, contending that analysis and ground test are not dependable as a basis for certification. In the light of this comment, and after further consideration and experience, the FAA has determined that flight testing for reliability does provide safety information not necessarily obtainable from analysis and ground test. Accordingly, the proposal to delete the reference to reliability in § 21.35(b)(2) is withdrawn.

No adverse comment was received on the proposal to replace the word "airplanes" in § 21.35(b)(2) with the word "aircraft" and this amendment to § 21.35(b)(2) is adopted without change.

Proposal 8–5. A commenter objects to the continued airworthiness provisions of § 21.50(b) (and also proposed § 21.31(c)) contending that—(1) continued airworthiness is the responsibility of the operator/owner; (2) current regulations in Parts 23 and 25 already require manufacturers to make available recommended maintenance procedures for the product at the time of its delivery; (3) current operating rules require the operator/owner to establish and comply with a maintenance program; and (4) with respect to transport airplanes, the present FAA Maintenance Review Board (MRB) system is an entirely satisfactory way of establishing the means for maintaining airworthiness. Current FAA practice allows operators of new transport category airplanes to utilize FAA MRB recommendations (reference FAA Advisory Circular No. AC 121–22) for starting their maintenance programs, and then vary them with FAA approval

as experience and operating conditions dictate. The commenter points out that, contrary to that practice, the amendment will require the manufacturer to obtain FAA approval of its recommended maintenance procedures before the airplane is type certificated, and to obtain FAA approval of revisions to those procedures (necessitated by any improvement change in the airplane) before approval of the change itself. This, the commenter states, will impose a severe and unnecessary hardship on the manufacturer.

On the first and second points, although the operator/owner does have responsibility for continued airworthiness, the FAA has found that the recommended maintenance procedures made available under current regulations are frequently inadequate in scope and content, and often do not provide a sound basis for the operator/owner to maintain the airworthiness of the aircraft. The FAA has concluded that the lack of such recommended maintenance procedures can best be remedied by requiring that they be made available to owners and operators by the type certificate or supplemental type certificate holder. On the third point, while it is true that not all operators/owners are required to establish and comply with a continuous airworthiness program, those that voluntarily wish to set up such a program are often handicapped by the lack of comprehensive instructions, which would be remedied by § 21.50(b). On the other hand, those required to establish a program will benefit from the more detailed and comprehensive instructions made available to them under § 21.50(b). On the fourth point, which is directed toward aircraft that will be maintained in accordance with an FAA approved operations specification and maintenance program under Parts 121, 123, 127, 135, or an approved inspection program under § 91.217(e), the FAA recognizes that these procedures for maintaining airworthiness of the products have functioned satisfactorily. In this regard, the FAA expects that operating segments of the air transportation industry would continue to work with type certification applicants in defining adequate maintenance instructions prior to type certification. The FAA MRB document, which is a product of contributions made by both the operators and manufacturer, could be picked up by the type design holder and included as a part of the required Instructions for Continued Airworthiness, thus continuing the usefulness of the existing MRB practices for the original entry into service of new product designs. Likewise, the additional maintenance instructions that would be required and which are not typical to MRB documents, but are presently required in air carrier operators' FAA approved maintenance programs, could also be picked up by the type design holder. Therefore, the screening process that would be utilized by the FAA in reviewing such maintenance documents would not unnecessarily delay type certification or approval of design changes after certification. See also the discussion under Proposal 8–3.

A commenter questions the need for the provision in § 21.50(b) requiring that the Airworthiness Limitations section of the Instructions for Continued Airworthiness be furnished with each aircraft, engine, or propeller. The FAA agrees that this provision is unnecessary, as the type certificate holder must make the manual available, and the operator/owner must comply. To require a manual to be furnished with each equipment would be redundant, and in some instances, would be unnecessary. Accordingly, the requirement that the Airworthiness Limitations section be furnished with each airplane or product is revised to require that the section be furnished to each owner of the type.

A commenter objects to § 21.50(b) insofar as it applies to rotorcraft type certificated under Parts 27 and 29, contending that the manufacturer is already required under those parts to furnish a maintenance manual, which has allegedly been proven adequate. The FAA does not agree. The proposed Instructions for Continued Airworthiness, which are broader in scope and more detailed than the maintenance manual currently required under Parts 27 and 29, would provide the operator/owner with the minimum amount of information needed to maintain the airworthiness of increasingly complex rotorcraft currently being designed.

A commenter suggests that § 21.50(b) be revised to make it clear that an aircraft manufacturer need not supply Instructions for Continued Airworthiness pertaining to engines and propellers until the complete aircraft is delivered to the first retail purchaser. The continued airworthiness instructions for propellers and engines should be provided to the aircraft manufacturer to facilitate transmittal to purchasers of the aircraft.

A commenter notes that § 21.50(b) would require an aircraft manufacturer to make the Instructions for Continued Airworthiness available to the owner upon delivery of the aircraft and to any other person required to comply with any of the terms of those instructions *upon request*. Since such a request could be made before the first aircraft delivery, it could impose an unnecessary burden on the aircraft manufacturer. The commenter suggests that § 21.50(b) be revised so that such a request need not be filled until after delivery of an aircraft to the first owner. The FAA agrees that an early request for the Instructions for Continued Airworthiness could impose an unnecessary burden on the manufacturer. Additionally, the FAA notes that airplanes can be delivered to an operator, prior to full type certification, with a provisional airworthiness certificate to allow activities such as crew training, and therefore prior to the approval of the Airworthiness Limitations section. Accordingly, the phrase "upon request" has been deleted from § 21.50(b) and the language has been revised to require that at least one set of the complete Instructions for Continued Airworthiness be furnished upon delivery to the customer, or subsequent to issuance of the first standard certificate of airworthiness, whichever occurs later.

Proposal 8–6. Commenters object to the proposal to make § 21.97(b) applicable to all products rather than to engines only because—(1) the volume of paperwork would increase out of proportion to any benefits that might be gained; (2) the applications for supplemental type certificates would be significantly more complex, since there are frequently many configuration variations within an aircraft model and a fleet operator would have to list all of the configurations or make separate application for each; and (3) the term "specific configuration" must be defined if the proposal is to be properly administered. In light of these comments and after further consideration, the FAA concludes that this proposal requires additional study and it is withdrawn.

Proposal 8–7. No unfavorable comment was received on the proposal to amend § 21.123 to require a manufacturer to submit a manual describing its production inspection system and means for controlling materials and parts. Accordingly, the proposal is adopted without substantive change.

Proposal 8–8. A commenter objects to § 21.143(a)(2) contending that substitution of the word "supplier" for "subsidiary" introduces a major change to the requirements, involving increased

paperwork and costs. The FAA does not agree. The FAA has consistently administered § 21.143(a)(2) as applying to *all* raw materials, purchased items, parts, and assemblies supplied to the prime manufacturer. The change does not involve increased paperwork or costs because it is a semantic change which clarifies the definition of persons or entities subject to the quality control data requirements of § 21.143, without expanding any of those requirements. The use of the term "subsidiary" is unclear because it implies that there must be a corporate connection between the prime manufacturer and his supplier. Accordingly, the language has been revised to reflect the FAA's intent that the quality control data requirements of § 21.143(a)(2) apply to all "suppliers" of each prime manufacturer. For similar reasons and for internal consistency, § 21.143(b) is revised to replace the term "subsidiary manufacturers" with the term "suppliers".

Proposal 8–9. No unfavorable comment was received on the proposal to amend § 21.182 to ensure that the proposed new § 45.11(c) is cross referenced. Accordingly, the proposal is adopted without substantive change.

Proposal 8–10. A commenter raises the question whether a special flight permit issued under § 21.197(a)(3) would serve as a certificate of airworthiness for international flights. The FAA notes that international flights cannot be conducted under special flight permits issued under § 21.197 unless specifically authorized by the foreign authorities concerned.

Another commenter objects to § 21.197(a)(3)(ii) because as worded, the individual aircraft would have to be flown for at least 50 hours, thereby defeating the purpose of the original proposal (as submitted for the Airworthiness Review) which aimed at eliminating unnecessary delays in obtaining FAA approval of customer demonstration flights. The commenter suggests that this provision be changed to stipulate that the aircraft type must have been flown for at least 50 hours. The FAA agrees that since the proposal concerns aircraft manufactured under a production certificate, and since the aircraft type would have been flown for at least 50 hours during the type certification program, the 50 hours of flight provision is not necessary. However, the FAA does not agree with the commenter's suggested revision. It is necessary to require that production flight tests for the individual aircraft involved be satifactorily completed before the aircraft is flown on customer demonstration flights. Accordingly, § 21.197(a)(5) is added to perscribe this condition in place of the 50 hours of flight provision.

The same commenter also suggests that § 21.197(a)(3)(ii) should be made applicable to aircraft produced under a type certificate only, since such aircraft received close production surveillance by the FAA. The FAA agrees that a production certificate should not be the limiting factor in obtaining FAA approval of customer demonstration flights. If the aircraft has been demonstrated to otherwise meet all the safety requirements for a standard airworthiness certificate, then customer demonstration flights could be permitted. This proposal is adopted by the addition of § 21.197(a)(5).

In addition, the commenter suggests that proposed § 21.197(a)(3)(ii) be amended with a reference to the maintenance and inspection programs called for under § 21.195 for Experimental and Subpart C Provisional Type Certificates. Such procedures would unnecessarily complicate the issuance of permits for customer demonstration flights and would in effect nullify the original proposal. The portion of the proposal calling for maintenance and inspection programs in these instances is therefore withdrawn.

Proposal 8–11. No unfavorable comments were received on the proposal to amend § 23.253(b)(3) to ensure that high speed buffeting does not become severe enough to prevent the pilot from reading the instruments or controlling the airplane. Accordingly, the proposal is adopted without substantive change. Also see Proposal 8–28.

Proposal 8–12. No unfavorable comments were received on the proposal to amend § 23.361 to redefine the limit engine torque load conditions to be considered for turbine engine installations and to make other clarifying changes. Accordingly, the proposal is adopted without substantive change.

Proposal 8–13. The FAA does not agree with a commenter who suggests that the lead-in of § 23.371 be revised to make the gyroscopic load requirements applicable to piston as well as turbine engines. The FAA has no information to indicate a need for coverage of piston engines in this regulation, nor was any submitted by the commenter.

Another commenter concurs with § 23.371, assuming that a rational analysis of loads under § 23.371(a) is an alternate to the loads specified in § 23.371(b). This assumption is correct. No change to § 23.371 was proposed in this regard. Section 23.371 is adopted without substantive change.

Proposal 8–14. A commenter suggests that the word "operated" in § 23.729(c) be replaced by the word "lowered". The commenter states that the intent of the rule is to ensure that the gear can be lowered in an emergency. The FAA concurs, but the word "extended" is used to preserve the internal consistency of the section. Section 23.729(c) is revised accordingly.

This commenter also questions whether § 23.729(e) would require an "up lock". The commenter is evidently referring to a "lock" in the sense of a positive means other than hydraulic pressure, as required to keep the gear extended by § 23.729(b). Section 23.729(e) contains no such requirement.

Another commenter suggests that the second sentence of § 23.729(e) be revised to add the words "and secured" after the words "fully extended" and "fully retracted" in order to clarify what functions the lights would indicate to the pilot. The first sentence of the paragraph clearly states that the indicators should inform the pilot that the gear is secured in the extended or retracted position.

A commenter states that the proposal is redundant since the requirement is already in effect. The FAA does not agree. This is one of several new provisions being incorporated into the current regulations to assure the reliability of small land-plane landing gear systems.

After further review, the FAA has determined that the words "and warning device" should be removed from the heading of § 23.729(e) to preclude confusion between the requirements of this paragraph and those of § 23.729(f). Section 23.729 is adopted with editorial changes and the revisions discussed.

Proposal 8–15. A commenter objects to §23.903(f) on the grounds that it imposes new and unjustified criteria for restart capability of reciprocating engine powered airplanes. The FAA believes the requirement to be fully justified. Accidents have occurred with multiengine reciprocating powered, as well as turbine powered airplanes because pilots have not been adequately apprised of the engine restart envelope for their airplane. Therefore, the requirement must apply to both types of engine installations.

This commenter further states that §23.903(g) is acceptable provided that the "restart requirement is understood to be within the restart envelope for the aircraft (if one is approved for the aircraft)." Present §23.903(e)(3), as applicable to turbine engine powered small airplanes, states that it must be possible to restart an engine in flight, and §23.903(f) requires that an approved restart envelope be established.

Therefore, development of a restart envelope would be required for the approval of each turbine engine powered small airplane. As adopted, §23.903(g) requires that, following in-flight shutdown of all engines, electrical power for ignition exists throughout the approved restart envelope.

Another commenter states that it seems inconsistent to require that electrical power be provided for ignition but not for rotational capability sufficient for an engine start. The FAA does not agree. As adopted, the rule provides for those circumstances where engine windmilling speed is sufficient for restarting but insufficient to provide electrical power for ignition.

The proposal is adopted without substantive change. However §23.903(f) is revised to make it clear that the specified in-flight engine restart capability is required throughout the required altitude and airspeed envelope.

Proposal 8–16. No unfavorable comment was received on adding a new §23.905(d) referencing propeller blade pitch control system durability requirements. Accordingly, §23.905(d) is adopted without substantive change. For discussion of a related proposal to add a new § 35.42, see the discussion under Proposal 8–103

Proposal 8–17. A commenter suggests that since the requirement for fuel tanks to retain fuel during a landing with landing gear retracted or collapsed may be subject to individual interpretation, advisory material on compliance methods should be reviewed with industry prior to implementation of the rule. The FAA does not agree. The revision merely clarifies an existing requirement. Section 23.967 is adopted without substantive change.

Proposal 8–18. A commenter recommends that the Proposal to add a new §23.991(d) which requires that operation of any fuel pump does not adversely affect continuous engine operation, be withdrawn or its adoption delayed while the compatibility of engine and airplane fuel systems is studied. The compatibility between these systems must be established in the design process, and the relevant design considerations are well known. Delaying the requirement in favor of additional study is not warranted.

Another commenter contends that the requirement is beyond the needs of safety. The FAA agrees that the proposal requirement is too restrictive and §23.991 (d) is revised to provide that the operation of any fuel pump may not affect engine operation so as to create a hazard.

Two commenters disagree with adding a new § 23.991(d), contending that it eliminates present fuel system designs. The FAA has no information to suggest that compliance with the revised section, as discussed above, would be impossible using present fuel system designs, nor was any presented by the commenter.

The proposal is adopted with the revision discussed above.

Proposal 8–19. No unfavorable comments were received on the proposal to amend §23.1305(n) to permit movement of the propeller blade up to 8° below the flight low pitch position before an indication of the movement is required for the flight crew. Accordingly, the proposal is adopted without substantive change.

Proposal 8–20. For comments related to withdrawal of the proposal to revise § 23.1521(a), see Proposal 8–94.

Proposal 8–21. Since the proposal for § 23.1529 is substantively identical to those for §§ 25.1529 (Proposal 8–58), 27.1529 (Proposal 8–64), and 29.1529 (Proposal 8–77), all comments on these proposals are considered here.

A commenter notes that although the explanation for § 23.1529 makes it clear that the Instructions for Continued Airworthiness need not be finalized until delivery of the first airplane, the proposal itself seems to require that they be finalized before type certification. The commenter suggests that this point be clarified. The FAA agrees, and §§ 23.1529, 25.1529, 27.1529, 29.1529, 31.82, 33.4, and 35.4, are revised accordingly.

In response to a commenter representing a group of scheduled air carriers, the FAA notes that, except for the Airworthiness Limitations section, there is no requirement that any operator/owner use the Instructions for Continued Airworthiness referred to in §§ 23.1529, 25.1529, 27.1529 and 29.1529. Moreover, the new §§ 43.13(a), 43.16, and 91.163(c) allow the use of other methods. In particular, the use of maintenance manuals and continuous airworthiness maintenance programs developed under current Parts 121, 123, 127, and 135, or an inspection program approved under current § 91.217(e), would be acceptable alternatives to the Airworthiness Limitations section. This commenter suggests that language be added to § 25.1529 to make it clear that alternatives to the Instructions for Continued Airworthiness (except the Airworthiness Limitations section) may be used. This suggestion was not adopted because §§ 43.16 and 91.163(c) make this provision sufficiently clear.

Proposals 8–22, 8–23, and 8–24. Final action on Proposals 8–22, 8–23, and 8–24 was taken in Airworthiness Review Program, Amendment No. 7: Airframe Amendments (43 FR 50578; Oct. 30, 1978).

Proposal 8–25. The proposals to add an appendix to Parts 23, 25, 27, and 29 (Proposals 8–62, 8–67, and 8–80) setting forth Instructions for Continued Airworthiness are substantively identical and are discussed below. Unless otherwise stated, the discussion refers to the designated sections in each of the appendices mentioned above.

§ *XX.1(a).* A commenter objects to the concept of specifying requirements (as opposed to providing guidance) for the preparation of Instructions for Continued Airworthiness, contending that such requirements would lead to time-consuming negotiations between the manufacturer and the FAA, and that some flexibility in providing the instructions is necessary. The appendix sets forth, in broad objective terms, the *kinds* of information the Instructions for Continued Airworthiness must contain. Within this framework, the manufacturer would be free to develop detailed instructions appropriate to its aircraft. The FAA is confident that the appendix provides a reasonable measure of flexibility, and anticipates no difficulties or delays in determining the acceptability of the Instructions developed by the manufacturer.

§ *XX.1(b).* A commenter objects to the requirement that Instructions for Continued Airworthiness be provided for appliances, contending that—(1) this information is often not available from the appliance manufacturer; (2) even when available, the information sometimes has to be revised for the particular application in a manner not approved or intended by the appliance manufacturer; and (3) the information necessary for customized equipment installations would be unreasonably costly to develop. The FAA does not agree. Such information, which is essential to the continued airworthiness of the aircraft, should be provided for each required product. Accordingly, the language of § XX.1(b) is revised to make it clear that if the aircraft manufacturer does not supply continued airworthiness instructions for the product, the Instructions for Continued Airworthiness for the aircraft must include this information. See also the discussion under § XX.3(a)(5)(i).

A commenter objects to the proposal to include information on engines and all appliances in the Instructions for Continued Airworthiness, contending that—(1) such information should be furnished by the engine or appliance manufacturer; and (2) with respect to appliances, only those for which standards have been established by FAA should be covered. On the first

point, manufacturers of new engine designs are required to supply the information for their products under new § 33.4. Manufacturers of new aircraft using currently certificated engines are required by § XX.1(b) to provide the information for the engine in their Instructions for Continued Airworthiness for the aircraft. In practice, the FAA expects this information to be developed and supplied by the engine manufacturer. A similar requirement for appliances would be administratively impracticable because of the large number involved. On the second point, it should be noted that specific performance and safety standards have not been established for all essential appliances. However, upon further review, the FAA concludes that it would be unreasonable to require the aircraft manufacturer to cover appliances other than those required in applicable regulations. Accordingly, § XX.1(b), as adopted, refers only to appliances "required by this chapter."

§ *XX.2.* A commenter suggests a revision of this section to make clear that the Instructions for Continued Airworthiness may consist of a series of volumes, or may be supplied in other than book form, such as on microfilm or microfiche. The language in § XX.2 is sufficiently broad to cover these acceptable alternatives. Reference to the Air Transportation Association of America Specification No. 100 (where it appeared) is deleted from § XX.2(b) because it is nonregulatory.

§ *XX.3, lead-in-paragraph.* A commenter objects to the requirement that the contents of the manual "be prepared to be understood by the person who will be responsible for maintaining" the aircraft or product, contending that—(1) it would impose a subjective standard that would be impossible to meet; and (2) it could be interpreted to mean that, in some circumstances, manuals for aircraft to be exported must be prepared in the language of the country of export. In light of these comments, the first sentence of the lead-in paragraph of § XX.3, is revised to read as follows: "The contents of the manual or manuals must be prepared in the English language." This conveys the intent of the original proposal. A commenter points out that there may be different levels of maintenance instructions, directed at different classes of operators. For example, the maintenance instructions provided to a fleet operator or commuter airline may be more comprehensive than those provided to a fixed base operator. Any level of maintenance instructions considered appropriate by the manufacturer may be submitted, provided that those instructions comply with the minimum standards in the appendix.

§ *XX.3(a)(2).* A commenter recommends that the requirement for complete descriptions be limited in scope to the "standard" aircraft and "quantity-installed" optional equipment, contending that it would be virtually impossible to devise "custom" maintenance manuals for each product because of the many combinations of equipment that may be ordered by the purchaser. In addition, the commenter states that a manual containing all of these combinations would be difficult to use. The FAA does not agree. To achieve its purpose, the Instructions for Continued Airworthiness must contain information on each item of equipment required by regulation to be installed on the aircraft. The FAA notes that supplemental type certificates (STC's) are required for installation of equipment not a part of the type certificate, and that this maintenance manual requirement is equally applicable to the STC applicant.

§ *XX.3(a)(3).* A commenter recommends that since maintenance personnel have no need for the kind of operating information provided in a Pilot's Operating Handbook, the paragraph be revised to require only *basic* principles of equipment control and operation. The FAA agrees, and § XX.3(a)(3) now refers to "basic control and operation information."

§ *XX.3(a)(5)(i).* A commenter recommends that applicants be allowed to refer to a component manufacturer as a source of information instead of including the information in the Instructions for Continued Airworthiness. The commenter argues that many component manufacturers prefer to maintain control of their maintenance information to ensure that it is up to date. In other cases, maintenance at the factory may be required because of the complexity of the equipment. The FAA recognizes that some accessories, instruments, and equipment have an exceptionally high degree of complexity, requiring specialized maintenance techniques, test equipment, or expertise. In such cases, it would be in the interest of safety to allow the applicant to refer to the appropriate manufacturer in the maintenance instructions. The FAA does not agree, however, that such reference should be allowed in other circumstances. Section XX.3(a)(5)(i) (redesignated § XX.3(b)(1)) is revised accordingly.

A commenter recommends that the last sentence of § XX.3(a)(5)(i), be revised to allow reference to a separate inspection program, rather than include it in the maintenance instructions, so that the inspection program could be better kept current and also tailored to an individual operator's needs. The FAA does not agree. The inspection program must be set forth in the Instructions for Continued Airworthiness to ensure its availability to those who will benefit from it.

The FAA, after further study of § XX.3(a)(5)(i), has decided that the provision should specifically require a description of applicable maintenance or wear tolerances. Section XX.3(a)(5)(i) (redesignated § XX.3(b)(1)) is clarified in this regard.

§ *XX.3(a)(5)(ii).* A commenter objects to the words "could occur" in this paragraph because it encompasses everything within the realm of possibility, thereby unnecessarily increasing the volume of the maintenance instructions. The phrase "probable malfunctions" replaces the phrase "typical malfunctions that could occur" in § XX.3(a)(5)(ii) (redesignated § XX.3(b)(2)).

§ *XX.3(a)(5)(iii).* A commenter suggests that this paragraph would be clearer if the first three words and the last five words are deleted. Section XX.3(a)(5)(iii) (redesignated § XX.3(b)(3)) is revised accordingly.

§ *XX.3(a)(5)(iv).* A commenter suggests revision of this paragraph to make it clear that the overweight landing check refers to the condition in which a certificated landing weight is lower than certificated takeoff weight, since the aircraft manufacturer cannot speculate what damage might be done to an aircraft that takes off and must immediately land at a weight near the certificated takeoff weight. This comment may have merit for certain aircraft. Moreover, since an overweight landing is but one of several occurrences which would necessitate a check to determine aircraft damage, to single out one occurrence would imply that the others need not be covered in the maintenance instructions. Accordingly, the words "checks after an overweight landing" are deleted from § XX.3(a)(5)(iv) (redesignated § XX.3(b)(4)).

§ *XX.3(b).* A commenter recommends deletion of the requirement for an overhaul manual or section, contending that—(1) there are many products that, for safety reasons, should not to be overhauled; and (2) the manufacturer must make the technical assessment as to whether a product can be safely overhauled. In the light of these comments, and after further consideration, the FAA finds that those

portions of § XX.3(b) that provide for overhaul information only (except for engines), should not be required in the Instructions for Continued Airworthiness. Accordingly, §§ XX.3(b)(1)(i), XX.3(b)(1)(ii), XX.3(b)(1)(iv), XX.3(b)(1)(viii), and XX.3(b)(3), are withdrawn. The other provisions of § XX.3(b) specify information that is needed for purposes other than overhaul.

§ *XX.3(b)(1)(iii).* No adverse comment was received on this proposal to require structural access plate information. Accordingly, it is adopted as proposed, but redesignated § XX.3(c).

§ *XX.3(b)(1)(v).* No adverse comment was received on this proposal to require instructions on special inspection techniques. Accordingly, it is adopted as proposed, but redesignated § XX.3(d).

§ *XX.3(b)(1)(vi).* A commenter points out that no part can be restored to its original condition by protective coatings or treatments. The FAA agrees, and § XX.3(b)(1)(vi) (redesignated § XX.3(e)) is revised to make this clear and to require only the information necessary to apply protective treatments to the structure after inspection.

§ *XX.3(b)(1)(vii).* No adverse comment was received on this proposal to require data on structural fasteners. Accordingly, it is adopted as proposed, but redesignated § XX.3(f).

§ *XX.3(b)(1)(ix).* No adverse comment was received on the proposal to require a list of special tools. Accordingly, it is adopted as proposed, but redesignated § XX.3(g).

§ *XX.3(c).* Three commenters object to the concept of supplying generalized repair data. One contended that—(1) the nature of the damage may not be known in a particular case, though it may appear to fall under a general repair "fix"; (2) the safety of the product may be seriously impaired by repairs made in such instances; and (3) the manufacturer can provide alternate means for a mechanic to obtain repair data. In the light of these comments, the FAA agrees that it is not necessary to include the repair information in the Instructions for Continued Airworthiness as proposed. Accordingly, proposed § XX.3(c) is withdrawn.

§ *XX.4.* A commenter suggests that the manufacturer should be allowed to list items in the Airworthiness Limitations section that it deems necessary to maintain structural integrity, where such items are not called out in the applicable airworthiness standards. Another commenter, representiang the scheduled airlines, objects to the inclusion, in the Airworthiness Limitations section, of mandatory replacement times for parts other than life-limited parts and of mandatory inspection intervals. The resolution of these comments is discussed under Proposal 8–3. The language proposed for the Airworthiness Limitations sections of the appendices to Parts 23, 25, 27, and 29 is being retained, except that the mandatory replacement times, mandatory inspection intervals, and related procedures are specified as those associated with structural integrity—including those approved under current § XX.571. It also is made clear that FAA approved alternative programs may be used. To avoid unnecessary restriction being placed on operation, only these items are listed in the pertinent Airworthiness Limitations section. Other items can of course be listed in other sections of the Instructions for Continued Airworthiness.

Proposal 8–26. The addition of new §§ 25.101(i) and (j) would set forth requirements for automatic systems that affect performance, including automatic takeoff thrust control systems (ATTCS). In view of the evolving technology of automatic systems, the special features and functions of each design, and the complex interrelationships with other systems, the FAA has concluded that specific regulations are premature and that safety considerations can be more advantageously addressed in special conditions for specific systems. Accordingly, Proposal 8–26 and related Proposals 8–34, 8–48, and the § 25.1305(c)(9) portion of 8–50 are withdrawn.

Proposal 8–27. The revision of § 25.111(c)(4) will permit changes in power or thrust by an automatic takeoff thrust system but prohibit any change requiring action by the pilot when determining the takeoff path. Although specific proposals relating to criteria for automatic takeoff thrust systems have been withdrawn, the FAA believes that this proposal should be retained as it standardizes the procedure for determining the takeoff path, and is consistent with current practice.

One commenter implies that this rule change will add the task of monitoring conditions and instruments and thereby increase the pilot workload. Other commenters suggest that a limited provision for manual throttle setting be included, or are opposed to the proposal completely on the grounds that safety will be compromised in service. Since the rule will apply in the context of a determination of performance rather than an operating requirement, the proposal is adopted without change.

Proposal 8–28. A commenter suggests that the term "impair" in § 25.253(a)(2)(iii) be changed to "significantly impair". The FAA does not agree. In present high altitude, high Mach number jet airplanes, any recovery from upset or speed anomaly must be done essentially by reference to flight instruments. Therefore, any buffet or vibration condition which would in any way impair the pilot's ability to accurately interpret instrument information cannot be tolerated. The same commenter stated that some interpretative material on vibrational frequencies and levels of acceleration would be useful. Use of interpretative material would divert attention from the primary consideration, impairment of pilot ability, which is qualitative. Proposed § 25.253(a)(2)(iii) is adopted without substantive change.

Proposal 7–17. Although no unfavorable comment was received on the proposal to amend § 25.305(d), two commenters state that their agreement was with the understanding that both the discrete gust and the continuous turbulence analyses are required. Present § 25.341(a) requires that limit load factors be established by reference to a discrete gust encounter. Present § 25.305(d) specifies that the dynamic response of the airplane to vertical and lateral continuous turbulence must be taken into account. Both analyses are required.

Two commenters recommend that present § 25.341 be amended to require dynamic loads analysis by reference to discrete gusts having varying gust gradient distances. The FAA does not agree. The combination of discrete gust analysis under § 25.341 and continuous turbulence analysis under § 25.305 is less complex than the method described by these commenters and provides sufficient substantiation of strength. The proposal is adopted without substantive changes.

Proposal 8–29. Many negative comments were received on the proposal to revise § 25.307(a) to require ultimate load tests for each normal and failsafe critical load condition. Three commenters indicate that the proposed regulation would add to the cost and time required for certification although present airplane safety records do not support the need for a change. One commenter points out that the design philosophy used for commercial transports, due to the dominant influence of the economic requirement for long life without structural fatigue problems, often produces reserve margins of safety. Another commenter proposes that ultimate load tests be limited to structures such as composites, which substantially differ from conventional structure. The FAA agrees

that to conduct ultimate load tests for all critical load conditions would greatly increase the amount of testing required, which is not warranted by the safety record since there have been no service features which indicate that present methods of substantiation are inadequate. In many cases failures in service result from conditions such as fatigue or corrosion which are not covered by ultimate load tests. The proposal to require ultimate testing of all structural components therefore is deleted. In some cases, however, analysis must be supplemented by limit and/or ultimate load tests. The amendment, as adopted, is revised accordingly.

Proposal 8–30. Several negative comments were received on §§ 25.365 (e) and (f), requiring airplane designers to consider pressure vessel decompression resulting from the loss of any nonplug door, detonation of a bomb within the cabin at all probable locations, and engine disintegration. Several commenters oppose designing for the loss of a nonplug door, stating that there is no reason why nonplug doors cannot be designed to be as safe as plug doors. These commenters suggest that the door design criteria be upgraded to improve door integrity. The FAA agrees that door integrity should be improved to the extent that design for their loss is not justified. Therefore § 25.783 is revised in response to Proposal 8–35 to require this improved level and § 25.365(e)(1) is withdrawn.

Many commenters object to designing for all possible bomb detonations and probable bomb locations. A commenter points out that airworthiness requirements in the past have attempted to safeguard aircraft against structural and mechanical failure, human error, natural hazards, etc. They note that no one has attempted to incorporate into airworthiness requirements the consequences of homicidal or suicidal tendencies. Another commenter states that the aircraft industry has to accept responsibility for compensating the public for loss or injuries resulting from defects in its products, and the inclusion of a bomb damage requirement in Part 25 could significantly extend the grounds of possible product liability actions, particularly with the imprecise requirements of § 25.365(e). Many commenters state that the wording of § 25.365(e)(3) is so vague as to make its implementation impossible. The FAA notes that, ultimately, minimizing the loss of airplanes as a result of bomb explosions is a ground security problem.

A commenter suggests an alternative to § 25.365(e)(3) which would establish a relationship between the design maximum opening and the cross-sectional area of the pressurized shell. The FAA agrees that the proposed relationship provides an acceptable method for determining hole size. The FAA has determined that the maximum hole size required should be 20 square feet, a value contained in Airworthiness Directive 75–15–05 (August 11, 1975) pertaining to openings in wide-body transports. Section 25.365(e)(3) is revised to allow the maximum opening to vary as a function of the cross-sectional area of the pressurized shell to account for the differences in size between narrow and wide-body transports and is redesignated and adopted as § 25.365(e)(2).

The FAA finds that the maximum opening specified in adopted § 25.365(e)(2) will exceed the opening that would result from causes other than bomb explosions or engine disintegration, and that a probability safety analysis to determine hole size in passenger or cargo areas resulting from other causes is not needed. Thus, proposed § 25.365(f) is withdrawn.

In light of the comments received on proposed § 25.365(e)(4), and after further consideration, the FAA concludes that openings caused by airplane or equipment failures can occur in any compartment, and that partitions, bulkheads, and floors should be designed for openings from these causes. Thus, proposed § 25.365(e)(4) is revised accordingly, redesignated, and adopted as § 25.365(e)(3).

No adverse comments were received on proposed § 25.365(e)(2) to require design to withstand penetration of the cabin by a portion of an engine following engine disintegration and the proposal is redesignated § 25.365(e)(1) and adopted without substantive change.

Amendment to § 25.571(a)(3). Because of the change to § 25.1529 adopted in this amendment, the reference to the "maintenance manual" in § 25.571(a)(3) is no longer appropriate. For consistency, § 25.571(a)(3) references the Airworthiness Limitations section of the Instructions for Continued Airworthiness.

Proposal 8–31. Numerous unfavorable comments were received on the proposal to add a new § 25.633 requiring that essential systems be designed to minimize damage caused by detonation of a bomb in the airplane. Most commenters contend that there is no means to protect essential systems from all possible bomb detonations and that bomb size and location cannot be rationally defined. Several commenters indicate that the separation of essential systems on modern airplanes presently provides a measure of protection and that the proposed requirements of § 25.633 are beyond the state of the art.

The FAA agrees that rational means of determining and defining all possible bomb size/location combinations which would damage essential systems does not exist. Therefore, the proposal is withdrawn.

Proposal 8–32. Several commenters object to the proposed horizontal stabilizer "trim-in-motion" aural warning requirement of § 25.677(e) on the grounds that the aural environment in today's cockpits is already cluttered and that finding new and distinctive aural warnings is becoming difficult. They further suggest that small increments of trim change should not cause aural warning, and that warnings should be given only when a safety-of-flight hazard exists. One commenter suggests that there is no need for separate aural warning on aircraft having direct trim control wheels in the cockpit.

The FAA agrees with the comments and upon further review concludes that the proposal is premature and unworkable. Accordingly, it is withdrawn for further study.

Proposal 8–33. Several adverse and supporting comments were received on the proposal to add a new § 25.685(e) requiring arrangement of control systems to provide an airplane with the capability of continued safe flight and landing in the event of an inflight localized structural failure. Several commenters agree with the intent of the proposal and propose minor changes. One commenter agrees with the intent of the proposal, but believes that only failures which have not been shown to be extremely improbable need be considered. Commenters state that the intent of the proposed rule change is already encompassed by § 25.365(e) which would require that floor failure resulting from rapid decompression be shown to be extremely improbable.

A commenter further states that present § 25.671(c) requires control systems to be designed to be tolerant of failures, and that control system damage is more likely from other sources. The commenter claims that service experience and rational analysis show that the floor structure provides the best available protection for the control system from damage from these other sources.

After further study the FAA agrees with the commenters that the primary objectives of this proposal are adequately covered by several existing sections of FAR 25. For example: § 25.365(e) requires that the floor be

designed for pressure vessel opening which is a function of the cross-sectional area of the fuselage; § 25.571 requires all structure to be damage tolerant where practical; § 25.671 requires that control systems be tolerant of failures, including exterior damage; § 25.629 requires freedom from flutter under failure conditions; § 25.631 requires protection of controls in the empennage structure from bird strikes; and § 25.901(d) requires design precautions be taken to minimize the hazards to the airplane, including control systems, in the event of an engine rotor failure. The proposal therefore is withdrawn.

Proposal 8–34. For an explanation of the withdrawal of the proposals concerning automatic systems that affect airplane performance, one of which is the proposal to add a new § 25.705, see Proposal 8–26.

Proposals 8–35 and 2–59. Several commenters object to the requirement in § 25.783(e) that provisions for the inspection of door locking mechanisms must be discernable under all possible lighting conditions. The commenters state that allowance should be made for use of supplemental lighting such as a flashlight to aid in the inspection. The FAA agrees and the section is revised accordingly.

A commenter states that direct visual inspection is only needed for external doors for which the initial opening movement is not inward and which are pressurized or for which an inadvertent opening could prevent continued safe flight and landing. Although these comments have merit, they go beyond the scope of Proposal 8–35 and interested parties have not had an opportunity to comment on these changes. No change to the section is being made based on these comments. Several commenters object to the redundancy of a dual warning system requirement and state that in lieu of redundancy, a reliability level should be specified. Further comments state that all external doors do not require this level of reliability. The FAA agrees that this reliability level could be specified and should apply only to external doors for which initial movement is not inward, and the section is changed accordingly. The present language defining where door warning systems are required is retained, as no change in present practice is intended.

A commenter suggests that § 25.783(e) should specify several good design practices. These design practices are desirable but are not essential, since the necessary level of safety can be obtained by alternate means under § 25.783.

Several commenters object to new § 25.783(f), suggesting that it apply only to nonplug type doors and doors whose loss would present a probable hazard. The FAA agrees that provisions to prevent unsafe pressurization can be limited to doors whose loss would present a portable hazard. However, the FAA does not agree that it should be limited to nonplug type doors because a plug door is defined as one whose initial opening is inward and this feature does not necessarily provide complete assurance that an unsafe pressurization will not occur with subsequent opening of the door in flight. The clarifying phrase "to an unsafe level" has been added to § 25.783(f). The intent is to prevent pressurization to a level which would be hazardous if an unlocked external door inadvertently opened.

Several commenters object to proposed new § 25.783(g) (Proposal 8–25), stating that it would unnecessarily preclude the use of nonplug type doors above 45,000 ft. The FAA agrees that nonplug type doors can safely be used at altitudes above 45,000 ft., since adequate warning systems and door integrity are provided by § 25.783(e). Proposed new § 25.783(g) is withdrawn.

A commenter proposes that for the door whose opening would be a hazard, the door and immediate surrounding fuselage, door mechanisms, and warning system be design for any combination of failures (including improper operation) not shown to be extremely improbable. The FAA agrees. In place of the proposals in 8–30, with regard to §§ 25.365(e) (1), (3), and (4), a rule is included to require determination by safety analysis that inadvertent opening of doors which could prevent continued safe flight and landing is extremely improbable.

Two commenters state that the criteria for passenger egress in the revision to the second sentence of § 25.783(g) (Proposal 2–59 of Notice 75–10) should be evacuation time, and not the rate of passenger egress through a given exit. The FAA agrees. Revision of the second sentence of § 25.783(g) is redesignated as § 25.783(i) and the reference to § 25.561(a)(3) in the proposal is corrected to reference § 25.561(b)(3).

Numerous negative comments concern proposed new § 25.783(j), which requires that lavatory doors open into the cabin to preclude anyone from being trapped in the lavatory. The commenters state that this requirement is overly restrictive on design and that an outward opening door could have an adverse effect on aisle width and emergency evacuation capabilities if such a door jammed open. The FAA agrees that inward opening doors can be designed to prevent anyone being trapped in a lavatory in cases of incapacitation or for other reasons. Thus, new § 25.783(j) is revised to delete the requirement that lavatory doors open into the cabin.

Proposals 8–36, 2–60, and 8–37. Final action on Proposals 8–36, 2–60, and 8–37 was taken in Airworthiness Review Program, Amendment No. 8: Cabin Safety and Flight Attendant Amendments (45 FR 7750; February 4, 1980).

Proposal 8–38. One commenter objects to adding a new § 25.792 to require a sign indicating whether lavatories are occupied, asserting that it would be inappropriate for general aviation aircraft certificated under Part 25. Two commenters doubt that the proposed rule would achieve the objective of preventing aisle congestion near lavatories. They point out that many existing aircraft have similar signs which have not prevented people from "standing in line" for lavatories. Also, passengers can cause congestion in aisles for other reasons. One of the commenters states that lighted signs in a darkened cabin; i.e., during movies or rest periods, would annoy passengers, and that the rule might foster a proliferation of signs throughout the cabin. Finally, one commenter is concerned that any increase in the number of lighted signs might distract the passengers' attention from more essential notices.

Based on the comments and upon further review, the FAA finds that the proposed requirement would not achieve the objective sought. Accordingly, the proposal is withdrawn.

Proposal 8–39. Final action on Proposal 8–39 was taken in Airworthiness Review Program Amendment No. 8: Cabin Safety and Flight Attendant Amendments (45 FR 7750; February 4, 1980).

Proposal 8–40. Final action on Proposal 8–40 was taken in Operations Review Program Amendment No. 8 (45 FR 41586; June 19, 1980).

Proposal 8–41. A commenter suggests that new § 25.851(a)(5), which replaces current § 25.853(f), be expanded to prescribe four fire extinguishers for a passenger capacity of 100 or more, and to require at least one CO_2, dry chemical, or all-purpose fire extinguisher near lavatory and galley areas. These suggested changes are beyond the scope of the notice. However, changes in these requirements are appropriate and the FAA is conducting a research program to establish comprehensive standards and guidance information pertaining to the

selection of portable fire extinguishers, taking into consideration types and quantities of extinguisher agents, extinguisher performance, and other factors. Regulatory changes based on the findings of this research program will be proposed in the next airworthiness standards review.

Sections 25.851 (a)(5) and (a)(6), which consolidate hand fire extinguisher requirements, are adopted without substantive change.

Proposals 8–42, 2–18, 2–65, 2–114, and 2–160. Final action on Proposals 8–42, 2–18, 2–65, 2–114, and 2–160 was taken in Airworthiness Review Program, Amendment No. 8: Cabin Safety and Flight Attendant Amendments (45 FR 7750; February 4, 1980).

Proposal 8–43. Final action on Proposal 8–43 was taken in Airworthiness Review Program, Amendment No. 7: Airframe Amendments (43 FR 50578; October 30, 1978).

Proposal 8–44. For a discussion of proposed § 25.905(c), see the discussion under Proposal 8–103. The proposal to add a new § 25.905(c) is adopted without substantive change.

Proposals 8–45 and 8–96. The proposed amendments to §§ 25.939 and 33.65 are being deferred for consideration in a forthcoming notice of proposed rule making of the Aircraft Engine Regulatory Review Program.

Proposals 8–46, 3–35, and 8–47. Final action on Proposals 8–46, 3–35, and 8–47 was taken in Airworthiness Review Program, Amendment No. 7: Airframe Amendments (43 FR 50578; Oct. 30, 1978).

Proposal 8–48. For an explanation of the withdrawal of the proposals concerning automatic takeoff thrust control systems, one of which is the proposal to add a new § 25.1143(f), see Proposal 8–26.

Proposals 8–49 and 3–41. Final action on Proposals 8–49 and 3–41 was taken in Airworthiness Review Program, Amendment No. 7: Airframe Amendments (43 FR 50578; Oct. 30, 1978).

Proposal 8–50. For an explanation of withdrawal of the proposals concerning automatic takeoff thrust control systems, one of which is the addition of a new § 25.1305(c)(9), see Proposal 8–26.

One commenter objects to revising § 25.1305(d)(1), stating that significant aerodynamic forces acting on the powerplant nacelle make the direct measurement of thrust impractical. The FAA agrees that such forces may be significant. This commenter further objects to the revision, stating that it is beyond the state of the art to prohibit a parameter from being used if the accuracy of the indication will be adversely affected by any engine malfunction or damage. The FAA agrees that precise values of thrust provided by a malfunctioning, damaged, or deteriorated engine are unnecessary, provided that any changes in thrust due to engine malfunction, damage, or deterioration are indicated to the pilot. The paragraph is revised to require that the indication must be based on the direct measurement of thrust or of parameters that are directly related to thrust.

Although concurring with § 25.1305(d)(1), one commenter states that he would prefer to retain the existing requirements and delete the words ", or to indicate a gas stream pressure that can be related to thrust,". The FAA does not agree. The change suggested by this commenter would eliminate the requirement for thrust information and would retain the requirement for change-of-thrust information only. It also would provide a lower level of safety than the adopted paragraph.

This commenter also states that § 25.1305(d)(1) should be complementary to a similar requirement in Part 33 of this chapter. The FAA does not agree. In current practice, the airframe manufacturer determines how performance should be met. The choice of a means to indicate thrust is negotiated between the airplane manufacturer and the engine manufacturer. The factors which influence the final choice are substantial and may vary among airplane designs. These factors may not be known to the engine manufacturer at the time of engine type certification. Another commenter states that the need for an actual value of thrust is not obvious, whereas indication of a loss of thrust would satisfy the original proposal. The FAA agrees that the actual value of thrust is of little value to the pilot. Section 25.1305(d)(1) is revised to specify that the indicator indicate thrust, or a parameter related to thrust, to the pilot.

Proposal 8–51. No unfavorable comments were received on the proposal to change the reference in § 25.1307(h) for fire extinquishers in connection with Proposal 8–41. Accordingly, the proposal is adopted without substantive change.

Proposal 8–52. Final action on Proposal 8–52 was taken in Airworthiness Review Program, Amendment No. 8: Cabin Safety and Flight Attendant Amendments (45 FR 7750; February 4, 1980).

Proposal 8–53. Several commenters point out a number of service deficiencies with proposed § 25.1421 which defines the requirements for cargo compartment fire detection systems. They contend that the requirement for the detection system to actuate a warning within one minute of the start of a fire is too restrictive. One commenter cites the results of FAA tests which show average fire detection times to be from 1.75 to 5 minutes. The commenters also suggest that the tests necessary to show compliance with the warning requirements are not clearly defined. Finally, one commenter points out that fires in baggage containers and other enclosed containers can burn for a considerable time before detection is likely by fire detectors in the cargo compartment.

The FAA does not concur that the one-minute requirement is too restrictive. A survey of fire detection technology has indicated that the state of the art permits detection of a fire in less than one minute after inception. In addition, current standards do not define the test procedures necessary to show compliance with warning requirements. The new one-minute requirement is intended to improve the standards in this regard.

The proposal is adopted without substantive change.

Note.—This proposal has been carried erroneously under § 25.1421 which pertains to megaphones. It will be included in the amendment as a new § 25.858.

Proposal 8–54. Comments received from several commenters reflected confusion over the intent of proposed § 25.1439(c). It was noted that much of what was intended by proposed § 25.1439(c) is included in existing § 25.1439(a) as amended by Amendment 25–38 (40 FR 55454; 12/20/76), provided that the portable oxygen equipment requirements of § 25.1447(c)(4) are retained. Amendment 25–38 emanated from Airworthiness Review Program Notice No. 2 (40 FR 10813; 3/7/75), and was adopted (41 FR 55468; 12/20/76) after publication of Airworthiness Review Program Notice No. 8 (40 FR 29420; 7/11/75) which contained proposals 8–54 and 8–55. The FAA agrees that the existing regulations require much of what was intended by proposal 8–54, provided that proposal 8–55 is withdrawn. The FAA further agrees that additional clarifications are needed before further amendments are made to § 25.1439. Therefore the FAA withdraws both proposals 8–54 and 8–55. The subject of protective breathing equipment will be addressed in a forthcoming notice of proposed rule making.

Proposal 8–55. The proposal to delete § 25.1447(c)(4) is withdrawn for the

reasons stated for withdrawal of Proposal 8–54.

Proposal 8–56. For comments related to the proposal to revise § 25.1521(a), and for the withdrawal of that proposal, see Proposal 8–94.

Proposal 8–57. Final action on Proposal 8–57 was taken in Airworthiness Review Program, Amendment No. 7: Airframe Amendments (43 FR 50578; October 30, 1978).

Proposal 8–58. For comments related to the proposal to amend § 25.1529, see Proposal 8–21.

Proposal 8–59. A commenter objects to the proposed new § 25.1557(e), calling for a placard on each flight attendant seat to indicate that it may be occupied by a flight attendant, asserting that such placarding is redundant and that a proliferation of placards in the aircraft will only serve to confuse the passengers and make all placards less effective. The commenter also states that the proposal would prohibit non-flight attendant airline personnel who are cognizant of emergency procedures from occupying flight attendant seats when the aircraft is full. The FAA concludes that a new aircraft certification rule is unnecessary to achieve this result and the proposal is withdrawn.

Proposals 8–60 and 8–61. Final action on Proposals 8–60 and 8–61 was taken in Airworthiness Review Program, Amendment No. 7: Airframe Amendments (43 FR 50578; October 30, 1978).

Proposal 7–55. A commenter recommends that discrete gusts with varying gradient distances be added as a supplement to Appendix G to Part 25. The FAA disagrees because past experience with the use of discrete gusts with varying gust gradient distances has indicated that knowledge with regard to how gust intensity varies with gust gradient distance is not currently available to the designer. The research and development work accomplished in the area of dynamic response to continuous turbulence has indicated that the continuous turbulence criteria of Appendix G to Part 25 is the most rational approach currently available which gives consistent strength levels for airplanes of different characteristics and missions.

A commenter recommends that paragraph (a) of Appendix G be revised to delete the requirement for considering combined stresses based on both vertical and lateral components of turbulence. The commenter states that the current practice of combining root-mean-square stresses (shear, moment, and torsion) resulting from gust calculations involving only purely vertical or lateral components of turbulence is a realistic, practical method for combining stress. The commenter contends that the methods for realistically combining statistical load quantities involving both vertical and lateral components of turbulence have not been satisfactorily developed in the current state of the art. After further review the FAA agrees. Paragraph (a) of Appendix G is revised to delete the requirement for considering the combined stresses resulting from the vertical and lateral components of turbulence.

A commenter recommends that paragraph (b)(3)(i) of Appendix G be revised to require a gust intensity of U =75 fps gust velocity in the interval 0 to 20,000 ft. altitude with a linear decrease to 30 fps at 80,000 ft. altitude. This recommendation would obviate the need to do mission analysis to justify lower levels of loads than those required to meet the design envelope gust intensity factor of 85 fps for new airplanes whose characteristics are similar to previous designs which have been shown to be adequate for the lower level of gust intensity being proposed. There is no technical need for new aircraft which are similar to existing aircraft with regard to response characteristics and basic mission profiles to make extension mission analysis computations in order to establish their adequacy with regard to loads resulting from encounters with continuous turbulence if they are designed for the gust intensity shown to be adequate for the existing design. Therefore, it is acceptable to use a gust intensity value of 75 fps from 0 to 20,000 ft. altitude, and a linear reduction from 75 fps at 20,000 ft. to 30 fps at 80,000 ft., provided the new design is comparable to a similar design with extensive satisfactory service experience. These criteria, which have been under discussion between FAA and industry for over 10 years, are proposed as new rules rather than acceptable means of complying with existing rules. Paragraph (b)(3)(i) is revised accordingly. The commenter also recommends that paragraph (d)(1) be revised to require a gust intensity of U =60 fps on the interval 0 to 20,000 ft. altitude and be linearly decreased to 23 fps at 80,000 ft. altitude. The FAA disagrees. The gust intensities in paragraph (d)(1) are based on the distribution of gust intensity with altitude which were developed in the basic research for the development of continuous turbulence criteria and are, therefore, considered reasonable as a lower design envelope limit for mission analysis. A cost analysis was provided by the commenter to justify the lower gust intensities, but the FAA finds that this cost analysis was based on "design envelope analysis" alone. Paragraph (c), which is an alternative to paragraph (b), provides for a "mission analysis". Actual experience has shown that "mission analysis," which considers airplane operational characteristics, has been used in the past in lieu of the 85 fps intensities to prevent weight and cost penalties. Paragraphs (c) and (d) of Appendix G are adopted without substantive change.

A commenter recommends that paragraph (d) of Appendix G be revised to delete the reference to "fail-safe loads" since such loads are not provided in Appendix G. The FAA agrees. Paragraph (d) of Appendix G is revised accordingly.

A commenter recommends that proposed paragraph (e) of Appendix G be deleted since acceleration levels measured at the pilot station on current conventional aircraft can be established by flight demonstration much more easily and with less cost than by use of an expensive analysis considering response to continuous turbulence. Upon further review, the FAA has determined that it lacks sufficient information to specify the right combination of analysis and flight test to determine the acceleration levels at the pilot's station during continuous turbulence. Accordingly, proposed paragraph (e) of Appendix G is withdrawn. The current requirements related to operation in turbulence are adequate to determine the response at the pilot's station during continuous turbulence.

Proposal 8–62. For comments related to the proposal to add a new Appendix G to Part 25, see Proposal 8–25. Appendix G (redesignated Appendix H) to Part 25 is adopted with the changes discussed in Proposal 8–25.

Proposal 8–63. Final action on Proposal 8–63 was taken in Airworthiness Review Program, Amendment No. 7: Airframe Amendments (43 FR 50578; October 30, 1978).

Amendment to § 27.571. Because of the change to § 27.1529 adopted in this amendment, the reference to § 27.1529(a)(2) in §§ 27.571 (b), (c), (d)(1), (d)(3), and (e) is no longer appropriate. The reference is changed to "§ A27.4 of Appendix A". This discrepancy was overlooked in Notice 75–31 (40 FR 29410; July 11, 1975). Since this amendment is clarifying in nature and does not impose a burden on the public, notice and public procedure are unnecessary and good cause exists for adopting this amendment.

Proposal 8–64. For comments related to the proposal to amend § 27.1529, see Proposal 8–21.

Proposals 8–65 and 8–66. Final action on Proposals 8–65 and 8–66 was taken in Airworthiness Review Program, Amendment No. 7: Airframe Amendments (43 FR 50578; October 30, 1978).

Proposal 8–67. For comments related to the proposal to add a new Appendix A to Part 27, see Proposal 8–25. Additional comments on this proposal, and on the proposal to add a new Appendix A to Part 29, are discussed here.

A commenter suggests that the wording of Appendix A be adjusted to take into account the differences between airplanes and rotorcraft. The FAA agrees. The appendix, as proposed, is generally equally applicable to airplanes and rotorcraft. However, several minor changes have been made to the appendix to provide for rotorcraft differences, primarily to cover rotors and differing fatigue standards.

A commenter objects to Appendix A, contending that: (1) The standards in current §§ 27.1529 and 29.1529 have been adequate in service, and (2) the proposal is excessive in scope and would create an undue burden. The FAA does not agree, having found that recommended maintenance procedures made available to operators/owners in the past were frequently inadequate in scope and content, providing no sound basis for maintaining the airworthiness of the rotorcraft. Appendix A, with the revisions and deletions discussed above and under Proposal 8–25, would not create an undue burden on the type certificate applicant.

One commenter expresses concern that certain inspection provisions in current § 91.217 might be applied to rotorcraft. The appendix contains no such requirement. Current § 91.217 applies only to certain airplanes.

Amendment to § 29.571. Because of the change to § 29.1529 adopted in this amendment, the reference to "§ 29.1529(a)(2)" in §§ 29.571 (b), (c), (d)(1), (d)(3), and (e) is no longer appropriate. For consistency, the reference is changed to "§ A29.4 of Appendix A required by § 29.1529". This change was overlooked in Notice 75–31 (40 FR 29410; July 11, 1975). Since this amendment is clarifying in nature and does not impose a burden on the public, notice and public procedure are unnecessary and good cause exists for adopting this amendment.

Proposal 2–154. For a discussion directly related to proposed new § 29.783(g), see the discussion under Proposal 8–35 for § 25.783(g) (Proposal 2–59 of Notice 75–10). Section 29.783(g) is adopted without substantive change.

Proposals 8–68 through 8–76 and 2–164. Final action on Proposals 8–68, 8–69, 8–70, 8–71, 8–72, 8–73, 8–74, 8–75, 8–76, and 2–164 was taken in Airworthiness Review Program, Amendment No. 7: Airframe Amendments (43 FR 50578; October 30, 1978).

Proposal 8–77. For comments related to the proposal to amend § 29.1529, see Proposal 8–21.

Proposals 8–78 and 8–79. Final action on Proposals 8–78 and 8–79 was taken in Airworthiness Review Program, Amendment No. 7: Airframe Amendments (43 FR 50578; October 30, 1978).

Proposal 8–80. For comments related to the proposal to add a new Appendix A to Part 29, see Proposals 8–25 and 8–67.

Proposal 8–81. No unfavorable comments were received on adding a new § 31.12 Providing for standardized application of the airworthiness requirements for balloons. Accordingly, § 31.12 is adopted without substantive change.

Proposal 8–82. No unfavorable comments were received on adding a new § 31.16 requiring that balloon empty weight be determined. Accordingly, § 31.16 is adopted without substantive change.

Proposal 8–83. No unfavorable comments were received on the intent of new § 31.17 which specifies performance in terms of an initial minimum rate of climb. However, a commenter raises the question whether compliance with proposed § 31.17(a) could be shown by testing at several altitudes and ambient temperatures and then extrapolating, by appropriate analysis, to the other values in the range for which approval is sought. The FAA considers that such extrapolation by analysis is an acceptable means of complying with proposed § 31.17(a), because the climb performance of balloons is based on fundamental principles and, therefore, can be predicted with sufficient accuracy from established test points.

The FAA notes that the 300 fpm climb rate requirement in § 31.17(a) was intended as a minimum standard. To make this clear, § 31.17 as adopted is revised by inserting the words "at least" before the number "300" in the first sentence of § 31.17(a).

Proposal 8–84. A commenter, referring to new § 31.19(a) governing critical uncontrolled descent, suggests that it would be difficult and time-consuming to determine which tear is the most critical single tear in the balloon envelope between tear stoppers. The FAA does not agree. An analysis, or a combination of test and analysis, would be an acceptable means of determining the most critical single tear. It would not be necessary to test each kind of tear. No other unfavorable comments were received on the proposal to add a new § 31.19. Accordingly, § 31.19 is adopted without substantive change.

Proposal 8–85. No unfavorable comments were received on the proposal to amend § 31.27(c) to be consistent with new § 31.19, Performance: Uncontrolled descent. Accordingly, the proposal is adopted without substantive change.

Proposal 8–86. No unfavorable comments were received on the proposal to amend § 31.65 updating the position light standards and expressing them in language consistent with related standards in other airworthiness parts. However, the FAA finds that the use of a cross reference to § 23.1397 as proposed in § 31.65(e) may be inconvenient for those governed by Part 31. Accordingly, § 31.65, as adopted, sets forth the chromaticity coordinates for aviation red and aviation white as currently prescribed in § 23.1397.

Proposal 8–87. No unfavorable comments were received on the proposal to amend § 31.71. However, after further consideration, the FAA concludes that proposed § 31.71(a)(2) is unnecessarily restrictive in that it would, in all cases, require marking the equipment as to its identification, function, *and* operating limitations. Marking of the equipment as to its identification, function, *or* operating limitations, or any applicable combination of those factors is sufficient. This is also the language used in corresponding sections of other aircraft airworthiness regulations. Section 31.71, as adopted, is revised accordingly.

Proposal 8–88. No unfavorable comments were received on the proposal to amend § 31.81 to detail operating limitations and information. The FAA notes, however, that proposed § 31.81(b) is not clear as to which "operating limitations and other information necessary for safe operation" must be furnished. The FAA's intent, as stated in the explanation, is to require that the information established under § 31.81(a) be furnished. Section 31.81(b) is revised accordingly. Section 31.81(a) is adopted without substantive change.

Proposal 8–89. A commenter is concerned that proposed § 31.82 might require balloon manufacturers to prepare two overlapping maintenance documents—the maintenance manual currently supplied to operators/owners,

and the proposed Instructions for Continued Airworthiness. The FAA notes that under §§ 31.82 and 21.50(b), balloon manufacturers would be required to prepare and furnish only the Instructions for Continued Airworthiness.

The FAA notes further (as discussed under Proposal 8–21) that the Instructions for Continued Airworthiness need not be finalized until delivery of the first balloon, while § 31.82, as proposed, could be interpreted to require that they be finalized before type certification. This point is clarified in § 31.82, as adopted, consistent with the corresponding requirement in Parts 23, 25, 27, and 29.

Proposal 8–90. No unfavorable comments were received on the proposal to amend § 31.85(b)(1). However, a commenter questions whether percentage figures on the required fuel quantity gauge would be acceptable. The FAA has determined that, in the particular case of balloons (for which the fuel quantity information is to an extent less important to safety than for other classes of aircraft), calibration of the fuel quantity gauge in percent of fuel cell capacity is an acceptable means of complying with the last sentence of § 31.85(b)(1). Section 31.85(b)(1), as adopted, is revised to make this clear.

Proposal 8–91. No adverse comments were received on the proposal to add a new Appendix A to Part 31. However, comments received on the proposals to add a similar appendix to Parts 23, 25, 27, and 29 (Proposal 8–25), were equally valid with respect to this proposal. Accordingly, Appendix A to Part 31, as adopted, is revised in substance as applicable.

Regarding the proposals to require generalized repair data in the Instructions for Continued Airworthiness, it is more appropriate, as well as necessary and practicable, to include specific instructions for repair of the key elements of a balloon—the balloon envelope and its basket or trapeze. This information is incorporated in paragraph A31.3(i) as revised.

Proposal 8–92. A commenter objects to § 33.4 insofar as it would require completion of the Instructions for Continued Airworthiness before the type certificate is issued, contending that a significant portion of the data and other material called for is typically not compiled until 6 months or longer after type certification. The commenter suggests that manufacturers be allowed to prepare and make available the Instructions for Continued Airworthiness before the first aircraft equipped with the subject engine is put into service, which, it claims, is the earliest such instructions would be needed. Requiring the engine manufacturer to complete the Instructions for Continued Airworthiness before the type certificate is issued would constitute an unnecessary burden. However, the FAA considers that they must be made available, and furnished, upon delivery of the first engine on an aircraft or issuance of a standard certificate of airworthiness for the aircraft, whichever occurs later. This would be consistent with corresponding requirements proposed for other products. See Proposals 8–5 and 8–21. Section 33.4 is revised and adopted accordingly.

Proposal 8–93. A commenter observes that § 33.5 requires that the instruction manual for installing and operating the engine be "approved," whereas proposed § 33.4 requires that the Instructions for Continued Airworthiness be "acceptable to the Administrator," and recommends that the latter term be used for consistency. The FAA notes that the term "acceptable to the Administrator" is widely used in Part 43 in connection with maintenance requirements, whereas the term "approved" is more frequently used in FAR Parts containing installation and operating requirements. Considering the FAR as a whole, the FAA does not agree that such consistency is essential. Accordingly, § 33.5 is adopted as proposed.

Proposal 8–94. Several commenters object to proposed §§ 33.6 (e) and (f), and to proposed §§ 23.1521(a) and 25.1521(a) (Proposals 8–20 and 8–56, respectively) on the grounds that the use of rated takeoff power or thrust for 10 minutes with one engine inoperative should be limited to "the extent that the utilization is necessary for the airplane to avoid, without necessitating turning maneuvers, obstacles beneath the flight path intended for the airplane prior to the loss of the engine." In light of these comments and after further review, the FAA concludes that these proposals are premature and they are withdrawn.

In addition, the proposed transfer of the definitions for rated power and thrust from § 1.1 to proposed new § 33.6, Proposal 8–1, is withdrawn since the transfer may cause confusion in the administration of the aircraft certification requirements. Accordingly, Proposals 8–1, 8–20, 8–56, and 8–94 are withdrawn.

Proposal 8–95. For discussion of proposed § 33.19(b) see the discussion under Proposal 8–103. Revised § 33.19 is adopted without substantive change.

Amendment to §§ 33.55(c), 33.57(b), 33.93(b), and 33.99(b). Because of the deletion of §§ 33.5 (c), (d), and (e), and the addition of a new § 33.4, the reference to "§ 33.5" in §§ 33.55(c), 33.57(b), 33.93(b), and 33.99(b) is no longer appropriate. For consistency, the reference is "§ 33.4." This change was inadvertently overlooked and was not proposed in Notice 75–31 (40 FR 29410; July 11, 1975). This editorial change corrects that discrepancy. Since this amendment is clarifying in nature and does not impose a burden on the public, notice and public procedure are unnecessary and good cause exists for adopting this amendment.

Proposal 8–97. A commenter recommends that § A33.3(a)(6) of Appendix A to Part 33 be revised by adding the words "requiring periodic attention" so as to make it clear that scheduling information is required solely for parts that require such attention. The language in this section is adequate. For parts not needing periodic attention, the applicant has only to state that parts not scheduled need not be serviced.

A commenter infers incorrectly that proposed §§ 43.16 and 91.163(c) apply only to rotorcraft. These regulations with the revision proposed also affect other classes of aircraft, as well as engines and propellers.

Some comments received on the proposed appendices for Parts 23, 25, 27, and 29 (Proposal 8–25) were equally vaild with respect to proposed Appendix A to both Parts 33 and 35. Accordingly, the appendices to Parts 33 and 35 are revised in substance as applicable.

Proposal 8–98. For a discussion related to proposed § 35.3 see Proposal 8–93. A commenter observes that § 35.3 requires that the instruction manual for installing and operating the propeller be "approved," whereas § 35.4 requires that the Instructions for Continued Airworthiness be "acceptable to the Administrator," and recommends that the latter term be used for consistency. The FAA notes that the term "acceptable to the Administrator" is widely used in Part 43 in connection with maintenance requirements, while the term "approved" is more frequently used in FAR parts containing installation and operating requirements. Considering the FAR as a whole, the FAA does not agree that consistency is required in this instance. Accordingly, § 35.3 is adopted as proposed.

Proposal 8–99. In response to the concern of a commenter representing a number of Part 121 operators, the FAA notes that there is no requirement that any operator/owner use the Instructions for Continued Airworthiness referred to

in proposed § 35.4. The new §§ 43.13(a), 43.16, and 91.163(c) allow the use of other methods. In particular, the use of maintenance manuals and continuous airworthiness maintenance programs developed under Parts 121, 123, 127, and 135, or an inspection program approved under § 91.217(e), would be acceptable alternatives to the Airworthiness Limitations section. This commenter suggests that language be added to proposed § 35.4 to make it clear that such alternatives may be used. The FAA agrees. The language in §§ 43.16 and 91.163(c) is revised accordingly.

Consistent with the discussion on proposed § 33.4 dealing with engines (see Proposal 8–92), the FAA finds that requiring the propeller manufacturer to complete the Instructions for Continued Airworthiness before the type certificate is issued would constitute an unnecessary burden. Accordingly, § 35.4, as adopted, requires that those instructions be made available and furnished upon delivery of the first aircraft with the propeller installed, or upon issuance of a standard certificate of airworthiness for an aircraft with the propeller installed, whichever occurs later.

Proposal 8–100. No unfavorable comments were received on the proposal to amend § 35.5 to more clearly indicate the basis for operating limitations and where they are listed. Accordingly, § 35.5 is adopted without substantive change.

Proposal 8–101. No unfavorable comments were recieved on the proposal to amend § 35.23 to provide an extreme low pitch indication. Accordingly, § 35.23 is adopted without substantive change.

Proposal 8–102. A commenter does not concur with the proposal to revise § 35.37 to require fatigue evaluation of metallic hubs and blades, stating that the words "must", "all", and "reasonably foreseeable" in the second sentence imply responsibility beyond current knowledge and the state of the art. The FAA does not agree. These terms are used in the current rule and the current state of the art defines the limits of the provision.

The same commenter recommends that § 35.37 be revised to apply to consideration of "normal and reasonably foreseeable load patterns," to account for the fact that only normal operations will or should be considered. The FAA does not agree. Load patterns which are reasonably foreseeable are critical and should be investigated even if they are not normal.

The same commenter also indicates that the third sentence should be revised to eliminate the term "reduction factors," since reduction factors are identified with only one particular method of presentation. The FAA agrees and the section is revised accordingly. This commenter finally states that the explanation implies that manufacturers have not taken permissible damage and material variation into account. This implication is not intended. It is the FAA's view that the fatigue evaluation should consider the occurrence of typical service damage and variation in material properties and the rule would provide for such an evaluation.

Another commenter suggests that the section be revised by adding certain technical requirements that are related to infinite component life. It is not necessary to specify technical requirements concerning infinite component life, since they are considered a normal part of propeller fatigue testing.

Section 35.37 is adopted as revised.

Proposal 8–103. A commenter objects to the proposal to add a new § 35.42 to define durability requirements for propeller blade pitch control system components, stating that the term "bench tests" in §§ 35.42 (a) and (b) is too descriptive and restrictive. The FAA agrees that a reference to "bench tests" may be too restrictive. Other test methods may be equally acceptable in providing the necessary data. Accordingly, §§ 35.42 (a) and (b) are revised to eliminate the specific reference to "bench."

The commenter also suggests that the words "in frequency and amplitude" be eliminated from § 35.42(a) since the words "cyclic testing" are fully descriptive. The FAA believes that these words are needed to prescribe key elements in the required test.

The commenter further suggests that the proposed testing to the equivalent of 1,000 hours of propeller operation is too restrictive in the case of a propeller with an overhaul period of less than 1,000 hours. The FAA considers the specific testing to be the minimum necessary to provide an acceptable safety level in service. The rule does not, however, prevent the selection of overhaul intervals of less than 1,000 hours.

Finally, the commenter suggests that the rule should permit an alternate of acceptance based upon service experience. The FAA recognizes that service experience can provide a statistical basis for determining component reliability. Its applicability, however, may vary according to such considerations as type of operation, the nature of the article under consideration, the degree of similarity between the reference article and the certification article, and the completeness of service records. Since it is dependent on such a variety of factors, the FAA does not agree that a specific alternative based on service experience should be included.

The proposal to add a new § 35.42, therefore, is adopted with the change discussed above. No adverse comments were received on the related proposed revisions to §§ 23.905, 25.905, and 33.19 to add the reference to new § 35.42, and the revisions are adopted.

Proposal 8–104. For comments related to the proposal to add a new Appendix A to Part 35, see Proposals 8–25 and 8–97.

A commenter objects to proposed § A35.1(c) of the appendix because the propeller owner (aircraft operator) would be wastefully provided with instructions and data that the propeller owner has no authority to use. The FAA does not agree. The Instructions for Continued Airworthiness must be furnished to the aircraft owner/operator who is the person responsible for maintaining the aircraft (including the propeller). The owner/operator may not be authorized to maintain the propeller, but the owner/operator can place the instructions in the hands of persons who are authorized.

The new Appendix A to Part 35, as adopted, is revised in accordance with comments discussed in Proposal 8–97.

Proposal 8–105. The proposed revision of § 43.9(a)(4) is being deferred for consideration in a forthcoming notice of proposed rule making of the Operations Review Program.

Proposal 8–106. A commenter representing a number of scheduled air carriers is concerned that the use of maintenance manuals and continued airworthiness programs developed under current § 121.133 and Subpart L of Part 121 (generally via Maintenance Review Board procedures), or under similar provisions of Parts 127 and 135, might not be acceptable as "other methods, techniques, and practices" under the terms of proposed § 43.13(a). This commenter suggests that language be added to proposed § 43.13(a) to make this clear. The FAA does not agree. The proposed language states that the use of such manuals and continued airworthiness programs is acceptable.

Proposal 8–107. A commenter representing a number of scheduled air carriers recommends that the Airworthiness Limitations section referred to in proposed § 43.16 include life limitations only and not inspections or other maintenance items. As discussed under Proposal 8–3, the FAA does not agree.

A commenter suggests that the words "or other methods, techniques; and

practices acceptable to the Administrator" be added at the end of proposed § 43.16 to make it consistent with proposed § 43.13(a). The Airworthiness Limitations section contains specific mandatory replacement times and inspection intervals (with related procedures) that must be complied with, unless it can be shown by an operator with an approved maintenance program that these times are inappropriate for his operation. The use of alternatives not covered in the Airworthiness Limitations section would be allowed if approved by the Administrator. Section 43.16 is revised to specifically state the alternatives to compliance with the Airworthiness Limitations section.

Proposal 8–108. No unfavorable comments were received on the proposal to amend § 45.11 to qualify, with respect to manned free balloons, the requirements in § 45.11(a) that deal with the location of the identification plate. Accordingly, the proposal is adopted without substantive change.

Proposal 8–109. No unfavorable comments were received on the proposal to amend § 45.13 to correctly reference §§ 45.11 (a) and (b) with regard to identification plate requirements. Accordingly, the proposal is adopted without substantive change.

Proposal 8–110. A commenter representing a number of scheduled air carriers recommends that the words "inspection interval, or related procedure" be deleted from proposed § 45.14. The supporting rationale is the same as submitted by this commenter concerning Proposal 8–3 to amend § 21.31(c). As discussed under Proposal 8–3, the FAA disagrees.

The language in § 45.14 covers rotorcraft as well as airplanes, balloons, engines, and propellers. To make this clear, the word "Rotorcraft" is changed to "Manufacturer's."

Two commenters object to proposed § 45.14 on the grounds that it would be impracticable to mark small parts with a part and serial number. The FAA is not aware that the marking of small parts under current § 45.14 has presented a problem. In any event, the rule allows markings that are equivalent to part and serial numbers, such as symbols enabling the identification of the part as one for which a replacement time, inspection interval, or related procedure is specified in an Airworthiness Limitations section. Identification of such parts is clearly essential for safety. Accordingly, § 45.14 is adopted as revised.

Proposal 8–111. A commenter representing a number of scheduled air carriers recommends that the words "inspection interval, or related procedure" be deleted from proposed § 91.163(c). The supporting rationale is the same as that submitted by this commenter concerning Proposal 8–3 to amend § 21.31(c). As discussed under Proposal 8–3, the FAA disagrees. However, § 91.163(c) is revised to specifically identify the acceptable alternatives to compliance with the "Airworthiness Limitations" section.

The language in proposed § 91.163(c) covers rotorcraft as well as airplanes, balloons, engines, and propellers. To make this clear, the word "Rotorcraft" in § 91.163(c) has been changed to "Manufacturer's", and a statement has been added that operations specifications approved by the Administrator may be used in lieu of the Instructions for Continued Airworthiness. Section 91.163(c) is adopted as revised.

Proposal 8–112. No unfavorable comment was received on the proposal to amend § 91.165 to clarify maintenance personnel entries in maintenance records. Accordingly, the proposal is adopted without substantive change.

Proposal 8–113. Several commenters object to §§ 91.173(a)(2) (i) and (iii). A commenter states that adoption of the proposal would result in an inconsistency between § 91.173 and § 121.380, which contains the recordkeeping requirements for aircraft maintained under Part 121. The commenter also states that this inconsistency would cause great difficulty and economic hardship whenever an aircraft is sold by a Part 121 operator to a Part 91 operator and the Part 91 aircraft is maintained by a Part 121 operator under its repair station certificate. According to the commenter, the economic hardship would occur to both the Part 91 operator and the repair station. The same commenter contends that reliability information accumulated in recent years on transport category airplanes shows that there is no need for individualized total time records on equipment and components. Another commenter states that proposed requirements would result in large increases in maintenance costs for Part 91 operators and that only those components that are life-limited should have to carry total times.

The FAA concludes, however, that revision of § 91.173(a)(2)(i) would contribute significantly to safety with little burden on those affected. The currently prescribed record of total time in service for the airframe does not generally apply to the aircraft's engines or propellers, since these components are frequently overhauled (or replaced) at different times. As a practical matter, it is known that operators of such aircraft normally keep records from which the total time in service of engines and propellers can be derived. Therefore, the FAA does not agree that the requirement to keep total times on engines and propellers would be a hardship and burden upon the operators. Accordingly, § 91.173(a)(2)(i) is adopted without change.

In light of the comment on proposed § 91.173(a)(2)(iii), the FAA has given further review of the proposal and has concluded that existing requirements satisfy the objective of the proposal. Accordingly proposed § 91.173(a)(2)(iii) is withdrawn.

The reporting and recordkeeping requirements contained in § 91.173 have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

Proposal 8–114. Several commenters agree with the intent of proposed § 91.193(c)(4) but suggest changes. A commenter suggests that the proposed installation instructions for hand fire extinguishers would be more appropriately placed in the type certification rules. The FAA does not agree. New type certification rules do not apply to aircraft already in service.

A commenter suggests that the words "unless obvious" be added to clarify when the hand fire extinguisher stowage provisions must be properly identified. The FAA agrees. Proposed § 91.193(c)(4) is revised and adopted accordingly.

Proposal 8–115. One commenter objects to the proposal to revise § 91.197(a) to require passenger information signs to meet the requirements of § 25.791. The commenter states that it is unnecessary, in many small general aviation aircraft operating under Subpart D of Part 91, to have such signs just for the sake of uniformity. The commenter also states that "nonstandard" signs now in use are wholly adequate to meet the needs of the type of operation. Finally, the commenter points out that installation costs for aircraft not currently having signs would be high and the pilot could just as easily announce the information as he could activate the signs.

Based on these comments and considering the type of operation involved, the FAA finds that the benefits associated with the proposal do not warrant its adoption. The proposal to revise § 91.197(a) is withdrawn.

Proposals 8–116, 8–117, 8–118, and 8–119. Final action on Proposals 8–116, 8–117, 8–118, and 8–119 was taken in Airworthiness Review Program, Amendment No. 8: Cabin Safety and

Flight Attendant Amendments (45 FR 7750; February 4, 1980).

Proposal 8–120. In light of the need to conduct further testing of protective breathing equipment, the FAA withdraws its proposal to amend § 121.337, which will be addressed in an upcoming notice of proposed rule making.

Adoption of the Amendment

Accordingly, Parts 11, 21, 23, 25, 27, 29, 31, 33, 35, 43, 45, and 91 of the Federal Aviation Regulations are amended as follows, effective October 14, 1980.

PART 11—GENERAL RULE-MAKING PROCEDURES

1. By redesignating §§ 11.11 (k), (l), and (m) as §§ 11.11 (m), (n), and (o), respectively, and adding new §§ 11.11(k) and (l) to read as follows:

§ 11.11 Docket.

* * * * *

(k) Special conditions required, as prescribed under § 21.16 or § 21.101(b)(2),

(l) Written material received in response to published special conditions,

* * * * *

2. By adding a new § 11.28 to read as follows:

§ 11.28 Action on special conditions.

(a) *General.* Except for the publication and comment procedures provided for in this section, no public hearing, argument, or other formal proceeding is held directly on a special condition established by the Administrator.

(b) *Procedures.* This subpart and Subpart C apply to the issue, amendment, and repeal of special conditions under Part 21. In addition to the information required by § 11.29(b), each notice will include—

(1) The name and address of the applicant;

(2) The model designation and a summary description of the affected product;

(3) The applicable type design approval regulations designated in accordance with § 21.17 or § 21.101 of Part 21; and

(4) A summary description of the novel or unusual design features that make the issue or amendment of special conditions necessary.

3. By adding a new § 11.49(b)(4) to read as follows:

§ 11.49 Adoption of final rules.

* * * * *

(b) * * *

(4) Special conditions under Part 21 of this chapter to the Director of Airworthiness.

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND PARTS

§ 21.16 [Amended]

3a. By deleting § 21.16(b), redesignating § 21.16(a) as § 21.16, and by replacing the phrase "paragraph (b) of this section" in the second sentence of the paragraph with "Part 11 of this chapter".

3b. By deleting the word "and" from the end of § 21.31(b), redesignating § 21.31(c) as § 21.31(d), and revising § 21.31(a) and adding a new § 21.31(c) to read as follows:

§ 21.31 Type design.

* * * * *

(a) The drawings and specifications, and a listing of those drawings and specifications, necessary to define the configuration and the design features of the product shown to comply with the requirements of that part of this subchapter applicable to the product;

* * * * *

(c) The Airworthiness Limitations section of the Instructions for Continued Airworthiness as required by Parts 23, 25, 27, 29, 31, 33, and 35 of this chapter; and

* * * * *

§ 21.35 [Amended]

4. By amending § 21.35(b) (2) by deleting the word "airplane" near the end of the sentence and inserting in its place the word "aircraft".

5. By redesignating § 21.50 as § 21.50(a), and by revising the heading of § 21.50 and adding a new § 21.50(b) to read as follows:

§ 21.50 Instructions for continued airworthiess and manufacturer's maintenance manuals having airworthiness limitations sections.

* * * * *

(b) The holder of design approval, including either the type certificate or supplemental type certificate for an aircraft, aircraft engine, or propeller for which application was made after October 14, 1981, shall furnish at least one set of complete Instructions for Continued Airworthiness, prepared in accordance with §§ 23.1529, 25.1529, 27.1529, 29.1529, 31.82, 33.4, or 35.4 of this chapter, as applicable, to the owner of each type aircraft, aircraft engine, or propeller upon its delivery, or upon issuance of the first standard certificate of airworthiness for the affected aircraft, whichever occurs later, and thereafter make available those instructions to any other person required by this chapter to comply with any of the terms of those instructions. In addition, changes to the Instructions for Continued Airworthiness shall be made available to any person required by this chapter to comply with any of those instructions.

6. By deleting from § 21.123(b) the word "and" following the semicolon, inserting at the end of § 21.123(c) a semicolon and the word "and" in place of the period, and adding a new § 21.123(d) to read as follows:

§ 21.123 Production under type certificate.

* * * * *

(d) Upon the establishment of the approved production inspection system (as required by paragraph (c) of this section) submit to the Administrator a manual that describes that system and the means for making the determinations required by § 21.125(b).

§ 21.143 [Amended]

7. By deleting from § 21.143(a) (2) the phrase "subsidiary manufacturers" and replacing it with the phrase "manufacturers' suppliers" and by deleting from § 21.143(f) the phrase "subsidiary manufacturers" and replacing it with the word "suppliers".

§ 21.182 [Amended]

8. By deleting the reference to "§ 45.11(a)" in §§ 21.182 (a) and (b)(3) and inserting "§ 45.11" in its place.

9. By revising § 21.197 by deleting the phrase "the purpose of—" from the lead in of § 21.197(a) and inserting the phrase "the following purposes:" in its place; by replacing the semicolons in §§ 21.197(a) (1) and (2) with periods; by replacing the semicolon and the word "and" at the end of § 21.197(a) (3) with a period; and by adding a new § 21.197(a) (5) to read as follows:

§ 21.197 Special flight permits.

(a)* * *

(5) Conducting customer demonstration flights in new production aircraft that have satisfactorily completed production flight tests.

PART 23—AIRWORTHINESS STANDARDS: NORMAL, UTILITY, AND ACROBATIC CATEGORY AIRPLANES

10. By revising § 23.253(b)(3) to read as follows:

§ 23.253 High-speed characteristics.

* * * * *

(b) * * *

(3) Buffeting that would impair the pilot's ability to read the instruments or to control the airplane for recovery.

11. By revising § 23.361 to read as follows:

§ 23.361 Engine torque.

(a) Each engine mount and its supporting structure must be designed for the effects of—

(1) A limit engine torque corresponding to takeoff power and propeller speed acting simultaneously with 75 percent of the limit loads from flight condition A of § 23.333(d);

(2) The limit engine torque as specified in § 23.361(c) acting simultaneously with the time loads from flight condition A of § 23.333(d); and

(3) For turbopropeller installations, in addition to the conditions specified in paragraphs (a)(1) and (a)(2) of this section, a limit engine torque corresponding to takeoff power and propeller speed, multiplied by a factor accounting for propeller control system malfunction, including quick feathering, acting simultaneously with lg level flight loads. In the absence of a rational analysis, a factor of 1.6 must be used.

(b) For turbine engine installations, the engine mounts and supporting structure must be designed to withstand each of the following:

(1) A limit engine torque load imposed by sudden engine stoppage due to malfunction or structural failure (such as compressor jamming).

(2) A limit engine torque load imposed by the maximum acceleration of the engine.

(c) The limit engine torque to be considered under paragraph (a)(2) of this section must be obtained by multiplying the mean torque for maximum continuous power by a factor of—

(1) 1.25 for turbopropeller installations;

(2) 1.33 for engines with five or more cylinders; and

(3) Two, three, or four, for engines with four, three, or two cylinders, respectively.

§ 23.371 [Amended]

12. By deleting the word "turbopropeller" in the lead-in of § 23.371 and inserting the word "turbine" in its place.

13. By revising the heading of § 23.729 and §§ 23.729 (c) and (e) to read as follows:

§ 23.729 Landing gear extension and retraction system.

* * * * *

(c) *Emergency operation.* For a landplane having retractable landing gear that cannot be extended manually, there must be means to extend the landing gear in the event of either—

(1) Any reasonably probable failure in the normal landing gear operation system; or

(2) Any reasonably probable failure in a power source that would prevent the operation of the normal landing gear operation system.

* * * * *

(e) *Position indicator.* If a retractable landing gear is used, there must be a landing gear position indicator (as well as necessary switches to actuate the indicator) or other means to inform the pilot that the gear is secured in the extended (or retracted) position. If switches are used, they must be located and coupled to the landing gear mechanical system in a manner that prevents an erroneous indication of either "down and locked" if the landing gear is not in a fully extended position, or of "up and locked" if the landing gear is not in the fully retracted position. The switches may be located where they are operated by the actual landing gear locking latch or device.

* * * * *

14. By adding new §§ 23.903 (f) and (g) to read as follows:

§ 23.903 Engines.

* * * * *

(f) *Restart capability.* An altitude and airspeed envelope must be established for the airplane for in-flight engine restarting and each installed engine must have a restart capability within that envelope.

(g) For turbine engine powered airplanes, if the minimum windmilling speed of the engines, following the in-flight shutdown of all engines, is insufficient to provide the necessary electrical power for engine ignition, a power source independent of the engine-driven electrical power generating system must be provided to permit in-flight engine ignition for restarting.

15. By adding a new § 23.905(d) to read as follows:

§ 23.905 Propellers.

* * * * *

(d) Each component of the propeller blade pitch control system must meet the requirements of § 35.42 of this chapter.

16. By revising § 23.967(e)(2) and adding a flush paragraph at the end of § 23.967(e) to read as follows:

§ 23.967 Fuel tank installations.

* * * * *

(e) * * *

(2) Under conditions likely to occur when the airplane lands on a paved runway at a normal landing speed under each of the following conditions:

(i) The airplane in a normal landing attitude and its landing gear retracted.

(ii) The most critical landing gear leg collapsed and the other landing gear legs extended.

In showing compliance with paragraph (e)(2) of this section, the tearing away of an engine mount must be considered unless all the engines are installed above the wing or on the tail or fuselage of the airplane.

17. By adding a new § 23.991(d) to read as follows:

§ 23.991 Fuel pumps.

* * * * *

(d) Operation of any fuel pump may not effect engine operation so as to create a hazard, regardless of the engine power or thrust setting or the functional status of any other fuel pump.

18. By revising § 23.1305(n) to read as follows:

§ 23.1305 Powerplant instruments.

* * * * *

(n) A blade position indicating means for each turbopropeller engine propeller to provide an indication to the flight crew when the propeller blade angle is below the flight low pitch position. The required indicator must begin indicating before the blade moves more than 8° below the flight low pitch stop. The source of indication must directly sense the blade position.

* * * * *

19. By revising § 23.1529, including its heading, to read as follows:

§ 23.1529 Instructions for Continued Airworthiness.

The applicant must prepare Instructions for Continued Airworthiness in accordance with Appendix G to this part that are acceptable to the Administrator. The instructions may be incomplete at type certification if a program exists to ensure their completion prior to delivery of the first airplane or issuance of a standard certificate of airworthiness, whichever occurs later.

20. By adding a new Appendix G to Part 23 to read as follows:

Appendix G—Instructions for Continued Airworthiness

G23.1 *General.*

(a) This appendix specifies requirements for the preparation of Instructions for Continued Airworthiness as required by § 23.1529.

(b) The Instructions for Continued Airworthiness for each airplane must include the Instructions for Continued Airworthiness for each engine and propeller (hereinafter designated 'products'), for each appliance required by this chapter, and any required information relating to the interface of those

appliances and products with the airplane. If Instructions for Continued Airworthiness are not supplied by the manufacturer of an appliance or product installed in the airplane, the Instructions for Continued Airworthiness for the airplane must include the information essential to the continued airworthiness of the airplane.

(c) The applicant must submit to the FAA a program to show how changes to the Instructions for Continued Airworthiness made by the applicant or by the manufacturers of products and appliances installed in the airplane will be distributed.

G23.2 *Format.*

(a) The Instructions for Continued Airworthiness must be in the form of a manual or manuals as appropriate for the quantity of data to be provided.

(b) The format of the manual or manuals must provide for a practical arrangement.

G23.3 *Content.*

The contents of the manual or manuals must be prepared in the English language. The Instructions for Continued Airworthiness must contain the following manuals or sections, as appropriate, and information:

(a) *Airplane maintenance manual or section.*

(1) Introduction information that includes an explanation of the airplane's features and data to the extent necessary for maintenance or preventive maintenance.

(2) A description of the airplane and its systems and installations including its engines, propellers, and appliances.

(3) Basic control and operation information describing how the airplane components and systems are controlled and how they operate, including any special procedures and limitations that apply.

(4) Servicing information that covers details regarding servicing points, capacities of tanks, reservoirs, types of fluids to be used, pressures applicable to the various systems, location of access panels for inspection and servicing, locations of lubrication points, lubricants to be used, equipment required for servicing, tow instructions and limitations, mooring, jacking, and leveling information.

(b) *Maintenance Instructions.*

(1) Scheduling information for each part of the airplane and its engine auxiliary power units, propellers, accessories, instruments, and equipment that provides the recommended periods at which they should be cleaned, inspected, adjusted, tested, and lubricated, and the degree of inspection, the appliable wear tolerances, and work recommended at these periods. However, the applicant may refer to an accessory, instrument, or equipment manufacturer as the source of this information if the applicant shows that the item has an exceptionally high degree of complexity requiring specialized maintenance techniques, test equipment, or expertise. The recommended overhaul periods and necessary cross reference to the Airworthiness Limitations section of the manual must also be included. In addition, the applicant must include an inspection program that includes the frequency and extent of the inspections necessary to provide for the continued airworthiness of the airplane.

(2) Troubleshooting information describing probable malfunctions, how to recognize those malfunctions, and the remedial action for those malfunctions.

(3) Information describing the order and method of removing and replacing products and parts with any necessary precautions to be taken.

(4) Other general procedural instructions including procedures for system testing during ground running, symmetry checks, weighing and determining the center of gravity, lifting and shoring, and storage limitations.

(c) Diagrams of structural access plates and information needed to gain access for inspections when access plates are not provided.

(d) Details for the application of special inspection techniques including radiographic and ultrasonic testing where such processes are specified.

(e) Information needed to apply protective treatments to the structure after inspection.

(f) All data relative to structural fasteners such as identification, discard recommendations, and torque values.

(g) A list of special tools needed.

G23.4 *Airworthiness Limitations section.*

The Instructions for Continued Airworthiness must contain a section titled Airworthiness Limitations that is segregated and clearly distinguishable from the rest of the document. This section must set forth each mandatory replacement time, structural inspection interval, and related structural inspection procedure required for type certification. If the Instructions for Continued Airworthiness consist of multiple documents, the section required by this paragraph must be included in the principal manual. This section must contain a legible statement in a prominent location that reads: "The Airworthiness Limitations section is FAA approved and specifies maintenance required under §§ 43.16 and 91.163 of the Federal Aviation Regulations unless an alternative program has been FAA approved."

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

21. By revising § 25.111(c)(4) to read as follows:

§ 25.111 Takeoff path.

* * * * *

(c) * * *

(4) Except for gear retraction and propeller feathering, the airplane configuration may not be changed, and no change in power or thrust that requires action by the pilot may be made, until the airplane is 400 feet above the takeoff surface.

* * * * *

22. By revising § 25.253(a)(2)(iii) to read as follows:

§ 25.253 High-speed characteristics.

(a) * * *

(2) * * *

(iii) Buffeting that would impair the pilot's ability to read the instruments or control the airplane for recovery.

* * * * *

23. By revising § 25.305(d) to read as follows:

§ 25.305 Strength and deformation.

* * * * *

(d) The dynamic response of the airplane to vertical and lateral continuous turbulence must be taken into account. The continuous gust design criteria of Appendix G of this part must be used to establish the dynamic response unless more rational criteria are shown.

24. By revising § 25.307(a) to read as follows:

§ 25.307 Proof of structure.

(a) Compliance with the strength and deformation requirements of this subpart must be shown for each critical loading condition. Structural analysis may be used only if the structure conforms to that for which experience has shown this method to be reliable. The Administrator may require ultimate load tests in cases where limit load tests may be inadequate.

* * * * *

25. By revising § 25.365(e) to read as follows:

§ 25.365 Pressurized cabin loads.

* * * * *

(e) Partitions, bulkheads, and floors in pressurized cabins must be designed to withstand the effects of a sudden release of pressure through an opening in any compartment at any approved operating altitude resulting from any of the following conditions (to be considered as ultimate conditions):

(1) The penetration of the cabin by a portion of an engine following an engine disintegration;

(2) An opening in any passenger or cargo compartment given by the equation—

$$H_o = PA_s$$

where,

H_o = maximum opening in square feet, not to exceed 20 square feet.

$$P = \frac{A_s}{6{,}240} + .024$$

A_s = maximum cross sectional area of pressurized shell normal to the longitudinal axis, in square feet; and

(3) The maximum opening caused by airplane or equipment failures not shown to be extremely improbable.

* * * * *

§ 25.571 [Amended]

26. By deleting the phrase "maintenance manual" from § 25.571(a)(3) and inserting the phrase "Airworthiness Limitations section of the Instructions for Continued Airworthiness" in its place.

27. By redesignating § 25.783(f) and the first sentence of § 25.783(g) as §§ 25.783 (g) and (h), respectively; by redesignating the second sentence of § 25.783(g) as § 25.783(i); by inserting the phrase "either during or after closure" following the phrase "single structural element" within the parenthetical expression in § 25.783(b); and by revising § 25.783(e) and new § 25.783(i) and adding new §§ 25.783 (f) and (j) to read as follows:

§ 25.783 Doors.

* * * * *

(e) There must be a provision for direct visual inspection of the locking mechanism to determine if external doors, for which the initial opening movement is not inward (including passenger, crew, service, and cargo doors), are fully closed and locked. The provision must be discernible under operational lighting conditions by appropriate crewmembers using a flashlight or equivalent lighting source. In addition, there must be a visual warning means to signal the appropriate flight crewmembers if any external door is not fully closed and locked. The means must be designed such that any failure or combination of failures that would result in an erroneous closed and locked indication is improbable for doors for which the initial opening movement is not inward.

(f) External doors must have provisions to prevent the initiation of pressurization of the airplane to an unsafe level if the door is not fully closed and locked. In addition, it must be shown by safety analysis that inadvertent opening is extemely improbable.

* * * * *

(i) If an integral stair is installed in a passenger entry door that is qualified as a passenger emergency exit, the stair must be designed so that under the following conditions the effectiveness of passenger emergency egress will not be impaired:

(1) The door, integral stair, and operating mechanism have been subjected to the inertia forces specified in § 25.561(b)(3), acting separately relative to the surrounding structure.

(2) The airplane is in the normal ground attitude and in each of the attitudes corresponding to collapse of one or more legs of the landing gear.

(j) All lavatory doors must be designed to preclude anyone from becoming trapped inside the lavatory, and if a locking mechanism is installed, it be capable of being unlocked from the outside without the aid of special tools.

28. By adding new §§ 25.851 (a)(5) and (a)(6) to read as follows:

§ 25.851 Fire extinguishers.

(a) * * *

(5) There must be at least the following number of hand fire extinguishers conveniently located in passenger compartments:

Minimum Number of Hand Fire Extinguishers

Passenger capacity:	
7 through 30	1
31 through 60	2
61 or more	3

(6) There must be at least one hand fire extinguisher conveniently located in the pilot compartment.

* * * * *

29. By adding a new § 25.858 to read as follows:

§ 25.858 Cargo compartment fire detection systems.

If certification with cargo compartment fire detection provisions is requested, the following must be met for each cargo compartment with those provisions:

(a) The detection system must provide a visual indication to the flight crew within one minute after the start of a fire.

(b) The system must be capable of detecting a fire at a temperature significantly below that at which the structural integrity of the airplane is substantially decreased.

(c) There must be means to allow the crew to check in flight, the functioning of each fire detector circuit.

(d) The effectiveness of the detection system must be shown for all approved operating configurations and conditions.

30. By adding a new § 25.905(c) to read as follows:

§ 25.905 Propellers.

* * * * *

(c) Each component of the propeller blade pitch control system must meet the requirements of § 35.42 of this chapter.

31. By revising § 25.1305(d)(1) to read as follows:

§ 25.1305 Powerplant instruments.

* * * * *

(d) * * *

(1) An indicator to indicate thrust, or a parameter that is directly related to thrust, to the pilot. The indication must be based on the direct measurement of thrust or of parameters that are directly related to thrust. The indicator must indicate a change in thrust resulting from any engine malfunction, damage, or deterioration.

* * * * *

32. By revising § 25.1307(h) to read as follows:

§ 25.1307 Miscellaneous equipment.

* * * * *

(h) Portable fire extinguishers as prescribed in §§ 25.851 (a)(5) and (a)(6).

33. By revising § 25.1529, including its heading, to read as follows:

§ 25.1529 Instructions for continued airworthiness.

The applicant must prepare Instructions for Continued Airworthiness in accordance with Appendix H to this part that are acceptable to the Administrator. The instructions may be incomplete at type certification if a program exists to ensure their completion prior to delivery of the first airplane or issuance of a standard certificate of airworthiness, whichever occurs later.

34. By adding a new Appendix G to Part 25 to read as follows:

Appendix G—Continous Gust Design Criteria

The continuous gust design criteria in this appendix must be used in establishing the dynamic response of the airplane to vertical and lateral continuous turbulence unless a more rational criteria is used. The following gust load requirements apply to mission analysis and design envelope analysis:

(a) The limit gust loads utilizing the continuous turbulence concept must be determined in accordance with the provisions of either paragraph (b) or paragraphs (c) and (d) of this appendix.

(b) *Design envelope analysis.* The limit loads must be determined in accordance with the following:

(1) All critical altitudes, weights, and weight distributions, as specified in § 25.321(b), and all critical speeds within the ranges indicated in paragraph (b)(3) of this appendix must be considered.

(2) Values of $\bar{A}$ (ratio of root-mean-square incremental load root-mean-square gust velocity) must be determined by dynamic analysis. The power spectral density of the atmospheric turbulence must be as given by the equation—

$$\phi(\Omega)=\frac{\sigma^2 L}{\pi}\,\frac{1+\frac{8}{3}(1.339\,L\Omega)^2}{[1+(1.339\,L\Omega)^2]^{11/6}}$$

where:

ϕ = power-spectral density (ft./sec.)²/rad./ft.

σ = root-mean-square gust velocity, ft./sec.

Ω = reduced frequency, radians per foot.

L = 2,500 ft.

(3) The limit loads must be obtained by multiplying the $\bar{A}$ values determined by the dynamic analysis by the following values of the gust velocity $U\sigma$:

(i) At speed V_c: $U\sigma$ = 85 fps true gust velocity in the interval 0 to 30,000 ft. altitude and is linearly decreased to 30 fps true gust velocity at 80,000 ft. altitude. Where the Administrator finds that a design is comparable to a similar design with extensive satisfactory service experience, it will be acceptable to select $U\sigma$ at V_c less than 85 fps, but not less than 75 fps, with linear decrease from that value at 20,000 feet to 30 fps at 80,000 feet. The following factors will be taken into account when assessing comparability to a similar design:

(1) The transfer function of the new design should exhibit no unusual characteristics as compared to the similar design which will significantly affect response to turbulence; e.g., coalescence of modal response in the frequency regime which can result in a significant increase of loads.

(2) The typical mission of the new airplane is substantially equivalent to that of the similar design.

(3) The similar design should demonstrate the adequacy of the $U\sigma$ selected.

(ii) At speed V_B: $U\sigma$ is equal to 1.32 times the values obtained under paragraph (b)(3)(i) of this appendix.

(iii) At speed V_D: $U\sigma$ is equal to ½ the values obtained under paragraph (b)(3)(i) of this appendix.

(iv) At speeds between V_B and V_c and between V_c and V_D: $U\sigma$ is equal to a value obtained by linear interpolation.

(4) When a stability augmentation system is included in the analysis, the effect of system nonlinearities on loads at the limit load level must be realistically or conservatively accounted for.

(c) *Mission analysis.* Limit loads must be determined in accordance with the following:

(1) The expected utilization of the airplane must be represented by one or more flight profiles in which the load distribution and the variation with time of speed, altitude, gross weight, and center of gravity position are defined. These profiles must be divided into mission segments or blocks, for analysis, and average or effective values of the pertinent parameters defined for each segment.

(2) For each of the mission segments defined under paragraph (c)(1) of this appendix, values of $\bar{A}$ and N_o must be determined by analysis. $\bar{A}$ is defined as the ratio of root-mean-square incremental load to root-mean-square gust velocity and N_o is the radius of gyration of the load power spectral density function about zero frequency. The power spectral density of the atmospheric turbulence must be given by the equation set forth in paragraph (b)(2) of this appendix.

(3) For each of the load and stress quantities selected, the frequency of exceedance must be determined as a function of load level by means of the equation—

$$N_{(y)}=\Sigma t N_o\left[P_1 \exp\left(-\frac{|y-y_{one\text{-}g}|}{b_1\bar{A}}\right)+P_2 \exp\left(-\frac{|y-y_{one\text{-}g}|}{b_2\bar{A}}\right)\right]$$

where—

t = selected time interval.

y = net value of the load or stress.

$Y_{one\text{-}g}$ = value of the load or stress in one-g level flight.

N(y) = average number of exceedances of the indicated value of the load or stress in unit time.

Σ = symbol denoting summation over all mission segments.

N_o, $\bar{A}$ = parameters determined by dynamic analysis as defined in paragraph (c)(2) of this appendix.

P_1, P_2, b_1, b_2 = parameters defining the probability distributions of root-mean-square gust velocity, to be read from Figures 1 and 2 of this appendix.

The limit gust loads must be read from the frequency of exceedance curves at a frequency of exceedance of 2×10^{-5} exceedances per hour. Both positive and negative load directions must be considered in determining the limit loads.

(4) If a stability augmentation system is utilized to reduce the gust loads, consideration must be given to the fraction of flight time that the system may be inoperative. The flight profiles of paragraph (c)(1) of this appendix must include flight with the system inoperative for this fraction of the flight time. When a stability augmentation system is included in the analysis, the effect of system nonlinearities on loads at the limit load level must be conservatively accounted for.

(d) *Supplementary design envelope analysis.* In addition to the limit loads defined by paragraph (c) of this appendix, limit loads must also be determined in accordance with paragraph (b) of this appendix, except that—

(1) In paragraph (b)(3)(i) of this appendix, the value of $U\sigma$ = 85 fps true gust velocity is replaced by $U\sigma$ = 60 fps true gust velocity on the interval 0 to 30,000 ft. altitude, and is linearly decreased to 25 fps true gust velocity at 80,000 ft. altitude; and

(2) In paragraph (b) of this appendix, the reference to paragraphs (b)(3)(i) through (b)(3)(iii) of this appendix is to be understood as referring to the paragraph as modified by paragraph (d)(1).

BILLING CODE 4910-13-M

Part 25 App. G.

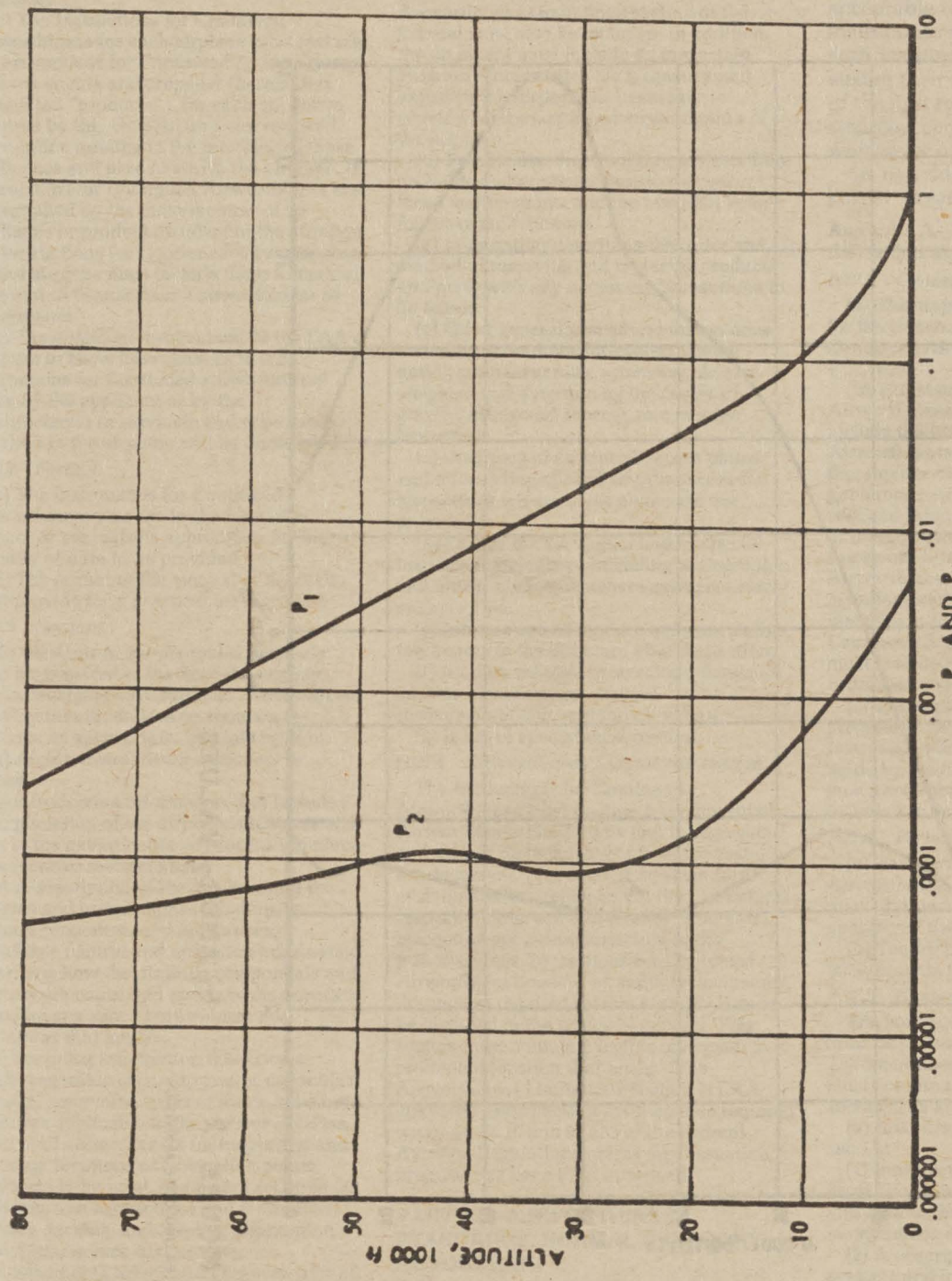


FIGURE 1 P_1 AND P_2 VALUES

Part 25 App. G.

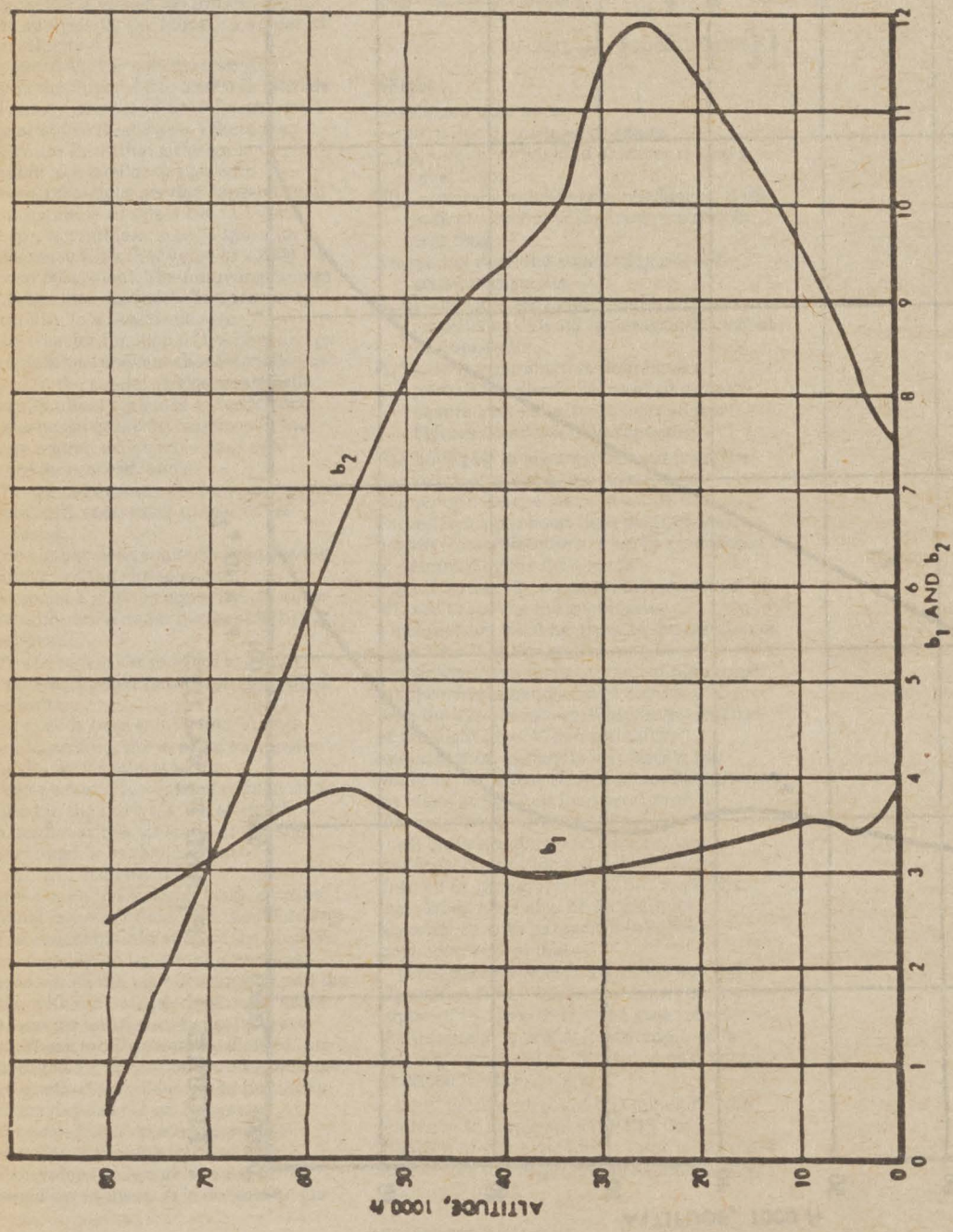


FIGURE 2 b_1 AND b_2 VALUES

BILLING CODE 4910-13-C

35. By adding a new Appendix H to Part 25 to read as follows:

Appendix H—Instructions for Continued Airworthiness

H25.1 *General.*

(a) This appendix specifies requirements for the preparation of Instructions for Continued Airworthiness as required by § 25.1529.

(b) The Instructions for Continued Airworthiness for each airplane must include the Instructions for Continued Airworthiness for each engine and propeller (hereinafter designated "products"), for each appliance required by this chapter, and any required information relating to the interface of those appliances and products with the airplane. If Instructions for Continued Airworthiness are not supplied by the manufacturer of an appliance or product installed in the airplane, the Instructions for Continued Airworthiness for the airplane must include the information essential to the continued airworthiness of the airplane.

(c) The applicant must submit to the FAA a program to show how changes to the Instructions for Continued Airworthiness made by the applicant or by the manufacturers or products and appliances installed in the airplane will be distributed.

H25.2 *Format.*

(a) The Instructions for Continued Airworthiness must be in the form of a manual or manuals as appropriate for the quantity of data to be provided.

(b) The format of the manual or manuals must provide for a practical arrangement.

H25.3 *Content.*

The contents of the manual or manuals must be prepared in the English language. The Instructions for Continued Airworthiness must contain the following manuals or sections, as appropriate, and information:

(a) *Airplane maintenance manual or section.*

(1) Introduction information that includes an explanation of the airplane's features and data to the extent necessary for maintenance or preventive maintenance.

(2) A description of the airplane and its systems and installations including its engines, propellers, and appliances.

(3) Basic control and operation information describing how the airplane components and systems are controlled and how they operate, including any special procedures and limitations that apply.

(4) Servicing information that covers details regarding servicing points, capacities of tanks, reservoirs, types of fluids to be used, pressures applicable to the various systems, location of access panels for inspection and servicing, locations of lubrication points, lubricants to be used, equipment required for servicing, tow instructions and limitations, mooring, jacking, and leveling information.

(b) *Maintenance Instructions.*

(1) Scheduling information for each part of the airplane and its engines, auxiliary power units, propellers, accessories, instruments, and equipment that provides the recommended periods at which they should be cleaned, inspected, adjusted, tested, and lubricated, and the degree of inspection, the applicable wear tolerances, and work recommended at these periods. However, the applicant may refer to an accessory, instrument, or equipment manufacturer as the source of this information if the applicant shows that the item has an exceptionally high degree of complexity requiring specialized maintenance techniques, test equipment, or expertise. The recommended overhaul periods and necessary cross references to the Airworthiness Limitations section of the manual must also be included. In addition, the applicant must include an inspection program that includes the frequency and extent of the inspections necessary to provide for the continued airworthiness of the airplane.

(2) Troubleshooting information describing probable malfunctions, how to recognize those malfunctions, and the remedial action for those malfunctions.

(3) Information describing the order and method of removing and replacing products and parts with any necessary precautions to be taken.

(4) Other general procedural instructions including procedures for system testing during ground running, symmetry checks, weighing and determining the center of gravity, lifting and shoring, and storage limitations.

(c) Diagrams of structural access plates and information needed to gain access for inspections when access plates are not provided.

(d) Details for the application of special inspection techniques including radiographic and ultrasonic testing where such processes are specified.

(e) Information needed to apply protective treatments to the structure after inspection.

(f) All data relative to structural fasteners such as identification, discard recommendations, and torque values.

(g) A list of special tools needed.

H25.4 *Airworthiness Limitations section.*

The Instructions for Continued Airworthiness must contain a section titled Airworthiness Limitations that is segregated and clearly distinguishable from the rest of the document. This section must set forth each mandatory replacement time, structural inspection interval, and related structural inspection procedure approved under § 25.571. If the Instructions for Continued Airworthiness consist of multiple documents, the section required by this paragraph must be included in the principal manual. This section must contain a legible statement in a prominent location that reads: "The Airworthiness Limitations section is FAA approved and specifies maintenance required under §§ 43.16 and 91.163 of the Federal Aviation Regulations unless an alternative program has been FAA approved."

PART 27—AIRWORTHINESS STANDARDS: NORMAL CATEGORY ROTORCRAFT

§ 27.571 [Amended]

36. By deleting the reference to "§ 27.1529(a)(2)" in §§ 27.571 (b), (c), (d)(1), (d)(3), and (e) and replacing it with "§ A27.4 of Appendix A."

37. By revising § 27.1529, including its heading, to read as follows:

§ 27.1529 Instructions for continued airworthiness.

The applicant must prepare Instructions for Continued Airworthiness in accordance with Appendix A to this part that are acceptable to the Administrator. The instructions may be incomplete at type certification if a program exists to ensure their completion prior to delivery of the first rotorcraft or issuance of a standard certificate of airworthiness, whichever occurs later.

38. By adding a new Appendix A to Part 27 to read as follows:

Appendix A—Instructions for Continued Airworthiness

A27.1 *General.*

(a) This appendix specifies requirements for the preparation of Instructions for Continued Airworthiness as required by § 27.1529.

(b) The Instructions for Continued Airworthiness for each rotorcraft must include the Instructions for Continued Airworthiness for each engine and rotor (hereinafter designated 'products'), for each appliance required by this chapter, and any required information relating to the interface of those appliances and products with the rotorcraft. If Instructions for Continued Airworthiness are not supplied by the manufacturer of an appliance or product installed in the rotorcraft, the Instructions for Continued Airworthiness for the rotorcraft must include the information essential to the continued airworthiness of the rotorcraft.

(c) The applicant must submit to the FAA a program to show how changes to the Instructions for Continued Airworthiness made by the applicant or by the manufacturers of products and appliances installed in the rotorcraft will be distributed.

A27.2 *Format.*

(a) The Instructions for Continued Airworthiness must be in the form of a manual or manuals as appropriate for the quantity of data to be provided.

(b) The format of the manual or manuals must provide for a practical arrangement.

A27.3 *Content.*

The contents of the manual or manuals must be prepared in the English language. The Instructions for Continued Airworthiness must contain the following manuals or sections, as appropriate, and information:

(a) *Rotorcraft maintenance manual or section.*

(1) Introduction information that includes an explanation of the rotorcraft's features and data to the extent necessary for maintenance or preventive maintenance.

(2) A description of the rotorcraft and its systems and installations including its engines, rotors, and appliances.

(3) Basic control and operation information describing how the rotorcraft components and systems are controlled and how they operate, including any special procedures and limitations that apply.

(4) Servicing information that covers details regarding servicing points, capacities of tanks, reservoirs, types of fluids to be used, pressures applicable to the various systems, location of access panels for inspection and servicing, locations of lubrication points, the lubricants to be used, equipment required for servicing, tow instructions and limitations, mooring, jacking, and leveling information.

(B) *Maintenance instructions.*

(1) Scheduling information for each part of the rotorcraft and its engines, auxiliary power units, rotors, accessories, instruments and equipment that provides the recommended periods at which they should be cleaned, inspected, adjusted, tested, and lubricated, and the degree of inspection, the applicable wear tolerances, and work recommended at these periods. However, the applicant may refer to an accessory, instrument, or equipment manufacturer as the source of this information if the applicant shows the item has an exceptionally high degree of complexity requiring specialized maintenance techniques, test equipment, or expertise. The recommended overhaul periods and necessary cross references to the Airworthiness Limitations section of the manual must also be included. In addition, the applicant must include an inspection program that includes the frequency and extent of the inspections necessary to provide for the continued airworthiness of the rotorcraft.

(2) Troubleshooting information describing problem malfunctions, how to recognize those malfunctions, and the remedial action for those malfunctions.

(3) Information describing the order and method of removing and replacing products and parts with any necessary precautions to be taken.

(4) Other general procedural instructions including procedures for system testing during ground running, symmetry checks, weighing and determining the center of gravity, lifting and shoring, and storage limitations.

(c) Diagrams of structural access plates and information needed to gain access for inspections when access plates are not provided.

(d) Details for the application of special inspection techniques including radiographic and ultrasonic testing where such processes are specified.

(e) Information needed to apply protective treatments to the structure after inspection.

(f) All data relative to structural fasteners such as identification, discarded recommendations, and torque values.

(g) A list of special tools needed.

A27.4 *Airworthiness Limitations section.*

The Instructions for Continued Airworthiness must contain a section, titled Airworthiness Limitations that is segregated and clearly distinguishable from the rest of the document. This section must set forth each mandatory replacement time, structural inspection interval, and related structural inspection procedure approved under § 27.571. If the Instructions for Continued Airworthiness consist of multiple documents, the section required by this paragraph must be included in the principal manual. This section must contain a legible statement in a prominent location that reads: "The Airworthiness Limitations section is FAA approved and specifies inspections and other maintenance required under §§ 43.16 and 91.163 of the Federal Aviation Regulations unless an alternative program has been FAA approved."

PART 29—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY ROTORCRAFT

§ 29.571 [Amended]

39. By deleting the reference to "§ 29.1529(a) (2)" in §§ 29.571 (b), (c), (d) (1), (d) (3), and (e) and replacing it with "§A29.4 of Appendix A".

40. By adding a new § 29.783(g) to read as follows:

§ 29.783 Doors.

* * * * *

(g) If an integral stair is installed in a passenger entry door that is qualified as a passenger emergency exit, the stair must be designed so that under the following conditions the effectiveness of passenger emergency egress will not be impaired:

(1) The door, integral stair, and operating mechanism have been subjected to the inertia forces specified in § 29.561(b)(3), acting separately relative to the surrounding structure.

(2) The rotorcraft is in the normal ground attitude and in each of the attitudes corresponding to collapse of one or more legs, or primary members, as applicable, of the landing gear.

41. By revising § 29.1529, including its heading, to read as follows:

§ 29.1529 Instructions for continued airworthiness.

The applicant must prepare Instructions for Continued Airworthiness in accordance with Appendix A to this part that are acceptable to the Administrator. The instructions may be incomplete at type certification if a program exists to ensure their completion prior to delivery of the first rotorcraft or issuance of a standard certificate of airworthiness, whichever occurs later.

42. By adding a new Appendix A to Part 29 to read as follows:

Appendix A—Instructions for Continued Airworthiness

A29.1 *General.*

(a) This appendix specifies requirements for the preparation of Instructions for Continued Airworthiness as required by § 29.1529.

(b) The Instructions for Continued Airworthiness for each rotorcraft must include the Instructions for Continued Airworthiness for each engine and rotor (hereinafter designated "products"), for each applicance required by this chapter, and any required information relating to the interface of those appliances and products with the rotorcraft. If Instructions for Continued Airworthiness are not supplied by the manufacturer of an appliance or product installed in the rotorcraft, the Instructions for Continued Airworthiness for the rotorcraft must include the information essential to the continued airworthiness of the rotorcraft.

(c) The applicant must submit to the FAA a program to show how changes to the Instructions for Continued Airworthiness made by the applicant or by the manufacturers of products and appliances installed in the rotorcraft will be distributed.

A29.2 *Format.*

(a) The Instructions for Continued Airworthiness must be in the form of a manual or manuals as appropriate for the quantity of data to be provided.

(b) The format of the manual or manuals must provide for a practical arrangement.

A29.3 *Content.*

The contents of the manual or manuals must be prepared in the English language. The Instructions for Continued Airworthiness must contain the following manuals or sections, as appropriate, and information:

(a) *Rotorcraft maintenance manual or section.* (1) Introduction information that includes an explanation of the rotorcraft's features and data to the extent necessary for maintenance or preventive maintenance.

(2) A description of the rotorcraft and its systems and installations including its engines, rotors, and applicances.

(3) Basic control and operation information describing how the rotorcraft components and systems are controlled and how they operate, including any special procedures and limitations that apply.

(4) Servicing information that covers details regarding servicing points, capacities of tanks, reservoirs, types of fluids to be used, pressures applicable to the various systems, location of access panels for inspection and servicing, locations of lubrication points, the lubricants to be used, equipment required for servicing, tow instructions and limitations, mooring, jacking, and leveling information.

(b) *Maintenance Instructions.* (1) Scheduling information for each part of the rotorcraft and its engines, auxiliary power units, rotors, accessories, instruments, and equipment that provides the recommended periods at which they should be cleaned, inspected, adjusted, tested, and lubricated, and the degree of inspection, the applicable wear tolerances, and work recommended at these periods. However, the applicant may refer to an accessory, instrument, or equipment manufacturer as the source of this information if the applicant shows that the item has an exceptionally high degree of complexity requiring specialized maintenance techniques, test equipment, or expertise. The recommended overhaul periods and necessary cross references to the Airworthiness Limitations section of the manual must also be included. In addition, the applicant must include an inspection program that includes the frequency and extent of the inspections necessary to provide for the continued airworthiness of the rotorcraft.

(2) Troubleshooting information describing probable malfunctions, how to recognize

those malfunctions, and the remedial action for those malfunctions.

(3) Information describing the order and method of removing and replacing products and parts with any necessary precautions to be taken.

(4) Other general procedural instructions including procedures for system testing during ground running, symmetry checks, weighing and determining the center of gravity, lifting and shoring, and storage limitations.

(c) Diagrams of structural access plates and information needed to gain access for inspections when access plates are not provided.

(d) Details for the application of special inspection techniques including radiographic and ultrasonic testing where such processes are specified.

(e) Information needed to apply protective treatments to the structure after inspection.

(f) All data relative to structural fasteners such as identification, discard recommendations, and torque values.

(g) A list of special tools needed.

A29.4 *Airworthiness Limitations Section.*

The Instructions for Continued Airworthiness must contain a section titled Airworthiness Limitations that is segregated and clearly distinguishable from the rest of the document. This section must set forth each mandatory replacement time, structural inspection interval, and related structural inspection procedure approved under § 29.571. If the Instructions for Continued Airworthiness consist of multiple documents, the section required by this paragraph must be included in the principal manual. This section must contain a legible statement in a prominent location that reads: "The Airworthiness Limitations section is FAA approved and specifies maintenance required under §§ 43.16 and 91.163 of the Federal Aviation Regulations unless an alternative program has been FAA approved."

PART 31—AIRWORTHINESS STANDARDS: MANNED FREE BALLOONS

43. By adding a new § 31.12 to read as follows:

§ 31.12 Proof of compliance.

(a) Each requirement of this subpart must be met at each weight within the range of loading conditions for which certification is requested. This must be shown by—

(1) Tests upon a balloon of the type for which certification is requested or by calculations based on, and equal in accuracy to, the results of testing; and

(2) Systematic investigation of each weight if compliance cannot be reasonably inferred from the weights investigated.

(b) Except as provided in § 31.17(b), allowable weight tolerances during flight testing are +5 percent and −10 percent.

44. By adding a new § 31.16 to read as follows:

§ 31.16 Empty weight.

The empty weight must be determined by weighing the balloon with installed equipment but without lifting gas or heater fuel.

45. By adding a new § 31.17 to read as follows:

§ 31.17 Performance: Climb.

(a) Each balloon must be capable of climbing at least 300 feet in the first minute after takeoff with a steady rate of climb. Compliance with the requirements of this section must be shown at each altitude and ambient temperature for which approval is sought.

(b) Compliance with the requirements of paragraph (a) of this section must be shown at the maximum weight with a weight tolerance of +5 percent.

46. By adding a new § 31.19 to read as follows:

§ 31.19 Performance: Uncontrolled descent.

(a) The following must be determined for the most critical uncontrolled descent that can result from any single failure of the heater assembly, fuel cell system, gas value system, or maneurering vent system, or from any single tear in the ballon envelope between tear stoppers:

(1) The maximum vertical velocity attained.

(2) The altitude loss from the point of failure to the point at which maximum vertical velocity is attained.

(3) The altitude required to achieve level flight after corrective action is inititated, with the balloon descending at the maximum vertical velocity determined in paragraph (a)(1) of this section.

(b) Procedures must be established for landing at the maximum vertical velocity determined in paragraph (a)(1) of this section and for arresting that descent rate in accordance with paragraph (a)(3) of this section.

§ 31.27 [Amended]

47. By amending § 31.27(c) by deleting the second sentence, by deleting the word "concrete" in the third sentence, and by deleting the last sentence and inserting the following in place thereof: "A drop test height of 36 inches, or a drop test height that produces, upon impact, a velocity equal to the maximum vertical velocity determined in accordance with § 31.19, whichever is higher, must be used."

48. By revising §§ 31.65(a), (b), and (c) and adding a new § 31.65(e) to read as follows:

§ 31.65 Position lights.

(a) If position lights are installed, there must be one steady aviation white position light and one flashing aviation red (or flashing aviation white) position light with an effective flash frequency of at least 40, but not more than 100, cycles per minute.

(b) Each light must provide 360° horizontal coverage at the intensities prescribed in this paragraph. The following light intensities must be determined with the light source operating at a steady state and with all light covers and color filters in place and at the manufacturer's rated mimimum voltage. For the flashing aviation red light, the measured values must be adjusted to correspond to a red filter temperature of at least 130° F:

(1) The intensities in the horizontal plane passing through the light unit must equal or exceed the following values:

Position light	Minimum intensity (candles)
Steady white	20
Flashing red or white	40

(2) The intensities in vertical planes must equal or exceed the following values. An intensity of one unit corresponds to the applicable horizontal plane intensity specified in paragraph (b)(1) of this section.

Angles above and below the horizontal in any vertical plane (degrees)	Minimum intensity (units)
0	1.00
0 to 5	0.90
5 to 10	0.80
10 to 15	0.70
15 to 20	0.50
20 to 30	0.30
30 to 40	0.10
40 to 60	0.05

(c) The steady white light must be located not more than 20 feet below the basket, trapeze, or other means for carrying occupants. The flashing red or white light must be located not less than 7, nor more than 10, feet below the steady white light.

* * * * *

(e) Each position light color must have the applicable International Commission on Illumination chromaticity coordinates as follows:

(1) *Aviation red*—

"y" is not greater than 0.335; and "z" is not greater than 0.002.

(2) *Aviation white*—

"x" is not less than 0.300 and not greater than 0.540;

"y" is not less than "x"−0.040" or "y_o−0.010", whichever is the smaller; and

"y" is not greater than "x+0.020" nor "0.636−0.0400 x";

Where "y_o" is the "y" coordinate of the Planckian radiator for the value of "x" considered.

49. By revising § 31.71 to read as follows:

§ 31.71 Function and installation.

(a) Each item of installed equipment must—

(1) Be of a kind and design appropriate to its intended function;

(2) Be permanently and legibly marked or, if the item is too small to mark, tagged as to its identification, function, or operating limitations, or any applicable combination of those factors;

(3) Be installed according to limitations specified for that equipment; and

(4) Function properly when installed.

(b) No item of installed equipment, when performing its function, may affect the function of any other equipment so as to create an unsafe condition.

(c) The equipment, systems, and installations must be designed to prevent hazards to the balloon in the event of a probable malfunction or failure.

50. By revising § 31.81 to read as follows:

§ 31.81 General.

(a) The following information must be established:

(1) Each operating limitation, including the maximum weight determined under § 31.14.

(2) The normal and emergency procedures.

(3) Other information necessary for safe operation, including—

(i) The empty weight determined under § 31.16;

(ii) The rate of climb determined under § 31.17, and the procedures and conditions used to determine performance;

(iii) The maximum vertical velocity, the altitude drop required to attain that velocity, and altitude drop required to recover from a descent at that velocity, determined under § 31.19, and the procedures and conditions used to determine performance; and

(iv) Pertinent information peculiar to the balloon's operating characteristics.

(b) The information established in compliance with paragraph (a) of this section must be furnished by means of—

(1) A Balloon Flight Manual; or

(2) A placard on the balloon that is clearly visible to the pilot.

51. By adding a new § 31.82 to read as follows:

§ 31.82 Instructions for Continued Airworthiness.

The applicant must prepare Instructions for Continued Airworthiness in accordance with Appendix A to this part that are acceptable to the Administrator. The instructions may be incomplete at type certification if a program exists to ensure their completion prior to delivery of the first balloon or issuance of a standard certificate of airworthiness, whichever occurs later.

52. By revising § 31.85(b)(1) to read as follows:

§ 31.85 Required basic equipment.

* * * * *

(b) * * *

(1) A fuel quantity gauge. If fuel cells are used, means must be incorporated to indicate to the crew the quantity of fuel in each cell during flight. The means must be calibrated in appropriate units or in percent of fuel cell capacity.

* * * * *

53. By adding a new Appendix A to Part 31 to read as follows:

Appendix A—Instructions for Continued Airworthiness

A31.1 *General.*

(a) This appendix specifies requirements for the preparation of Instructions for Continued Airworthiness as required by § 31.82.

(b) The Instructions for Continued Airworthiness for each balloon must include the Instructions for Continued Airworthiness for all balloon parts required by this chapter and any required information relating to the interface of those parts with the balloon. If Instructions for Continued Airworthiness are not supplied by the part manufacturer for a balloon part, the Instructions for Continued Airworthiness for the balloon must include the information essential to the continued airworthiness of the balloon.

(c) The applicant must submit to the FAA a program to show how changes to the Instructions for Continued Airworthiness made by the applicant or by the manufacturers of balloon parts will be distributed.

A31.2 *Format.*

(a) The Instructions for Continued Airworthiness must be in the form of a manual or manuals as appropriate for the quantity of data to be provided.

(b) The format of the manual or manuals must provide for a practical arrangement.

A31.3 *Content.*

The contents of the manual or manuals must be prepared in the English language. The Instructions for Continued Airworthiness must contain the following information:

(a) Introduction information that includes an explanation of the balloon's features and data to the extent necessary for maintenance or preventive maintenance.

(b) A description of the balloon and its systems and installations.

(c) Basic control and operation information for the balloon and its components and systems.

(d) Servicing information that covers details regarding servicing of balloon components, including burner nozzles, fuel tanks, and valves during operations.

(e) Maintenance information for each part of the balloon and its envelope, controls, rigging, basket structure, fuel systems, instruments, and heater assembly that provides the recommended periods at which they should be cleaned, adjusted, tested, and lubricated, the applicable wear tolerances, and the degree of work recommended at these periods. However, the applicant may refer to an accessory, instrument, or equipment manufacturer as the source of this information if the applicant shows that the item has an exceptionally high degree of complexity requiring specialized maintenance techniques, test equipment, or expertise. The recommended overhaul periods and necessary cross references to the Airworthiness Limitations section of the manual must also be included. In addition, the applicant must include an inspection program that includes the frequency and extent of the inspections necessary to provide for the continued airworthiness of the balloon.

(f) Troubleshooting information describing probable malfunctions, how to recognize those malfunctions, and the remedial action for those malfunctions.

(g) Details of what, and how, to inspect after a hard landing.

(h) Instructions for storage preparation including any storage limits.

(i) Instructions for repair on the balloon envelope and its basket or trapeze.

A31.4 *Airworthiness Limitations Section.*

The Instructions for Continued Airworthiness must contain a section titled Airworthiness Limitations that is segregated and clearly distinguishable from the rest of the document. This section must set forth each mandatory replacement time, structural inspection interval, and related structural inspection procedure, including envelope structural integrity, required for type certification. If the Instructions for Continued Airworthiness consist of multiple documents, the section required by this paragraph must be included in the principal manual. This section must contain a legible statement in a prominent location that reads: "The Airworthiness Limitations section is FAA approved and specifies maintenance required under §§ 43.16 and 91.163 of the Federal Aviation Regulations."

PART 33—AIRWORTHINESS STANDARDS: AIRCRAFT ENGINES

54. By adding a new § 33.4 to read as follows:

§ 33.4 Instructions for Continued Airworthiness.

The applicant must prepare Instructions for Continued Airworthiness in accordance with Appendix A to this part that are acceptable to the Administrator. The instructions may be incomplete at type certification if a program exists to ensure their completion prior to delivery of the first aircraft with the engine installed, or upon issuance of a standard certificate of airworthiness for the aircraft with the engine installed, whichever occurs later.

55. By deleting §§ 33.5 (c), (d), and (e) and revising the lead in and heading of § 33.5 to read as follows:

§ 33.5 Instruction manual for installing and operating the engine.

Each applicant must prepare and make available to the Administrator prior to the issuance of the type certificate, and to the owner at the time of delivery of the engine, approved instructions for installing and operating the engine. The instructions must include at least the following:

* * * * *

56. By redesignating § 33.19 as § 33.19(a) and adding a new § 33.19(b) to read as follows:

§ 33.19 Durability.

* * * * *

(b) Each component of the propeller blade pitch control system which is a part of the engine type design must meet the requirements of § 35.42 of this chapter.

§ 33.55 [Amended]

57. By deleting the reference to "§ 33.5(e)" in § 33.55(c) and replacing it with "§ 33.4".

§ 33.57 [Amended]

58. By deleting the reference to "§ 33.5" in § 33.57(b) and replacing it with "§ 33.4".

§ 33.93 [Amended]

59. By deleting the reference to "§ 33.5" in § 33.93(b) and replacing it with "§ 33.4".

§ 33.99 [Amended]

60. By deleting the reference to "§ 33.5" in § 33.99(b) and replacing it with "§ 33.4".

61. By adding a new Appendix A to Part 33 to read as follows:

Appendix A—Instructions for Continued Airworthiness

A33.1 *General.*

(a) This appendix specifies requirements for the preparation of Instructions for Continued Airworthiness as required by § 33.4.

(b) The Instructions for Continued Airworthiness for each engine must include the Instructions for Continued Airworthiness for all engine parts. If Instructions for Continued Airworthiness are not supplied by the engine part manufacturer for an engine part, the Instructions for Continued Airworthiness for the engine must include the information essential to the continued airworthiness of the engine.

(c) The applicant must submit to the FAA a program to show how changes to the Instructions for Continued Airworthiness made by the applicant or by the manufacturers of engine parts will be distributed.

A33.2 *Format.*

(a) The Instructions for Continued Airworthiness must be in the form of a manual or manuals as appropriate for the quantity of data to be provided.

(b) The format of the manual or manuals must provide for a practical arrangement.

A33.3 *Content.*

The contents of the manual or manuals must be prepared in the English language. The Instructions for Continued Airworthiness must contain the following manuals or sections, as appropriate, and information:

(a) *Engine Maintenance Manual or Section.* (1) Introduction information that includes an explanation of the engine's features and data to the extent necessary for maintenance or preventive maintenance.

(2) A detailed description of the engine and its components, systems, and installations.

(3) Installation instructions, including proper procedures for uncrating, deinhibiting, acceptance checking, lifting, and attaching accessories, with any necessary checks.

(4) Basic control and operating information describing how the engine components, systems, and installations operate, and information describing the methods of starting, running, testing, and stopping the engine and its parts including any special procedures and limitations that apply.

(5) Servicing information that covers details regarding servicing points, capacities of tanks, reservoirs, types of fluids to be used, pressures applicable to the various systems, locations of lubrication points, lubricants to be used, and equipment required for servicing.

(6) Scheduling information for each part of the engine that provides the recommended periods at which it should be cleaned, inspected, adjusted, tested, and lubricated, and the degree of inspection the applicable wear tolerances, and work recommended at these periods. However, the applicant may refer to an accessory, instrument, or equipment manufacturer as the source of this information if the applicant shows that the item has an exceptionally high degree of complexity requiring specialized maintenance techniques, test equipment, or expertise. The recommended overhaul periods and necessary cross references to the Airworthiness Limitations section of the manual must also be included. In addition, the applicant must include an inspection program that includes the frequency and extent of the inspections necessary to provide for the continued airworthiness of the engine.

(7) Troubleshooting information describing probable malfunctions, how to recognize those malfunctions, and the remedial action for those malfunctions.

(8) Information describing the order and method of removing the engine and its parts and replacing parts, with any necessary precautions to be taken. Instructions for proper ground handling, crating, and shipping must also be included.

(9) A list of the tools and equipment necessary for maintenance and directions as to their method of use.

(b) *Engine Overhaul Manual or Section.* (1) Disassembly information including the order and method of disassembly for overhaul.

(2) Cleaning and inspection instructions that cover the materials and apparatus to be used and methods and precautions to be taken during overhaul. Methods of overhaul inspection must also be included.

(3) Details of all fits and clearances relevant to overhaul.

(4) Details of repair methods for worn or otherwise substandard parts and components along with the information necessary to determine when replacement is necessary.

(5) The order and method of assembly at overhaul.

(6) Instructions for testing after overhaul.

(7) Instructions for storage preparation, including any storage limits.

(8) A list of tools needed for overhaul.

A33.4 *Airworthiness Limitations Section.*

The Instructions for Continued Airworthiness must contain a section titled Airworthiness Limitations that is segregated and clearly distinguishable from the rest of the document. This section must set forth each mandatory replacement time, inspection interval, and related procedure required for type certification. If the Instructions for Continued Airworthiness consist of multiple documents, the section required by this paragraph must be included in the principal manual. This section must contain a legible statement in a prominent location that reads: "The Airworthiness Limitations section is FAA approved and specifies maintenance required under §§ 43.16 and 91.163 of the Federal Aviation Regulations unless an alternative program has been FAA approved."

PART 35—AIRWORTHINESS STANDARDS: PROPELLERS

62. By revising § 35.3, including its heading, to read as follows:

§ 35.3 Instruction manual for installing and operating the propeller.

Each applicant must prepare and make available an approved manual or manuals containing instructions for installing and operating the propeller.

63. By adding a new § 35.4 to read as follows:

§ 35.4 Instructions for continued airworthiness.

The appliant must prepare Instructions for Continued Airworthiness in accordance with Appendix A to this part that are

acceptable to the Administrator. The instructions may be incomplete at type certification if a program exists to ensure their completion prior to delivery of the first aircraft with the propeller installed, or upon issuance of a standard certificate of airworthiness for an aircraft with the propeller installed, whichever occurs later.

64. By revising § 35.5 to read as follows:

§ 35.5 Propeller operating limitations.

Propeller operating limitations are established by the Administrator, are included in the propeller type certificate data sheet specified in § 21.41 of this chapter, and include limitations based on the operating conditions demonstrated during the tests required by this part and any other information found necessary for the safe operation of the propeller.

65. By revising the heading of § 35.23 and adding a new § 35.23(c) to read as follows:

§ 35.23 Pitch control and indication.

* * * * *

(c) Each propeller approved for installation on a turbopropeller engine must incorporate a provision for an indicator to indicate when the propeller blade angle is below the flight low pitch position. The provision must directly sense the blade position and be arranged to cause an indicator to indicate that the blade angle is below the flight low pitch position before the blade moves more than 8° below the flight low pitch stop.

66. By revising § 35.37, including its heading, to read as follows:

§ 35.37 Fatigue limit tests.

A fatigue evalution must be made and the fatigue limits determined for each metallic hub and blade, and each primary load carrying metal component of nonmetallic blades. The fatigue evaluation must include consideration of all reasonably foreseeable vibration load patterns. The fatigue limits must account for the permissible service deteriortion (such as nicks, grooves, galling, bearing wear, and variations in material properties).

67. By adding a new § 35.42 to read as follows:

§ 35.42 Blade pitch control system component test.

The following durability requirements apply to propeller blade pitch control system components:

(a) Except as provided in paragraph (b) of this section, each propeller blade pitch control system component, including governors, pitch change assemblies, pitch locks, mechanical stops, and feathering system components, must be subjected in tests to cyclic loadings that simulate the frequency and amplitude those to which the component would be subjected during 1,000 hours of propeller operation.

(b) Compliance with paragraph (a) of this section may be shown by a rational analysis based on the results of tests on similar components.

68. By adding a new Appendix A to Part 35 to read as follows:

Appendix A—Instructions for Continued Airworthiness

A35.1 *General.*

(a) This appendix specifies requirements for the preparation of Instructions for Continued Airworthiness as required by § 35.4.

(b) The Instructions for Continued Airworthiness for each propeller must include the Instructions for Continued Airworthiness for all propeller parts. If Instructions for Continued Airworthiness are not supplied by the propeller part manufacturer for a propeller part, the Instructions for Continued Airworthiness for the propeller must include the information essential to the continued airworthiness of the propeller.

(c) The applicant must submit to the FAA a program to show how changes to the Instructions for Continued Airworthiness made by the applicant or by the manufacturers of propeller parts will be distributed.

A35.2 *Format.*

(a) The Instructions for Continued Airworthiness must be in the form of a manual or manuals as appropriate for the quantity of data to be provided.

(b) The format of the manual or manuals must provide for a practical arrangement.

A35.3 *Content.*

The contents of the manual must be prepared in the English language. The Instructions for Continued Airworthiness must contain the following sections and information:

(a) *Propeller Maintenance Section.* (1) Introduction information that includes an explanation of the propeller's features and data to the extent necessary for maintenance or preventive maintenance.

(2) A detailed description of the propeller and its systems and installations.

(3) Basic control and operation information describing how the propeller components and systems are controlled and how they operate, including any special procedures that apply.

(4) Instructions for uncrating, acceptance checking, lifting, and installing the propeller.

(5) Instructions for propeller operational checks.

(6) Scheduling information for each part of the propeller that provides the recommended periods at which it should be cleaned, adjusted, and tested, the applicable wear tolerances, and the degree of work recommended at these periods. However, the applicant may refer to an accessory, instrument, or equipment manufacturer as the source of this information if it shows that the item has an exceptionally high degree of complexity requiring specialized maintenance techniques, test equipment, or expertise. The recommended overhaul periods and necessary cross-references to the Airworthiness Limitations section of the manual must also be included. In addition, the applicant must include an inspection program that includes the frequency and extent of the inspections necessary to provide for the continued airworthiness of the propeller.

(7) Troubleshooting information describing probable malfunctions, how to recognize those malfunctions, and the remedial action for those malfunctions.

(8) Information describing the order and method of removing and replacing propeller parts with any necessary precautions to be taken.

(9) A list of the special tools needed for maintenance other than for overhauls.

(b) *Propeller Overhaul Section.* (1) Disassembly information including the order and method of disassembly for overhaul.

(2) Cleaning and inspection instructions that cover the materials and apparatus to be used and methods and precautions to be taken during overhaul. Methods of overhaul inspection must also be included.

(3) Details of all fits and clearances relevant to overhaul.

(4) Details of repair methods for worn or otherwise substandard parts and components along with information necessary to determine when replacement is necessary.

(5) The order and method of assembly at overhaul.

(6) Instructions for testing after overhaul.

(7) Instructions for storage preparation including any storage limits.

(8) A list of tools needed for overhaul.

A35.4 *Airworthiness Limitations Section.*

The Instructions for Continued Airworthiness must contain a section titled Airworthiness Limitations that is segregated and clearly distinguishable from the rest of the document. This section must set forth each mandatory replacement time, inspection interval, and related procedure required for type certification. This section must contain a legible statement in a prominent location that reads: "The Airworthiness Limitations section is FAA approved and specifies maintenance required under §§ 43.16 and 91.163 of the Federal Aviation Regulations unless an alternative program has been FAA approved."

PART 43—MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION

69. By revising the first sentence of § 43.13(a) to read as follows:

§ 43.13 Performance rules (general).

(a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices

prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in § 43.16. * * *

* * * * *

70. By revising § 43.16, including its heading, to read as follows:

§ 43.16 Airworthiness limitations.

Each person performing an inspection or other maintenance specified in an Airworthiness Limitations section of a manufacturer's maintenance manual or Instructions for Continued Airworthiness shall perform the inspection or other maintenance in accordance with that section, or in accordance with operations specifications approved by the Administrator under Parts 121, 123, 127, or 135, or an inspection program approved under § 91.217(e).

PART 45—IDENTIFICATION AND REGISTRATION MARKING

71. By revising § 45.11(a) and adding a new § 45.11(c) to read as follows:

§ 45.11 General.

(a) *Aircraft and aircraft engines.* Aircraft covered under § 21.182 of this chapter must be identified, and each person who manufactures an aircraft engine under a type or production certificate shall identify that engine by means of a fireproof plate that has the information specified in § 43.13 marked on it by etching, stamping, engraving, or other approved method of fireproof marking. The identification plate for aircraft must be secured in such a manner that it will not likely be defaced or removed during normal service, or lost or destroyed in an accident. Except as provided in paragraph (c) of this section, the aircraft identification plate must be secured to the aircraft at an accessible location near an entrance, except that if it is legible to a person on the ground it may be located externally on the fuselage near the tail surfaces. For aircraft engines, the identification plate must be affixed to the engine at an accessible location, in such a manner that it will not likely be defaced or removed during normal service, or lost or destroyed in an accident.

* * * * *

(c) For manned free balloons, the identification plate prescribed in paragraph (a) of this section must be secured to the balloon envelope and must be located, if practicable, where it is legible to the operator when the balloon is inflated. In addition, the basket and heater assembly must be permanently and legibly marked with the manufacturer's name, part number (or equivalent) and serial number (or equivalent).

§ 45.13 [Amended]

72. By deleting the reference to "§ 45.11" in § 45.13(a) and inserting "§§ 45.11 (a) and (b)".

73. By revising § 45.14 to read as follows:

§ 45.14 Identification of critical components.

Each person who produces a part for which a replacement time, inspection interval, or related procedure is specified in the Airworthiness Limitations section of a Manufacturer's Maintenance Manual or Instructions for Continued Airworthiness shall mark that component with a part number (or equivalent) and serial number (or equivalent).

PART 91—GENERAL OPERATING AND FLIGHT RULES

74. By revising § 91.163(c) to read as follows:

§ 91.163 General.

* * * * *

(c) No person may operate an aircraft for which a manufacturer's maintenance manual or Instructions for Continued Airworthiness has been issued that contains an Airworthiness Limitations section unless the mandatory replacement times, inspection intervals, and related procedures specified in that section or alternative inspection intervals and related procedures set forth in an operations specification approved by the Administrator under Parts 121, 123, 127, or 135, or in accordance with an inspection program approved under § 91.217(e), have been complied with.

§ 91.165 [Amended]

75. By revising the last sentence of § 91.165 to read, "In addition, each owner or operator shall ensure that maintenance personnel make appropriate entries in the maintenance records indicating that the aircraft has been approved for return to service."

76. By revising § 91.173(a)(2)(i) to read as follows:

§ 91.173 Maintenance records.

(a) * * *

(2) * * *

(i) The total time in service of the airframe, each engine and each propeller.

* * * * *

77. By adding a new § 91.193(c)(4) to read as follows:

§ 91.193 Emergency equipment.

* * * * *

(c) * * *

(4) Hand fire extinguishers must be installed and secured in such a manner that they will not interfere with the safe operation of the airplane or adversely affect the safety of the crew and passengers. They must be readily accessible, and unless the locations of the fire extinguishers are obvious, their stowage provisions must be properly identified.

* * * * *

(Secs. 313(a), 601, 603, 604, Federal Aviation Act of 1958 (49 U.S.C. 1354(a), 1421, 1423, and 1424); sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c)))

Note.—The FAA has determined that this document involves a regulation which is not significant under Executive Order 12044, as implemented by Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). A copy of the final evaluation prepared for this document is contained in the docket. A copy of it may be obtained by writing to the individual and address listed in the "For Further Information Contact" paragraph.

Issued in Washington, D.C., on August 27, 1980.

Langhorne Bond,

Administrator.

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Thursday
September 11, 1980

Part III

Federal Communications Commission

Cable Television Syndicated Program Exclusivity Rules

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[FCC 80-443; Docket No. 20988; RM-2721; Docket No. 21284; RM-2919; RM 3324; RM-3346]

Cable Television Syndicated Program Exclusivity Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule; report and Order in Dockets 20988 and 21284.

SUMMARY: Existing FCC rules limit the number of distant television signals that cable television systems may distribute to their subscribers. The Commission has concluded that these rules do not benefit the public and should be eliminated. This document relaxes the distant signal carriage restrictions. This action will promote substantial improvements in television service to the public without causing any significant risk of loss of the existing level of services provided by local television broadcast stations.

EFFECTIVE DATE: October 14, 1980.

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

FOR FURTHER INFORMATION CONTACT: William H. Johnson, Cable Television Bureau (202) 632-6468.

SUPPLEMENTARY INFORMATION:

Report and Order

Adopted: July 22, 1980.

Released: September 11, 1980.

In the matter of Cable Television Syndicated Program Exclusivity Rules, Docket 20988, Rm-2721 and Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, Docket 21284, Rm-2919, Rm-3324, Rm-3346.

By the Commission: Commissioners Lee, Quello and Washburn dissenting and issuing statements; Commissioners Ferris, Chairman; Fogarty and Brown issuing separate statements; Commissioner Jones concurring and issuing a statement.

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I. Summary and Introduction

Summary of Decision

1. The basic question presented in this proceeding is whether the Commission should continue in force rules that restrict the carriage of distant television broadcast signals by cable television systems. Our conclusion is that these rules do not benefit the public and should be eliminated.

2. Existing cable television signal carriage rules limit the number of distant television signals that cable television systems may distribute to their subscribers. Syndicated program exclusivity rules also require the deletion of individual programs from distant signals that are otherwise available for carriage. The rules in question are found in 47 CFR Part 76, including particularly Sections 76.59, 76.61, 76.63 and 76.151-76.161. These rules were adopted in the Commission's 1972 *Cable Television Report and Order* [1] and, although some changes in them have been made, they retain the basic form given them at that time.

3. Almost four years ago the Commission initiated a formal inquiry to review the purpose, effect, and desirability of the syndicated program exclusivity rules.[2] This was followed by a similar proceeding to review the distant signal carriage rules.[3] Detailed economic reports reviewing the functioning of these rules and their impact on the public's television service were adopted by the Commission in 1979. These *Reports* concluded that the television service received by the public would not be impaired and would in some respects be significantly improved by the elimination of these regulatory constraints.[4] Based on these findings, a *Notice of Proposed Rule Making* was issued proposing the elimination of the distant signal and syndicated program exclusivity rules.[5] The purpose of this *Notice* was to permit interested persons an opportunity to participate in the rule making process, to comment on the research and analysis presented by the Commission, and to set forth relevant information of their own relating to the rule making proposal.

4. We have now carefully reviewed the comments received. This review persuades us that the proposal was sound and should be adopted. We have also reviewed proposals submitted to us for alternative rules that would require cable television system operators to obtain individual permissions, in the form of retransmission consents, for the distant television broadcast stations carried. This proposal is we believe, essentially related to copyright considerations and is beyond the authority of the Commission to adopt. Based on the wealth of information and analysis now before us, we believe the rule changes proposed should be adopted and that this will significantly benefit the public with no undue risk of injury to the broadcast service the public now receives.

General Background

5. Commercial television broadcasting in the United States is generally recognized to be highly remunerative. It is also a field in which competition is

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[1] 36 FCC 2d 143, 37 Fed. Reg. 3252 (1972).

[2] *Notice of Inquiry in Docket 20988*, 61 FCC 2d 746, 41 Fed. Reg. 50055 (1976).

[3] *Notice of Inquiry in Docket 21284*, 65 FCC 2d 9, 42 Fed. Reg. 32825 (1977).

[4] *Report in Docket 20988*, 71 FCC 2d 951 (1979) ("Syndicated Exclusivity Report") and *Report in Docket 21284*, 71 FCC 2d 632 (1979) ("Economic Inquiry Report").

[5] *Notice of Proposed Rule Making in Dockets 20988 and 21284*, 71 FCC 2d 1004, 44 Fed. Reg. 28347 (1979).

intended to be the general rule, with each individual broadcaster left to "survive or succumb according to his ability to make his programs attractive to the public." [6].

6. Although competition is the general rule, our system of broadcasting places significant weight on the value of "localism" [7] and on the understanding that broadcast station licensees are public trustees that must serve the "public interest, convenience, and necessity" even if, in particular circumstances, that does not comport with their own immediate economic interests. [8]

7. The juxtapositon of these considerations has created a certain tension in the law as it is applied to broadcasting. Because competition is the general requirement, the Commission is not to be concerned with the effects of competition on station revenues or profits. It must be concerned, however, if there is evidence that competition is so destructive or debilitating that it results in a loss of broadcast service to the public. [9]

8. The Commission's historic concern in its regulation of the cable television industry has been that the additional viewing options made possible by the expanded channel capacity of cable systems and their ability to introduce distant signals that would not ordinarily attract viewers in the local market, introduced competition that was likely to be both inequitable and destructive. When first presented with this issue, the Commission found in the available evidence no basis for action.[10] However, in the years that followed, the potential for injury was felt to outweigh the lack of clearly defined evidence and the regulation of cable television operations was commenced.[11] Although the Commission's authority to act in this manner was not specifically set forth in the Communications Act, the Commission's general authority was found by the Supreme Court to be broad enough to authorize this regulatory activity.[12]

9. The Commission's assumption of regulatory responsibility in this area was at each step accompanied by frank admissions that the facts underlying its theoretical concerns were not fully understood. In 1965, certain regulations were applied to cable television indirectly but the Commission found it "impossible, with the data at hand, to isolate reliably the effects of CATV competition from all the other factors which operate to produce particular financial results in differing settings." [13] In 1966, the Commission adopted new rules for cable television operations, but stated, with respect to adverse impact on broadcast service, that "we cannot make that judgment on the record now before us" and that "[i]t may be that CATV, if allowed full, unfettered growth, would prove to be an excellent supplement, bringing additional service and diverse programming to millions of people in built-up areas who can afford it, without detriment to the provision of additional local broadcasting service to the entire nation. * * * It is, we think, time to get the facts * * *" [14] Again in 1972 the Commission found itself faced with conflicting evidence and again felt compelled to act in the face of inherent uncertainties and with no ability to forecast precisely how cable was likely to develop.[15] The history of our regulatory involvement with cable television is set forth in some detail in Appendix A to this document. This *Report and Order* involves a major alteration in our cable television rules and it is therefore important that the nature of the change from past policies be clearly understood so that it is evident that "prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corporation v. FCC*, 444 F. 2d 841, 852 (1970). This history should also demonstrate that, because of their unique origin, the present rules may not be entitled to the benefit of the doubt sometimes accorded the *status quo*.

The Existing Rules

10. The signal carriage rules are basically of four types: Rules that mandate carriage of particular signals, rules that limit the number of distant television broadcast signals that may be carried, rules that require the deletion of particular network or syndicated programs from signals that are carried, and rules that require deletion of particular sports programs from signals that are carried.

In this proceeding we are focusing our attention only on the distant signal and syndicated program exclusivity rules. Changes in the mandatory carriage, sports blackout, and network nonduplication rules have been explicitly excluded from review in this proceeding.[16]

11. The distant signal carriage rules generally vary the number of distant signals that cable systems may carry based on the size of the television market (35 mile zone) in which the system is located.[17] Systems that are not located within a market, as that term is defined by the rules, are not subject to any limits. Those in the smaller television markets (below the 100 largest markets) may carry no distant independent or network television stations if each of the three national television networks has a local affiliate and one or more independent stations exist in the market. If there is no local independent station or one or more of the national networks do not have local affiliates, then distant station signals may be imported so that subscribers have at least one independent station signal and one station affiliated with each of the national networks.

12. Cable television systems in the 100 largest television markets are permitted to carry enough local and distant signals to provide subscribers with at least two independent television stations and one station affiliated with each of the national television networks. Moreover,

[6] *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, (1940).

[7] *Sixth Report and Order in Dockets 8736 et al.*, 41 FCC 148, 172 paras. 79 and 124 (1952).

[8] Section 309, Communications Act of 1934, as amended, 47 U.S.C. § 309; *Enbanc Programming Inquiry*, 44 FCC 2303 (1960).

[9] *FCC v. Sanders Bros. Radio Station, supra; Carroll Broadcasting Co. v. FCC*, 258 F. 2d 440 (D.C. Cir. 1958).

[10] *Report and Order in Docket 12443*, 26 FCC 403, 24 Fed. Reg. 3004 (1959).

[11] First indirectly, *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), and then directly, *Second Report and Order in Docket 14895 et al.*, 2 FCC 2d 725, 31 Fed. Reg. 4540 (1966).

[12] *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[13] *First Report and Order in Dockets 14895 and 15233*, 38 FCC 683, 30 Fed. Reg. 6038 at paragraph 68 (1965).

[14] *Second Report and Order in Dockets 14895 et al., supra*, at paragraph 155 (1966). *See also Suburban Cable TV Co., Inc.*, 11 FCC 2d 604, 606 (1968) (separate opinion of Commissioner Loevinger).

[15] *Cable Television Report and Order, supra*, at paragraph 70. The rules adopted in 1972 were based in part on an industry "Consensus Agreement" which accounts for the lack of economic analysis of certain parts of the rules. See *The Role of Analysis in Regulatory Decisionmaking: the Case of Cable Television*, Lexington Books, 1973, page 26, where it is suggested that the parties' acceptance of the compromise was made "in a virtual vacuum."

[16] *Notice of Proposed Rule Making in Dockets 20988 and 21284, supra*, para. 5 at 1006.

[17] The terms "local" and "distant" are used loosely for purposes of this discussion. Generally speaking a local signal is one that is receivable over-the-air by television viewers and a distant signal is one that cannot be so received. The dividing line is not nearly as clear as this suggests, however, and entire proceedings have been devoted to adding greater definition to these terms. See, for example, *Report and Order in Dockets 16004 and 18052*, 53 FCC 2d 855 (1975) (involving television station contour definitions). The difficulties in defining these terms precisely are in part technical and in part a confusion over the question of whether, in a prticular situation, a technical, economic, or audience survey focus is appropriate. A continuation of the confusion over the correct definition continues in some of the comments filed in response to the *Notice* in this proceeding. These comments are addressed in detail below.

under these rules, at least two distant independent signals may always be carried and, in the 50 largest markets, if there is no local independent station, three distant independent stations may be carried.

13. All cable television systems may also carry specialty stations (stations whose programming, on an all day basis and in prime time, is at least one-third foreign language, religious, and/or automated) and non-commercial educational stations in the absence of justified objection by local educational stations. Smaller systems (those with under 1,000 subscribers) are exempt from these limitations.[18]

14. The syndicated program exclusivity rules limit the carriage of individual programs on signals that are otherwise available for carriage under the distant signal carriage quotas. These rules apply only to cable television systems in the fifty largest and second fifty largest television markets. In their application to the fifty largest markets, they require cable television systems, at the request of local television stations, to delete all programs from distant signals that are under contract for television exhibition to local stations. The rules also permit the owners of television programs to require deletion of programs from distant signals for a period of one year after an individual program is first sold for television broadcast anywhere in the United States.

15. In the second fifty television markets, television stations that have programs under contract are also permitted by the rules to have these programs deleted from distant signals carried by cable television systems. The rights provided by the rules, however, expire at the end of specified time periods or on the occurance of a specified event: (1) for off-network series, exclusivity commences with the first showing and lasts until the completion of the first run of the series, but no longer than one year, (2) for first-run syndicated series, it commences with the first showing and runs for two years thereafter, (3) for feature films first-run non-series syndicated programs, it commences with the availability date of the program and extends for two years thereafter, and (4) for other types of programs, it commences with the purchase and continues until completion of the first run but, in no event, beyond one year.

16. These rules generally require that the distant signal programs involved be deleted regardless of when that particular program is scheduled for showing by the local market station. However, in the second fifty markets, if the distant syndicated program is broadcast in prime time it need not be deleted unless the market station seeking protection is also going to broadcast that program in prime time. The rules also permit cable television systems to substitute other distant signal programs, if they are available, in place of those that must be deleted under these rules.

17. Neither the distant signal nor the syndicated exclusivity rules, when they were adopted, were applied retroactively. That is, notwithstanding these regulations, cable systems carrying distant signals prior to 1972 were permitted to continue carriage of those signals. Moreover, programs on signals carried prior to 1972 were generally not subject to deletion under the syndicated program exclusivity rules. Both of these "grandfathering" provisions are of particular significance in the context of this proceeding because they make it possible to view the operations of a class of cable systems that are in many respects the equivalent of unregulated operations due to their operational status at the time our regulation was commenced. As will be discussed in greater detail below, this ability to observe the operations of unregulated systems is a significant aid to us in determing the impact of a more general deregulation of the cable television industry.

Origin of the Present Proceeding

18. These rules have increasingly been the subject of criticism in recent years.[19] In part this criticism is a reflection of the general disfavor into which regulations limiting competition have fallen. The preception that these rules were in need of re-evaluation, however, is also the consequence of: (1) the availability of more complete and detailed audience survey data reflecting television viewing patterns in the homes of cable television subscribers,[20] (2) the increasing financial strength of television broadcasters even in the face of increased cable television competition,[21] and (3) the resolution in 1976 of the status of cable television under the copyright laws by passage of the Copyright Revision.[22] In recognition of these changed circumstances and motivated by our own statutory responsibility to re-assess on a continuing basis the public interest value of our policies and regulations [23] we issued in November of 1976 our *Notice of Inquiry in Docket 20988, supra,* "commencing a detailed review of the rules that limit cable television carriage of syndicated programs on distant signals" and in June of 1977 our *Notice of Inquiry in Docket 21284, supra,* which commenced "a more general review of the economics of the relationship between television broadcasting and cable television."

19. In order to permit the fullest possible participation, the comment periods in each of those proceedings were extended. Additional studies

[18] This description of the rules, it should be recognized, is somewhat oversimplified. Other provisions of the rules, for example, provide for the carriage of additional stations late at night (*Report and Order in Docket 20028,* 46 FCC 2d 446, 39 Fed. Reg. 33528 (1974)), for the carriage of additional network news programs (*Report and Order in Docket 19859,* 57 FCC 2d 68, 41 Fed. Reg. 1063 (1976)), and for the carriage of additional UHF stations (*Report and Order in Docket 20496,* 65 FCC 2d 218, 42 Fed. Reg. 36831 (1977)). Specific provision is also made for *ad hoc* variances from the rules in situations where their general application is found to be inappropriate. 47 C.F.R. § 76.7.

[19] See, for example, Staff of House Communications Subcommittee, 94th Cong. 2d Sess., *Cable Television: Promise Versus Regulatory Performance* (Subcommittee Print 1976).

[20] The national audience rating services for many years made no separate accounting for viewing in cable homes and, even after they first commenced making separate viewing data available, the widely scattered nature of cable television across the country and the relatively small number of households involved made it difficult to obtain statistically reliable samples.

[21] Annual broadcast station financial reports to the Commission reflect that, since 1972, when the existing rules were adopted, total television station revenues have increased by 183 percent. This occurred notwithstanding the fact that the cable television subscribing population increased by approximately 150 percent. During this period and controlling for inflation the profits of the average independent station rose more than tenfold.

[22] General Revision of the Copywright Law, Pub. L. 94-553, 17 U.S.C. Sections 101 *et seq.* (1976). Cable system operators historically have made use of both local and distant television broadcast signals without any direct nexus of financial responsibility either to the originating station or the creators of the programming broadcast. Questions as to the lawfulness of this situation and the appropriate policy that should be applied were debated almost from the very start of the cable industry. *See* Smith, "The Emergence of CATV: A Look at the Evolution of a Revolution," 58 *Proceedings of the IEEE* 967 (July 1970). In the late 1950's and early 1960's cable operators were charged with unfair competition, unjust enrichment, and tortious interference with contract rights—charges which the courts ultimately rejected in *Cable Vision, Inc. v. KUTV, Inc.,* 335 F.2d 348 (9th Cir., 1964) *cert. denied sub nom. Klix Corp. v. Cable Vision, Inc.* 379 U.S. 989 (1965). In the late 1960's and early 1970's, the Supreme Court found in two separate proceedings that cable television systems were not violating the 1909 Copyright Law by carrying either local or distant television broadcast signals. *Fortnightly Corporation v. United Artists Television, Inc.,* 392 U.S. 390 (1968) and *Teleprompter Corp.* v. *CBS, Inc.,* 415 U.S. 394 (1974). This dispute was resolved by the Congress in 1976 with the passage of the new copyright act.

[23] It should also be noted that the Commission is obliged by the decision of the D.C. Circuit Court of Appeals in *Geller v. FCC,* 610 F. 2d 973 (D.C. Cir. 1979) to reassess those of the rules which were based on the 1971 industry "Consensus Agreement" that is described in the *Cable Television Report and Order, supra.*

undertaken by the Commission's staff were placed in the record of Docket 21284 and made available for public comment and additional outside contract research was undertaken. Voluminous comments were received in response to each of these notices. Our examination of the materials filed and our own research efforts led to our *Syndicated Exclusivity* and *Economic Inquiry Reports*. Each of these *Reports* reached the conclusion that the rules under review were having negative rather than positive consequences in terms of the television service received by the public and that the rules could be eliminated without undue risk of injury to the public.

20. Based on these *Reports*, and with their findings incorporated by reference, we issued a *Notice of Proposed Rule Making* which invited public comment on the substance of each of the *Reports* as well as on the general conclusion contained therein to the effect that the Commission could proceed to eliminate these two sets of rules without incurring any considerable risk of injury to either cable or non-cable viewing members of the public.[24]

21. To obtain a fuller appreciation of those industries whose economic incentives, as tempered by regulation, have a major influence on the video services available to our society, we provided an overview of the television broadcasting, cable television, and television program production industries. *Notice*, Paras. 8–43, *supra*, at 1006–1021. We observed that the "competitive juxtaposition of these important elements of our economy's communications sector has produced numerous demands on the Congress and this Commission for the imposition of economic regulation." Para. 44, *id.* at 1020. We strongly emphasized, however, as we have on previous occasions [25] that the Commission's underlying concern in the regulation of both broadcasting and cable television is "with the quantity and quality of video and telecommunications service that the public receives" and not, as some might erroneously perceive, "with shifting or safeguarding revenues or profits, or with the success of failure of any particular firm, industry, or technology." Para. 7, *id.* at 1006.

Criteria for Evaluation

22. In the course of analyzing these rules, both in the two *Reports* and in the *Notice*, we reviewed in considerable detail the historical rationale on which the Commission had premised these regulations, and set forth Criteria on which to judge their continuing effectiveness. The restrictions historically were rationalized on one of the four following grounds:

(1) As a means of assuring the public against a net loss of television service as a consequence of cable-created audience losses which it was theorized would undermine the economic support of television stations and in the process deprive the poor and those living in areas unserved by cable or video services;

(2) As necessary to preserve the broadcast television allocations policy with its emphasis on local service;

(3) As a means of eliminating what was perceived to be the unfair means by which cable systems competed with local broadcasters; and

(4) As necessary to assure against injury to the continued production of television programming. Para. 45, *id.* at 1021.

23. In re-evaluating the facts and policies underlying the cable television distant signal and syndicated program exclusivity rules we identified three criteria by which it seemed to us appropriate to judge the effects of various policies on the welfare of consumers of video services. These three criteria, which roughly correspond with those considered and used in earlier Commission decisions involving cable television but using somewhat more precise economic terms, relate to: (1) consumer welfare, (2) distributional equity, and (3) external or spillover effects. These terms are described in some detail in our *Economic Inquiry Report, supra*, at 636–639.[26]

24. Briefly, consumer welfare is grounded in our responsibility to assure "efficient" communications service, 47 U.S.C. Sec. 151. It is reflected in our concern with assuring that policies adopted tend toward the creation of a communications system that increases the net video service supplied to the public or otherwise maximizes the value the public receives from society's overall investment in the video distribution system.

25. Distributional equity is related to the allocation between various segments of society of the costs and benefits of a particular policy. Cable television service, in contrast with broadcast service, must be paid for directly and is generally not available to residents of very low population density areas or urban centers where demand is low and construction costs are high. Thus, even if the effect of a policy change to consumers as a whole proved beneficial, some groups might be less well off as a consequence of that policy change.

26. External or spillover effects are related to our concern with localism in broadcasting and the obligations of broadcasters to inform the public. Since the true value of local news and public affairs programming may not be reflected in the number of individuals who view it or the value they place on it but rather in the value it has to our society as a whole and especially to the functioning of our democratic institutions, it may be regarded as an "externality" that needs to be accounted for in regulations since this extra or external value may not be completely accounted for by ordinary market institutions.

27. To the extent that the rules had in the past been based on a concern with "unfair" competition, we noted that this appeared to be a consideration that was coextensive with the issue of the cable industry's copyright liability. *Notice, supra*, at 1025. Moreover, we noted the statement of the Court of Appeals in *Home Box Office, Inc. v. FCC*, 567 F. 2d 9, 42 (D.C. Cir. 1977), *cert. denied* 434 U.S. 829 (1977) that "[W]e do not perceive any public benefit to be achieved by hobbling cable television to correct the sort of unfair competition alleged by the Commission."

Basis for Rulemaking Proposal

28. Comparing the facts adduced in the two inquiry proceedings with the criteria set forth for re-evaluating the rules, we concluded that "none of the four problems which these rules ostensibly address in fact exists." (footnote omitted) Para. 63, *Notice, supra*, at 1026. We concluded that the distant signal and syndicated exclusivity rules themselves caused "significant sacrifices in consumer welfare." *Id.* We found that no significant adverse consequences would befall the ability of television broadcast stations to provide local programming if the rules were eliminated and that the

[24] In an effort to assure interested persons the fullest possible opportunity to participate in the present phase of this proceeding we extended the original time frames for the submission of comment and reply comment. *Order* adopted July 12, 1979, FCC 79–426, and provided further opportunity for comment on a new contract study undertaken at our request and deemed to be of relevance to the proceeding. The Consumer Assistance Division of the Commission's Office of Public Affairs distributed notice of the pendency of the proceeding widely to public and consumer groups with a potential interest in the outcome of the proceeding in order to promote the widest public participation in the decision process.

[25] *See, e.g., Cable Television Report and Order, Supra*, at 134 n. 32 where we stated that "We are guided by the standard of what will best serve the public interest and not by a desire to protect any industry from the impact of new technology."

[26] See also *Report in Docket 20988, supra*, at 955–956 and *Notice of Proposed Rule Making in Dockets 20988 and 21284, supra*, at 1023–1027.

likelihood of any viewers being significantly harmed from elimination of the rules was remote. *Economic Inquiry Report* at paras. 140–145, *Syndicated Exclusivity Report* at paras. 94–96. We noted that whatever effects deletion of these rules might have on program supply was derivative of the effects on television broadcasting and that the effects were found to be minimal. *Syndicated Exclusivity Report*, paras. 43, 45, 72–88 and 95. We also found no evidence to indicate that the interests of consumers of video services would be inadequately served by the "markets linking consumers with the cable, broadcasting and program production industries" if we eliminated these rules. *Notice* at para. 57. Finally, we concluded clear benefits would result from a relaxation of these rules, including "an increase in the opportunity for diversity and competition both in the economic marketplace and in the marketplace of ideas." *Economic Inquiry Report* at 143. "The benefits of our current rules are small," we said, "and . . . these benefits go mainly to broadcasters whose incomes thereby rise faster than they otherwise would. The costs of our current regulations fall on existing and potential cable subscribers, each of whom is denied some increase in freedom of choice. The costs of our present policy also fall on society as a whole, to the extent that we have inadvertently stifled some participants in the system of freedom of expression." *Id.* at para. 144. Accordingly, since we found no material benefits gained from the continuance of these rules, we issued our *Notice of Proposed Rule Making* proposing their elimination.

Alternative Rule Making Proposals

29. We also considered in our *Notice* two additional matters brought to our attention in the form of petitions for rulemaking. The first of these matters (RM–3324) was filed by the National Telecommunications and Information Administration of the United States Department of Commerce. It requested that we adopt a regulation that would compel new cable systems or cable systems expanding existing operations to obtain the consent of the originating station if they wished to distribute the non-network programs of that station. It was urged that this "retransmission consent" policy would achieve a marketplace solution to cable carriage of distant signals since such a proposal would leave distribution of this type of programming to marketplace forces instead of governmental intervention. NTIA emphasized that complete deregulation of distant signal carriage by the Commission would merely place increased emphasis on the Copyright Royalty Tribunal (a separate governmental body whose responsibilities include establishing the level of copyright fees paid by cable television systems for the carriage of distant signals).

30. We carefully examined the petition and, on balance, believed that it should be denied. We stated that to the extent that the proposal recommended that we refrain from deregulation of distant signal carriage and impose stricter syndicated exclusivity requirements on cable systems in the second fifty major television markets (also an aspect of the proposal) it involved "considerably more which appears less consistent with reliance on the marketplace." Para. 78, *id.* at 1033. Moreover, we added that to the extent the proposal favored deregulation only if accompanied by a retransmission consent policy and would continue to place distant signal carriage restrictions and syndicated program exclusivity restrictions on cable systems and their subscribers, "it is inconsistent with our conclusions, enunciated in the *Report*, clearly endorsing increased competition in the marketplace." Para. 79, *id.* at 1033–1034. As we had noted:

> a major objective of these proceedings was to determine from available economic evidence whether Commission regulation of the competition between cable and television broadcasting continued to be supportable on public interest grounds or whether a marketplace approach would produce better results for consumers of video services. The Reports adopted today indicate quite clearly that increased competition in the marketplace for video entertainment and information services would not adversely affect consumers of video service. Para. 81, *id.*

31. Further, we pointed out our "previous unsuccessful effort to implement a retransmission consent program" and that in light of this, we were "extremely reticent to forbear from proceeding on the evidence and recommendations" unless compelling evidence could be shown "that substantial injury now or in the foreseeable future would occur to the public." Para. 80, *id.* at 1034. We added that "[i]f our investigation of marketplace opportunities, deficiencies, and supplements so warrants," we were confident that we would "be able to take appropriate action at a later time." *Id.*

32. Nevertheless, we expressed our desire for "a market solution to the problems of compensating owners of programming materials" for their use by others. Para. 81, *id.* We pointed out that the retransmission consent proposal, as well as the existing compulsory license system, "prejudge the type of market institutions that can best deal with the protection of equities" and stated that our preference would be to allow the marketplace the opportunity to work and impose regulation only if it was shown that the marketplace would not work. *Id.* We therefore invited comment "on how the markets in program rights might develop, and what actions, if any, the Commission can legally take that would serve that end." *Id.* We expressed the view that "we should examine independently the retransmission consent aspect of the proposal" insofar as it was not contrary to the approach we proposed by reasons of our findings, and, accordingly, we solicited comment on it as well as "on preretransmission notification and any other way to allow the market process to work with the least amount of intervention." Para. 82, *id.* at 1035. We pointed out that our rejection of the petition on policy grounds avoided the necessity of our resolving the jurisdictional question posed by it. But to facilitate "a full discussion of what options we might have to encourage marketplace solutions in lieu of governmental regulation," we set forth some of the arguments which might lead us to believe that we do not have jurisdiction to adopt proposals such as the one embraced by the petition.

33. The other matter presented to us was a petition for rulemaking (RM–3346) from the National Association of Broadcasters which requested the Commission to commence rulemaking to consider the adoption of rules to ensure that the development of "superstations" does not result in harm to local broadcast service. We carefully examined the petition and related comments and reached the determination that no evidence existed to show that "a regulatory problem either now exists or is being fomented" which would justify a departure from our decision in *Memorandum Opinion and Order in RM–2952*, 68 FCC 2d 57 (1978), less than a year earlier, in which we declined to restrict carriage of television broadcast signals distributed to cable systems by means of satellite communication. Para. 104, 118, *id.* at 1043, 1050. We concluded that it would be inappropriate to halt the development of new video opportunities such as those created by satellite technology "unless it can be clearly shown that the detriments to the public . . . outweigh the benefits to be derived by consumers." Para. 125, *id.* at 1053.

34. In conclusion, we stated that "we have before us a wealth of information and analysis" from our *Reports* and that

we had given careful consideration to the two additional matters brought before us. Para. 126, *id.* at 1054. We reiterated our view that the distant signal carriage restrictions could be terminated "without undue risks and that the public would benefit by this action." *Id.* We noted our intention to provide interested persons "a full opportunity to subject to detailed examination all of the policy criteria, information, and economic analysis relied on." Para. 127, *id.* We pointed out that these "regulations cannot stand unless the need therefore has been documented" and, accordingly, we urged that interested persons "address themselves to supplying the evidence on which an informed decision can be made" particularly "with respect to those issues where the relevant information is uniquely in the possession of the commenting parties." *Id.*

Response to Notice of Proposed Rulemaking

35. Approximately 90 parties filed formal responses to our *Notice of Proposed Rule Making.* For purposes of responding to these comments we have divided our discussion roughly into three parts. The first relates to the question of the impact of cable television distant signal carriage on television broadcast service to the public. The second relates to the syndicated program exclusivity rules, a matter that in part relates to distant signal impact on broadcast service, in part to the impact of distant signal carriage on the supply of television broadcast programming, and in part to other concerns relating to property rights in television programming and the functioning of the copyright laws. The third involves the retransmission consent proposal, copyright concerns, and the functioning of markets for television programming. These issues are, we recognize, interwined both in the comments of various parties as well as in actual substance. This division, however, provides a useful format for discussing the extensive comments received.

Preliminary Procedural Issues

36. *Burden of Proof.* Before proceeding to discuss the substantive aspects of our proposed action and the comments received in response to it, a number of the commenting parties raise a general issue which warrants consideration. These parties urge that the Commission has in this proceeding improperly or unfairly placed or shifted the burden of proof to those persons who seek retention of distant signal carriage restrictions on cable systems. WTVC *et al.*, for example, state that we have unreasonably or unlawfully imposed a substantially higher burden of proof of persuasion on those favoring a retention of the rules which the Commission cannot cure by declaring that these interests "uniquely" possess relevant information which, if not submitted, will be taken as effective default. In a similar vein, Tribune Company says that we cannot avoid meeting the burden normally placed on a proponent of a proposed action by placing the burden on the proposal's opponent if the studies have failed to support our conclusions. KOB–TV *et al.*, express the view that since neither of the *Reports* contain an order or the equivalent of final action, any alleged attempt to treat the "injury" question as resolved or to shift the burden of proof is meaningless.

37. In *Home Box Office v. FCC, supra,* at 36, the Court stated that a "'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist,'" quoting *City of Chicago v. FPC,* 458 F. 2d 731, 742 (D.C. 1971), *cert. denied* 405 U.S. 1074 (1972).

38. In *International Harvester Co. v. Ruckelshaus,* 478 F. 2d 615, 642–643 (D.C. Cir. 1973), the Court said:

> When certain material "lies particularly within the knowledge" of a party, he is ordinarily assigned the burden of adducing the pertinent information. This assignment of burden to a party is fully appropriate when the other party is confronted with the often-formidable task of establishing a "negative averment." *United States v. Denver & R.G.R. Co.,* 191 U.S. 84, 92 (1903).

39. In the *Economic Inquiry Report,* the *Syndicated Exclusivity Report,* and the *Notice of Proposed Rule Making* in this proceeding we have set forth in considerable detail the foundation for the rule change proposal. We recognize that the responsibility for making a reasoned decision rests with us and that our role is not to be that of a simple referee between the contesting interests. We have met our responsibility for adducing the evidence aggressively and, we believe, fairly. But it must be recognized that our resources are limited, especially in relation to the commercial parties involved in this proceeding. If publicly available information suggests certain facts and private parties contest those facts rhetorically but fail to provide data to support their argument, we believe we are justified in concluding that the absent information would not have furthered these parties' position. In our *Notice of Proposed Rule Making* we sought, with a full awareness of our responsibilities under 5 U.S.C. § 553 of the Administrative Procedure Act and applicable case law, to indicate that parties ought to assist us in meeting our burden if they expected us to reach a conclusion that would be sustainable under judicial scrutiny.

40. Recently, the level of specificity of record evidence to support agency rulemaking has been heightened through case law. The Supreme Court many years ago in *Pacific States Box & Basket Co. v. White,* 296 U.S. 176, 186 (1935) enunciated the principle that:

> Where the regulation is within the scope of authority legally delegated, presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies.

The Attorney General's Manual on the Administrative Procedure Act (1947) stated, in describing the rulemaking process, that:

> [F]indings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the consideration upon which the rules were issued. *Id.* at 32.

41. The trend now, however, seems to be toward the requirement of a far more elaborate specification of the evidence:

> Once it was the general judicial practice to treat rules much like legislation. Once the question of the agency's statutory authority was settled, the main question was the traditional Brandeisian one: whether any set of facts could be imagined to support the rule in question. The decisions of our court for several years, as well as the Supreme Court's scrupulous review of the materials amassed by the ICC in the *Allegheny-Ludlum* rulemaking case, suggest to me that agencies are properly being held to a higher burden of justification. (footnote omitted) [27]

This is especially the case when, as here, First Amendment and national policies favoring competition coincide.[28]

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[27] Wright, "Court of Appeals Review of Federal Regulatory Agency Rulemaking," 26 Ad. Law Review 199, 207–208 (1974).

[28] *Home Box Office* v. *FCC, supra,* at n. 67. This is not to suggest that the burden of justification is unreasonably high, for as the same Court in a succeeding case of the same name stated "we may not demand complete factual support in the record for the Commission's judgment insofar as it rest[s] upon factual determinations that '[are] primarily of a judgmental or predictive nature'; for 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" (cititions omitted). *Home Box Office* v. *FCC,* 190 U.S. App. D.C. 351 (1978). As recognized by the Supreme Court, the strength of the record evidence to support an informal rulemaking action should not be confused with the statutory requirement of "burden of proof" under 5 U.S.C. § 556(d) of the Administrative Procedure Act. *American Trucking Ass'n* v. *U.S.,* 344 U.S. 298, 320 (1953); *See also U.S.* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 756–757 (1972). As to the soundness of the record evidence supporting

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42. Our intention in suggesting that parties wishing us to change our course and retain regulations or adopt alternative regulations provide us with evidence was simply to put them on notice that we would be unable to comply with our responsibilities under the law if we lacked evidence to support our conclusions, and that parties should assist us in obtaining that information if they were to obtain a positive response to their arguments. We do not believe that in doing this we have in any way improperly altered the burden of proof.

43. *Prejudgment.* In a somewhat related argument some parties have suggested that the outcome of this proceeding has been prejudged. They complain that the consultants used by the Commission had fixed views on the subject matter which were well known before they were hired, that Chairman Ferris in a speech indicted his predisposition, and that the very content of the *Notice* suggested prejudgment by its certitude. We reject categorically all of these arguments. The consultants we hired have well established reputations in the field, have a broad knowledge of it, and appeared to us to be virtually the only individuals with the required knowledge and with national reputations who were not already under contract to one of the interested parties and were available to us. No specific improper conduct on the part of any of them is alleged. The full text of the Chairman's speech seems to us to make it absolutely clear that his mind remained open for the objective consideration of the evidence. And the material in the Two *Reports* and the *Notice of Proposed Rule Making* seems to us entirely in keeping with their intended function of placing the public and interested parties on notice of the preliminary judgments reached in this matter so that responsive comments could be as focused and useful as possible.[29]

44. *Delay.* Another general procedural point raised in some of the comments concerns requests that further action in this matter be delayed pending the occurrence of various events. For example, the Motion Picture Association of America in its comments in the syndicated exclusivity inquiry urged the Commission to make no modification in the exclusivity rules "until the Copyright Royalty Tribunal is constituted and prepared to conduct the royal rate review that such modifications would require."[30] Others have urged that, until legislation is forthcoming, no further deregulatory action should be taken and that "the Commission should defer all action in this proceeding until such time as Congress has acted on the Broadcast/CATV provisions of the Communications Act Rewrite Bill currently pending before it."[31] Fisher Broadcasting also asks that the Commission "defer all action in this proceeding until such time as it has adopted and provided sufficient time to evaluate, *inter alia,* local origination requirements for cable television systems (RM–3430), recommendations of the UHF Comparability Task Force (Gen. Docket No. 78–391), opportunities for minorities and women to become television and radio owners and operators, etc. [sic]"[32]

45. In addition, we have been asked by Congressman Robert W. Kastenmeier, Chairman of the House of Representatives Subcommittee on Courts, Civil Liberties, and the Administration of Justice (the House Subcommittee with responsibility for copyright matters) to "delay taking any action which would disturb the delicate balance of copyright and communications policy until the Copyright Royalty Tribunal has been given an opportunity to carry out its 1980 review and Congress is in a position to respond, if necessary."[33] A number of similar requests were also received from other members of the Congress.[34]

46. Endemic to the cable television regulatory process is the problem of delay. Almost fifteen years ago it was proposed that new cable systems be prohibited from carrying distant signals for a period of five years "to allow time for UHF stations' growth and, perhaps, resolution of the copyright question."[35] When the cable television copyright issue was first before the Supreme Court, eight years before the Copyright Act was finally revised, the Solicitor General suggested to the Court that it "defer judicial resolution of the . . . case in order to allow a speedy completion of the pending legislative proceedings."[36] In 1972, the Commission was urged to delay implementing already adopted cable television rules until Congressional enactment of copyright legislation.[37]

47. This historical experience suggests to us that delay is not likely to either be as short as is initially anticipated or to improve the policy making processes in this difficult area. All of the evidence in this proceeding has been carefully accumulated and action seems to us already overdue. This is especially the case with respect to the syndicated program exclusivity rules which, when the *Inquiry* proceeding commenced, were said by the Commission to deserve "prompt and expeditious handling" with the Commission's consideration of the matter to be concluded by *January 1, 1978.*[38]

48. We are also required by the decision in *Geller* v. *FCC, supra,* to review those aspects of the rules that grew out of the 1972 "Consensus Agreement." And we have been reminded recently by the D.C. Circuit Court of Appeals in another context that "delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires." (footnote omitted).[39] We believe our obligation to proceed with the resolution of this matter is clear. We would note, however, that even proceeding as expeditiously as we are able, the rule changes adopted will not become effective much before the time when the Copyright Royalty Tribunal's initial deliberations should be complete and that development of new cable

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the *Notice of Proposed Rule Making* in this proceeding, we believe that its evidential foundation was more than adequately detailed in the *Economic Inquiry Report,* the *Syndicated Exclusivity Report,* and the *Notice of Proposed Rule Making* itself.

[29] It should be noted that we have already issued a partial response to some of these allegations. *In the Matter of McKenna, Wilkinson & Kittner,* FCC 79–717,——FCC 2d——(1979).

[30] Motion Picture Association of America, comments in Docket 20988, April 13, 1977 at p. 8.

[31] Fisher Broadcasting Inc., comments in Dockets 20988 and 21284, March 17, 1979 at p. 2.

[32] We were also requested to hold further oral proceedings in this Docket which would in our view also have resulted in a further long delay in the resolution of this proceeding. That request has been the subject of a separate opinion. See *Memorandum Opinion and Order in Dockets 20988 and 21284,* FCC 80–442,——FCC2d——(1980).

[33] Letter of March 13, 1980.

[34] On the other hand, Congressman Van Deerlin, Chairman of the House of Representatives Subcommittee on Communications, wrote the Commission before this proceeding was even commenced, stating "Now that the Copyright Revision Act is law, I urge you not to delay in your reconsideration of the sydicated program exclusivity rules." Letter of October 21, 1976.

[35] Statement of Commissioner Kenneth A. Cox, concurring in part, and dissenting in part to the *Second Report and Order in Dockets 14895, 15233, and 15971,* 2 FCC 2d 725, 817 (1966).

[36] *See Teleprompter Corp. v. CBS,* 415 U.S. 394, n. 16 (1974).

[37] *Reconsideration of Cable Television Report and Order,* 36 FCC 2d 326, 328 (1972).

[38] *Notice of Inquiry in Docket 20988, supra,* at para. 9.

[39] *MCI Telecommunications Corp.* v. *FCC* Case No. 79–1119, slip opinion at 43 (D.C. Cir., April 2, 1980). See also *Delay in the Regulatory Process,* Senate Document No. 95—72: "Delay in the regulatory process is not merely an irritation. It can add enormous expenses for business that are eventually reflected in higher prices and increased unemployment." (p. 176).

television systems, especially in the major television markets, will occur slowly and should leave ample time for legislative consideration of the changes we are adopting.

II. The Effect of Distant Signals on Television Service to the Public

49. There are in excess of 1000 television stations and 4000 cable television systems in operation, serving together almost 74 million television households in the United States. Every year financial and programming data is filed with the Commission and audience survey information is collected by commerical audience survey organizations. This information provides the raw data from which judgments can be made and estimates created as to the existing and potential impact of cable television distant signal carriage on the television service received by the public.

50. Our *Report in Docket 21284* and our *Report in Docket 20988* represented the culmination of years of intensive research on the effect of distant signals on television service to the public. Estimates of the future are, of course, inherently uncertain. But in our *Inquiry Reports* we used the information available to us along with certain mathematical tools and with the assistance of the commenting parties sought to reduce these uncertainties to a manageable level. Various approaches to the question were used in order to increase the degree of certainty of our findings, including consideration of gross trends (TV station revenues and profits, television's share of total advertising, growth in television homes and in UHF television homes), econometric analyses of audience data, and case studies of situations intended as proxies of a potentially unregulated cable television future. We examined the supply and demand for cable television, the amount of audience that cable television diverts from local broadcast stations, and the effect that this loss in audience has on both the viability of local stations and the public service programming that they broadcast. To completely appreciate the the care with which we approached this task, the two *Inquiry Reports* and the *Notice of Proposed Rule Making* must be read in their entirety. In brief, however, our conclusion was that the vast majority of television viewers either stand to benefit or will be unaffected if the Commission's regulations regarding distant signals are relaxed.

51. As previously indicated, our discussion will be divided into three parts relating to: impact on television service to the public, the syndicated program exclusivity rules, and the retransmission consent and associated proposals. In each section we will review the substance of the findings from our *Inquiry Reports*, the comments received addressed to these findings, our response to these comments and our general conclusion with respect to each issue.

52. We turn first to the question of the impact of cable television distant signal carriage on television service to the public. The general proposition put forth in favor of distant signal regulation is that, in the absence of regulation, cable operations carrying distant signals will continue to grow, that local audiences will be attracted to cable delivered distant signals reducing the audiences of local stations which will in turn reduce the amount that advertisers are willing to pay to local stations causing the overall revenues of stations to decline. Stations will then, it is posited, reduce the amount of public service or "merit" programming they broadcast, generally reduce the quality of the service they provide, or, in the extreme, terminate operations and go dark.

53. Our economic analysis set about to test the validity of this model of what competition would be like in the absence of regulation. We resorted first to econometric and mathematical modeling techniques. That is we attempted to construct a rigorous model of the interaction of the cable and broadcast industries and, making use of many observations from the available evidence, construct, either manually or using computers, statistical models into which various assumptions could be placed for testing. The particular value of the econometric technique is that results are developed that have degrees of certainty attached to them and which indicate the influence of particular variables among many in contributing to the overall result. While these econometric techniques can be highly sophisticated and make it possible to account for a large number of variables at the same time, they are only as good as the data and the assumptions from which they are made up. As a cross-check for the econometric projections we also reviewed in detail actual case studies of markets or stations in which cable had been permitted, for various historical reasons, to grow without the limitations that are otherwise established by our regulations. The degree of confidence placed in our conclusions in making the proposals in this proceeding stems in large part from the findings of these case studies which represent in many respects an actual market test of the policies proposed in major aspect devoid of the speculations that are otherwise part of the process of projecting into the future.

54. Our *Reports* received extensive criticism from the television broadcast and television program production industries. However, as we believe our review of the evidence will demonstrate, no evidence has been presented that shows consumers will be disserved by the additional competition from cable television. Instead, the parties have attempted to shroud our conclusions in doubt by criticizing some of the analysis that we relied on. We have reviewed carefully all of the comments in the record and believe the discussion in this section will demonstrate that the criticisms are invalid or do not bear on our ultimate conclusions.

Statistical Models

55. In considering the impact of distant signal carriage on broadcast service to the public we turn first to the econometric and statistical models relating to: (1) the supply and demand for cable television service, (2) the audience impacts of distant signal carriage, and (3) the impact of audience changes on public service programming by television stations. This parallels the discussion which is found in Sections II, III, and V of our *Economic Inquiry Report*. It is important, however, to keep this discussion in proper perspective. Many of the criticisms are minor and, even if correct, not outcome determinative. Moreover, the evidence relied on most heavily in reaching our ultimate conclusion is not at all refuted: local stations have prospered despite the presence of high degrees of cable penetration and the carriage of large numbers of distant signals by the vast majority of cable systems in those markets where cable developed prior to our regulation. The parties opposing our conclusions do not address this finding but, instead, focus their comments on evidence which has less importance for our overall conclusion. Thus, the discussion in this section is weighted toward topics which never cut to the heart of the research that is presented in the *Inquiry Report*. While this framework appears to be unavoidable, we note again that this part of our discussion should be kept in the proper perspective.

56. *Supply and Demand for Cable Television.* To judge potential cable television impact on broadcast service it is necessary to have some estimate of the amount of cable television service that is likely to develop. Moreover, the effect of limiting distant signal carriage on cable demand is of particular

importance in assessing the social costs that are imposed by our existing rules.

57. In order to obtain this information we undertook an analysis in the *Economic Inquiry Report* [40] which consisted of five major parts: (1) an historical analysis of the development of the cable television industry by size of market, (2) a summary analysis of the economics of the cable television industry, (3) a summary analysis of the demand for cable television, (4) a discussion of the necessary conditions for the viability of cable television in various kinds of markets, and (5) conclusions regarding untimate levels of cable penetration in individual markets. A brief synopsis of our findings for each of these parts is presented here.

58. Our *Report* showed that the growth of cable television has been inversely related to market size. Cable television generally serves communities with limited local television service or poor off-the-air reception. We found that two-thirds of the approximately 50 million households not now offered cable service are within the "metro" areas of the top 100 markets and 60 percent are in the metro areas of the top 50 markets alone. We concluded that for the cable television industry to match its growth of the past ten years, service must be provided to the large cities which have not yet attracted sufficient funds for construction. Whether these large cities are provided cable television service in the future will depend upon the economics of supply and demand in the cable television industry, including the effects of governmental regulation.

59. We studied the factors affecting cable system viability under various marketplace conditions because viability under various circumstances will determine the industry's future growth. The viability of cable operation is determined by its costs, such as capital costs, construction costs, and operating expenses (i.e., supply factors), and by its revenues (i.e., demand factors).

60. The demand for cable television commonly is measured by the penetration (or saturation) rate: the number of households that subscribe to cable service as a percentage of those offered service. It is important to note that the terms penetration rate, penetration level, and cable penetration often are used interchangeably. For example, we treat the penetration rate as equivalent to cable penetration, although the term, "systemwide cable penetration," actually may be the more appropriate usage. This is true because the terms penetration level and cable penetration also are used to denote the percentage of total television homes in a county or television market that subscribe to cable television (whether or not all of the television homes are offered cable service). In these cases, the more appropriate usage, to avoid confusion, may be countywide or marketwide cable penetration. Nevertheless, we believe that the appropriate meaning of these terms should be apparent from the context in which they appear.

61. A large number of factors affect cable demand—including especially the number and type of signals available over-the-air versus on cable, the reception quality of local signals, the subscription price, and the demographic characteristics of the households offered the service.[41] The extent to which these factors affect the demand for cable television has been analyzed in detail in five major econometric studies.[42] These studies find that the quantity and reception quality of the signals available over-the-air are key determinants of cable penetration. Additionally, the ultimate penetration rate for cable systems in the urban areas of the top hundred markets generally has been predicted to reach only 20 to 40 percent at the prevailing monthly rates in these areas, even with the importation of a substantial number of distant signals. These estimates are supported by current cable penetration data that show, in urban areas with good signal reception quality, systemwide cable penetration often is less than 35 percent. Or, to be conservative, these results imply that if every household in the urban areas of the top hundred markets had access to cable television, less than forty percent of all households in these areas would subscribe to the service.

62. The effect of distant signals on cable demand is particularly important in assessing the consumer welfare costs of our cable regulations. If consumer demand for distant signals is significant, our signal carriage restrictions result in large sacrifices of welfare for subscribers and potential subscribers. Most of the studies of cable demand estimate that the carriage of four distant independent signals will increase system penetration rates by at least nine percentage points on average. The effect of distant duplicating network stations on cable demand has been estimated to be similar to that of distant independents.

63. The supply of cable television also has received extensive analysis. Numerous models have been developed to determine the level of cable demand that would be required to generate enough revenues to cover system costs.[43] The conclusion from these models was that breakeven system penetration rates were in the 30 percent to 40 percent range. These estimates were for prevailing prices and for urban areas of the top hundred markets.

64. The final financial parameter for cable television operation considered here is pay cable. The advent of pay television as a service option for the cable television industry potentially can affect both the supply and demand for cable television. Currently, pay cable generally is offered as a pay channel (consisting primarily of movies) only to subscribers of the basic cable service. Only about one-third of all basic cable subscribers that have access to a pay channel subscribe to it. However, the extent to which pay cable will affect the growth of cable television cannot be precisely determined. The continued development of competing services such as multi-point distribution systems, subscription television stations, and video cassettes should have an effect on

[40] *Report in Docket 21284, supra*, at paras. 74–96.

[41] It should be noted that many commenting parties have criticized the Commission for failing to analyze more closely the demographic characteristics of cable television households. It was believed that a more thorough evaluation of the social costs of cable television deregulation should have been performed by placing greater emphasis on the criterion of distributional equity. This criticism will be addressed more specifically below. Briefly, however, we felt it unnecessary to consider the demographic issue raised in great detail because we concluded that the risk of distributional effects resulting from the rule changes proposed is negligible.

[42] W. S. Comanor and B. M. Mitchell, "Cable Television and the Impact of Regulation," 2 *Bell Journal of Econ. and Management Sci.* 154 (1971); R. E. Park, "Prospects for Cable in the 100 Largest Television Markets," 3 *Bell Journal of Econ. and Managment Sci.* 130 (1972); Noll, Peck and McGowan, *Economic Aspects of Television Regulation* (1973); Charles River Associates, Inc., "An Analysis of the Demand for Cable Television," (1973); The John Hopkins University Center for Metropolitan Planning and Research, K. Lyall, R. Duncan, and C. DeKay, *Estimation of an Urban Cable Demand Model and Its Implication for Regulation for Major Markets* (1976).

[43] W. S. Comanor and B. M. Mitchell, "Cable Television and the Impact of Regulation," 2 *Bell Journal of Econ. and Management Sci.* 154 (1971); B. Mitchell and R. Smiley "Cable, Cities and Copyrights," 5 *Bell Jour. of Econ. and Management Sci.* 264 (1974); R. Crandall and L. Fray, "A Reexamination of the Prophecy of Doom for Cable Television," *Id.*; Noll, Peck and McGowan, *Economic Aspects of Television Regulation* (1973); Mitre Corporation, *Urban Cable Systems* (1971); Rand Corp., L. Johnson, *et al., Cable Communications in the Dayton Miami Valley Area: Basic Report* (1972); The John Hopkins University Center for Metropolitan Planning and Research, *Economics of Cable Television in Urban Areas: Baltimore City* (1975); The John Hopkins University Center for Metropolitan Planning and Research, *Economic Feasibility of a Cable Systen for Cleveland* (1976); and Cable Television Information Center, *Cable Television Options for Jacksonvile* (1973).

the growth of both pay cable and the cable television industry.[44]

65. The ultimate cable penetration in an individual market will depend upon the availability of cable television service and the number of households that will subscribe when offered service. Due to the complexity of and the large variation in the factors involved, it is difficult to assess the extent to which cable television will grow to serve new areas. One factor is apparent, however: even if the demand for cable television increases to the point of surpassing the breakeven penetration rate required for new system growth, the demand for basic cable television service in the urban areas of the larger markets is generally such that not more than forty percent of the total number of households offered the service would subscribe.[45] Using this estimate, combined with the higher estimated penetration levels in other areas we concluded that the total number of cable subscribers in all markets will not be greater than about forty-eight percent of the total number of television households within the foreseeable future, even with unlimited distant signal importation.[46]

66. The Commission's analysis of the supply of and demand for cable television has not received extensive criticism. Only a handful of parties have taken exception to various parts of this section of the *Report*. We believe these comments, when properly analyzed, do not weaken our conclusions from this section that (1) the future growth of cable will be very dependent upon the ability of cable operators to offer consumers additional program choices and innovative services at attractive prices and (2) that no more than about 48 percent of the nation's television households will subscribe to cable television within the foreseeable future. In fact, the comments if anything tend to confirm our belief that the estimates arrived at were reasonable. Some of the commenting parties, in an effort to suggest that cable's impact on television broadcast service will be greater than our estimates, have suggested that we underestimated the likely growth of cable. Others, in an attempt to suggest that cable will never make a major contribution to the television service received by the public, have attempted to suggest that our estimates were too high. When the details of these comments are considered, the net result either reveals misunderstanding on the part of the commenting parties or tends to confirm the results of our earlier study.

67. For example, our prediction of an ultimate nationwide cable penetration on more than about 48 percent is criticized as being too low by Boston Broadcasters, Inc.[47] because the top 50 cable television operators currently have a 56 percent penetration. National Broadcasting Company, Inc.[48] argues similarly that cable penetration presently is 50 percent where pay cable is available and, as a result, seriously questions the reliability of the Commission's prediction. Despite our clarification of this point at n. 81 of the *Report in Docket 21284*, these criticisms demonstrate a failure to recognize the difference between systemwide cable penetration and marketwide cable penetration.[49] *Systemwide cable penetration* is defined as the number of cable subscribers to a system, as a fraction of the number of homes passed by cable by that system. *Marketwide cable penetration* is defined as the number of cable subscribers, as a fraction of the total number of television households in the entire market. The statistics furnished by the commenting parties refer to *systemwide* cable penetration. Our estimates pertain to *marketwide* cable penetration. For example, cable systems currently attract an average of about 53 percent of the homes they pass with cable.[50] But this figure *cannot* be extrapolated to the entire nation, *even if every home in the nation were passed by cable*, because two-thirds of the households currently without access to cable television are located in the "metro" areas of the top 100 television markets. The demand for cable television in these areas is significantly lower than in areas currently served by cable due to the large number of signals that is readily available without cable. Or, in other words, the aggregate systemwide cable penetration currently is as high as 53 percent only because cable television has grown to serve first the areas which have the greatest demand for its service. Therefore, if cable grows to serve the large urban areas that have not yet attracted the funds necessary for construction, the aggregate systemwide cable penetration will decrease. Thus, we find this criticism is without merit when the economic evidence is interpreted correctly.

68. The Association of Independent Television Stations, Inc., (INTV) [51] suggests that the estimate of 48 percent nationwide cable penetration must be re-evaluated in light of the cable industry's own predictions. INTV cites *Cablevision* and *Cablecast* to say that "cable industry leaders have predicated 50 percent cable penetration nationally by 1990." [52] The actual statement in *Cablevision*, however, is that "within the next three to five years, it is forecast that cable will serve 30 percent of all households in the United States and an estimated 50 percent of all homes will have cable service *available* to them." (Emphasis added).[53] The 50 percent figure refers to homes passed by cable, not subscribers to the systems. (That is, these households will have access to cable television, but will not necessarily subscribe to the service.) Similarly, not only is the citation to *Cablecast* incorrect,[54] but neither of the two issues which INTV may have been referring to can be used to validate their claim of a 50 percent nationwide penetration by 1990. The closest reference of this prediction in the two issued is that "cable operators are now beginning to realize that if they can sell additional services to, say 70 percent of their subscribers [in urban areas], and if basics are only 40 percent of homes passed, they really have 68 percent penetration. For this they will build." [55] This quotation suggests that a (basic) cable penetration of only 40 percent (of the homes passed by the system) is expected in urban areas. This suggestion corresponds with our estimate of cable demand, and contradicts INTV's claim for 50 percent nationwide cable penetration.

69. INTV also refers to the assumption by Paul Kagan Associates, Inc. that an additional 2.5 million households will subscribe to cable television every year until 1985. INTV then applies the assumption well beyond the range intended and concludes that "the

[44] Compare the comments of Tribune Company in Dockets 20988 and 21284, September 17, 1979 where reference is made to the service MATV subscribers in apartment buildings received from MDS and STV stations as placing "Another damper on demand for cable service * * *." p. 21.

[45] See our discussion in the *Report in Docket 21284* at para. 89–92.

[46] For the complete derivation of this conclusion, see the *Report in Docket 21284* at n. 105.

[47] Comments on Boston Broadcasters, Inc. Dockets 20988 and 21284, September 17, 1979.

[48] Comments of National Broadcasting Company, Inc., Docket 20988 and 21284, September 17, 1979.

[49] Boston Broadcasters, Inc. filed supplemental comments on October 11, 1979 dealing specifically with this point. However, these comments fail to correct their previous error.

[50] See the *Report in Docket 21284* at para. 78.

[51] Comments of the Association of Independent Television Stations, Inc., Dockets 20988 and 21284, September 17, 1979.

[52] *Id.* at 22.

[53] *Cablevision*, "Advertising on Cable: From Madison Ave. to Main St.," October 23, 1978 at 22.

[54] INTV cites *Cablecast*, No. 188, December 18, 1978. The December 18, 1978 issue of *Cablecast* is No. 218. The issue numbered 188 is dated September 12, 1977.

[55] *Cablecast*, Paul Kagan Associates, Inc. No. 218, December 18, 1978.

national cable penetration would exceed 55 percent in less than 15 years." [56] However, the validity of assuming a constant increase in the number of cable subscribers is highly questionable. Growth curves rarely follow this pattern over an extended time period. Instead, a logistic growth curve frequently is used to represent growth processes.[57] This reflects the fact that the most economically desirable locations for cable systems are constructed first and the fact that television viewers most desiring cable service become subscribers first.

70. Boston Broadcasters, Inc. proposes an additional argument for our 48 percent nationwide cable penetration estimate being too low in that it states, "when local stations are deprived of the best in professional sports, the more popular syndicated programming, and popular movies, more and more people will subscribe to cable in order to receive pay cable." [58] We note that the assumption guiding this argument is strikingly similar to that which the Commission relied upon in promulgating its former pay cable rules. In reviewing these rules, the Court found that "if there is any evidentiary support at all [that siphoning is real, not imagined], it is indeed scanty" [59] and as a consequence these rules were eliminated. No evidence has accumulated since the Court's statement and the elimination of the rules, nor has any such evidence been submitted in this record which suggests that such program siphoning will occur.

71. Boston Broadcasters, Inc. also claims that the estimate of 40 percent cable penetration in the metro areas of the top 100 markets is too low because recent surveys in Boston suggest that as many as 40 to 55 percent of the households offered service would subscribe. It seems to us, however, that reliance on surveys such as these should be kept to a minimum given the experience of existing cable systems. Surveys of this type often are unreliable because of the inflated expectation that people have of cable television before receiving the service, especially when pay cable television is included in the marketing package.[60] Actual experience and existing research, indeed, do suggest otherwise.[61]

72. In contrast to the above comments which suggests that cable penetration will be higher than our estimate, others say our estimate is already too high. American Broadcasting Companies, Inc. (ABC) says that "the enormous cost of wiring the nation * * * casts doubt upon achievement of even the 48 percent penetration level projected in the *Economic Inquiry Report.*" [62] It should be noted, however, that the ultimate nationwide cable penetration was estimated by the Commission to be *no more than* about 48 percent, even assuming that all households would have access to cable television. The possibility that all households would have access to cable television is extremely unlikely. Hence, the 48 percent figure represents an upper limit on nationwide cable penetration.[63] We believe this estimate provides a sufficiently conservative [64] basis from which to predict the future long-run impact of eliminating our distant signal carriage and syndicated exclusivity rules on local station audiences.

73. ABC also cites a report from the Commission's Broadcast Bureau on the information developed under the cable economic inquiry which said that "in our review of the demand for cable discussion, we find no indication that the staff performed a critical evaluation of any of the five studies." [65] Similarly, reference is made to the Broadcast Bureau's belief that the "assessment of the future of cable lacks analytical depth." [66] However, as noted in n. 80 of the *Report in Docket 21284,* a comprehensive summary and evaluation of the five studies on the demand for cable television was prepared for the Office of Telecommunications Policy (OTP), Executive Office of the President by six leading scholars in the communications field.[67] We felt this analysis was adequate, and thus determined that an additional detailed review of these studies was unnecessary.[68] Similarly, the assessment of the future growth of cable television relies heavily upon this analysis, together with the very conservative assumption that all households will be passed by cable in the future. We believe this approach provides a sufficient basis upon which to ascertain future potential levels of cable penetration for rulemaking purposes.

74. Some parties also have alleged a failure on the Commission's part to estimate the effect of pay cable on the growth of cable television. For example, Boston Broadcasters, Inc. finds that "amazingly, no consideration has been given by the Commission to the substantial effect that pay cable would clearly exert on the number of cable subscribers." [69] Similarly, INTV notes the inability of the Commission to estimate the effect of pay cable on the supply of cable television and concludes that the "estimate of 48 percent penetration in the foreseeable future appears to be nothing more than a guess." [70] To place the above criticisms into proper perspective, the Commission has found that sufficient data to determine the extent to which pay cable channels will increase the basic penetration rate are not yet available. Thus, the extent to which pay cable will affect the supply of cable television is not fully known at this time. However, no evidence concerning the effects of pay cable on the growth of cable television exists or has been presented which suggests our findings are incorrect. Pay cable, along with competitive services such as multipoint distribution systems, subscription television stations, video cassettes, low power television, and direct satellite to home broadcasting, are in the developmental stage. Any positive effect that pay cable is having on the growth of cable television in the short run is likely to be offset to some extent by competing services in the long run as these services begin to provide consumer access to services which may now be available

[56] *Supra,* n. 51 at p. 22.

[57] *See, e.g.,* Rolla Edward Park, *Potential Impact of Cable Growth on Television Broadcasting,* the Rand Corp. R-587-FF, October 1970.

[58] *Supra,* n. 47 at 9.

[59] *Home Box Office, Inc. v. FCC, supra* at 42.

[60] *See, e.g.,* Walter S. Baer, *Cable Television: A Handbook for Decision-making,* the Rand Corp., R-1133-NSF at 44, February 1973.

[61] This is not to suggest that we would find higher penetration levels undesirable for this would suggest that cable was contributing even more than anticipated to the welfare of subscribers.

[62] Comments of American Broadcasting Companies, Inc., Docket 21284, at 37, August 3, 1979. The ABC comments in this proceeding and those of Bahia De San Francisco *et al.,* are substantially duplicative. Therefore comments attributed to ABC may also generally be attributed to Bahia De San Francisco *et al.,* throughout this discussion.

[63] For further clarification of this point, see n. 86 in the *Report in Docket 21284.*

[64] By conservative we mean a figure which tends to exaggerate the effect of cable television and thus makes any resulting impact estimate an upper bound one.

[65] Broadcast Bureau, Report on Information Developed Under the Cable Economic Inquiry, April 18, 1979 at 29.

[66] *Id.* at 32.

[67] *See* S. M. Besen, B. M. Mitchell, R. G. Noll, B. M. Owen, R. E. Park and J. N. Rosse, *Economic Policy Research on Cable Television: Assessing the Costs and Benefits of Cable Deregulation* (1976).

[68] We also attempted to avoid excessive duplication of the OTP report by focusing the summary of cable demand on factors that are relevant to this proceeding. For example, while ABC seems to believe the sensitivity of demand to price is worthy of review, we do not believe this factor is critical for determining the impact of cable television on local station audiences given that cable system operators set prices to maximize profits and not subscribers.

[69] *Supra,* n. 47.

[70] Comments of Association of Independent Television Stations, September 17, 1979 at 21.

only from cable. This marketplace response also applies to other non-broadcast services offered on cable. That is, if there is a significant consumer demand for other non-broadcast services offered on cable, we expect that these services also will be offered by competing distribution technologies. Most importantly, however, we believe we have adequately dealt with the uncertainties created by these new developments by estimating the effect of pay cable on the growth of cable television using the extremely conservative assumption that cable television will grow to pass every home in the nation. This approach provides an estimate of nationwide cable penetration that has an extremely small probability of being underestimated.[71]

75. The final area of criticism of this section of the *Report in Docket 21284* concerns the effect of additional distant independent signals on the demand for cable television. We found that distant independent signals increase the demand for cable television. While the extent of this increase is unclear, most studies estimate that the carriage of four distant independent signals will increase system penetration rates by at least nine percentage points on average. It is important to note that this increase is for system penetration rates and not county or market cable penetration. If some households in a television market do not have access to cable television, the effect of distant signals on marketwide cable penetration will be less than that on system penetration rates.

76. The National Association of Broadcasters (NAB) [72] performs its own analysis of the studies on cable demand and argues that our finding of the consensus of the effect of distant independent signals on cable demand is too high. On the other hand, Boston Broadcasters, Inc. expects that "the increase would be even greater [than the Commission estimates] in areas where the quality of television reception off-the-air is reasonably good."[73] INTV seems to believe that the extent of the increase in cable demand from additional independent signals is unclear.[74]

77. The only discussion in the comments that evaluates the findings of the studies on the demand for cable television is provided by NAB. NAB addresses five studies on cable demand, including that by Wharton Econometric Forecasting Associates which was undertaken as part of their audience model developed for this proceeding. For background in evaluating NAB's discussion, it should be noted that Noll, Peck, and McGowan present two studies of cable demand in their book by collecting data for two distinct samples.[75] One sample was chosen specifically to estimate the demand for cable television in the 100 largest markets. However, the authors found that "when this is done there is very little intersystem variation in the cable viewing options relative to over-the-air options so that the impact of added viewing options cannot be reliably estimated."[76] That is to say that in their sample of systems in the larger markets, most systems carry roughly the same number of distant signals and are faced with similar competition from local over-the-air television signals. Since there is little variation in the signals available to cable and non-cable households among large markets, it is difficult to estimate systematically the effect of additional signals. As a result, Noll, Peck and McGowan report that the overall explanatory power of this study is very low, and characterize it as having "highly inconclusive results."[77] In fact, when estimating the value that consumers derive from "free" television, an extremely important measure for the conclusions reached in their book, the authors do not rely upon this study, but rather rely upon their second study of cable demand. Resultantly, we did not include the study with highly inconclusive results among the five studies of cable demand reviewed in the *Report in Docket 21284*. Instead, we relied upon the second study performed and favored by the authors in their own work.

78. With this background, we find that in NAB's discussion of the studies of cable demand, reference is made to the study by Noll, Peck and McGowan that is not included in our review. We do not believe that any reliance can be put on this study. Hence, we find any conclusions that NAB attempts to draw from it unacceptable. Similarly NAB also criticizes our reliance on the study by Park, "Prospect for Cable in the 100 Largest Markets"[78] Because "Park's results, by his own admission, were not directly applicable to major television markets because most systems existing in 1970 were located in areas where off-the-air service was poor, due to lack of stations or bad reception."[79] This criticism also is without merit. Park characterizes his sample by saying the "model is developed using a sample of 63 cable systems located where several signals can be received over-the-air with no particular reception problem."[80] Additionally, Park says that the "levels of [off-the-air] service [in the communities served by these systems] are roughly the same as those found in most of the top 100 markets."[81] Hence, NAB's review of the Park study is in error.

79. Taking the above criticisms of NAB's review of the studies on cable demand into account, we believe that our finding of the effect of additional distant independent signals on the demand for cable television remains sound. Most studies estimate that the carriage of four distant independent signals will increase system penetration rates by at least nine percentage points on average. However, NAB contends that the Wharton study submitted with NAB's comments in response to the Commission's original *Notice of Inquiry in Docket 21284* is worthy of far more confidence than previous efforts to estimate the significance of the various factors which influence demand for cable television. For example, NAB draws upon the Wharton study to conclude that in a market with three

[71] ABC in its comments has set forth some estimates of the cost of wiring the nation with two-way cable service. According to ABC "even assuming a very conservative household cost of $4,000, it would cost *$243 billion* to provide the presently unwired 60.8 million households with cable television service." Comments filed August 6, 1979 at 38. While these estimates are merely extrapolations from a study completed in 1968 and may not be very scientific, they do suggest why we believe our use of a 100 percent wiring assumption is extremely conservative.

[72] Comments of the National Association of Broadcasters, Dockets 20988 and 21284, September 17, 1979.

[73] *Supra*, n. 47 at 6.

[74] Although these parties differ on the facts, each uses its version to argue against changes in the rules. Thus, Boston Broadcasters, Inc. argues that the estimated effect of distant signals on cable penetration is too low because cable penetration is correlated positively with audience diversion. Hence, if the predicted cable penetration was higher, the predicted audience losses due to cable also would be higher. On the other hand, NAB argues that the effect of distant signals on cable demand is not substantial because it realizes that the major reason for allowing the importation of distant signals is the benefits that consumers derive from these signals. If there was little increase in cable penetration, NAB could argue more convincingly that distant signal importation is not in the public interest. We note, however, that NAB's argument is not very persuasive from a theoretical perspective. If consumers did not demand distant signals, cable systems would not import them. Furthermore, if no one were to watch distant signals, there would be no audience diversion from the local stations, so presumably NAB would not have cause for concern with importation of distant signals.

[75] Noll, Peck, and McGowan, *Economic Aspects of Television Regulation* (1973).

[76] *Id.* at 292.

[77] *Id.* at 293.

[78] Rolla Edward Park, "Prospects for Cable in the 100 Largest Television Markets," *3 Bell Jour. of Econ. and Management Sci.* 130 (1972).

[79] *Supra*, n. 72 at 79–80.

[80] *Supra*, n. 78 at 130.

[81] *Id.* at 136.

local independent stations in addition to three network affiliates, increasing the number of imported distant independents from 1 to 6 leads to an increase in cable penetration of 3.1 percent. NAB proceeds to conclude that "rarely will the projected increase of 3 or 4 precent fall at the critical margin of deciding whether or not to construct a cable system in a particular television market." [82] However, NAB has erroneously interpreted Wharton's treatment of cable penetration. Wharton defines cable penetration as the number of cable subscribers in a county as a fraction of the number of television households in that county.[83] This is not equivalent to systemwide cable penetration as NAB infers. Thus, NAB has made an error similar to that of INTV and other commenting parties in this proceeding as to the appropriate use of cable penetration. In this case, NAB mistakes countywide cable penetration for systemwide cable penetration. Since some homes will not have access to cable television, the effect of distant signals on countywide cable penetration will be less than that on systemwide cable penetration. Hence, Wharton's results are not necessarily inconsistent from those of the other studies of cable demand.

80. In summary, the criticisms leveled at the *Report in Docket 21284* have not persuaded us that our analysis of the supply and demand of cable television is incorrect. We continue to believe that the future growth of cable television will be dependent upon the ability of cable system operators to offer consumers additional program choices and innovative services at attractive prices. We also believe that no more than about 48 percent of the nation's television households will subscribe to cable television within the foreseeable future. We regard this estimate as sufficiently conservative to account for the possible effects of pay cable on system growth.

81. *The Impact of Distant Signals on Local Station Audiences.* Having developed some understanding of likely cable television growth patterns, the next step in our analysis in the *Economic Inquiry Report* was to obtain information on the audience behavior of cable television subscribers with access to distant signals. From this, estimates of the total local station audience impact likely to result from elimination of the distant signal carriage rules could be developed. In the *Inquiry* stage of this proceeding we were fortunate to have available a wealth of new information made available in large part due to new audience data from the audience rating services on the viewing habits of both cable and non-cable households in individual counties. Four major studies that made use of these new data were relied on heavily by the Commission. These studies were prepared by the National Cable Television Association (NCTA),[84] the Motion Picture Association of America (MPAA),[85] Wharton Econometric Forecasting Associates (WEFA) for the National Association of Broadcasters,[86] and Dr. Rolla Edward Park of the Rand Corporation under contract to the Commission.[87]

82. The NCTA, in a study of 109 stations operating in television markets with greater than 33 percent cable penetration, reported that the average audience diversion due to cable for the entire day is 8 percent, and is greatest in smaller markets. For instance, in one- and two-station markets cable diverts an average of 10 percent of audience, while in markets with three or more network stations, cable diverts an average of only 4 percent of potential audience. This difference is attributable to, in large part, the importation of the second and/or third network signal into the smaller markets. The diversion from UHF licensees was found to be one-third of that from VHF licensees because of the greater improvement in reception that cable television provides UHF stations. Additionally, since no market with greater than 33 percent cable penetration contains a local independent station, NCTA also analyzed the effect of cable on the audiences of mature UHF independents. Of the fifteen mature UHF independents for which the necessary viewing data are available, NCTA reported that cable augments the viewing of thirteen of these stations. Two UHF independents experienced an audience loss averaging 1.5 percent. We noted that the studies by NCTA do not adjust for the greater amount of television viewing by cable subscribers, nor do they estimate the effect of alternative signal carriage rules.

83. The MPAA study focused on individual counties rather than on an entire market and found that local stations lost more audience as the proportion of television households in a county subscribing to cable television increased. The audience diversion attributable to cable at a 12.5 percent cable penetration was reported to be 2.4 percent. At 50 percent cable penetration, audience diversion due to cable increased to about 15 percent.

84. The applicability of the results of the MPAA study are limited somewhat due to the aggregation of county data. MPAA aggregates all of the counties in its sample by the level of cable penetration and disregards the complement of local signals in the counties. However, the audience diversion for the local stations due to cable television is likely to differ substantially depending upon the number of local signals, even if the level of cable penetration is identical. For example, holding other factors constant, cable television diverts more audience where there is only one local signal because of the importation of a second and third network signal. Thus the applicability of the general results presented by MPAA is inadequate for assessing the effect of cable on local stations for any specific case.

85. While the above studies provided a "snap shot" view of the impact of cable television on local station audiences, the NAB–WEFA and Park studies, which were also relied on, attempted to estimate by econometric methods the effect of a *change* in the number of imported distant signals on local station audiences.

86. The NAB–WEFA study is an ambitious and comprehensive undertaking that compiles data for all counties for which viewing data are available for both cable and non-cable households. The model, however, employs a highly complex structure which increases the difficulty of analyzing simulations of the model. While we found certain flaws in the model which were reviewed in the *Economic Inquiry Report* and which we believed biased the finding that small independent stations suffer most from additional distant signals on cable, we were able to use it in terms of marketwide impacts by aggregating the predicted impacts to both independent stations and network affiliates, thereby providing one estimate for the entire market. For example, our summary of the NAB–WEFA results for large markets containing independent stations was that increasing the number of

[82] *Supra*, n. 72 at 84.

[83] Wharton treats each county as representative of a market. Hence, countywide cable penetration is treated as analogous to marketwide cable penetration.

[84] National Cable Television Association, comments in Docket 21284, March 15, 1978.

[85] Motion Picture Association of America, reply comments in Docket 21284, June 20, 1978.

[86] National Association of Broadcasters, comments, "The Impact of Cable TV on Local Station Audience" prepared by Wharton Econometric Forecasting Associates, Docket 21284, March 15, 1978.

[87] R. E. Park, "Audience Diversion Due to Cable Television: A Statistical Analysis of New Data," the Rand Corporation, prepared for the Federal Communications Commission, January 1979. Attached as Appendix A to the *Report in Docket 21284*.

distant independent stations from 1 to 6 would reduce local station audiences by 10 to 13 percent at a 50 percent marketwide cable penetration.

87. In small markets, where *no* adjustments to the NAB–WEFA model were made, NAB–WEFA found that increasing the number of distant signals from 1 to 6 would reduce local station audiences by 8.7 to 12.7 percent at a 52 percent marketwide cable penetration, depending upon the number of local signals. Finally, in medium-sized markets with three local stations, increasing the number of distant independent signals from 2 to 5 was predicted to decrease local station audiences only by 6.5 percent, even at the unreasonably high marketwide cable penetration of 68 percent. In neither case were the findings inconsistent with the results of the other studies in this proceeding.

88. Park, in a study done under contract to the Commission, estimated the effect of additional distant signals on local station audiences by using a simpler model based on a sample of 121 counties. He provides estimates of audience diversion due to cable under both the current signal complement permitted by the FCC rules and under relaxed signal carriage rules. The estimates for each are provided at both current and projected ultimate cable penetration levels. At current cable penetration, the incremental audience diversion from eliminating the signal carriage rules is estimated by Park to be 14 percent or less for all cases. At the projected ultimate marketwide cable penetration levels, the incremental audience diversion is estimated to be less than 20 percent in all but the smallest markets. However, we characterized Park's long-term results as being overstated, especially in small markets, because the projected ultimate cable penetrations are too high.[88] Hence, we interpreted Park's results for the long term as predicting virtually no scenario where the relaxation of the signal carriage rules will generate more than a 20 percent audience diversion. It should also be noted that we had numerous other problems with the Park model, aside from the projected levels of cable penetration, that led us to conclude that Park overestimated the effect of eliminating the signal carriage rules. These problems are important to note in assessing our conclusion of the general consensus of the impact of cable television on local station audiences. They will be discussed in detail below.

89. In conjunction with these four studies as well as the other comments received, we also analyzed the current impact of cable on local station audiences for six grandfathered markets, seven independent stations, and nineteen "worst case" broadcast stations or markets alleging harm due to cable. Audience diversion due to cable was found to be less than 10 percent in more than two-thirds of the cases analyzed. The specific findings of this study are discussed in detail below. For present purposes it is sufficient to note that the findings from the grandfathered markets contributed to our assessment of the more general statistical studies. The results of the analysis of these markets contributed heavily to our conclusions because they provide an excellent picture of the marketplace working essentially *without* signal carriage restrictions.

90. The consensus on the audience diversion due to cable television that was reached in the *Report in Docket 21284* was that:

> (a) The impact of cable television on local station audiences under current market conditions generally is less than 10 percent. This finding includes cases with extraordinarily high cable penetration and a large number of distant signals. For example, in one of the most extreme cases, Bakersfield, California, the local stations lose only between 9 and 13 percent of their potential audience due to cable, even though more than half the households in their market have access to at least seven distant signals on cable. Additionally, UHF stations, particularly UHF independents, often receive audience gains from cable television.
>
> (b) The incremental audience diversion from eliminating the signal carriage rules will be less than 10 percent at all marketwide cable penetrations that are realistic in the foreseeable future for all but a few cases.

91. Our analysis of the impact of distant signals on local station audiences has received extensive criticism from the television broadcast and television program production industries. These range from specific criticisms of the Park study to the allegation that the Commission was highly selective in its use of the available research material. Each of these criticisms will be addressed separately below. Our discussion should demonstrate that the *incremental* audience diversion from eliminating the signal carriage rules will be less than 10 percent in the foreseeable future except for a very few cases. The fact that the data tell the same story in almost all cases shows the validity and robustness of the consensus that we have drawn from them.

92. Our goal throughout this proceeding has been to insure that we would have available the most accurate evidence possible from which to make a public interest determinaton. We considered this to be of particular importance in view of the fact that the stakes to consumers from the final outcome of this proceeding are so high. Many of the commenting parties devoted a large amount of their energies toward criticizing the Park study. As a preliminary matter, we must emphasize that we did not place our sole reliance, or, indeed, any overbearing emphasis on the Park study in reaching our conclusions on the impact of cable on local stations' audiences in the *Report in Docket 21284*, since it was only one of several studies that addressed this relationship. However, to alleviate any justifiable concern that might have a reasonable bearing upon the accuracy of the Commission's determination, we contracted with Dr. Park to address the criticisms of his initial study and to make certain modifications to improve it and test the validity of certain criticisms. (See Appendix B) As it turns out, our analysis shows that the additional work performed by Park acts to strengthen our previous conclusion concerning audience diversion due to cable television. Therefore, we rely, in part, upon the additional work undertaken by Park in addressing the criticisms of the television broadcasters and program producers that are relevant to this section. It should also be noted that at an earlier juncture in this proceeding we made numerous attempts to obtain modifications of the NAB–WEFA model so that it to could be relied on with greater confidence. However, the requested information was never received.

93. *The Consensus Effect.* Parties critical of our proposal, and the *Economic Inquiry Report* generally, have argued that the consensus of the studies reported was arrived at only through a misuse or misreading of the studies relied on. Thus, for example, ABC claims that "the Commission unfairly and improperly failed to give sufficient weight to studies submitted by NAB, MPAA, INTV and ABC, each of which predicted adverse impact on television broadcasting in more significant measures than the studies upon which the Commission relied."[89] The ABC Television Affiliates Association points out that Parks' results "vary tremendously from the *Economic Inquiry Report's* conclusion

[88] In particular, Park's estimates for ultimate cable penetration are based on the assumption that every home will be passed by cable. We found this to be an unlikely possibility, especially in areas of low population density.

[89] American Broadcasting Companies, Inc., comments in Dockets 20988 and 21284, August 3, 1979 at 6.

that 'in all but the most extreme cases, the additional audience loss will be less than 10 percent in the foreseeable future' " [90] Upon reviewing the Commission's summary of the Park study, Capital City Television *et al.*, finds "the Commission's Conclusion that 'there is virtually no scenario which generates a 20 percent audience loss within the foreseeable future from relaxed signal carriage rules,' is clearly misleading." [91] The Joint Motion of the Association of Independent Television Stations *et al.*, alleges that "whereas the staff either ignored or went to great length to include material critical of NAB, MPAA, and INTV, it included virtually no criticism of either the NCTA or Park audience loss studies." [92] The National Association of Broadcasters complains of our treatment of its study, stating that we "capriciously chose to ignore ctitical findings of the Wharton study * * * " [93] INTV states that "since part of the Cooper study [commissioned by INTV] relied on data from the Wharton study, it too was discounted by the Commission without any discussion." Further, "there is no indication in any of the documents in this proceeding that the Commission even considered those portions of the Cooper study not relying on the Wharton data." [94]

94. As explained in the *Report in Docket 21284*, notable examples of audience studies submitted as comments in this proceeding that provided information which we consider very valuable in reassessing our cable policies and rules include those by NAB–WEFA, NCTA, and MPAA. Other comments, including those of ABC, we noted as submitting data that attempted to display the impact of cable television on local station audiences. The data provided by these comments, however, were not considered valuable for policy purposes because of the inadequacy of the analysis provided therein. The study by ABC, for example, focused primarily on the disparity in the share of viewing of local stations between cable and non-cable households. This analysis gives an entirely incomplete picture of the effect of cable on local stations because it fails to account for the relative sizes of the cable and non-cable populations.[95] Other studies, such as those of the Rocky Mountain Broadcasters Association, also appeared to us not to be usable in isolation for predictive purposes. Rather, to address the concerns in these comments, we analyzed, using a standard procedure, key economic factors of each station and/or market that was identified as being harmed by cable. Careful attention was given to the viability of these stations and, in cases of financial hardship, the extent to which cable was responsible for their financial distress. (See para. 174 below.) A similar procedure has been implemented for the comments in this round of the proceeding.

95. Additionally, while noting their limitations, the results of the studies of audience diversion by NCTA and MPAA were accepted by the Commission *in toto*. These studies generally are carefully done. And, despite ABC's claim, the results of the MPAA study are well within the bounds of audience diversion established as the consensus opinion by the Commission. For example, MPAA finds audience diversion from local stations attributable to cable television to be about 8 percent in counties with 30 percent cable penetration. Our conclusion in the *Report in Docket 21284* was that the impact of cable television on local station audiences at the present time generally is below 10 percent.[96]

96. On the other hand, the specific results of audience diversion for local independent stations predicted by the NAB–WEFA were rejected because of the inherent bias attributable to the model specification.[97] Where estimates were provided specifically for independent stations, we chose instead to employ the NAB–WEFA model to provide one estimate of audience diversion for the entire market.

97. The results of the NAB–WEFA model as to the incremental effect of additional distant signals on local independent stations were unacceptable because of: 1) the use of the "logit" equation specification, 2) estimation of the effect of increasing the number of distant independent signals from 1 to 6, instead of from a base of 2 signals as our rules currently permit for the markets analyzed, and 3) the use of unrealistically high marketwide cable penetrations.

98. To actually demonstrate the shortcomings of the NAB–WEFA study, we would have liked to compare its results to the detailed case study analysis that we performed for grandfathered markets (as we did with the Park study). We believe this comparison particularly would be enlightening if it could be undertaken for small UHF independent stations. Unfortunately, NAB–WEFA has not answered our requests for additional information. Furthermore, we have been unable to duplicate the reported results of the NAB–WEFA study.[98] In these circumstances we do not think it would be appropriate for us to employ the NAB–WEFA model to make predictions of audience diversion due to cable for the small independent stations that we analyzed in the case studies.

99. The main problem identified with the NAB–WEFA study was that it employed a "logit" equation specification for predicting audience shares under various signal complements. Our *Report* showed that employment of this equation specification resulted necessarily in a proportionately greater impact on local independent stations than network affiliates, regardless of what the actual data may have indicated.[99] Hence, we rejected the "finding" that small, independent stations suffer most of the audience losses from additional imported signals. Instead, as indicated previously, we summarized the results of the NAB–WEFA model by providing its prediction of the impact of cable on local station audiences for an entire television market, and not for its predictions of the impact on individual stations.

100. In its reply to the Commission's critique, WEFA finds that "the derivation of derivatives shown in footnote 116 (page 61) of the FCC document is correct," but "the

[90] ABC Television Affiliates Association, comments in Dockets 20988 and 21284, September 17, 1979 at 14.

[91] Capital City Television *et al.*, comments in Dockets 20988 and 21284, September 17, 1979 at 5.

[92] Association of Independent Television Inc.; Caucus for Producers, Writers and Directors; Metromedia, Inc.; Motion Pictures Association of America, Inc.; National Association of Broadcasters; National UHF Broadcasters Association; and Screen Actors Guild; *Joint Motion for Revision of Procedures*, Dockets 21284 and 20988, June 22, 1979. The discussion provided therein has been incorporated into the comments of this proceeding by the Motion Picture Association of America.

[93] National Association of Broadcasters, comments in Docket 20988 and 21284, September 17, 1979 at 111.

[94] Association of Independent Television Stations, comments in Dockets 20988 and 21284, September 17, 1979, at 28.

[95] See also our discussion on the appropriateness of using "share data" in the Case Study Section of the *Report in Docket 21284*.

[96] For a comparison of the results of the major studies submitted in this proceeding on audience diversion, *see* the *Report in Docket 21284*, para. 116(a). *See* also Park, Appendix A, *Report in Docket 21284* at 38–48.

[97] For a detailed analysis of the NAB–WEFA predictions, *see* the *Report in Docket 21284* at para. 107 and n. 116.

[98] For example, when we employ the NAB–WEFA model, we find that the sum of individual shares predicted for each station in a market varies greatly from 100 percent. In contrast, NAB–WEFA, without explanation, reports that the predicted shares of the individual stations in a market sum to 100 percent.

[99] *See* the *Report in Docket 21284* at para. 107 and n. 116 for a more detailed demonstration of the correctness of this statement and the nature of a "logit" equation.

mathematics in footnote 116 support a conclusion exactly opposite to that given in the text of paragraph 107(i)." [100] WEFA's reasoning in reaching this conclusion is flawed. In fact, its own analysis confirms our findings. WEFA finds that "what the FCC has shown is that the percentage change in the market share (which is like a percentage change in a percentage share) increases as the market share decreases." [101] This is precisely the reason for which we reject WEFA's findings for independent stations (i.e., those stations with small market shares). Thus, the validity of our reasoning is not rejected, but agreed upon by WEFA. Furthermore, WEFA proceeds to provide numerical examples to demonstrate the validity of our criticism of the WEFA model.[102] WEFA's error in its reply is attributable to considering the absolute change in a local station's viewing share from additional distant signals rather than the percentage change. We are interested in and the NAB–WEFA model provides predictions for the latter. We find, and WEFA agrees, that this loss must necessarily be estimated to be greater for small independent stations when the logit equation specification is employed.[103] Hence, WEFA's criticism of our analysis of the NAB–WEFA's study is flawed.

101. Our *Report* also found that providing projections of audience diversion in larger markets when the number of imported signals is increased from 1 to 6 is not very helpful for policy purposes because two signals can be imported in these markets under existing FCC policies. Without explanation, WEFA contends that "the logic of [this] argument seems to be missing." [104] We feel, however, the logic of our argument is clear. The effect of relaxing the signal carriage rules in the larger markets is not equivalent to the effect of increasing the number of imported signals from a base of one. The appropriate incremental effect should be calculated from a base of two distant independent signals because we currently permit this many signals to be imported into all of the larger markets.[105]

102. WEFA also disagrees with our categorization of the market in their study with 3 network affiliates and 1 independent as a large market and therefore claims our criticisms of this simulation are not relevant.[106] However, in their original study, WEFA says that "we have considered two different local signal offerings for the *larger* market: three local network stations and one local independent . . ." [107] (Emphasis added.) Hence, in its report, WEFA categorizes its set of results for the market with 4 local stations as a larger market. Therefore, WEFA's claim in its reply is negated by its own discussion in the original study, and our criticisms of its procedure remain.[108]

103. Additionally, because it relies on the NAB–WEFA findings for the impact of cable television on local station audiences, Roger Cooper and Associates submitted an additional analysis which attempts to justify the NAB–WEFA findings.[109] For example, since our interpretation of the NAB–WEFA model is that smaller stations must necessarily be estimated to suffer greater audience losses (in percentage terms) from additional distant signals, Roger Cooper and Associates requested NAB–WEFA to run an additional simulation for a market containing an independent station with a much smaller audience share than specified previously. In comparing the results for these two cases, Roger Cooper and Associates conclude that "cable affects the local independent station in almost exactly the same way." [110] Roger Cooper and Associates bases this conclusion on the results presented in Table III of its analysis. In this table, importation of one distant independent signal on cable is calculated by Roger Cooper and Associates from NAB–WEFA's predictions to divert 38 percent of the audience from both the smaller and larger local independent stations. However, one of these calculations is arithmetically in error. The audience diversion to the stronger independent station, from a share in cable homes of 16.8 percent to a share of 12.1 percent, is 28 percent, and not 38 percent as Roger Cooper and Associates calculate. Therefore, instead of contradicting, it appears that Roger Cooper and Associates also has supplied an example supporting our criticism of the NAB–WEFA model.

104. Due to the fact that *both* of the Cooper studies [111] submitted in INTV's comments relied *exclusively* upon the NAB–WEFA results for independent stations for their estimates of audience diversion, we also rejected this analysis.[112]

105. INTV also has submitted a new study by Roger Cooper and Associates since the issuance of our *Report* that attempts to validate the results of the NAB–WEFA model.[113] Data on the shares of viewing of local independent stations in cable and non-cable households are provided for a few selected counties within the stations' service area (abstracting from the associated levels of cable penetration in the counties). We have performed a case study analysis of each of the eleven stations for which data were presented because focusing on a few select counties can provide a distorted picture of the effect of cable television on local station audiences. We found that cable television does not pose a threat to any of these stations. [See case study discussion below at paragraphs 157 to 184.]

106. NAB–WEFA has supplied some information to Roger Cooper and

[100] *Supra*, n. 93, Exhibit H, at 1, 2.

[101] *Id.* at 4.

[102] *Id.* at 7. As documented in n. 116 of our *Report*, we believe the column entitled "ds/dx/S—logit" is the appropriate focus.

[103] It should be noted that WEFA also mistakes the Park audience model undertaken for the proceeding as a linear one, and proceeds to demonstrate that the same result holds for linear models. However, the Park model is not a linear one. For further discussion, *see* Park, Appendix A.

[104] *Supra*, n. 93, at 8.

[105] *See* 47 C.F.R., Part 76, Subpart D.

[106] This categorization is provided in the *Report in Docket 21284*, Section III, Table 2.

[107] *Supra*, n. 86 at 97.

[108] Careful analysis of WEFA's predictions for this simulation illustrates part of the problem with the model. If one distant independent signal is imported by cable, WEFA predicts that local households view the local independent signal 30 percent more often than the distant independent signal. However, if six distant independent signals are imported, WEFA predicts that local households view the local independent signal 33 percent *less* often then *each* distant independent signal.

[109] Additional comments of Association of Independent Television Stations in Dockets 20988 and 21284, filed January 10, 1980, Attachment A.

[110] *Id.* at 13.

[111] The two studies submitted by INTV in the inquiry stage of this proceeding which were undertaken by Roger Cooper and Associates are: 1) The Effect of Cable Carriage of Distant Signals on the Audience and Revenue of Local Independent Television Stations, dated May 15, 1978; and 2) Part 2 of: The Effect of Cable Carriage of Distant Signals on the Audience and Revenue of Local Independent Telvision Stations and on Their Ability to Provide Service to the Public, dated January 31, 1979.

[112] The results of the Cooper studies are premised on the audience diversion estimates provided by NAB–WEFA. The other relationship which the Cooper results depend on concerns the revenues that local stations receive. However, since Cooper's revenue diversion estimates depend on NAB–WEFA's audience diversion estimates, they are biased. Nevertheless, Cooper's research concerning the revenues received by local stations was analyzed and we believe it is consistent with our conclusion that there is roughly a one-to-one relationship between the audience and revenue of television broadcast stations. Additionally, the estimates provided by Roger Cooper and Associates for the audience/revenue relationship of independent stations over the various day-parts have been employed by Park in his response to industry comments. (See Appendix B.) We also are aware of the study of Roger Cooper and Associates on the impact of cable television on local station audiences, by program, in San Diego and Bakersfield, submitted in the comments of Storer Broadcasting Company and McGraw Hill Broadcasting in this proceeding. We note that detailed case studies for both San Diego and Bakersfield are provided in the *Report in Docket 21284*, which constitute our response to this study.

[113] Association of Independent Television Stations, comments in Dockets 21284 and 20988, September 17, 1979, Attachment.

Associaties concerning a simulation which is similar to the case of the independent station operating in Buffalo, N.Y., which we have analyzed in our grandfathered market study. For this simulation, the NAB–WEFA model is employed to estimate audience diversion due to cable from an independent (which, however, is UHF) station with a very small non-cable share (i.e., 5 percent) that competes with three local network affiliates.[114] The NAB–WEFA model predicts that the local independent station's audience share will decrease by 38 percent in cable households if one distant independent station is imported and will decrease by 80 percent in cable households with six distant independent stations. In the Buffalo ADI, we note that the independent station also attracts roughly a 5 percent share of the non-cable viewing in competition with three local network affiliates. Additionally, this station competes in cable households against four distant network affiliates, three strong distant VHF independent stations, and three Canadian signals. Our analysis shows, however, that the local independent station in Buffalo actually is *helped* by cable television in its local market. This evidence, which is drawn directly from the actual viewing patterns supplied by Arbitron and is not an econometric projection based on questionable techniques, contrasts sharply to NAB–WEFA's predictions.[115] Thus, we believe this evidence demonstrates further that the NAB–WEFA model is inappropriate for assessing the effect of distant signals on local independent station audiences.

107. As described previously, our *Report* summarized the Park study by providing the predictions derived by Park of the incremental audience diversion due to relaxed signal carriage rules at both present and projected ultimate cable penetrations. For example, in the long-term, Park predicts the incremental effect of eliminating the signal carriage rules to be as high as 41 percent for markets with one local VHF network affiliate. However, we discounted Park's long-term estimates because the projected ultimate cable penetrations employed to generate these estimates were overstated. For example, in markets with one local VHF network affiliate, Park projects an ultimate marketwide cable penetration of 84 percent by assuming every home will have access to cable television and by employing his earlier model on cable demand to predict cable penetration.[116] It should be noted, however, despite the fact that cable has grown to maturity in almost all one-station markets (i.e., few cable systems have applied for franchises in the past few years in these markets), and that many of the cable systems currently operating in the markets are carrying a large number of distant signals because of the grandfathering provisions of our rules, the average marketwide cable penetration in markets with one local VHF network affiliate currently is only 41 percent. Cable penetration is not expected to increase substantially in these markets because of the large areas of low population density contained therein. Thus, having discounted Park's values for projected ultimate marketwide cable penetration, we concluded that the predictions generated by Park's audience model suggest that there is virtually no scenario which generates a 20 percent audience loss within the foreseeable future from relaxed signal carriage rules.[117]

108. Capital City Television provides a list of thirty-one stations for which Park predicts a long-term incremental reduction in local station audience of 41 percent as a result of the elimination of the signal carriage rules and suggests that we have ignored his findings in this respect.[118] However, as noted, we have specifically rejected Park's long-term predictions, especially in one- and two-station markets, because the ultimate marketwide cable penetrations employed in these markets to measure the effect of cable are too high. Additionally, it should be noted that at the current level of 41 percent cable penetration for markets with one local VHF network affiliate, Park predicts only a 14 percent incremental audience diversion due to relaxed signal carriage rules. The cable penetration in these markets is not expected to increase substantially. Therefore, it is only the very few cases where cable penetration will exceed about 60 percent on a marketwide basis that Park predicts greater than 20 percent incremental audience diversion from relaxation of the signal carriage rules.

109. Our treatment of the long-term effect of the growth of the cable television industry is also found wanting by a number of the commenting parties. The Park study provides estimates of audience diversion due to cable under the current signal complement permitted by the FCC rules and under relaxed signal carriage rules. These estimates are provided at both current and projected ultimate cable penetration levels. In Table 4 of Section III of the *Report in Docket 21284*, we presented Park's predictions of the short run local station audience diversion due to relaxed signal carriage rules. The figures in this table represented the audience losses to local stations (in percentage terms) from additional distant signals at current levels of marketwide cable penetrations. These figures were derived by subtracting Park's estimates of local station audience in a deregulated market from Park's estimates of local station audience in a regulated market (both at current penetrations), and then, in order to determine the percentage loss, we divided these differences by the estimates of local station audience in a regulated market. In Table 5, to establish the upper boundary, we present Park's predictions of the long-term local station audience diversion due to relaxed signal carriage rules. The same procedure as before is employed here, except that all calculations of audience diversion are made at the projected ultimate cable penetrations. ABC claims that the audience diversion predictions in Table 5 do "not include audience losses from increased cable penetration."[119] This statement is simply untrue. In the first simulation in Table 5, for example, market cable penetration is predicted to increase from 28 percent to 37 percent *as a result* of the relaxation of the signal carriage rules.

110. Several parties disagree with our calculations of the long-term local station audience diversion due to relaxed signal carriage rules from the Park study. For example, the Joint Motion contends that the audience

[114] Additional comments of Association of Independent Television Stations in Dockets 20988 and 21284, January 10, 1980, Attachment A.

[115] While this comparison is not perfectly valid because the independent station in Buffalo operates on a UHF frequency and the NAB–WEFA prediction is for a VHF station, the resulting disparity also is evident for other of our case studies. For example, while the VHF independent stations in Indianapolis and Seattle have much larger audience shares than the simulated 5 percent share in the NAB–WEFA example, they also are helped by cable television in their local markets.

[116] Park, *supra*.

[117] It should be noted that the conclusion of there being virtually no scenario which generates a 20 percent audience loss from relaxed signal carriage rules represents a summary interpretation of the Park audience model. That is, it accepts the estimates of audience derived from Park's estimation of an "attractiveness index" for various types of television stations as correct. However, as documented throughout the *Reports in Docket 21284 and 20988*, and explained again below, we believe that Park's audience estimation technique results in an overstatement of the true impact of cable on local station audiences.

[118] We have analyzed each of these stations in our case study analysis, *infra*. ABC makes a similar point but includes a different list of stations. ABC lists, for example, WUHQ, Battle Creek, Michigan as in a single station below top 100 market. The licensee of WUHQ in its comments, however, refers to the station as being in the 37th market.

[119] *Supra*, n. 89, at 19–20.

diversion estimates "should be based on both the increase in penetration *over time* and the impact of carrying the specified additional signals (including three distant network affiliates)." [120] (Emphasis shifted.) This is equivalent to the difference (in percentage terms) between local station audiences at current cable penetration levels with cable systems operating under the current signal carriage restrictions and local station audiences at projected ultimate cable penetration levels without signal carriage restrictions, holding all other factors constant.[121] Such an estimate includes audience diversion attributable to the growth of cable television that will occur irrespective of the elimination of the Commission's cable rules, because even if we were to retain our distant signal carriage rules, marketwide cable penetration would increase over the long run. However, audience diversion attributable to normal cable growth should not be added to that resulting from the elimination of our signal carriage restrictions in assessing the effect of the elimination of the Commission's rules. Or, in other words, the estimates for the long-term audience diversion *due to* relaxed signal carriage rules should *not* include audience diversion attributable to increases in cable penetration *not due to* relaxation of the signal carriage rules. Instead, the appropriate focus for policy purposes is the effect that a *change* in Commission *rules* will have on local station audiences. These estimates derived from the Park model are provided for the near term in Table 4 and for the long-term (i.e., in the future) in Table 5. The alternative method presented in the comments for displaying this data can also be used but is, we believe, a less appropriate focus. And, as we have indicated elsewhere, it clearly is not appropriate to hold all other factors constant when we can reasonably expect that there will be offsetting factors.

111. In summarizing the work undertaken on audience diversion due to cable television in this proceeding, we concluded that in all but the most extreme cases, the additional audience loss to local stations from the elimination of the signal carriage rules will be less than 10 percent in the foreseeable future. A number of parties, however, question the validity of this conclusion. We believe these comments reflect a misunderstanding of our conclusion. When properly interpreted, our conclusion is acknowledged to be an inference that is drawn from *all* work on audience diversion due to cable in this proceeding—NCTA, MPAA, NAB–WEFA, Park and the case studies—*after* the necessary adjustments are made to the studies.

112. Thus, for example, we summarized the Park model as predicting an incremental diversion of no more than 20 percent from relaxing the signal carriage rules. However, we provided numerous reasons and examples, aside from the chosen levels of ultimate marketwide cable penetration, that demonstrate that Park's estimates of audience diversion are overstated. Notable among these are: (1) the assumption that local stations obtain 100 percent of the non-cable local audience; (2) the assumption that the "attractiveness index" for each station does not vary with the number of signal choices. This assumption results in the estimated effect of a sixth imported independent station to be a substantial fraction of the estimated effect of the first; and (3) the failure to control for the fact that many cable systems carry more than the standard complement of distant signals permitted because of the "grandfathering" and "significantly viewed" provisions of our rules. These shortcomings of the Park model are not inconsequential. For example, Park predicts an overall audience loss due to cable of 42 to 46 percent in Palm Springs, California, under current marketplace conditions. We find the actual audience diversion in Palm Springs to be between 10 and 20 percent, depending on whether or not the increased television viewing in cable households is attributable to cable television service. Additionally, in summary form, the Park model predicts audience diversion from relaxing the signal carriage rules to be roughly 30 percent for markets comparable to Palm Springs (see Simulation 9, Table 5, *Report in Docket 21284).* Yet, most cable systems in one- and two-station markets already carry many distant signals because of the grandfathering provisions of our rules. For these reasons, in addition to the use of unreasonably high ultimate marketwide cable penetrations, it is clear that Park's estimates of the incremental audience diversion due to the elimination of the signal carriage rules are overstated.

113. Finally, the comment is made that we either ignored the NAB, MPAA, and INTV studies or went to great lengths to include material critical of them and included virtually no criticism of either the NCTA or Park audience loss studies. However, contrary to this allegation, the studies by NCTA and Park received substantial criticism in the *Report in Docket 21284* at paras. 101, 112 and 113, and notes 110, 121, and 126. Additional criticisms of the Park study are provided in the *Report in Docket 20988.* Thus, we believe, and our *Reports* give every indication, that each study and comment in this proceeding has received serious and extensive consideration. Where the results of one study are criticized, for example, the predicted effect of cable on independent stations in the NAB–WEFA study, we fully documented our reasons. Furthermore, ample opportunity has been provided to enable parties to comment not only upon our summary and analysis of the work submitted, but also on the case studies that were undertaken to scrutinize more carefully the allegations raised by the television broadcast industry. We also provided ample time for a second round of comments on the Park study, after minor adjustments were made by Park in response to industry comments. We believe our procedures in this proceeding extend well beyond the guidelines established by administrative procedural law.

114. But, what is most important to be aware of in assessing our determination of the incremental audience diversion from the elimination of our signal carriage rules is the fact that we have actual marketplace experience with local television stations operating in markets with extraordinarily high cable penetration and a large number of distant signals. In most of these cases, *total* audience diversion due to cable (including that from the large number of distant signals) is less than 10 percent. Furthermore, it is extremely rare to have the *total* audience diversion due to cable being greater than 20 percent, even in cases with extraordinarily high marketwide cable penetration and a large number of distant signals. Therefore, in conclusion, we are confident that the *incremental* audience diversion from eliminating the rules will be less than 10 percent in the foreseeable future for all but a very few cases.

[120] *Supra*, n. 92, at 21. The Joint Motion correctly identifies an error in the characterization of simulation 3 of the Park study as markets containing 1 rather than 2 UHF independents. This error has no bearing upon our conclusions reached from the Park study, however, because the estimated effect of cable on local UHF independent station audiences is unchanged by the correction.

[121] The contention of the Joint Motion implies that the calculation should be made assuming partial equilibrium conditions. That is, all of the other things that affect local station audience, except for cable, should be held constant. We have already pointed out, however, that other factors, such as population growth, almost always act to more than offset any audience losses attributable to cable television over time. *See* Section IV of the *Report in Docket 21284.*

115. *The Park Study.* As we pointed out earlier, the Park study done under contract to the Commission was one of several studies that we relied upon in arriving at the consensus effect of cable television on local station audiences. Since numerous criticisms of the Park study are provided in the comments, we contracted with Park to permit him an opportunity to respond to these criticisms. We have reviewed the comments on the Park study, his response to them, and the response of the parties to his response, and will discuss them as indicated below.

a. *Definition of local and distant signals.*

116. The Joint Motion questions the findings of the Commission by saying that "basic to the Economic Inquiry Report was acceptance of Dr. Rolla Park's definition of 'local' and 'distant' signals" and "that the use of [ADI] assignments in individual counties provides a distorted, skewed definition of 'local' and 'distant' stations."[122] Before addressing the merit of Park's definition, we would like to clarify, once again, that Park's study was not relied upon exclusively for our conclusion regarding audience impact. In fact, Park himself suggests that the studies be regarded as "complements rather than competitors." (*Economic Inquiry Report*, p. 755). As noted previously, we made use of four studies provided by outside parties in addition to our own staff analysis. We believe that the similarity of the results of these studies, when they are interpreted correctly, despite the use of different data and methodologies, lends credence to our reliance upon the general consensus derived from them.

117. As to the merit of Park's definition of local and distant signals, we find it acceptable. Despite the claim in the Joint Motion that "the Park methodology fails to distinguish between signals which are truly 'local' in a particular county and those which are accessible only to cable system subscribers," they fail to come up with a superior definition. In fact, an audience study submitted in this proceeding by one of the petitioners of the Joint Motion (MPAA) employed a definition of local signals which is strikingly similar to Park's.[123]

118. In an attempt to discredit Park's definition of local signals, the Joint Motion identifies several local commercial stations in Park's sample that have audience shares of zero in non-cable homes. The Joint Motion contends that a signal cannot be considered local to an area if it receives no off-the-air viewing. We, however, agree with Park in that "it is a fact of life that some stations get little or no audience in some parts of their own markets. One of the benefits of cable is that it improves reception so that these stations can attract some audience in previously dead areas."[124] Therefore, we do not believe that Park's assignments provide a distorted, skewed definition of local and distant stations. Nevertheless, we respect the contention that "although the precise impact of such errors cannot be determined [by ourselves] they are clearly significant in establishing the need for careful, objective review of the Park study in view of the Commission's reliance on the findings of this study."[125] To address this concern, Park excludes, in his revised analysis, all local stations in his sample that receive a zero share of non-cable viewing in their own market. Park's finding, after also making adjustments for other minor problems with the sample, is that "excluding these stations makes very little difference to the projections, and what difference there is, is usually in the direction of *less* diversion."[126] Thus, we believe that Park adequately has addressed the problem raised by the Joint Motion with respect to his definition of local and distant signals. Local stations with zero shares in non-cable households should remain in the sample when providing the preferred audience diversion estimates. Several parties, however, remain unsatisfied with Park's definition of local signals. MPAA, for example, advances several new problems with the definition. It identifies 13 additional counties in which a local station has a non-cable share ranging from 1 to 5 percent.[127] MPAA questions the reasonableness of these data, and, presumably, would prefer that these stations also be excluded from the analysis. We do not find this position surprising. MPAA questions the use of these data because it is precisely these stations which are helped by cable television. But, since a real effect that cable television has on some local stations is to increase the audience they receive in portions of their local markets, it would be invalid to attempt to eliminate this effect from the analysis. While there certainly can be different definitions of the term "local," and indeed there does not appear to be one definition for all purposes, we believe Park's definition to be a reasonable one which does not distort or skew his analysis and which is statistically acceptable.

b. *Day-parts.*

119. Of the five major audience studies in this proceeding, only two, NAB–WEFA and MPAA, provide detailed estimates of audience diversion from cable for all all day-parts (i.e., day, early fringe, prime time, late night). These two studies show that audience losses due to cable are greatest in the early fringe time period *(i.e.,* 4:30–7:30 p.m., Eastern Time, Monday–Friday). On the other hand, the studies by NCTA and Park, and the case studies undertaken by the Commission staff, focus primarily on the effect of cable on local station audiences over the entire day without any explicit adjustment or allowances for differences in viewer behavior in the four day-parts.

120. The broadcast industry's response to this treatment of audience diversion is that "the Commission's failure to consider Fringe Time audience losses in its major study of audience loss is a significant and prejudicial omission."[128] In an attempt to substantiate this claim, NAB submitted a modification of the previous work submitted by Charles River Associates concerning the audience/revenue relationship of television broadcast stations.[129] The results of this study suggest that the value of viewing households to local broadcast stations differs depending upon the day-part in which the viewing occurs. For example, CRA estimates that a viewing household

[122] *Supra*, n. 92, at 12–13. The Petitioners also note our reliance upon the Park study in the *Report in Docket 20988*. On page 34 of that Report we said "we are relying upon Park's estimates (as opposed to other work on cable impact) because the total audience impact of cable for various complements of local and distant signals is readily available in his work and because we found in the *Report in Docket 21284* that his results are broadly consistent with other studies of audience impact." This statement was included simply to point out that other studies could have been used, but the results would have been similar.

[123] In its study, MPAA states that "We define 'local stations' as those stations in an ADI which collectively achieve a minimum share of 75 percent of non-cable household viewing, on a Total Day Basis." (Emphasis omitted.) Motion Picture Association of America, Reply Comments, Docket 21284, June 20, 1978 at 4. In comparison, Park required that local stations attract at least 70 percent of the total off-the-air audience in the sample counties selected from their ADI.

[124] R. E. Park, "Audience Diversion Due to Cable Television: Response to Industry Comments," the Rand Corporation, Santa Monica, California, a Rand note prepared for the Federal Communications Commission, November 1979 at 16. Attached as Appendix B.

[125] *Supra*, n. 92, at 15.

[126] Appendix C, at 17.

[127] Motion Picture Association of America, Further Comments in Dockets 20988 and 21284, January 10, 1980. MPAA also questions the shift in local market assignments for some stations in the sample resulting from Park's revision to take network non-duplication into account. We address this criticism separately below.

[128] Joint Motion, *supra*, n. 92, at 19.

[129] National Association of Broadcasters, Reply Comments in Dockets 20988 and 21284, October 17, 1979.

is worth approximately 45 percent more revenue to a network affiliate during early fringe than prime time. In comments submitted by INTV, Roger Cooper and Associates also demonstrate a skewed audience/revenue relationship for the different day-parts of independent stations.[130] In light of this belief that "impact in terms of Fringe Time is critical,"[131] we requested Park to determine whether estimates of audience diversion from cable for the entire day would differ if "worked-up" using audience survey data provided by Arbitron for each day-part. We also hoped to answer the question of whether the skewed audience/revenue relationship of television broadcast stations, in conjunction with the larger impact of cable television on local station audiences during early fringe, would cause a significant difference between the audience effect and the revenue effect of cable television on local broadcast stations over the entire day.

121. The results of Park's analysis confirmed that the impact of cable television on local stations' audiences and revenues would not change significantly if the estimates were developed from audience and revenue data for each day-part. In fact, Park finds that "audience projections are not affected by taking into account differences in diversion among different periods of the day."[132] Park also finds that "any differences between [the] revenue projections and the audience projections . . . are no larger than one percentage point. The exception is projections for independents using Charles River weights."[133] However, Park finds that the "revenue projections using Roger Cooper weights are almost the same as the audience projections."[134] In comparing these two results, it should be noted that the difference between the audience effect and the revenue effect of cable on UHF independents over the entire day when using the CRA audience/revenue estimates is due, in large part, to the perverse results generated by the CRA model. The CRA model estimates that an independent station *loses* revenue for every household watching the station during late fringe and earns approximately *fifteen times more* revenue for each viewing household during early fringe than during prime time.[135] These findings defy both logic and our general understanding of the broadcast industry. Although we previously rejected the audience diversion projections of Roger Cooper and Associates because they were derived from the NAB–WEFA model, we are inclined to rely more heavily upon the estimates of the audience/revenue relationship supplied by Roger Cooper and Associates in assessing the revenue diversion from local independent stations because these estimates were derived independently from the NAB–WEFA model and do not contain the same flaws.[136] If the results of the Cooper study of the audience/revenue relationship for independent stations are relied upon, then the impact of cable television on the audiences and revenue of local broadcast stations that is estimated from data for the individual day-parts usually is equal to, and is never more than three percentage points greater than, the impact of cable television on local station audiences that is estimated from data for the entire day. This omission seems to us to be neither significant nor prejudicial. In summary, use of audience data for the entire day is adequate for estimating the impact of cable television on local station audiences. The effect of cable on station audiences calculated from data for the entire day will be equivalent roughly to the actual effect on station revenues, just as we have previously assumed.

c. *Non-duplication protection.*

122. The Commission's rules specify that cable systems must provide "local" network affiliated stations protection, upon request, from lower priority distant stations that are simultaneously broadcasting the identical network programs.[137] In estimating the effect of cable on local station audiences, Park did not distinguish whether the distant network signals imported by the cable systems in his sample were being blacked out in accordance with our non-duplication rules. In Dr. Franklin Fisher's analysis of the Park study, submitted in the Joint Motion in this proceeding, he concludes that "one cannot tell the extent to which the reported results depend on this. Both the total audience equation and the audience share equation may be affected in any or all of their coefficients to greater or lesser extent by this problem."[138] The Park model as revised, however, explicitly takes into account non-duplication afforded to local stations. After making the necessary adjustment for stations that get protection and for stations that are blacked out to provide protection, Park finds this adjustment "does not change the audience diversion projections very much from those in my earlier report."[139] Hence, the question raised concerning the extent to which the results previously reported by Park depend on the protection afforded by our non-duplication rules has been answered. There is no significant change.

123. Nevertheless, NAB contends that the Park revision fails to provide any "indication of the effect of carriage of multiple non-simultaneous duplicate network programs."[140] Similarly, we also are aware of the contention of some parties that our non-duplication rules would be rendered ineffective if network affiliated stations were permitted to be imported from other time zones. It should be noted, however, that not one party has presented any evidence concerning the effect of non-simultaneous duplicate network programs. Nevertheless, we are fortunate to already have considerable marketplace experience with non-simultaneous or pre-released network programming.[141] Analysis of these situations leads us to believe that the public will be served best without additional restrictions on viewer choices emanating from an expansion of our

[130] *See* n. 94, *supra.*

[131] Joint Motion, *supra.* n. 92, at 18.

[132] Attachment B, at 27.

[133] *Id.* at 22.

[134] *Id.* at 27.

[135] The finding of lost revenue during late fringe is not significantly different from zero, but the fact of an "unbiased" negative estimate remains.

[136] It should be noted that in NAB's reply to the Park revision, dated January 10, 1980, Dr. Fisher seems to argue that the CRA estimates are preferable because they are derived from an econometric study. Here, however, Roger Cooper and Associates have collected data *directly* from twelve independent stations. These stations provided the percentage distribution of their revenues over the various day-parts. With these data, there is no need for econometric modeling.

[137] For further clarification of these rules, *see* 47 CFR, Part 76, Subpart F.

[138] *Supra,* n. 92, Attachment at 15.

[139] *Supra,* n. 124, at 34. Park notes further that "if one further assumes that distant primary network signals are just as attractive as local affiliates, the projected diversion due to cable in one- and two-station markets is increased, but the projected incremental diversion due to relaxing present rules is decreased." For policy purposes, we are interested in the incremental effect of relaxing the rules. Thus, to be conservative, we prefer the estimation procedure which will overstate the incremental effect. The estimates using this procedure (See Appendix B, Tables 3 and 4) are relied upon when we assess the Park model. To this extent, Fisher's criticism of Park's further assumption is rendered moot.

[140] National Association of Broadcasters, Comments in Docket 20988 and 21284, January 10, 1980, at 15.

[141] In addition to our case study analyses in this proceeding of local television stations that are operating in competition with pre-released programming on cable television systems, see the *Second Report and Order in Docket 19995, 54 FCC 2d 229 (1975). See* also our *Report in Docket 20649, FCC 79–780 (1979).*

non-duplication rules. Finally, we must point out that these contentions address the question of the appropriate scope of our network non-duplication rules, and not our signal carriage rules. We have specifically and consistently stated that an analysis of the network non-duplication rules is beyond the scope of this proceeding.[142] We note that to the extent that parties wish to address the merits of the network non-duplication rules, a channel is available to them through petition for rulemaking.

124. Some parties also had difficulties with Park's methodology for adjusting non-duplication protection. For example, INTV asserts that "Dr. Park does not explain how he determined which stations receive non-duplication protection." [143] We note, however, that this explanation is provided by Park on page 52. [See Appendix C]. Additionally, MPAA finds "*many* instances where the blackout notations inserted by Park defy reason." [144] For example, MPAA questions "on what basis is KXII entitled to non-duplication protection [in county #17 (Bryan, Oklahoma)] while KTEN is not?" [145] This question reveals a lack of understanding of our non-duplication rules. Ardmore-Ada is a hyphenated market. The cable system in Bryan, Oklahoma is farther than 55 miles from station KTEN, Ada, but is within the 55 mile zone of protection of KXII, Ardmore. Thus KXII is entitled to protection and KTEN is not.[146]

125. MPAA also states that *"if we were asked to single out one case to illustrate the inaccuracy, unreasonableness, and prejudicial nature of the Park Study, we would rest our case on county #30* [Jackson, Alabama]." [147] (Emphasis in original.) We believe this statement demonstrates the lack of understanding with which MPAA has attacked the Park study. Therefore, we believe it useful to provide some extended discussion of the data for Jackson County. Park's designation of stations being either local or distant in his original study in this proceeding was determined by Area of Dominant Influence or ADI. Stations assigned by the Arbitron audience rating service to an ADI were considered local in all areas of that ADI. However, to avoid including counties near the fringes of an ADI, Park excluded counties from his sample in which the local stations received less that 70 percent of the non-cable viewing. Although MPAA did not provide an alternative method for defining local signals, and in its major study of audience diversion in this proceeding it employed a definition of local signals which is very similar to Park's,[148] MPAA found Park's definition to be unacceptable. Presumably, MPAA would prefer Park to have restricted the local area of a station to those areas which are even closer to the community of license. Interestingly, Park's revision of his definition of a local signal to account for non-duplication protection *did* have this effect in some cases. One such case is county #30 (Jackson, Alabama). Originally, Park considered the stations operating in Chattanooga, Tennessee to be local in Jackson County, Alabama because of the county's assignment to the Chattanooga ADI. However, since the cable system in Jackson County is within the 35 mile zone of the station in Huntsville, Alabama and these stations receive non-duplication protection against the Chattanooga stations, Park has reclassified the Huntsville stations as the local signals for this county. But, as it turns out, cable television increases substantially the audience of the Huntsville stations in Jackson County. Therefore, for this case, MPAA argues explicitly that the stations farther away from Jackson County should be designated the local stations for this county. While it demonstrates the difficulty of finding perfect definitions of local and distant signals, we find MPAA's conclusion with respect to the definitions used to be not only unreasonable, but inconsistent with their previous criticisms of the Park study.[149] In summary, we reject the commenting parties' criticisms of both Park's definition of local signals and his procedure for dealing with non-duplication protection.

126. Additionally, in its comments on the Park revision, INTV argues that the revisions altered the results significantly.[150] This argument also is without merit. Park summarizes his revision by saying "although the new estimates differ from the earlier ones in a number of ways, the resulting audience diversion projections are changed very little." [151] The appropriate comparisons are Tables 7 and 8 in the original report and Tables 3 and 4 in the revision, respectively. The difference is no greater than three percentage points for any of the simulations.

d. *Total Audience Model.*

127. The Park study estimates a total audience model and an audience share model to generate audience diversion projections. The total audience model is formulated to test the hypothesis that the increased viewing in cable versus non-cable homes is attributable to the tendency of heavier viewers to subscribe to cable television (*i.e.*, the self-selection hypothesis. If the hypothesis is true, the greater amount of viewing observed in cable versus non-cable homes is not attributable to cable television, and therefore cable has the potential to divert more audience from local stations. After testing this hypothesis, however, Park concludes that he has "not succeeded in settling the question of whether or not cable should get the credit for higher viewing in cable homes." [152] Faced with this limitation, Park proceeds to provide a range of estimates of audience diversion from cable television by making the alternative assumptions that cable gets all of and none of the credit for the higher viewing in cable homes.[153] However, Park finds that "the question of which assumption is correct (or where, in between, the truth lies), although interesting, turns out not to be too important" because "the range of values calculated by using the extreme assumptions is quite narrow, usually only two of three percentage points wide." [154]

128. Upon reviewing the Park study, Dr. Fisher finds "Park's total audience equations * * * to be very unreliable." [155] Fisher also finds that "the obviously unsatisfactory audience equation can make a substantial difference [in projections of audience diversion]." [156] As it turns out, however, the example that Fisher uses in attempting to demonstrate this substantial difference is arithmetically in error.[157] Thus, we find Fisher's criticism to be without merit.

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[142] *See, Notice of Proposed Rulemaking in Dockets 21284 and 20988*, para. 5.

[143] Additional comments of the Association of Independent Television Stations, Inc., filed in Dockets 20988 and 21284, January 10, 1980 at 4.

[144] Further comments of Motion Picture Association of America, Inc., filed in Dockets 20988 and 21284, January 10, 1980 at 9.

[145] *Id.* at 9.

[146] *See* 47 CFR, Part 76, Subpart F, Appendix C to the *First Report and Order in Docket 19995*, 52 FCC 2d 519 (1957) contains an explanation of the rules in this type of situation in diagram form.

[147] *Id.* at 10.

[148] See note 123 *supra*.

[149] Previously, for example, MPAA argued in the Joint Motion (*supra*, at n. 92) that Park disregarded the distance between the local stations and the cable systems in the sample. It was noted that the Grade B contour of KXON is at least 100 miles short of Brown County (which Park considered local to KXON).

[150] *Supra*, at n. 143, at 6–7.

[151] Park, Appendix A, *Report in Docket 21284* at 3.

[152] Park, Appendix A, *Report in Docket 21284* at 23.

[153] This procedure also was employed in our detailed case study analysis in the *Report in Docket 21284*.

[154] *Supra*, n. 124, at 23.

[155] *Supra*, n. 92 at 2.

[156] *Id.* at 11.

[157] *See* Park, *supra*, n. 124, at 28.

129. To summarize our position on this question, we continue to believe that "we can do no better than provide upper and lower bounds on the magnitude of audience diversion which has resulted from the presence of cable." [158] Hence, we rely upon both share and rating data (in a procedure identical to Park's) to reach our conclusions. For example, in our grandfathered market analysis, we found that the broadcast stations in the San Deigo television market lose approximately 1 to 4 percent of their potential audience because of cable television.[159] That is, they lose one percent if the greater amount of viewing in cable homes is attributable to cable television; four percent, if not.

e. *Signal Reception.*

130. New data on the television viewing of cable and non-cable households are available for individual counties. These data provide a substantial improvement over previously available marketwide viewing data because signal reception differences between households within each unit of observation (i.e., the county as opposed to the entire market) are reduced significantly. Even so, Dr. Fisher argues that "some stations cannot be seen in all of the county from which the data come" which "will directly affect the audience diversion estimates." [160] Fisher contends that "the results can be substantially affected." [161] We believe Park's decision on the point to be entirely reasonable. For our purposes, however, it is sufficient to note that while the Park and NAB studies choose different methods for dealing with reception differences across counties, they come out with similar results, suggesting that adjusting for receivability does *not* affect the results substantially. This conclusion is given further support by comparison of the results of the previous studies that employed marketwide viewing data, the current studies that employ county wide viewing data without adjusting for reception quality, and the study by Video Probe Index [162] which restricts the areas from which viewing data are drawn to particular communities. Clearly, the reception quality of the signals viewed off-the-air differs significantly between the households comprising each unit of observation (i.e., market, county, community) in these studies. Yet, here again, the fact that the result of these studies are broadly consistent leads us to conclude that adjusting for receivability in a study of audience behavior is not very important to the "bottom line" estimates. Hence, we find Fisher's criticism to be overstated and, as a result, we do not believe it is necessary for Park to account for receivability in his study.

131. INTV attempts to take the signal reception argument one step further by contending that "any proper measurement of audience impact due to importation of distant signals must assume equality of reception in cable and non-cable homes in order to eliminate improvement in reception as a variable." [163] We believe this contention is unreasonable. An important effect that cable television has on local stations is an improvement in their signal reception and an expansion in their coverage area. For example, in our analysis of independent stations that operate in markets with high cable penetration,[164] we found that the UHF independent stations analyzed receive audience gains from cable television within their own ADI, despite the carriage of at least 5 distant signals. Therefore, to eliminate improvement in reception is to eliminate an important effect of cable television on local station audiences from the analysis. Hence, we reject INTV's contention.

f. *The Sample.*

132. The sample for Park's study of audience behavior between cable and non-cable households was selected by the Commission staff. The primary criterion is selecting the sample was that each unit of observation (*i.e.*, each county) have consistent viewing options on cable. In this manner, the relationship between the availability of distant signals and viewer behavior could be monitored carefully. To insure this consistency of viewing options on cable, the Commission staff limited the samples to all those counties that contain only one cable system. Additionally, it was required that viewing data be available for both cable and non-cable households in each county. Finally, the sample was restricted further by excluding those cable systems (*i.e.*, counties) that provide syndicated exclusivity protection to local broadcast stations.[165] Upon receiving a sample of 166 counties from the Commission, Park excluded an additional forty-five counties located near the fringe of their markets. Local stations were required to attract at least 70 percent and actually received an average of 92 percent of the total off-the-air audience sample counties.

133. Several parties have questioned the adequacy and representativeness of the Park sample. For example, Fisher concludes that "the gain in 'cleanliness' [from restricting the sample to counties with only a single cable system] does not seem worth the sacrifice of large amounts of information and of the representativeness of the sample of counties." [166] We do not believe that the choice between selecting a sample for its cleanliness or its representativeness was an unreasonable one. In reviewing the signal carriage of cable systems for our case study analysis in the *Report in Docket 21284,* we found frequent and significant differences in the signal carriage of cable systems located within the same county. Therefore, one also may argue that the other audience studies in this proceeding suffer because of a lack in cleanliness in their samples. Indeed, if Park had chosen to expand his sample at the cost of cleanliness, the commenting parties just as easily could have criticized his judgment. It is apparent to us that there is no perfect solution to the problem. This is typical of all econometric work. Of primary importance, however, is the fact that studies employing different selection criteria for their samples come out with generally consistent results. This provides us reason to believe that the selection criteria for choosing a sample (if not purposely biased) will not influence significantly the magnitude or direction of the estimates. From our perspective of viewing all of the studies on audience diversion in the record, the cleanliness of the data for the Park study is worth its costs.

134. The Park sample also has been criticized for not having enough local independents. Park does not deny this criticism, nor the criticism that his estimation procedure will fail to properly estimate diversion from local independents. He states that "the question of whether or not independents lose a larger share of their audience than do affiliates is probably unanswerable by statistical methods until we have accumulated more experience with cable systems carrying

[158] *Report in Docket 21284* at n. 136.

[159] *See* the *Report in Docket 21284* at Table 2–3 of Section IV.

[160] *Supra,* at n. 92, at 15, 17.

[161] *Supra,* at n. 92, at 19.

[162] See National Cable Television Association, Comments in Docket 21284, March 15, 1978, Exhibit D.

[163] *Supura,* n. 113, at 18.

[164] *Reports in Docket 21284,* Section IV.

[165] While this degree of control was not interjected explicitly into the other studies of audience diversion in this proceeding, all of the studies are roughly indicative of a marketplace functioning without syndicated exclusivity protection. (*See* the *Report in Docket 20988* at para. 56.) Thus, to the extent that distant signals do not affect adversely the television service provided by local broadcast stations, this implies that the syndicated exclusivity rules are not necessary to stem adverse consequences to consumers emanating from additional competition to local broadcast stations.

[166] *Supra,* n. 92, at 19.

distant signals into large markets." [167] As it turns out then, both the NAB–WEFA and Park models suffer from data limitations and methodological problems in assessing the incremental effect of additional distant independent signals on local independent station audiences. Hence, our summary of the results of these studies for markets containing independent stations is restricted to the provision of only one estimate of impact for the entire market. Additionally, it should be noted that for policy purposes, we can rely more confidently on the results of our case study analysis, which reflects actual marketplace experience, in assessing the effect of cable television on independent stations than on the NAB–WEFA and Park studies.

135. Finally, in its response to the Park revision, MPAA alleges that numerous problems exist with the data for the Park study. For example, MPAA states that "in our opinion, the Park study—as initially presented and as modified—is a classic example of the failure to recognize that the conclusions arrived at from an analysis of insignificant, unreliable data are also insignificant and unreliable. The underlying problem, we believe, is the very small number of valid diaries in the Arbitron samples for the vast majority of the counties used by Park for this analysis." [168] We believe this statement reveals a lack of appreciation and understanding of statistical analysis. At first blush, we note that the number of diaries in Park's sample exceeds substantially the number of diaries that A. C. Nielsen collects for its weekly survey of total nationwide viewing patterns. Thus, without elaborate explanation, it should be obvious that "smallness" of sample size for statistical estimation does not imply inadequacy of sample size.[169] MPAA also argues that the size of the sample can affect Park's findings. However, here again, MPAA fails to consider a basic tenet of statistical analysis. That is, there always is some variation introduced by taking a sample of an entire population. But sample size affects only the statistical significance of the estimates, and not the expected value of the estimates.[170] Indeed, we note that despite the alleged scarcity of in-tab diaries, Park's estimate coefficients are estimated quite precisely in a statistical sense. Finally, we note that for sample size to affect Park's results significantly, there must be a systematic bias in measurement by Arbitron at varying sample sizes. We are not aware of any such bias.

136. MPAA also questions the accuracy of the data provided by Arbitron. For example, MPAA contends that the "inconsistencies between 'shares' and 'Net Weekly Circulation' data are so substantial and so numerous, we believe that *all* NWC figures should be eliminated from the econometric manipulation which are basic to the Park study." [171] We note, however, that Park does not employ NWC data for any of his estimates. Furthermore, given the intensive scrutiny that the data used by Park has received, we believe that the cleanliness of this data far exceeds that of most econometric analyses. Therefore, we find frivolous MPAA's "conviction that the Park study is science fiction." [172] We note, once again, that we believe our "consensus effect" is a sound conclusion derived from *all* of the available evidence *and* from the careful analysis and interpretation of that evidence.

137. *Additional Miscellaneous Comments.* A number of additional comments relating in part to the econometric studies and in part more generally to our *Economic Inquiry Report* were also received. For example, ABC criticizes us and the Park study for "assum[ing] the same availability of program product in the future, despite evidence that the siphoning of major sports and other highly attractive program product from television broadcasting to CATV is highly realistic and would greatly affect projected audience diversion and resultant revenue losses." [173] We are not aware of any persuasive "evidence" of this shift in program product taking place. And it should be noted that even if this phenomenon were to occur, it is unlikely that Park's audience diversion estimates would be affected substantially, for if it were to occur, it would not affect materially the relative attractiveness of local broadcast stations vis-a-vis distant broadcast stations because all broadcast stations presumably would be subject to the same programming shifts. The relative attractiveness of distant versus local stations is the relevant focus of the Park study. In addition, since no evidence has been presented to us which suggests that siphoning will occur, we do not believe it is appropriate for us to factor any alleged adverse effect of siphoning into our analysis of station profitability.[174] Others suggest that loosening of restrictions on broadcast signal carriage will result in decreased carriage of nonbroadcast programming and an overall decrease in diversity of program content. We find no evidence to support this view.

138. In our *Notice of Proposed Rulemaking in Dockets 21284 and 20988,* we addressed a petition from the National Association of Broadcasters requesting the Commission to commence rulemaking leading toward the adoption of rules designed to insure that local television broadcast service is not harmed by the development of superstations. We denied that petition because of the lack of any evidence that a regulatory problem exists or is being fomented. Nevertheless, INTV, in its latest comments in this proceeding, claims that "satellite distribution of signals has created unforeseen inequities that mandate retention of the rules." [175] INTV claims that "independent stations, and particularly UHF independents, are disproportionately sensitive to audience loss." [176] INTV also maintains that "satellite carriage often impacts to the superstation's detriment as well." [177] However, as in NAB's petition, the facts supporting these arguments are either missing or incorrect. For example, one of the most significant findings of the *Report in Docket 21284* was that UHF independents frequently are *helped* by cable in their local markets, even in instances where many distant signals are carried by cable. Thus if satellite carriage increases the demand for cable television it may help UHF stations. Additionally, our conclusion for audience diversion due to cable applies to the importation of television signals currently distributed by satellite as well as by other means. It is the number and

[167] *Supra,* n. 124, at 38.

[168] Further comments of Motion Picture Association of America, January 10, 1980, Attachment at 1.

[169] MPAA notes that Park's sample includes 79 counties for which there are less than 50 in-tab diaries. In an attempt to discredit the Park study, it compares Park's sample composition which is based on Arbitron's sampling procedures for countywide viewing to the procedure employed by A. C. Nielsen for its marketwide viewing surveys. It should be noted that these Nielsen surveys are not equivalent to the Nielsen nationwide survey mentioned above. The appropriate sampling procedure for a survey will differ depending upon the population that one is trying to estimate. Indeed, MPAA's comparison of Nielsen's procedure for estimating marketwide viewing to Arbitron's procedure for estimating countywide viewing is invalid. For example, Nielsen does not report audience data for any market if the number of in-tab diaries is below 50 because such a response signifies that a relatively small proportion of the households in the survey have responded. However, this is not necessarily, nor even likely to be, the case if less than 50 diaries are returned for a county.

[170] *See, e.g.,* Mood, Graybill and Boes, *Introduction to the Theory of Statistics* (1974).

[171] *Supra,* n. 168, Attachment at 6.

[172] *Id.* at 5.

[173] *Supra,* n. 89, at 22.

[174] See *Home Box Office, Inc. v. FCC, supra,* at 42.

[175] *Supra,* n. 113, at 54.

[176] *Id.* at 54–55.

[177] *Id. at 56.*

type of distant signals that affect local station audiences and not the means by which they are imported. Furthermore, in the *Report in Docket 20988*, we concluded that it is likely that superstations will receive some measure of compensation for the audiences they attract in distant communities. Thus, satellite carriage may be beneficial, rather than detrimental, to superstations. Nevertheless, it is the public interest that is paramount here, and not financial well-being of any one particular kind of station.[178] Here again, no facts have been presented which suggest the public will be disserved by the satellite carriage of programming.

139. NAB criticizes the Commission for "its failure to consider numerous and related factors which may compound the adverse impact on broadcast service—namely, audience fragmentation due to pay television, reallocation of advertising expenditures from broadcast to cable television, and audience and advertising reduction which may result from such services as satellite to home broadcasting." [179] This proceeding addresses the effect of the distant signal carriage and syndicated exclusivity rules on television service to the public. Our methodological approach has been to ascertain the amount of audience diversion that will occur in the absence of the rules and to determine whether these losses, if any, will affect the service from television broadcast outlets. With this in mind, pay cable and other services emerging in the market are relevant to this proceeding only to the extent that they will affect television broadcast profitability. At this point we are lacking any evidence that they do.[180]

140. In addition, cable systems do not compete significantly in advertising markets. For example, even though almost one out of five households in the nation subscribed to cable television, advertising revenues for the cable television industry were less than one tenth of one percent of those of the television broadcast industry in 1978. Thus, we do not envision that the growth of cable television will compound any adverse impact that cable may have on television stations' profits by siphoning advertising revenues from broadcast stations for cable systems.

141. NAB also alleges that "the Commission has made no attempt to consider how * * * carriage of specialty stations carrying substantial amounts of syndicated programming will increase the degree of program duplication dramatically." [181] However, as noted in para. 63 of the *Report in Docket 21284*, we previously had determined that the cable carriage of specialty stations would contribute to the welfare of consumers, while not adversely affecting the ability of commerical broadcasters to provide a satisfactory level of service to the public. Moreover, our conclusion in this proceeding is that the unregulated cable carriage of syndicated programming also will act to promote the public interest. Nothing has been presented here to suggest that our decision in 1977 to permit unlimited cable carriage of specialty stations was incorrect.[182]

142. Capital City Television *et al.* finds it "curious that the Commission has so far shown little regard for these smaller market broadcasters, and instead has focused in its conclusions almost exclusively on impact on big city television stations." However, to the contrary, the work on audience diversion due to cable in this proceeding has focused in large measure on small market stations. For example, Dr. Fisher and MPAA categorize the Park sample as being geared mostly to smaller markets. NCTA analyzed all markets with greater than 33 percent cable penetration. The majority of these markets rank below one hundred. NAB–WEFA and MPAA, by analyzing most if not all counties with greater than 10 percent cable penetration, also incorporate a substantial amount of information on audience diversion due to cable in smaller television markets in their studies. Lastly, we focused on smaller television markets throughout our case study analysis. Our conclusions are directed appropriately to both big city and small market television stations.

143. One commenting party, WBOC–TV, went so far as to request "a replication study of the statistical analysis contained in the 'Economic Inquiry,' using data for the years in question supplied by Arbitron's competitor, A. C. Nielsen, Inc." [183] Replication of the statistical analysis undertaken to date in this proceeding easily could add more than another year to the termination date of this proceeding. The gain in accuracy that *might* occur certainly is not required at this point. After almost three years of study, we have been presented with no good reason to believe that Arbitron data is less reliable than Nielson data, since the estimates supplied therein are in statistical tolerance of each other. Thus, we do not find it desirable to further delay the conclusion of this proceeding in order that a very small degree of confidence might be added to its conclusions.

144. *Summary.* Our *Report in Docket 21284* concluded that the incremental audience losses to local broadcast stations from eliminating the signal carriage rules will be less than 10 percent in the foreseeable future except for the most extreme cases. This conclusion was drawn from all of the substantive work on audience diversion that was undertaken for this proceeding—NCTA, MPAA, NAB–WEFA, Park and the case studies—after necessary adjustments were made to the studies. It is important to note that no new study has been submitted which suggests this conclusion is incorrect. In fact, the majority of comments on the *Report in Docket 21284* consist of criticisms of only one of the five audience studies—the Park study. However, in the *Report*, we characterized the Park Study as overstating the effect of cable television on local station audiences and we provided numerous reasons and examples demonstrating the validity of this characterization. Our analysis essentially has been ignored. Instead, the commenting parties have submitted a large number of criticisms of the Park study attempting to establish that it understates audience diversion due to cable. These criticisms address what we have shown in this *Report and Order* to be minor problems that do not significantly affect Park's results. Our belief remains that Park overestimates the effect of cable television on local television station audiences.

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[178] We are aware, for example, that INTV requests the retention of the rule because of "unforeseen inequities." More specifically, competition from cable is said to be more keen for independent stations than for network affiliates. However, we are aware of no statutory mandate that requires us to consider the equities involved in shifting profits among firms. In fact, the U.S. Court of Appeals, District of Columbia Circuit in *Carroll Broadcasting Co. v. FCC*, 258 F. 2d 440 (D.C. Cir. 1958) concludes that "the question whether a station makes $5,000, or $10,000 or $50,000 is a matter in which the public has no interest so long as service is not adversely affected." It is clear that our mandate is to best judge that which is in the public interest. The criteria we employ to make this judgment are described in the first section of this *Report and Order*.

[179] *Supra*, n. 93, at 111.

[180] We are aware that some parties have submitted partial summaries of the data in the "Nielsen Pay Cable Report." We are unable to ascertain the effect of pay cable television on local station audiences from the data submitted. However, other studies suggest that pay cable will not affect significantly the audiences of local television stations. *See* the survey by Video Probe Index, *supra*, n. 162. *See* also *Stations KMIR-TV and KPLM-TV*, 66 FCC 2d 576 at 582–3 (1977).

[181] *Supra*, n. 93, at 143.

[182] *See* the *First Report and Order in Docket 20553*. 58 FCC 2d 442 (1976).

[183] WBOC–TV, Comments in Dockets 20988 and 21284, September 17, 1979 at 4.

145. Additionally, several parties have attempted to obfuscate our criticisms and adjustments to the NAB–WEFA model. However, the issue here is clear and simple. WEFA's employment of a "logit" specification for its structural equations causes an inherent bias in their results because small independent stations must be predicted by the model to suffer greater percentage losses in audience from distant signals than larger stations, regardless of what the data actually may indicate. The responses to our criticisms of the NAB–WEFA model have acted to confirm, rather than contradict, this conclusion. We also have provided numerous reasons and examples demonstrating that the NAB–WEFA predictions of audiences losses to independent stations from cable television are overstated.

146. Finally, and most importantly, our detailed analysis of "grandfathered" markets and "worst case" broadcast stations has received criticism relating only to the procedure employed to determine audience diversion. However, not only did the commenting parties fail to show how our results would be changed with different methodology, but also we have found that these criticisms are invalid. (See discussion below.)

147. In summary, we believe our analysis demonstrates convincingly that (1) the data relied upon describe accurately the cable television and television broadcast industries; (2) the methodology employed is valid and has been applied properly; and (3) the conclusions are derived correctly from the available information.

148. *The Impact of Distant Signals on Public Service Programming by Local Stations.* The Commission has long been concerned about the effect the presence of cable television might have on the ability of local stations to fulfill their obligations to serve the public by providing local programming options to their viewers. Our concern has been that if cable succeeds in diverting viewers from watching the signals of local stations to those of distant ones, the resulting decline in revenues of the local stations might force these stations to reduce the public service programming that they provide.

149. Traditionally, we have attached particular importance to local public service programming because of the effect it may have in shaping the attitudes and values of citizens, in making the electorate more informed and responsible, and in contributing to greater understanding and respect among different racial and ethnic groups. Since the social benefits of this programming exceed the private benefits of the actual viewers, we have sought to assure that the public will capture these benefits and, thus, for example, the Commission has recognized the necessity for licensees to "devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest to the community served by the particular station." *Fairness Report,* 48 FCC 2d 1, 2 (1974) quoting *Report on Editoralizing,* 13 FCC 1246, 1249 (1949).

150. In this proceeding, we are interested in determining what effect the carriage of distant signals has on the ability and propensity of local broadcast stations to provide local public service programming. To measure this effect precisely would require an elaborate set of information. Unfortunately, however, a fully descriptive or accurate set of the information necessary for this determination is unavailable. Most importantly, the expense data collected from television licensees by the Commission suffer from a lack of uniformity in accounting policies.[184] Thus, the reported results for station expenses and profits cannot be relied upon in a cross-sectional econometric analysis that is undertaken for policy purposes.[185]

151. Faced with these data limitations, studies have attempted to estimate statistically the relationship between station revenue and the amount of local programming broadcast by television stations. In our *Report,* we relied most heavily on a study performed by the Commission's Broadcast Bureau which utilizes the most recent data.[186] The Broadcast Bureau finds—after accounting for such factors as the presence or absence of network affiliation, whether a station is VHF or UFH, and the number of stations competing in the market—that each additional $1 million in station revenue is associated, on average, with about 14 minutes of additional local programming per week. This finding also is supported by the studies of Drs. Crandall and Park appearing in the literature.[187] It is important to note, however, that the Broadcast Bureau has taken care to emphasize that utilizing such a model to predict the effect of changes in revenue on the quantity of local programming may not produce very reliable estimates. Since the result is derived from comparisons across stations, it is not purely applicable to the effect of a change in an individual station's revenue. Accordingly, our use of the model has been limited to providing only a rough indication of the magnitude of the relationship between revenue and public service programming. Nevertheless, the results of the model suggest that changes in revenue have small effect on the amount of public service programming that television stations broadcast.

152. To provide a rough estimate of the effect of cable television on the amount of public service programming broadcast by local stations, we applied the results of the Broadcast Bureau model to our findings in the "Grandfathered Market Analysis" of the *Report in Docket 21284.* The largest effect from cable television that we estimated for an individual station in the six grandfathered markets was a reduction in local programming of 5 minutes per week. Again, we must emphasize that this estimate should be considered only a rough approximation. Nevertheless, we believe our conclusion is correct that the effect of cable television on the amount of public service programming broadcast by television stations generally is minimal. This result is strongly supported by our other findings in the case study analysis that 1) the profits generally earned by television broadcasters enable them more than adequately to provide public service programming and 2) cable television plays a very small part in determining station profits.

153. Our analysis of the effect of cable television on the public service programming provided by local broadcast stations has not received substantial criticism. In fact, there virtually is no debate in the record concerning our finding of the effect of cable on the *amount* of public service programming by local stations. The only

[184] *See, e.g.,* R. E. Park, *et al.* "Projecting the Growth of Television Broadcasting: Implications for Spectrum Use," prepared for the Federal Communications Commission, 1976, p. 119. The authors suggest that the substantial differentials in the reported financial results for similarly situated stations, in addition to varying accounting methods, might also be attributable to different goals and performance by station management.

[185] The reference to cross-sectional analysis is mentioned here to signify that the problem exists most severely when comparing the results of different stations. It should be noted that we rely upon the reported operating income of television stations in our case study analysis. In this analysis, however, we are comparing the results of the same station over time. This approach minimizes variations attributable to a lack of uniformity in accounting policies or management performance.

[186] FCC Broadcast Bureau, "Television Public Service Programming and Audience Diversion: An Economic Analysis" in *Report on Information Developed under the Cable Economic Inquiry,* Docket 21284, April 18, 1979.

[187] *See* Rolla Edward Park, "Television Station Performance Revenues," *Educational Broadcasting Review,* June 1971; and Robert W. Crandall, "Regulation of Television Broadcast: How Costly is the Public Interest?", *Regulation,* Jan./Feb. 1978.

criticism of our finding is that the language in the *Notice of Proposed Rulemaking in Dockets 21284 and 20988* that "substantial increases in broadcast licensee revenues produced little increase in local and merit programming, and coversely, substantial decreases in licensee revenues produce little decrease in such programming"[188] is too strong in light of our statement in the *Report in Docket 21284* that the "results should be regarded as no more than rough approximations."[189] We do not believe, however, that these two statements are inconsistent. For example, we would project that a $500,000 reduction in annual station revenue would reduce local programming 7 minutes per week. Thus a substantial decrease in station revenue would have a minimal effect on local programming. But more importantly, while we only can conclude the 7 minute estimate is a rough approximation, we can conclude with much more confidence that the effect is less than 15 minutes per week.[190] Thus, we believe our statement in the *Notice* that additional competition from cable television would not cause the supply of local and merit programming to diminish materially is valid.

154. The most serious criticisms of our analysis of the effect of cable television on the public service programming provided by local stations are the allegations of what it failed to consider. For example, NAB says, it "cannot concur that the Commission should look only to local or 'merit' programming. The service a station provides encompasses a wide variety of program types."[191] Hence, NAB contends that "a station able to allocate more money to programming can purchase better programming as well as produce better programming."[192] Similarly, because program expenditures are correlated positively to revenues, NBC argues that revenues are correlated significantly to program quality and diversity. For the same reason, ABC apparently would like us to consider the findings of the Broadcast Bureau study that local programming expenditures are related strongly to station revenues. NAB synthesizes this line of reasoning by arguing that the "importation of additional distant signals will have a negative effect on the quantity and quality of broadcast service available to the entire viewing public."[193] Before proceeding, we note that neither the NAB, nor any other party, has offered any reason for rejecting our estimate of the effect of cable television on the *quantity* of local programming provided by television broadcast stations. Additionally, we believe that NAB's argument, along with those of the other commentators addressing the effect of cable television on the quality of television programming, demonstrates a misunderstanding of the economic theory and evidence adduced in this proceeding. For example, economic theory suggests that broadcasters may actually increase expenditures for programming in response to increased competition from cable television (because it may be more profitable to do so rather than to reduce expenditures). Thus there is no reason for us to expect that the quality of television programming will decline necessarily because of additional competition. In fact, when the evidence is interpreted correctly,[194] the opposite result appears to be true in some circumstances. For example, the empirical estimates of the Broadcast Bureau study provide some evidence that the entry of an independent station into a market will cause an increase in program expenditures for the network affiliates.[195] Therefore, we find the industry's contention that additional distant signals will necessarily reduce the quality of local programming to be without merit. In any event, no evidence has been presented or uncovered in this proceeding that shows that cable television reduces or will reduce the quality of television programming broadcast by local television stations.

155. Finally, ABC has cited the Broadcast Bureau study for saying that the use of minutes of local programming may suffer from the fact that this data represents minutes of both remunerative and nonremunerative programming. However, this data limitation is of no consequence to our results because we conclude that cable television has no material adverse effect on the total amount of local programming broadcast by local stations. If cable forces a shift from nonremunerative local programming to remunerative local programming, we do not envision this effect redounding to the detriment of consumers.

156. In summary, we find that cable television does not affect materially the quantity of local programming broadcast by local television stations. Additionally, we find any claims of adverse impact from cable on the quality of television programming to be unsupported both by economic theory and by socioeconomic evidence.

157. In many respects the most important findings from our *Economic Inquiry* came from our case studies of actual markets facing cable competition. Our *Report in Docket 21284* focused upon cases for which it was perceived that cable television would have the greatest potential to affect the viability of broadcast stations: (1) grandfathered markets which are characterized by high cable penetration and a large number of distant signals; (2) independent television stations in markets with significant cable penetration and where cable systems carry a large number of distant signals and (3) "worst case" stations or markets which have alleged they are harmed by cable television.[196] Comments were filed with the Commission on behalf of 78 broadcast stations and markets—including many independent stations, UHF stations, one-station markets and two-station markets. We considered these to represent the "worst" cases since they were the stations/markets which the industry chose to call to our attention. These case study analyses formed the backbone of our finding of the effect of distant signals on the performance of local broadcasters because most of the stations analyzed were operating in an essentially unregulated marketplace.

[188] *Supra*, at para. 60.

[189] *Supra*, at para. 138.

[190] It should be noted that the effect of revenues on local program minutes is measured very precisely in a statistical sense by the Broadcast Bureau study to be 14 minutes per week for each additional million dollars in revenues. The F statistic (a measure of variance) for the coefficient of revenue is 32.96. The standard error is about 2 minutes per week. Thus, for the example above, we can attach a 99 percent level of confidence to the statement that the effect would be no larger than 15 minutes per week, assuming the model is specified properly.

[191] *Supra*, n. 93, at 121.

[192] *1 Id.*

[193] *Id.* at 118.

[194] The evidence presented by NAB demonstrating that the revenue and expenses of broadcast stations are positively correlated by market size cannot be employed to derive any conclusions concerning the effect of additional competition on the magnitude or direction of the values of these variables. The suggestion that revenues and expenditures both will necessarily decrease in response to additional competition ignores the simultaneous interrelationship between audience, revenue, and program expenditures in determining the profit maximizing selection of programming. Revenues and program expenditures actually may increase in response to additional competition due to a new program selection mix. Additionally, NAB ignores the fact that broadcasters operating in smaller markets pay less for the *same* programs that are purchased in the larger markets. Hence, comparison of program expenditures across markets is not necessarily a good method for comparing program quality.

[195] It should be noted, however, that we cannot place much reliance on this estimate because of the inadequacy of the data. Nevertheless, this finding is supported both theoretically and empirically by the analysis of Park, *et. al., supra*, n. 184 at Appendix F.

[196] *Report in Docket 21284, supra*, at Section IV and Appendix B.

We found no evidence of debilitating economic competition due to cable television. It was our intent to supplement the more theoretical findings of earlier scholarly studies and our own econometric work with actual evidence from case studies.

158. Six broadcast markets were selected for detailed analysis based upon their high levels of cable penetration and the availability of a large number of distant signals due to the grandfathering provisions of our rules.[197] These markets provide an excellent indication of the effect of cable television on local station audiences and finances in the absence of distance signal restrictions on cable television. The markets ranged in size from the eighteenth largest (Seattle, Washington) to one of the nation's smallest (Parkersburg, West Virginia—market 199). With the high levels of cable penetration present and the large number of distant signals being imported into these markets, we expected to find some evidence of audience diversion. Our primary concern, however, was the degree of audience loss and the extent to which this loss affected the economic viability of the local stations.

159. Of the six markets analyzed, only the Palm Springs and Bakersfield stations experienced appreciable audience diversion. Cable had no major effect on the audience levels in the other four markets. San Diego experienced a very slight diversion of audience; Parkersburg realized an audience gain; and Harrisonburg/York and Seattle experienced little, if any, audience effect from cable (the impact revealed was either a modest gain or loss depending upon whether a "rating based" or "share based" analysis was used.)[198] Although Palm Springs and Bakersfield experienced diversion from cable, their overall audience levels (9 AM–midnight) did not decline during the past five years.[199] More importantly, in all of the grandfathered markets, the revenue and operating income of the local stations had increased substantially from 1972 to 1977. Ordinary growth in revenues more than offset any adverse effects from cable. Thus, whatever adverse effect that cable may have had on stations in these markets, it was not large enough to offset the effects of other factors contributing to their well-being. We stated that we expected these trends to continue.

160. Because of the concern that independent television stations, as opposed to network affiliates, might be affected most by the carriage of distant signals on cable, we analyze the effect of cable on the audiences and financial operating results of seven independent stations in five markets. These stations were selected by identifying all independent stations located in markets having 15 percent or greater cable penetration and a large number of distant signals on cable. For several reasons, these selection criteria yielded only a small sample suitable for analysis. For example, significant cable penetration must exist in a market in order to examine the effect of cable on individual local station audiences. Yet, all but two of the independent stations in the nation operate in the top 100 markets and nearly 75 percent of these stations are in the top 25 markets. Cable penetration in these large markets is generally very low. Another factor which narrowed the sample is that the cable systems within a market must carry relatively consistent distant signal complements in order for the analysis to be instructive. Also, a large number of distant signals must be imported by the cable systems to indicate the effect of cable in an unregulated market. Finally, the choice of markets was constrained by the data limitation that separate audience figures for cable homes are not always provided for many of the market counties where cable exists. With these selection criteria, only seven independent stations were found to be suitable for analysis[200]—primarily due to the fact that most independent stations are located in large markets with very low cable penetration.

161. Of the four independent VHF stations analyzed, two revealed a negative audience impact from cable and two experienced a positive effect. Of the three UHF independent stations analyzed, all revealed positive audience effects from cable, despite the carriage of at least five distant signals on cable systems in their markets. The two VHF independent stations which experienced a negative audience effect from cable were XETV, San Diego and KTVU, Oakland. Station XETV operates from Mexico and thus financial information for this station is not available to the Commission. The other station, KTVU, had substantial revenue and operating income gains over the past five years despite the presence and growth of cable. Furthermore, we found that independent VHF stations generally are very profitable. For example, the three VHF stations in our analysis, for which we had financial data, had a combined net income in 1977 of over $15 million. Thus, our study of independent stations revealed that cable is not a major negative force on the financial viability of these stations and that independent UHF stations are often helped by cable despite cable carriage of many distant signals. Although some VHF stations experienced audience diversion due to cable in these essentially unregulated markets, the substantial amounts and growth of revenue and operating income of these VHF independent stations reveals a minimal impact of cable on their overall profitability. The results of this analysis were considered indicative of the potential effect of cable on independent stations in general. For example, because all but two of the independent VHF stations in the nation operate in the top 50 markets, one would expect these stations to be financially sound. In fact, further analysis revealed this to be true. We concluded that the revenues and operating incomes of independent stations will continue to increase due to both population growth in metropolitan areas and increases in the demand for television viewer exposures.

162. We also analyzed the audience trends and operating results of 78 broadcast stations and markets which, in the *Economic Inquiry*, alleged current and/or potential adverse impact from cable television.[201] Of these, only nineteen "worst cases" were identified as warranting further, more detailed, analysis to determine the effect of cable television upon station viability. Four

[197] Non-commercial stations were excluded from the analysis because the financial results of their operations are not reported to the Commission. Instead we performed a separate analysis of the effect of cable on non-commercial stations in Appendix C of the *Report in Docket 21284*. Comments on that analysis are examined in Appendix C of this *Report and Order*. We conclude in that study that cable television is no more likely to impact adversely on non-commercial television service to the public than it is on commercial service.

[198] For a further discussion of this distinction, see paras. 123 and 124 of the *Report in Docket 21284*.

[199] This point deserves further clarification. Loss of audience is often discussed in two different contexts. When a lower percentage of cable homes vis-a-vis non-cable homes are viewing local stations, this appropriately is considered audience diversion in the sense that the local station's total audience is less than it would otherwise be if cable were not present in the market. However, it does not necessarily follow that the station experiences an actual decline in its audience when this diversion occurs. In fact, our studies found that station audiences normally increased over the period analyzed. Thus, it is apparent that factors other than cable (e.g. population growth, programming adjustment, increased power, and improved television receivers) often act to offset the effect of cable. Conversely, there are other cases in which a station's audience was shown to be stagnant or declining, and yet cable diversion of potential audience was either not present or was not a primary factor in the decline.

[200] *See* Table 3 and Appendix B of the *Report in Docket 21284*.

[201] *See* Table 5 and Appendix B of *Report in Docket 21284*.

selection criteria were employed to identify these cases. The primary criterion was to select for further analysis all stations or markets which experienced losses or no gain in audience during the past five year period and stations which had experienced a decline in "real" revenues (price deflated based upon the 41 percent inflation rate during the 1972–1977 period).[202] These two criteria yielded a total of sixteen cases (fourteen stations and two markets) for further analysis. Two additional stations were included because of high cable penetration in their markets and because of their previous involvement with the Commission in the form of requests for special relief. Finally, a station was included because of its claim of hardship despite relatively low cable penetration in its market.

163. The effect of cable television for these nineteen "worst cases" was estimated using the same procedure employed for the grandfathered market cases. The analysis included a thorough survey of cable versus non-cable viewing patterns within each county of the ADI market. Through a weighting of the audience diversion (or gain) due to cable on a county by county basis, we were able to develop a quantitative estimate of the marketwide audience effect of cable on the local stations. The results were presented in Table 6 of the *Report* and are summarized below.

164. In four of the nineteen cases analyzed in detail, cable television acted to increase the overall viewing of local stations. There also were two cases in which cable appeared to have no effect on the audience of the local station.[203] In the remaining thirteen cases in which audience diversion from cable was present, only two instances were found in which the losses were accompanied by a decline in both "real" revenues and operating income. In each of these cases, however, the rate of growth of the stations' actual revenues was only slightly less than the rate of inflation. Moreover it is important to note that cable penetration and the number of distant signals carried by the cable systems in these markets remained relatively constant during the period, indicating some factor(s) other than cable was responsible for the decline in operating income. For example, one of these stations operates in the Idaho Falls market wherein a new network affiliate began broadcast operations in 1974. This is likely to be a very significant factor in explaining the audience and operating income decline of station KID–TV between 1973 and 1977. Therefore, we found that even in the worst cases, cable does not appear to be a major negative force on the financial situation of TV broadcasters. For example, although station KOSA, Odessa, Texas experienced an audience diversion of between 7 percent to 10 percent, this diversion of cable subscribers did not result in a decline in the station's average total audience. During the 1972–1977 period, cable penetration in the market increased from 36 percent to 50 percent; the station's 9 am to midnight audience remained constant; yet station revenues and operating income both increased by approximately 85 percent. We concluded that factors such as population growth and increased demand for television advertising make this apparent anomaly possible, and we stated that we expect these trends to continue in the foreseeable future.

165. Careful attention was given to the performance of each of the stations in our analyses. For example, a five year comparison (1972–1977) of all the relevant economic data for these stations was performed. We compared changes in cable penetration, average 9 am to midnight audience, revenues, and operating income for each station or market between 1972 and 1977. Actual audience measures of cable and non-cable viewing patterns were utilized to determine the diversion of local audiences due to the availability of cable television in the market. Additionally, we performed a detailed financial analysis of the stations/markets, including analysis of many other factors which influence performance, e.g. year operations began, local competition, and authorized power and antenna height. Finally, we carefully monitored the number of local program minutes broadcast by stations in the grandfathered markets.

166. In summary, we found in our studies of grandfathered markets, independent stations and "worst case" stations that cable television generally does not cause any appreciable diversion of local station audiences and that UHF stations, particularly those in intermixed markets, often are helped by cable television. More importantly, we found that overall audiences, "real" revenues, (i.e. revenues adjusted for inflation), and real operating incomes of local broadcast stations increased in most cases, despite the presence of cable. Our conclusion was that cable does not appear to be a major negative force on the financial situations of television broadcasters, and that the adverse effect of cable, if any, is not great enough to offset the ordinary secular growth in real incomes that the broadcast stations realize. The risk that consumers of broadcast television will be harmed by unrestricted cable carriage of broadcast signals was considered to be negligible and the existing levels of service to the public seemed secure. These case studies provided an excellent test of the effect of increased signal carriage, and they show conclusively that expanded viewing options on cable television do not work to the detriment of any group of viewers.

167. Because these studies spoke directly to the financial performance and market facts of individual stations or markets, we would have expected any errors in our analysis to be reported to us. None of the commenting parties, however, disputed the major findings of these studies—that even in the essentially unregulated markets, stations prospered. Moreover, if there were specific case studies missing that told a different story we would have expected these to be reported to us. None were. Rather, the cross-examination of this analysis fell generally into three categories: (1) apparent data inconsistencies or criticisms of methodology including the discovery of some typographical errors, (2) questions as to why certain markets or stations were chosen for analysis, and (3) perceptions that certain types of stations and markets (UHF stations, independent stations, and smaller markets) were either ignored or insufficiently addressed. Several parties questioned the use of 1976 figures for marketwide "cable TV homes" in Appendix B of the *Report* whereas 1977 figures were cited in Table 2 of the body of the *Report*. This, they stated, indicated a lack of precision in the analysis. However, as was noted in Table 2–1 of the *Report*, the impact formula used in Appendix B consists of several factors which are, of necessity, obtained from different Arbitron source books. For the formula to be useful, each factor has to be taken from the same time period or from as close a period as possible. The most current figures available for the county rating and share factors in the formula were averages from three surveys taken in May 1976, November 1976 and February 1977. The survey of "cable TV homes" which fell closest to this time period range was taken in October of 1976, and, thus, this was the figure which had to be used in

[202] No stations or markets experienced a decline in actual revenues.

[203] This is based upon the expectation that the true audience effect of cable probably lies somewhere between the impact based upon a "share" analysis and a "rating" analysis as discussed in paras. 122 and 124 of the *Report*.

the impact formula in Appendix B of the *Report*, even though more recent data (September 1977) were available for the number of cable TV homes in each market. In other sections of the *Report* (Table 2) we used the more recent 1977 data to display cable growth since 1972. In short, we explained the distinction in the *Report* and, in any event, it makes no significant difference in the estimated impact whether 1976 or 1977 figures are used.

168. INTV also states that the impact formula should have used ADI (area of dominant influence) audience figures in both the numerator and denominator of the formula. We have, they feel, underestimated the impact by using the loss of cable homes in the ADI in the numerator while using the station's total audience in the TSA (total survey area) as the denominator. However, Arbitron's standard measure of a station's audience is provided on the basis of TSA surveys, and it is this total audience of the station on which the Commission seeks to measure impact. To measure impact only on the ADI portion of a station's overall audience (although this portion may represent 95 percent of the total audience) would slightly overstate the estimated impact. Ideally, to measure the impact of cable television within a station's entire survey area, one would determine the diversion or gain due to cable in each county of the station's survey area. However, due to the often large number of counties within a station's TSA, overlapping TSA counties among stations, and a lack of cable viewing data for each county within a station's TSA, this would be a formidable, if not impossible, task. The closest we can come to this ideal is to measure the diversion or gain within the Area of Dominant Influence (ADI) counties as a percentage of the station's total audience. It should be noted, however, that were we able to conduct the analysis for the entire TSA, the audience diversion would likely be lower than that estimated in the *Report*, since cable normally improves the reception of a station's signal outside of its ADI.

169. INTV also criticizes the *Report* for failing to control for equality of reception in cable and non-cable homes by measuring overall impact throughout the market. That is, in distant counties of the ADI, cable may improve an ADI station's reception (and thus its viewing share in cable homes vis-a-vis non-cable homes); whereas in the closer ADI counties more diversion due to cable will occur. INTV feels that if the diversion in the closest counties were measured alone, the impact estimates would more accurately reflect potential harm. We are of the opposite opinion. It is the overall impact on a station which is important. One of the conclusions of the *Report* was that the improved reception characteristics of cable in some areas of a market can act to offset the negative effect of cable in other areas of the market. Even when a county may lie many miles distant from a station, if it is assigned to that station's ADI market (due to the viewing patterns of county residents) then the county is considered part of that market for TV advertising purposes.

170. NAB questions our use of a "sign-on to sign-off" audience figure to represent a station's total audience in the impact formula of Appendix B of the *Report*, whereas 9 AM to Midnight audience figures are used in other tables of the *Report*. As mentioned previously, all factors in the formula should be for the same period in order to be most useful. The share and rating figures in the Arbitron County Coverage books are provided in terms of the sign-on to sign-off period. Therefore, the average audience figure in the denominator of the formula also had to be expressed in these terms. In other sections of the *Report* we simply listed the more-often quoted measure of a station's average total audience—the average 9 AM to Midnight audience. Actually, it would not have made much difference whether the station's 9 AM to midnight audience or its sign on to sign off audience was used in the impact formula since there is normally little difference between the two figures. Both are used as generally representative of a station's average all-day audience. Only minor differences would have resulted by using a 9 AM to Midnight audience figure in the denominator of the formula—and the effect would have been to estimate a lower impact from cable than we predicted in the *Report*.

171. NAB also states that there are mathematical errors in the case studies which significantly affect the results. However, only one was specifically identified by NAB and, when corrected, we find an increase in the predicted cable impact by less than three-tenths of 1 percent. This error is insignificant, and on further review, we are unable to identify any mathematical errors which had any substantive effect on the results of our studies.

172. Another point raised by NAB and INTV is that the *Report* measures average audience diversion over the entire broadcast day rather than during segments of the day when impact may be more severe—such as early fringe. We recognize that there are certain day parts during which audience diversion will be more than average, and others during which diversion will be less than average. Nevertheless, for purposes of this analysis, the full day estimates provide an adequate and reasonable basis for judging the effect of cable on a station's overall audience and financial viability. The econometric analysis which attempts to provide quantitative projections of the effect of changes in signal importation deals with this issue in greater detail. See Section II.

173. INTV also seeks information as to why the six markets in the "grandfathered market" section of the *Report* were chosen for analysis. It states that there are other markets which meet our criteria of high cable penetration and a large number of imported signals; in particular the San Francisco market. We did not feel there was a need to examine every highly cabled and grandfathered market in the nation.[204] Rather, we selected a sample of six such markets which, it was felt, would provide a good cross-section for determining the impact of cable in various type markets. For example, several large markets with network and independent stations were chosen, one smaller market having all three network affiliates was selected and two of the smallest markets in the nation were chosen, each having extremely high levels of cable pentration, one being a one-station market and the other a two-station market. There was no intention to exclude any particular market from consideration. Indeed, we specifically encouraged, in the economic inquiry, all parties to submit instances and evidence of cable television's impact. In regard to not choosing the San Francisco market for analysis, we had already selected three of our six cases from the top 50 markets, and three of the six cases also were markets within the state of California. Therefore, we did not feel that including the San Francisco market would add materially to our results. It should be noted, however, that in the study of independent stations, three San Francisco stations were analyzed, two of which realized audience gains from cable in the market and all of which had experienced substantial revenue and operating income increases over the past five years. Furthermore, San Francisco market stations have, since 1973, had a 20 percent overall increase in average audience, increases in revenues of nearly 100 percent (from $62

[204] Also, the cable systems within each market had to carry the same number and complement of imported signals for the analysis to be instructive. This lowered the number of markets to choose from.

million to $123 million) and increases in operating income of 140 percent (from $19 million to $46 million). During this period, cable homes have grown from 20 percent of the market to 30 percent of the market. These facts regarding the San Francisco market serve to strengthen our original conclusion that cable does not appear to have a significant impact upon broadcast station viability—even in highly cabled and grandfathered markets.

174. The Rocky Mountain Broadcasters' Association commented that the significance of two studies submitted in Docket 21284 had not been properly weighed by the Commission. One of the studies presented was by Dr. William Duhamel, President and General Manager of Duhamel Broadcasting Enterprises. The study described a methodology for computing cable audience diversion for eleven markets in the Rocky Mountain Time Zone. The methodology used is in many ways quite similar to that later used by the Commission in its *Report in Docket 21284* and, not surprisingly, yields similar impact results. Each of the eleven markets in the Duhamel study was examined in the case study section of the Commission's *Report*. The two markets which had not experienced audience gains during the past five years (all had experienced healthy revenue gains) were further analyzed to determine audience diversion due to cable television. In Cheyenne, Wyoming, the sign-on to sign-off audience diversion was estimated to be 14.5 percent and in Miles City/Glendive, Montana the diversion was estimated to be 26.1 percent. The Duhamel study produced very similar diversion estimates for these two markets. The slight difference in the two sets of estimates may result from the fact that Dr. Duhamel's analysis measures cable audience diversion as a percentage of a station's ADI audience and thus results in a somewhat higher estimate than the Commission's analysis which measures cable audience diversion as a percentage of a station's total audience from the TSA as measured by Arbitron. In short, there is no major disagreement with the Duhamel analysis, but rather with the conclusions reached. Our conclusion remains that we find no evidence that the audience diversion in these markets has resulted in a serious impact upon the revenues and financial viability of local stations and upon their ability to provide news and public interest programming. Of the eleven markets surveyed, all but two showed audience increases since 1972; all revealed increased revenues, and all had a positive operating income. The impact of cable in these highly cabled markets with many grandfathered systems has not resulted in any apparent decline in local broadcast service to non-cable households. It should be noted that the comparatively large audience impact figures which are revealed in the Rocky Mountain area should not be confused with estimates of audience impact which might result from the rule changes ordered herein. The Rocky Mountain estimates are for impact which has already occurred and been absorbed. More importantly, the magnitude of the impact is primarily the result of households in one or two station markets being offered (on cable) what the Commission has already authorized and encouraged as a minimum—access to three network stations and an independent station. Thus, any diversionary effect from additional signals would be spread among all stations being offered on the cable systems and the incremental impact upon a local network affiliate would be minimal.

175. The other study submitted by the Rocky Mountain Broadcasters Association was prepared by Mr. Joseph Sample, a past president of the Association. Mr. Sample argues that, rather than an audience loss formula, a more appropriate measure of cable television's impact in a television market is revealed by a study of gross rating points (GRP's)—as determined by advertising agencies through the use of A. C. Neilsen audience surveys. For example, an agency seeking an advertising weight of 100 gross rating points (an audience measure) in each market within the Rocky Mountain Area would first purchase time in the major markets—Denver and Salt Lake City. Then, by utilizing the Neilsen studies which reveal audience spill-in and spill-out effects among markets, the advertiser can see that some GRP's in the smaller Rocky Mountain markets will be obtained. By not having to purchase a full 100 GRP's in these smaller markets, advertisers might negotiate lower prices or even drop a market from consideration—depending upon its coverage by larger markets. Mr. Sample's description of the methods used for purchasing station time in the Rocky Mountain Time Zone may well be accurate. However, either there are other advertisers who fill the void or some other means must be used by stations to offset the effect; because we can find no evidence to suggest any decline in the revenues or operating incomes of these small market stations.

176. Finally, there were several comments which expressed the opinion that certain types of stations and markets (UHF stations, independent stations, one-station markets and two-station markets) would be most affected by the proposed rulemaking, and that this had been either ignored or insufficiently addressed in the *Report*. This is not the case. We focused considerable attention upon these types of stations.

177. In the *Economic Inquiry Report* we analyzed 98 different stations and markets. Based on the comments received in response to our *Notice of Proposed Rule Making* we have now again studied and analyzed over 100 stations and markets and find our initial conclusion again confirmed. (See Appendix D.) Eliminating the overlap in the stations and markets studied both in the *Economic Inquiry Report* and for this document, the total number of separate stations and markets analyzed is approximately one-hundred and sixty. The financial results of every station and market brought to our attention were surveyed. Our analyses included nearly every one and two-station market in the nation as well as a large number of UHF and independent stations. Five year trends of cable penetration, viewing audience, revenues and operating income were studied. Of all the "worst case" and grandfathered markets and other stations analyzed in this proceeding, we were able to identify only one instance [205] in which an actual revenue decline had occurred over the past five years—in spite of both high cable penetration and the large number of distant signals available in many of the cases surveyed. [206]

[205] KVOS–TV, Bellingham, Washington experienced a revenue decline during the 1973–1976 period. However, this decline was primarily the result of the Canadian Tax Act of 1976 which stated, in part, that Canadian businesses could no longer write off as business expenses their advertising expenditures on American television. As KVOS–TV stated in an August 9, 1977 Letter to the Commission, "restrictive and discriminatory legislation in Canada has caused a critical erosion of our economic base. It has been necessary for us to cut our advertising rates by about 50% in order to remain in a competitive selling posture." The trend of revenue decline was reversed in 1978 when KVOS–TV experienced a revenue and operating income gain over the previous year. The station continues to remain profitable and is an economically viable business entity in spite of the effects of cable television and the recent Canadian Tax Act.

[206] There is an instance in which the presence of cable television is alleged to have brought about the change of a commerical to a non-commercial station. KTVR–TV was a network satellite station operating in La Grande, Oregon. It was sold to the State of Oregon in 1976 and now operates as an educational station. The Northeastern corner of Oregon is a very sparsely populated area of the nation which has never been able to support its own

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178. Several parties in this proceeding commented that the impact of the proposed rule changes would fall most heavily upon UHF stations, which have traditionally been the least profitable segment of the broadcasting industry. Thus, it is stated, the proposals are in conflict with previous Commission decisions to foster UHF development.

179. This concern was given considerable attention in preparing the *Report in Docket 21284,* and we found no evidence to suggest that cable television would seriously affect UHF stations. Of the several studies [207] which separately consider cable television's impact upon both UHF and VHF broadcast stations, all reveal that UHF stations experience less audience diversion from cable television than do VHF stations. In fact, in many instances, it is found that cable television generally has a positive effect on UHF station audiences. NCTA's study of mature independent UHF stations and our own study of UHF stations tend to confirm this effect. Of fifteen UHF stations analyzed by NCTA, the audiences of thirteen (87 percent) were augmented by cable television. In the *Report in Docket 21284* and in the response to comments received since the *Report,* the Commission examined the performance, over the past five years, of thirty-four UHF stations. Over 75 percent of these stations had audience increases during the period, and all experienced revenue increases. We further analyzed the cable versus non-cable viewing shares of thirteen UHF stations and found that cable augmented the viewing of ten (77 percent) of these stations using a rating-based analysis and eight stations using a share-based analysis. These results are not surprising since cable television has the effect of equalizing UHF and VHF reception thoughout the market, thus eliminating the primary aspect of the "UHF handicap." The improved viewability of the UHF station in its market offsets in varying degrees the diversionary effect of distant signals.

180. With regard to cable television's impact upon future growth in the number of UHF stations, the aforementioned findings also would indicate that the impact would be minimal. New UHF stations have in fact continued to come on the air in areas of the country, such as for example in Pennsylvania, where there is already extensive cable penetration. Additionally, a Rand Corporation paper [208] prepared by R. E. Park and Barry Fishman, *The Viability of Television Stations: Comments and Extensions,* lends evidence to this conclusion. Their econometric model predicts that the number of commercial UHF stations in the top 100 markets will approximately double by 1990. The model also provides weak evidence that cable television generally has a positive effect on UHF stations, although in each case the overall result depends upon whether the positive effect of improved reception or the negative effect of competing signals predominates.

181. Another way of looking at the facts gathered in these studies of grandfathered markets, independent stations, and "worst cases" is to examine all the markets and stations in areas where cable penetration has increased over the last five years. Of the one hundred and thirty-one cases in which cable penetration increased, only twenty-one stations experienced any audience decline, and only one (KVOS-TV, Bellingham, Washington—see note 205) had a decline in revenue and operating income. All others experienced gains in revenues and/or operating income, most of which were substantial. It is thus apparent that other factors (e.g. rate increases stimulated by the demand and supply of television advertising) almost always act to offset the effect of audience decline in those relatively few instances where it is shown to occur. This was one of the most revealing aspects of the case study analysis.

182. We noted in the *Report* that the revenues and profits of stations are likely to increase in the future and that the effects of cable competition are likely to be offset at least in part by increases in population and demand for television viewer exposures. Although some parties suggest that population will not increase, or that future revenues will not offset the effects of cable audience diversion, or that other factors will reduce revenue growth, we believe these case study analyses present a fairly clear picture of both the actual trend and the functioning of the market in the presence of high cable penetration. Population has increased during the period analyzed, station audiences have increased, and revenues and profits have grown markedly. With respect to population, we expect this trend to continue.[209] Moreover, it seems clear to us that advertiser demand is strongly correlated with overall economic activity and that it too will be increasing both because of increased population and because of rising economic activity. The increased demand for viewer exposures over the long term will translate into higher advertising rates and increased revenues.[210]

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commercial television station. When the satellite station was established in 1963, the area was heavily served by cable and also had five translator stations providing all three network signals from Spokane, Washington. The parent station of KTVR-TV (KTVB, Boise, Idaho) now operates a translator station in the La Grande area. We cannot conclude that there has been a detrimental effect on the public in this region following the assignment of KTVR-TV's license to the State of Oregon. Network signals from Spokane, Portland, or Boise are available via translator stations and in addition, a new educational station providing local/regional originations has begun operation in La Grande.

[207] Park, Rolla Edward, *Audience Diversion Due to Cable Television: A Statistical Analysis of New Data,* The Rand Corporation, R-2403-FCC, April 1979; *Audience Diversion Due to Cable Television: Data for Response to Industry Comments,* The Rand Corporation, N-1334/1—FCC, November 1979; Roger G. Noll, Merton J. Peck, and John J. McGowen, *Economic Aspects of Television Regulation,* The Brookings Institution, Washington, D.C., 1973; National Cable Television Association, *Comments,* Docket 21284, March 15, 1978; Schink and Thanawala, *The Impact of Cable TV on Local Station Audience,* Wharton EFA, Inc., Philadelphia, Pa., March 1978.

[208] This paper estimates UHF station viability, and updates the authors' previous work: *Projecting the Growth of Television Broadcasting: Implications for Spectrum Use,* Rand Corp. R-1841-FCC, 1976—a study used by the Federal Communications Commission's UHF Task Force in estimating future spectrum demand. *See also,* "An Evaluation of the Rand UHF Viable Stations Model," FCC, March 1979. A useful summary of the conclusions of this Rand study as they relate to cable television can be found in testimony of Dr. Leland L. Johnson to the Communications Subcommittee of the House of Representatives. *Cable Television Regulation Oversight: Hearings Before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce,* 94th Cong., 2d Sess. (1976) Serial No. 94-137 pp. 42-44.

[209] *See* Bureau of Census, Current Population Report; Series P-25, No. 704 (Projections of the population of the United States 1977-2050; 1977) Series II Projections. During the 1960's, the population in the United States grew by approximately 13 percent or 24 million persons. In the 1970's, the growth rate slowed to 9 percent (18 million persons). During the 1980's expectations are that the growth rate will remain at 9 percent (22 million persons). As can be seen (although the growth rate has remained stable), in absolute numbers, population will grow by more during the 1980's than it did during the 1970's. More importantly, the 26-36 year old population group (children of the 1954-64 "baby boom") is expected to increase by nearly 20 percent during the 1980's. This is a primary buying group for the durable goods advertised on television such as furniture, automobiles and appliances. Additionally, TV households are expected to grow at a faster rate than population, due to an increase in the number of single-person households. We have used the mid-range Census Bureau projections here (Series II) because they appear to be the most reasonable (see Bureau of Census, Current Population Reports, *Id.* at n. 6). However, even using the lowest growth projection (Series III), as is done by some commenting parties, significant population growth will occur during the next decade.

[210] The comment is sometimes made that secular growth in television station revenues will not overcome the audience fractionalization effects of cable because expenses as well as revenues increase over time. See, for example, John A. Dimling, Jr., "A View from the National Association of Broadcasters," in *The Role of Analysis in Regulatory Decisionmaking,* Park, Ed., Lexington Books, 1973 at 25. The short answer to this is that

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183. These conclusions appear to be widely shared not only by industry analysts and advertising agencies, but also by broadcast industry executives as reflected in their public statements.

Individuals in each of these areas have recently stated that decreased audience shares will not translate into declining revenues. For example, the President of NBC has been quoted as stating that commercial television's share of the viewing audience through 1988 will remain high—close to 90 percent—and that the impact of alternative program sources would not decrease audiences, but rather would increase the number of hours each household spent watching television. He further predicted (citing an NBC study) that the growth in TV homes and multiset homes would compensate for other forms of audience diversion and that television would receive an increasing share of advertising expenditures.[211] The Vice-President and Chief Economist of CBS television has said that moderate changes in television audience shares will not change revenues until advertisers have an alternative and they will not have such an alternative during the coming decade.[212] The President of the Television Bureau of Advertising has predicted that television advertising revenues will surpass newspaper advertising revenues by the end of the decade.[213] The U.S. Department of Commerce has recently predicted that broadcasting will receive an increased share of advertising expenditures despite the increased rates charged. Advertising expenditures for radio and television are predicted to expand at a compounded annual growth rate of 14 percent for the next five years.[214]

184. In conclusion, it should be emphasized that the approximately 160 markets and stations analyzed in Docket 21284 were not randomly selected. Rather, most were brought to our attention as representing the worst instances of cable impact. They included most one and two station markets, many markets with high levels of cable penetration and a larger complement of imported signals (due to "grandfathering") than otherwise authorized, and a great many UHF and independent stations. Following the additional analyses conducted in response to the comments in Docket 21284, our basic conclusions as stated in the *Report* and in *The Notice of Proposed Rulemaking* have not changed. We feel that it is unlikely that any broadcast station will be significantly harmed by a relaxation of our carriage rules and extremely unlikely that any viewer will be significantly harmed. By contrast, the benefits of a relaxation of our distant signal restrictions are obvious: an increase in the opportunity for diversity and competition both in the economic marketplace and in the marketplace of ideas. We believe that existing levels of service to the public are secure.

Conclusions

185. Traditionally, we have been concerned that cable television, by threatening the viability of local stations, could cause a significant reduction in television broadcast service—especially for the poor and rural consumers who would not be able to purchase cable service. We were also concerned that cable television might cause a reduction in the external benefits flowing to our entire society because we felt that the additional competition from cable television could result in a decrease in the supply of local public service programming broadcast by television stations. Thus, we have acted cautiously in promulgating our cable television policies in the face of considerable uncertainty concerning the effect of cable television on local television broadcast service.

186. The information adduced in this proceeding, however, has allayed the fears we have harbored concerning the risk of loss of service to non-cable households. That risk has been found to be very small. After almost three years of intensive study, we have not found it to be the case that competition from cable television has redounded to the detriment of non-cable households. This finding is not attributable to our turning a deaf ear to the most egregious cases. To the contrary, we have analyzed approximately 160 cases, many of which have been brought to our attention as instances where the local stations suffer harm due to cable television. In the cases that we have identified as having audience declines during the 1972–1977 period, or revenue increases less than the rate of inflation, we performed further detailed analysis to determine the extent to which cable television appears to be a negative force on their financial situations and, more importantly, whether cable television threatens the local television broadcast service to non-cable households. We found that cable television is not a major negative force on the financial situation of these stations and poses little or no threat to their continued operation.

187. We also analyzed carefully six "grandfathered" markets and seven independent stations that face substantial competition from cable television because of high marketwide cable penetration and a large number of distant signals. These cases are representative of a marketplace functioning essentially without any signal carriage restrictions. We have found that competition from cable television does not appear to threaten the continued operation of the local stations in any of the cases analyzed.

188. We also inquired into the effect of cable television on the public service programming provided by local broadcast stations. Here, we were able to establish only a very weak relationship between the two. In the cases where we thought competition from cable television was most severe, we estimated only a very small reduction in the amount of local programming provided by the broadcast stations. Furthermore, we were unable to establish theoretically or empirically that cable television reduces the quality of local programming. Competition from

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revenues do rise faster than expenses. The compound annual growth rate of total broadcast revenues from 1973 to 1978 was 14.8 percent and that of expenses 13.4 percent (net income rose at a 20.3 percent compound annual rate). No reason why this trend should not continue is evident.

[211] "Television and the New Technologies," remarks by Fred Silverman to the California Broadcaster's Association, August 24, 1979.

[212] Presentation by Dr. David Blank to the Broadcast Financial Management Association's 19th Annual Conference. *Broadcasting*, September 24, 1979, p. 32. This statement attributed to Dr. Blank parallels a comment filed with the Commission by CBS some fifteen years ago which experience shows to have been quite accurate. As CBS stated: "* * * continously offsetting the effects of the rise in CATV penetration, with its depressing effect on station revenues, is the persistent rise in advertising demand for television time." "In other words, it will be only in rare cases that the rise of CATV will, in fact, be rapid enough and large enough in magnitude to cause an absolute decline in station revenues. And this is precisely why it is so hard to find actual cases of stations in which CATV growth can be related to absolute declines in station revenues." Comments of Columbia Broadcasting System, Inc., in Docket 15971, July 23, 1965 at 27, 29.

[213] *Broadcasting*, May 5, 1979, p. 114.

[214] *U.S. Industrial Outlook 1980*, U.S. Department of Commerce, Industry and Trade Administration. See also, for example, "Walking on the Sunny Side of Wall Street," (an interview with Mr. Bill Suter of Merill, Lynch, Pierce, Fenner and Smith), *Broadcasting*, January 28, 1980, p. 72; "Forecasters See A Mixed Outlook for Broadcasting in the Eighties," *Broadcasting*, September 24, 1979, p. 32; Remarks by Gene Jankowski, President of CBS/Broadcasting Group, before the Academy of Television Arts and Sciences, November 29, 1979; "Financial Impact of New Technologies: End of Golden Age?" *Television/Radio Age*, January 14, 1980, p. 66; "We'll Do Quite Well, Thank You," Rosenfield, *Broadcasting*, November 19, 1979, p. 68; "TV Ad Picture Bright," *Washington Star*, April 2, 1980, p. F–1; "Double Digit Optimism For Broadcasting Economy," *Broadcasting*, January 1, 1979, p. 40.

distant signals may actually, in some circumstances, increase the quality of programming broadcast by local stations.

189. Intuitively, the above findings may seem somewhat surprising. Certainly, the evidence demonstrates that local broadcast stations will earn less revenues and profits if distant signals are authorized than they otherwise would have if additional distant signals were not permitted to be imported. However, television broadcast stations, including UHF independent stations which traditionally have been presented to us as the industry's weakest element, often earn substantially more than a normal return on their investments. Additionally, UHF stations in intermixed markets, which traditionally have been our greatest concern, often are helped by cable television. But, perhaps more importantly, the impact of additional distant signals on local stations will occur in a context of offsetting factors. Increases in population and the demand for advertising act to increase substantially the revenues and profits of local broadcast stations. Moreover, even if cable penetration levels were much higher than they are today, the audience losses attributable to cable television are small in relation to the yearly growth in revenues and profits that we observe for television stations. Thus, we find that the risk of loss of service to non-cable households appears to be small. It seems unlikely that poor or rural consumers will be denied television service because of additional competition from cable television. The existing levels of local public service programming provided by broadcast stations also seem secure and actually are expected to increase because of the entry of new stations into the marketplace. Therefore, the costs to non-cable households from deregulating cable television appear to be insignificant.

190. On the other hand, the benefits to existing and potential cable households from permitting the carriage of additional signals are substantial. Millions of households may be afforded not only increased viewing options, but also access to a diversity of services from cable television that presently is unavailable in their communities.

191. In summary, we believe that relaxation of our distant signal carriage restrictions will promote substantial improvements in television service to the public without causing any significant risk of loss of the existing levels of service provided by local television broadcast stations. We have found in our analysis of the evidence in this proceeding that competition from cable television has improved television service to the public and will continue to do so in the future. More specifically, in terms of the criteria for evaluation of these rules set forth, we do not believe the elimination of the rules will have undesirable distribution or external effects and we believe their elimination will promote the welfare of consumers generally.

III. The Effect of the Syndicated Exclusivity Rules on Television Service to the Public

192. Existing rules, in addition to establishing quotas on the number of distant signals that may be carried, require the deletion of particular syndicate programs from those signals that are carried, upon the request of local television stations and in some instances at the request of program producers or distributors.[215]

193. Because of their historical origin, the intended function of these rules is not as clear as it might otherwise be. This history is set forth in some detail in the *Syndicated Exclusivity Report*, (pp. 956–964) as well as more recently in *Geller v. FCC*, 610 F. 2d 973 (D.C. Cir. 1979). Compressing a somewhat complex situation down to its fundamentals, this history reveals that in 1971 the Commission was prepared to adopt a set of cable television distant signal carriage rules that contained no limitations of the type now found in the exclusivity rules. As the result of a "Consensus Agreement" between major elements of the cable television, broadcast television, and television program production industries, which the Commission adopted in order to facilitate the passage of copyright legislation, the syndicated exclusivity provisions were included in the rules. Because of the process whereby they were adopted, there was virtually no economic analysis of their functioning either by the Commission or, apparently, by the industry groups involved.[216] For this reason also there is no extended "legislative history" or other articulation of the rationale underlying the rules. In part, it appears that they were intended as a response to the fact that cable television systems operated outside of traditional program supply markets as a result of the operation of the Copyright Act of 1909,[217] creating what was viewed as unfair competition between cable television systems and television broadcast stations. In our *Syndicated Exclusivity Report* and in our *Notice of Proposed Rule Making* in this proceeding we concluded that this consideration was coextensive with the issue of copyright liability and not a reason for retaining the rules.[218] In particular, we noted the statement in *Home Box Office v. FCC*, to the effect that the Supreme Court's decision in *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1977) "certainly does not establish that 'unfair competition' requires the general protection of broadcast television," [219] and the same Court's conclusion in *CBS Television Network Affilates Ass'n v. FCC*, that our concern over "unfair competition" was essentially based on the possibility that distant signal importation by cable systems might threaten the viability of local stations from the standpoint of allowing "debilitating economic competition" and not "so much with the 'pirating' of signals per se." [220] Nothing in the comments received provides us with any reason to alter our conclusion in this regard.

194. A more explicit rationale for the rules was set forth in the 1972 *Cable Television Report and Order* where it was said that the rules were intended "to protect local broadcasters and insure the continued supply of television programming." [221] In view of this statement, when we commenced our review of these rules in our *Notice of Inquiry in Docket 20988*, we sought information on the following questions:

—If there were no cable television syndicated program exclusivity protection for television broadcast stations, how would this effect their ability to serve the public in those areas they are licensed to serve?, and

—What effect do the syndicated exclusivity rules have on the production

[215] Generally speaking, for purposes of these rules, a syndicated program is any television broadcast program other then a network program, including series programs, feature films, and all other non-network programs. See 47 C.F.R. § 76.5 (p). The provisions of the syndicate exclusivity rules are more generally described in paragraphs 14–16 above.

[216] In view of this it is somewhat disconcerting to find parties arguing that the economic analysis which led to the adoption of the rules are as valid today as in 1972. See, for example, Motion Picture Association of America, comments in Docket 20988, March 1, 1977 at 7.

[217] 35 Stat. 1075, as amended.

[218] *Syndicated Exclusivity Report, supra*, at paras. 17, 35, 51–52. *Notice of Proposed Rule Making in Dockets 20988 and 21284, supra*, at para. 61.

[219] 567 F. 2d at 41.

[220] 555 F. 2d at 990.

[221] 36 FCC 2d at 169 (1972). More generally, it might be said that the rules were adopted to facilitate the passage of copyright legislation applicable to the cable television industry. This rationale has been the subject of litigation and, as a consequence of this litigation and the passage of copyright legislation in 1976, the Commission is now obligated to consider the continuing validity of these rules pursuant to the Court's order in *Geller v. FCC, supra*.

and availability of syndicated programming?

195. In our *Syndicated Exclusivity Report*, we responded in terms of these two concerns separately, noting, however, that the form of the rules suggests that they were principally intended as protections for program suppliers.[222] That this is so is suggested by the fact that the most extensive protections are accorded the larger market stations which presumably are less in need of protection from competition and from which program suppliers obtain the bulk of their revenues and by the provision of the rules that permits the substitution of additional (and conceivably more attractive) programs in place of those deleted.[223] That this view is correct is confirmed by some industry comments. In our *Notice of Inquiry in Docket 20988* we noted the statement of the National Association of Broadcasters that, "[i]n terms of ameliorating impact on local television stations the rules are largely meaningless." [224] Comments from ABC, state that "The important point is not fractionalization impact at all. Having decided upon the number of permissible distant independent signals, the Commission has established a permissible degree of fractionalization." [225]

196. However, because whatever impact there is on program supply from changes in these rules is derivative of the impact they have on television broadcast stations, we discussed each separately in the *Syndicated Exclusivity Report* and will do so here as well.

197. In our *Report in Docket 20988* we analyzed the effect of the syndicated exclusivity rules on television service to the public. We examined the effect of the rules on the subscribers and potential subscribers of cable television, on local television stations, and on the supply of television programming. We concluded that the public interest would be better served in the absence of the syndicated exclusivity rules for cable television systems.

198. Television broadcast and program production interests have voiced numerous objections to the findings of our *Report*. Many of the criticisms leveled at our analysis in the *Report in Docket 21284* are repeated for the analysis in the *Report in Docket 20988*. These criticisms are addressed in Section II, *infra*, and that discussion is not duplicated here. Several other criticisms are directed to the analysis which appears only in the *Report in Docket 20988*. The discussion in this section should, we believe, demonstrate that these criticisms also are without merit. Moreover, no new evidence has been submitted which contradicts our previous findings.[226] Thus we remain confident that the public will be better served without the syndicated exclusivity rules.

199. At the outset we must emphasize that the syndicated exclusivity rules impose substantial welfare costs upon the subscribers and potential subscribers of cable television service. The television programs that are blacked-out pursuant to the syndicated exclusivity rules are readily avilable at cable head-ends and can be delivered to cable subscribers at no cost. The fact that cable subscribers are denied programs when the marginal cost of receiving them is zero violates a basic efficiency criterion of modern welfare economics.[227] The resulting welfare loss to cable subscribers is substantial. Our *Report in Docket 21284* found that the demand for and the availability of cable television service by and to consumers is affected significantly by distant signals. Thus the syndicated exclusivity rules impose substantial costs upon the subscribers and potential subscribers of cable systems by restricting many of the programming alternatives on distant signals for which consumers are willing to pay.[228]

200. Several parties disagree with our conclusion that the syndicated exclusivity rules impose costs on the subscribers and potential subscribers of cable television. For example, some parties argue that the elimination of the syndicated exclusivity rules will not foster diversity because only duplicative programming will be made available to cable subscribers. Several parties also criticize our reference to an earlier proceeding before the Commission concerning television re-runs [229] where the television networks and other broadcasters presented evidence intended to demonstrate the value to the public of having alternative viewing times for the same program. NBC argues "in that proceeding, the issue was the value of repeat broadcasts for the entire viewing public not the 'very small percentage' of cable subscribers on systems presently required to comply with the rules." [230] NBC has not demonstrated, however, why repeat broadcasts are of less value to this segment of the viewing public nor why a "very small percentage" would create significant injury. Indeed, evidence suggests that consumers are willing to pay for such broadcasts.[231]

201. Fisher Broadcasting, Inc., by providing share data for the top ten primetime programs in the Seattle-Tacoma market, makes a more specific attack on our reference to the material filed in the re-run proceeding (Docket 20203). In that proceeding a number of individuals and organizations involved in the production of television programming were urging the Commission to restrict the amount of repeat or re-run programming shown on the major television networks. The

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[222] *Supra*, at p. 976–977.

[223] In addition, some of the rights created by these rules flow directly to program suppliers.

[224] *Supra*, at p. 953.

[225] American Broadcasting Companies, Inc., comments in Docket 20988, March 1, 1977 at p. 34. See also, for example, comments of Westinghouse Broadcasting Co. in Dockets 20988 and 21284, September 17, 1979: "Nor was the primary intended purpose of the rules to prevent station audience fractionalization or diversion." (p. 7). Others have made the point more bluntly. Barbara Ringer, the Register of Copyrights wrote in 1972 that the rules were "probably the most elaborate and intricate copyright provisions ever promulgated anywhere." Barbara Ringer, "Recent Cable Television Developments in the United States Involving Copyright," 3 *Performing Arts Review* No. 4, p. 581 (1972).

[226] Several comments from parties with both cable and broadcast interests, including Storer Broadcasting and the parties filing jointly with Cox Broadcasting, urge the elimination of the distant signal carriage rules but retention and simplication of the syndicated exclusivity rules. Storer Broadcasting, comments in Dockets 20988 and 21284, September 17, 1979; Cox Broadcasting Co. *et. al.* comments in Docket 20988 and 21284, September 17, 1979. No study or evidence is offered in support, however, Cox *et. al.* for example, finding it "unnecessary" and "presumptuous" to add further specific data.

[227] *See, e.g.*, Jora R. Minasian, "Television Pricing and the Theory of Public Goods," *Journal of Law and Economics*, Vol. 7 (October 1964). *See also* Noll, Peck, and McGowan, *Economic Aspects of Television Regulation* (1973).

[228] For estimates of the amount of programming on distant signals that can be blacked out pursuant to the syndicated exclusivity rules, see the *Report in Docket 20988*, at para. 59. It should be noted that we have been unable to estimate precisely the effect of the syndicated exclusivity rules on the growth of cable television. There are many factors which influence the decision whether to provide cable television service to an area. Nevertheless, the syndicated exclusivity rules reduce entrepreneurs' willingness to risk their capital to provide cable service because they reduce the expected returns from providing that service.

[229] *Report and Order in Docket 20203*, 61 FCC 2d 946 (1976).

[230] *Supra*, at n. 48 at p. 21. It should be noted that by concurring in our derivation that only 4.4 percent of all households presently can be affected by the syndicated exclusivity rules, should broadcasters fully exercise their rights, NBC lends credence to our belief that the effect of eliminating the rules on local broadcasters and program producers will be small.

[231] *See* para. 93 and n. 32 in the *Report in Docket 20988*. It should be noted that in our *Syndicated Exclusivity Report* we did not dwell at length on the costs these rules impose because we found little reason to retain them in terms of their own justification and wished to avoid, insofar as possible, any suggestion that the rules should be eliminated to "promote" cable television. What we are concerned with is the overall service the public receives.

networks and various television station parties were defending the re-run practice. By way of illustrating why the syndicated exclusivity rules decrease significantly the welfare of cable subscribers even though the programming lost under these rules will generally be available at some time from a local television station, we made reference, in footnote 83 of our *Syndicated Exclusivity Report,* to the contention of broadcasters in the re-run proceeding that "with respect to prime-time network programs only 14 percent of the potential viewing audience actually watches a program when it is first broadcast."

202. Although Fisher Broadcasting has attacked the 14 percent figure, when carefully considered, these comments actually appear to reinforce the point made: namely, that during a single broadcast of any particular program a considerable portion of the potential audience for that program is either watching another channel or not watching television at all, and would, for that reason, find alternative viewing times for programs to be highly desirable.[232] Fisher's comments show that during January 1979 the ten most popular prime time programs in the Seattle-Tacoma market were viewed, on average, by about 32 percent of the potential audience.[233] Clearly, the average audience reached by all prime time network programs will be far below the figure for the ten most popular, the average audience for all network programs will be lower than the prime time average, and the typical syndicated program will, in any particular showing, reach even a smaller part of the whole potential audience. Thus, Fisher's comments tend to reinforce the point that a considerable portion of television households do not view a program when it is first broadcast. "Duplicative" programming can therefore offer many households true diversity. Thus, we believe that the syndicated exclusivity rules reduce both program diversity to some cable subscribers and "time diversity" to others.[234] We believe these reductions diminish significantly the welfare that subscribers and potential subscribers derive from cable television.

The Impact of Eliminating the Syndicated Exclusivity Rules on Local Stations

203. As indicated, the syndicated exclusivity rules were adopted, in part, "to protect local broadcasters."[235] Our *Report in Docket 21284* analyzed the effect of distant signals, in the absence of blackouts resulting from the application of the syndicated exclusivity rules, on television service to the public.[236] We found that protection of local stations against competition from distant signals imported by cable systems served no public interest purpose. This finding largely moots any concern that the syndicated exclusivity rules are necessary to promote the public interest by protecting the operation of local stations because the effect of the syndicated exclusivity rules on local broadcast service is a subset of the larger, encompassing effect of unregulated distant signal carriage. Nevertheless, since the effect of the syndicated exclusivity rules on program supply is derivative of the effect of the rules on local station audiences, we provided estimates of the amount of audience that is subject to shelter by the rules in order to gauge the effect of the rules on program supply.

204. To determine the effect of the syndicated exclusivity rules on local station audiences we would have liked to compare the distribution of cable viewing to distant signals for instances in which the rules were and were not in effect. By taking the difference between these two distributions we would have been able to determine directly the amount of audience that is protected by the rules. Unfortunately, the requisite data for such an exercise were unavailable. Even today it appears that syndicated exclusivity protection is not requested or provided on a wide-scale basis.

205. Our *Report,* however, established that the audience subject to shelter by the syndicated exclusivity rules is equal to a percentage of the total audience loss attributable to te absence of exclusivity protection.[237] We assumed this percentage to be equal to the percentage of all distant programming that potentially could be blacked out pursuant to the rules. Thus, if cable television diverts 10 percent of the audience of a local television station in an unregulated market (i.e., there are no distant signal carriage or syndicated exclusivity restrictions) and 40 percent of the distant programming carried by the cable systems could be blacked out pursuant to the syndicated exclusivity rules, we assumed that 4 percent of the local station's audience could be protected by the syndicated exclusivity rules. Or, stated differently, the potential impact of eliminating the rules on the local station's audience in this case is estimated to be 4 percent.

206. We employed the study by Dr. R. E. Park of the Rand Corporation to estimate the percentage of time that distant signals on cable could be blacked out pursuant to the syndicated exclusivity rules under various local market conditions.[238] Park's work is the only published article on the subject of which we are aware and his estimates are broadly consistent with those provided by various parties in this proceeding.[239] We applied Park's "black out" percentages to his estimates of audience diversion due to cable in an unregulated market [240] to determine the protection which potentially could be afforded to local stations by the syndicated exclusivity rules. Park's audience estimates were employed because the results are presented in a form which facilitates ready application of the "black out" percentages appearing in his earlier study. We took care to emphasize, however, that we believed Park's estimates of audience diversion due to cable were overstated.

207. Approaching the issue of audience diversion from the elimination of the syndicated exclusivity rules conservatively, we explored the potential impact at both current cable

[232] The value of alternative viewing times to the public is illustrated by the home video recorder business in which consumers are making substantial investments for the principal purpose of making possible alternative television viewing times. See, for example, D. Agostino, R. Johnson, and H. Terry, "Home Video: a Report on the Status, Projected Development and Consumer Use of Videocassette Recorders and Videodisc Players," Feb. 1980: "It is clear that the principal use of the VCR to date is for time-shift viewing." p. 61. The loss of programming by virtue of these rules is a major source of complaints to the Commission from cable subscribers.

[233] *See* Fisher Broadcasting, Inc., comments in Dockets 20988 and 21284, September 17, 1979. *See also* the *Report and Order in Docket 20203,* 61 FCC 2d 946 at n. 5 of Appendix A (1976).

[234] *See also* 47 C.F.R. Part 76.151(a) which requires cable systems in the top fifty television markets to black-out for a period of one year, upon request from the copyright holder, first-run syndicated programming imported from distant markets, even if the programming is not broadcast in the local market.

[235] *Cable Television Report and Order,* 36 FCC 2d at 169 (1972).

[236] It should be noted that most of the studies of audience impact due to cable television in this proceeding measure the results of a marketplace functioning without syndicated exclusivity restrictions. *See* para. 56 of the *Report in Docket 20988.*

[237] To simplify the analysis and be conservative in terms of audience impact we assumed that no program substitutions would be made.

[238] R. E. Park, "The Exclusivity Provisions of the Federal Communications Commission's Cable Television Regulations," The Rand Corporation, June 1972.

[239] *See, e.g.,* the Comments of the National Cable Television Association in Docket 20988, March 1, 1979.

[240] R. E. Park, "Audience Diversion Due to Cable Television: A Statistical Analyses of New Data," the Rand Corporation, Prepared for the Federal Communications Commission, January 1979, attached as Appendix A to the *Report in Docket 21284.*

penetration levels and anticipated future penetration levels. Under present conditions we found that the syndicated exclusivity rules, should broadcasters *fully* exercise their rights, would protect no more than one percent of the audience for any local station.[241] In the long-term we estimated that the maximum possible audience protection from the rules for some local stations may approach nine percent. We noted, however, that this estimate was overstated because of the use of the Park audience model. The estimates for the long term also were dependent on the assumption that the grandfathering provisions of our rules would no longer be applicable. Thus we concluded that the exclusivity rules would protect much less than nine percent of the potential audience for any broadcast station in the foreseeable future.

208. This conclusion was corroborated by our findings in the **REPORT IN DOCKET 21284.** For example, in our grandfathered market analysis the largest audience loss due to cable for stations that would be able to exercise their rights to protection but for the grandfathering provisions of our rules was between 4 and 7 percent for the VHF independent station operating in San Francisco, California. The syndicated exclusivity rules could protect no more than between 2 and 4 percent of this station's potential audience if the grandfathering provisions were eliminated.[242] Similarly, if syndicated exclusivity protection were afforded to the stations in our grandfathered market analysis suffering the largest audience losses due to cable (i.e., those stations licensed to Palm Springs, California which are not entitled to protection because they operate outside the top hundred markets), the audience protected for these stations would be no more than about 1 to 2 percent.[243] It is important to note that the grandfathered markets analyzed in the *Report in Docket 21284* are extreme cases because of the high levels of marketwide cable penetration and the large number of distant signals that are imported by the cable systems. Thus, it is clear that even in the long term the syndicated exclusivity rules can afford local broadcast stations very little audience protection.

209. We concluded that the maintenance of the syndicated exclusivity rules would provide no improvement in the television service provided by local stations. We found that the level of profits for the television industry is expected to continue to increase even without any protection against distant signal importation by cable television systems and that cable television has little effect on the local public service programming provided by broadcast stations.

210. Several parties have voiced the same general criticisms of our analysis of audience diversion due to cable in the *Report in Docket 21284* to our analysis of audience diversion due to the elimination of the syndicated exclusivity rules in the *Report in Docket 20988.* For example, NAB contends that the "Commission's treatment of audience losses resulting from importation of duplicative syndicated programming is inadequate, primarily because of the Park study on which it relies is flawed and inadequate."[244] In its section on syndicated program exclusivity, INTV states that "of particular concern to INTV is the failure of the Cable Bureau to analyze impact in terms of 'fringe time'—the time period before and after prime time."[245] Capital City *et al.* argue that the long-term incremental effect of eliminating the syndicated exclusivity rules should include audience diversion due to the normal growth of cable television that is not attributable to the elimination of the rules. However, we have already shown in detail the invalidity of these general criticisms in the previous section of this *Report and Order,* and, accordingly, we do not believe it would be fruitful to reiterate that discussion here.

211. A few parties also have directed criticisms to the analysis appearing only in the *Report in Docket 20988.* For example, the Joint Motion contends that "it appears that the presentation of the basic findings of the Park Study in the Economic Inquiry Report [sic] is replete with numerous errors, which raise very serious questions as to the Commissioners' reliance on the staff summaries rather than the Park Study itself. Thus, for example, on Tables 2 and 3 in the Report (presented on pages 35 and 37), the 'percent Audience Loss' figures cited are *fractions* of the actual Park data."[246] (Emphasis in original.) We believe this criticism may have been voiced because of petitioners' inadvertently regarding the tables referred to as part of the *Economic Inquiry Report* when they are in fact found in the *Syndicated Exclusivity Report.* In any event, the parties obviously did not understand that the estimates in Tables 2 and 3 *were* meant to be fractions of the actual Park data. These tables provide estimates of the effect on local station audiences of eliminating the syndicated exclusivity rules. The Park study provides estimates of the overall audience diversion due to cable in the absence of distant signal restrictions *and* syndicated exclusivity protection. Since not all of the programming on distant signals could be blacked out pursuant to the syndicated exclusivity rules, only a fraction of the total audience diversion due to cable in an unregulated market could be protected by the rules. Thus the "serious questions" raised by the Joint Motion of the "staff summaries" represent a misunderstanding on the petitioners' part.

212. Capital City *et al.* contend that the Commission's procedure for estimating the potential effect of eliminating the syndicated exclusivity rules on local station audiences "seriously understates the actual likely impact in markets [with eight local signals] since Park has calculated the extent to which a typical distant signal is blacked out by the syndicated exclusivity rules only in markets with six or fewer local stations."[247] For example, in the *Report in Docket 21284* we reported that Park estimates that 63 percent of distant programming could be blacked out pursuant to the syndicated exclusivity rules in markets with six local stations. Since Park did not estimate the percentage of distant programming that could be blacked out in markets with eight local stations, and in the absence of other estimates for these markets, we assumed that 63 percent of the distant programming could also be blacked out in markets with eight local stations. We do not believe this assumption leads to a "serious" understatement of audience diversion. For example, even if 80 percent of the distant programming carried by cable systems in markets with eight local stations could be blacked out pursuant to the syndicated

[241] We also showed that very little protection would be afforded to broadcast stations in the smaller markets if the rules were applicable there because of the small amount of syndicated programming purchased in these markets.

[242] This calculation is based on the estimate that 63 percent of the distant programming could be blacked out. See the *Report in Docket 20988* at para. 59.

[243] In this case we estimate that only 10 percent of the distant programming could be blacked out pursuant to the syndicated exclusivity rules. See *id.* at n. 48.

[244] *Supra,* n. 93 at p. 143.

[245] *Supra,* n. 94 at p. 34. Several parties also suggest that impact should be analyzed in terms of syndicated programming because audience diversion during syndicated programming is greater than average and the revenue/audience ratio for this programming also is greater than average. We view this suggestion as functionally equivalent to that of analyzing impact in terms of early fringe. It makes very little difference to the "bottom line" estimates of audience diversion in either case. See Section II above.

[246] *Supra, n. 92, at 24.*

[247] *Supra, n. 91, at 15.*

exclusivity rules, our estimates in Table 2 for the near-term would increase by only one percentage point and our estimates in Table 3 for the long-term would increase at most by only two percentage points.

213. INTV alleges that "the Comments and Reply Comments filed by INTV in Docket 20988 demonstrated the need for the syndicated program exclusivity rules. The Cable Bureau did not contradict (or even respond to) INTV's arguments." [248] The theme of INTV's most substantive argument in the referenced comments was that "the syndicated program exclusivity rules are still of continued importance for the future viability of the independent television industry." [249] To substantiate its argument, INTV had presented audience data for cable and non-cable housholds in Seattle and San Francisco. INTV had contended that "these examples clearly indicate the fractionalization of audience which takes place as a result of importation of distant signals when there is no exclusivity protection. The Seattle-Tacoma and San Francisco-Oakland-San Jose markets are not atypical, and what is happening there provides an insight into what will be happening in other markets in the future as cable continues to develop." [250] We agreed with the latter statement. It is precisely the reason for which we analyzed the effect of cable television on the local independent stations in these markets. [251] This analysis constituted our response to INTV's comments. We found that cable television augments the audience of the independent station in Seattle by 3 to 5 percent and increases the audience of the two UHF independents in San Francisco by an even greater amount. [252] On the other hand, the VHF independent in San Francisco loses between 4 and 7 percent of its audience due to cable television and only a percentage of this diversion would be attributable to the absence of syndicated exclusivity protection. However, we found this station has realized tremendous growth in revenues and profits during the period for 1972 to 1977. Thus we rejected INTV's contention that the syndicated exclusivity rules were essential to the viability of independent television stations.

214. In its latest comments in this proceeding dated September 17, 1979, INTV refers to the study performed by Roger Cooper and Associates, submitted as comments by McGraw-Hill Broadcasting Company, Inc. and Storer Broadcasting Company for additional support for the proposition that some independent stations would not be able to remain viable without the ability to protect at least the portions of their schedules being duplicated by distant signals. The Cooper study allegedly demonstrates a reduction in the audiences of the Bakersfield stations of more than 69 percent. We analyzed the effect of cable television on the stations in Bakersfield in our grandfathered market analysis in the *Report in Docket 21284*. We found that while these stations may lose as much as 13 percent of their potential audience due to cable, their revenues had increased by almost $3 million from 1972 to 1977, an increase of over 100 percent. Thus we believe the contention that some stations will not remain viable without syndicated exclusivity protection is simply invalid.

215. Several parties also have advanced some unsupported theories concerning the syndicated exclusivity rules in their comments to our *Notice of Proposed Rulemaking in Dockets 21284 and 20988*. For example, NAB claims that "the lack of syndicated exclusivity protection may result in total withdrawal of syndicated programming from local broadcast exhibition." [253] This claim is without merit. Program syndicators attempt to sell their product in virtually every market regardless of the potential audience size, provided they can cover their distribution costs. Thus we find it extremely unlikely that these syndicators will not sell their products to the stations in a market because they attract at most a few percent less audience due to the absence of syndicated exclusivity protection. In fact, the stations in our grandfathered market analysis do purchase programs that are imported by cable television systems from distant markets. Additionally, syndicators often sell the same programs to stations situated in adjacent markets such as Washington, D.C. and Baltimore, Maryland, where the programs from both markets can be received readily by a large proportion of the households in these markets. Moverover, there are many sources of program supply. If one syndicator refuses to sell its products in a market, its competitors eagerly will fill the void. Thus we cannot accept the argument that syndicated exclusivity protection is essential for local stations to be able to compete in the marketplace.

216. Nor can we accept the argument advanced by several parties in this proceeding that the financial base of television is such that the industry could not survive in the absence of program exclusivity. Local stations are aware of the competition that they face and negotiate over the price of syndicated television programming accordingly. The syndicated exclusivity rules restrict competition and thereby protect the high profits that television broadcasters capture in the absence of competition. In contrast to the allegations raised in the comments, we believe that increased competition from cable television will not decimate the television broadcast industry, but rather will act to improve the performance of television broadcasters.

217. In summary there has been little criticism directed specifically to our analysis of the potential effect of eliminating the syndicated exclusivity rules on local television stations. Moreover, we found these criticisms to be without merit. Several parties also have reiterated their general criticisms of our findings of the overall effect of distant signals on local stations. These criticisms have been shown to be invalid in Section II, *infra*. It should also be noted that no new evidence has been submitted since our issuance of the *Notice of Proposed Rule Making* in this proceeding that shows our conclusion concerning audience diversion is incorrect. Therefore, we remain confident that the potential effect of eliminating the syndicated exclusivity rules on local station audiences will be minor. In the near term the loss to any local station would be no greater than about 1 percent. In the long run the

[248] *Supra*, n. 94, at p. 36.

[249] Association of Independent Television Stations, Inc., comments in Docket 20988, March 1, 1977. INTV also claimed that: 1) syndicated program exclusivity protection was a basic tenet of the "Consensus Agreement"; and 2) the syndicated program exclusivity rules do not cause cable viewers to lose any programming, but rather, foster diversity of programming to the public. At para. 48 of the *Report in Docket 20988*, we said that we did not regard the Consensus Agreement as a reason to refrain from rules changes and INTV has made no new argument not considered at that time. In this regard, see also *Geller v. FCC*, 610 F. 2d 973 (D.C. Cir. 1979) requiring that these rules be reviewed. At paras. 69 and 91–3 the *Syndicated Exclusivity Report* we concluded that the rules adversely affect the subscribers and potential subscribers of cable systems.

[250] *Id.*, at p. 19.

[251] *See* the *Report in Docket 21284* at paras. 127–129.

[252] It is perhaps worth noting that Kaiser Broadcasting, then the licensee of KBHK–TV, one of the two UHF stations in San Francisco, in its March 7, 1977 filing in Docket 20988 (pp. 16–17) relied on the INTV filing in complaining of the adverse audience effects of cable operations without noting that the INTV data showed KBHK–TV's cable audience share to be almost triple that which it received off-the-air. In addition, the data supplied by INTV, which purported to reflect the entire San Francisco ADI, actually did not include San Francisco, Alameda County west, or Napa County north. More complete data is shown for KBHK–TV at p. 811 of the *Economic Inquiry Report*.

[253] *Supra*, n. 93, at p. 19.

effect will be greater, but in all likelihood will be considerably less, for all stations, than our theoretical worst-case projection for some stations of 9 percent. For example, our case studies suggest that the potential impact of eliminating the syndicated exclusivity rules will rarely be as large as 4 percent for any station in the foreseeable future. We have relied upon the evidence in the *Report in Docket 21284* and the analysis of Section II of this *Report and Order* to conclude that audience deversion of this magnitude will not hinder the television service provided by local broadcast stations.

The Impact of Eliminating the Syndicated Exclusivity Rules on Program Supply

218. The syndicated exclusivity rules were, as indicated above, rationalized when they were adopted not only as protections for local television broadcasters but as necessary "to insure the continued supply of television programming." [254] In the proceeding section we determined the protection that the rules afford local broadcast stations will not lead to any significant benefits for consumers in the foreseeable future. Thus, we are left in this section with the determination of the effect of the rules on program supply. It should be emphasized, however, that the effect of the rules on program supply is derivative of the effect of the rules on local broadcasters.

219. Traditionally, we have been concerned that without syndicated exclusivity protection the production of television programming would diminish.[255] We thought that if local stations would pay less for programming because of the decreased audience they would attract in competition with less proximate broadcasters and if producers were not indemnified by cable television systems for the use of their product, the economic incentive to produce original works would diminish, resulting in a reduction in the supply of programming. Thus, the syndicated exclusivity rules were adopted, in part, as a copyright remedy for the retransmission of broadcast signals by cable systems.

220. Our *Report in Docket 20988* analyzed the effect of the syndicated exclusivity rules on program supply even though we doubted the authority of this Commission to assign copyright liability for the retransmission of broadcast signals by cable television systems in the absence of debilitating economic competition to local broadcast stations. Our analysis, however, was predicated upon the applicability of the compulsory licensing system established by Congress. Thus we investigated the effect of the syndicated exclusivity rules on program supply under the auspices of compulsory licensing. A summary of those findings is presented here.

221. Our *Report in Docket 20988* found, unsurprisingly, that the price of television programming is determined by the interaction of supply and demand in the marketplace. The prices paid by television broadcast stations for programming were shown to be correlated strongly with advertisers' demand for commercial time, thus corroborating the expectation that the revenue a broadcaster anticipates for exhibiting a particular program will affect significently the price paid for the program. We determined, therefore, that the effect of the syndicated exclusivity rules on the price paid for television programming by local stations depends largely on the amount of audience that the rules protect. We had found, however, that the elimination of the rules would reduce local station audiences by no more than about 1 percent at the present time, even if all of the stations that were entitled to protection were receiving it. Thus we concluded that the elimination of the syndicated exclusivity rules would have a minimal effect on the prices paid for programming and therefore would have no perceivable effect on the supply of television programming over the near term. Or, stated differently, we concluded that the rules do not confer any present benefits on the public in the form of an expanded supply of programming.

222. Over the long term we had found that the audience protection afforded by the syndicated exclusivity rules would increase, theoretically approaching nine percent for some stations, although the likely figure would be much less. Thus we analyzed more carefully the potential effect of the rules on the supply of programming in the long run. We were unable to establish any definitive effect. For example, while local broadcasters may pay less for programming because of the reduced audience resulting from the unrestricted cable importation of distant signals, we noted that it is likely that these distant stations will pay program producers more because of their increased audience circulation. We found that total payments to producers from broadcast stations may remain unchanged or may even increase as a result of the elimination of the syndicated exclusivity rules. However, even if the elimination of the rules were to affect adversely the total payment to producers, we could not determine whether this would cause any perceivable reduction in the supply of programming in comparison to what it otherwise would have been. For one thing, the importation of distant signals by cable television plays only a very small part in determining the overall payments to producers. Our *Report* found that both the overall payments to producers and the supply of television programming will continue to increase over the long term even with the complete deregulation of cable television. Second, we were unable to establish that reduced payments to producers would affect significantly the supply of programming. We noted the divergence of scholarly thought on this matter appearing in the literature. Essentially, there is general disagreement about the extent to which lower payments to producers merely result in lower rents being paid to performers and other factor inputs. For example, some authors argue that reduced payments show up largely as reductions in rents paid to performers without adversely affecting the supply of programming to any significant degree. We were unable to test this theory empirically, however, because of the general unavailability of data on the program production industry.

223. Finally, we noted that even if the above chain of events would unravel in a manner that resulted in the supply of programming being less than what it otherwise would have been with the protection afforded by the syndicated exclusivity rules, the Copyright Revision Act of 1976 provides a mechanism to prevent any adverse reallocation of resources from the program production industry to the cable television industry from occurring.[256] Thus we were unable

[254] *Cable Television Report and Order, supra*, p. 169.

[255] It should be noted that our authority to adopt remedial regulations in response to concerns of this nature is far from clear. In another proceeding (the TV re-run proceeding referred to above) the Commission raised questions "as to whether this subject—the welfare and viability of the program production industry and employment in it—affords a basis for Commission regulation in the public interest." *Report and Order in Docket 20203*, 61 FCC 2d 946, 950 (1976). The situation presented was found to afford no basis for action and the Commission went on to say:

> We are persuaded that it is not this Commission's province to engage in regulatory action (by rule or otherwise) with the purpose, or largely for the purpose of furthering employment or economic conditions in a particular industry or a particular part of the country. While the Communications Act terms "public interest, convenience and necessity" encompass many concepts, and their scope has grown wider with time, there is no reason to believe it extends this far. (footnote omitted). *Id.* at 950.

[256] 17 U.S.C. § 801(b)(2)(C). More generally, we noted that Congress has implemented this copyright

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to ascertain that the supply of programming would be less than what it otherwise would have been in the long term because of the elimination of the syndicated exclusivity rules.

224. Our *Report* concluded that the near-term effect of eliminating the syndicated exclusivity rules on program supply is inconsequential. We found the effect in the long term to be less determinate, but we were able to conclude confidently that the program production industry will continue to prosper and the overall supply of television programming will continue to expand.

225. The criticisms of our analysis of the effect of the elimination of the syndicated exclusivity rules on the supply of programming include no attempts to refute its results empirically. No new evidence has been submitted to contradict our findings that (1) the program production industry will continue to prosper, (2) the supply of programming will continue to expand, and (3) the elimination of the syndicated exclusivity rules will not threaten the continued supply of programming. In the previous section we demonstrated that all of the available information leads conclusively to the result that the syndicated exclusivity rules will provide very little audience protection to local broadcast stations into the foreseeable future. This evidence—alone—would seem to foreclose the possibility of any adverse effects on program supply resulting from the elimination of the syndicated exclusivity rules. Nevertheless we feel obliged to respond to some additional contentions from the comments received in some detail.

226. *Ancient Data.* Our *Report in Docket 20988* stated that the price paid for television programming by local broadcast stations is determined by the interaction of supply and demand in the marketplace. We theorized that prices are greater where advertisers; demand for commercial time is greater (i.e., in the larger markets) and provided some evidence to support this theory. The evidence consisted of the average price per broadcast episode paid by stations for syndicated services in 1968. Our conclusion from this analysis was that the revenue a broadcaster anticipates from a program strongly influences the price paid for that program. The Joint Motion's response to this analysis is that "the reliability and probative value of such ancient data merits serious exploration." [257] The Joint Motion, however, does not proffer any alternative hypotheses that the new data could be used to test. We find no dispute in the record that the revenue a broadcaster expects from exhibiting a particular program will affect significantly the price paid for that program. Thus we find the Joint Motion's contention to be without merit.

227. *Elimination of the Rules Would Be Detrimental to the Production of Syndicated Programs.* Our *Report in Docket 20988* estimated the effect of eliminating the syndicated exclusivity rules on local station audiences over the entire day. For example, we found that elimination of the rules would result in no more than about a 1 percent loss in audience for any broadcast station at the present time. Capital City *et al.*, argue that estimation of the "total average audience [loss] if the syndicated exclusivity rules are terminated is irrelevant to the question of how much particular syndicated programs will be worth to the television station and its advertisers, since specific syndicated programs broadcast by local stations will lose considerably more of their audience." Based upon this belief, Capital City *et al.*, conclude that "the Commission has drastically underestimated the potential impact to the syndicated programming industry." [258] Similarly Metromedia, Inc., argues that the elimination of the syndicated exclusivity rules would "drastically disadvantage non-network programs vis-a-vis network programs." [259] We disagree with these assessments. We believe the syndicated exclusivity rules protect the audiences of both network and non-network programming of local network-affiliated stations. For example, application of the rules often results in a substantial number of blackouts on distant signals during prime time when network-affiliated stations are broadcasting network programs. [260] This reduction in viewing options translates into increased viewing of prime time network programming. Additionally, our *Report* showed that independent stations, which broadcast mostly syndicated programs, often receive less protection from the syndicated exclusivity rules than network-affiliated stations operating in the same market. Thus, while audience data are not available to estimate the effect of the syndicated exclusivity rules on syndicated programming versus local or network programming, we do not believe the differences are large enough to alter our conclusion. [261] We are not persuaded that the elimination of the syndicated exclusivity rules will disadvantage any one particular segment of the program production industry. But, more importantly, we believe that the elimination of the rules, because of its very small effect on local station audiences and thus program producers, will benefit the subscribers and potential subscribers of cable television without subjecting non-cable households to any significant risk of loss of service.

228. *Compulsory License Fees Are Too Low.* Several parties have alleged that the compulsory licensing fees are too low and/or that the present copyright legislation is inadequate. These parties also contend that elimination of the syndicated exclusivity rules will compound this problem. Finally the parties claim there is no data to justify our belief that the compulsory licensing fees may be adjusted to enable program producers to recoup fully any losses that may occur to them as a result of the elimination of the syndicated exclusivity rules.

229. At the outset, we must establish that this Commission has no authority to invalidate the copyright solution for cable television imposed by Congress or to adjust compulsory licensing fees. [262] Any revision of the fees in light of new evidence of this nature can be made only by Congress or by the Copyright Royalty Tribunal. Moreover, it would be difficult for us to determine the appropriate level of fees. For example, Congress' goal in establishing the fees appears to have been to offset "the damage to the copyright owner" from the distribution of a program "in an area

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remedy for cable television, because of the market failure resulting from the unreasonably high level of transaction costs that cable operators would face in bargaining for programming.

[257] *Supra*, n. 92 at p. 32.

[258] *Supra*, n. 91 at 17–18.

[259] Comments of Metromedia, Dockets 20988 and 21284, September 17, 1979 at ii.

[260] *See, e.g.*, the Comments of the National Cable Television Association, Inc., Docket 20988, March 1, 1977. In the past cable systems generally have not substituted programming during blackouts because the marginal cost of program substitution exceeded the marginal revenue. *See, e.g.*, B. M. Mitchell and R. H. Smiley, "Cable, Cities, and Copyrights," 5 *Bell Journal of Econ. and Management Sci.* 264 (1974). This may change somewhat with the increased availability of broadcast signals via satellite. However, without distant signal restrictions, application of the syndicated exclusivity rules will result in blacked out channels, including during prime time.

[261] For example, in the previous section we found to be without merit the industry's claim that accounting for the difference in impact from cable television during early fringe (i.e., the period in which mostly syndicated programming is broadcast) would significantly affect our results. Moreover, the effect of the syndicated exclusivity rules on local station audiences is much less than that of unfettered distant signal carriage. Thus accounting for differences between program types in this case is even less likely to affect our results.

[262] For further discussion, *see* Section IV.

beyond which it has been licensed."[263] Congress exempted cable systems from paying for the right to carry programs purchased by the local stations and by the national networks because such carriage "does not injure the copyright owner."[264] Congress said the copyright owner contracts for these programs on the basis of receiving viewership in cable households and "is compensated accordingly."[265] However, we believe this rationale may also apply to all distant programming carried by cable systems, especially that of superstations. For example, there is no disagreement in the record that superstations presently are paying programmers for their increased circulation.[266] We cannot determine, however, whether this is a stable equilibrium because we do not know whether these stations will receive additional revenue for distant cable viewing. Thus we cannot determine whether the fees are too high or too low given our perception of Congress' goal in setting them. If distant audiences are compensated for, the fees will be too high. Nevertheless all of these factors were considered by Congress in its determination of the appropriate fee level. Thus we believe the complaints and allegations raised in the comments concerning the adequacy of the present copyright legislation for cable television have been directed to an inappropriate forum.

230. Furthermore, Congress has mandated the Copyright Royalty Tribunal to make determinations concerning the adjustment of reasonable copyright royalty fees if the syndicated exclusivity rules are changed. Any adjustments must be reasonable and the Copyright Royalty Tribunal shall consider, among other things, the economic impact of the rule change on copyright owners and users in determining the reasonableness of the fees. Thus we cannot accept the assertion that the elimination of the syndicated exclusivity rules will adversely affect copyright owners because of the inadequacy of the present fee schedule. We also do not believe any data are necessary to support our belief that owners of copyrights will not go unindemnified should a change in the syndicated exclusivity rules do "damage to the copyright owner."[267] Moreover, we do not have jurisdiction to protect program producers *per se*. Thus we find the contentions raised by the commenting parties to be without merit.

231. *Distant Cable Viewers Are Worthless.* Our *Report in Docket 20988* stated that to the extent that television stations are able to receive compensation for the audiences they attract in distant markets we expect their demand for television programming will increase, resulting in greater payments to producers. We concluded that there has been insufficient opportunity to date for the relevant markets to adjust because we are in a transitional period in the growth of superstations. NBC contends, however, that "distant viewing is of no value to local advertisers on the 'superstations' and is not considered economically significant to warrant any substantial increase in the price at which the 'superstation' sells its time."[268] Similarly, MPAA cites the *Report and Order in Docket 20487*, 57 FCC 2d 625 (1976), where the Commission said "distant cable carriage, at this time, does not generally appear to be of significant value to television stations." The reasons specified by the Commission for this conclusion were: (1) the existence of the syndicated exclusivity rules, (2) the lack of information concerning viewing in distant cable communities, (3) the likelihood that distant audiences are worthless to local advertisers, and (4) the possibility that distant signal carriage might not be adequate to reach the advertiser's target audience in the distant market.

232. Several events have occurred since 1976 which suggest a change in reasoning. For example, much better information is becoming available on the viewing of superstations in distant markets.[269] Additionally, there is some indicaton that national advertisers value highly the audience on cable systems located throughout the nation. For example, Madison Square Garden Sports Network receives a comparable, if not higher, price per viewer for commercial time than broadcast stations receive for commercial time during prime time.[270] Thus marketplace forces may dictate that national advertisers will replace local advertisers to a great extent on superstations and will pay for the added circulation in the distant markets. Whether national advertisers value audience more highly than local advertisers is an empirical question that cannot be answered yet because we are in a transitional period where both novelty and uncertainty over regulatory intervention, among other factors, have hindered the requisite adjustments in the informational and advertising markets that have occurred to date. Nevertheless, we believe it is likely that distant audiences will add revenues to television stations if our regulations permit unfettered distant signal carriage.

233. *The Requisite Data To Estimate Elasticities of Supply Has Been Collected by the Network Inquiry Staff.* Our *Report* found that even under worst-case conditions for the program production industry (*i.e.*, payments to producers actually decrease as a result of the elimination of the syndicated exclusivity rules), we could not determine the effect on program supply due to insufficient information to estimate elasticities of supply. We further noted that even with the requisite data any judgment of the effect of a change in the supply of television programming on the welfare of television viewers could be no more than conjectural. In contrast, Tribune Company assserts that the requisite data to estimate the elasticity of supply of television programming has been submitted in the Network Inquiry.[271] Tribune Company has not, however, pointed to any information provided in

[263] Report of the House Committee on the Judiciary, Copyright Law Revision, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 90 (1976).

[264] *Id.*

[265] *Id.*

[266] *See, e.g.*, Superstation, comments in Docket 21284, September 14, 1979. *See also* Tribune Company, comments in Dockets 20988 and 21284, September 17, 1979.

[267] The Copyright Royalty Tribunal is empowered to adjust the ratio if the Commission's rules are changed any time after April 15, 1976. It should be noted that a number of such changes have already been made (see, for example, *First Report and Order in Docket 20553*, 58 FCC 2d 442 (1976) (specialty stations) and *Report and Order in Docket 20496*, 65 FCC 2d 218 (1977) (expanded UHF carriage)), but insofar as we are aware no request for a revision of the fee structure has even been filed with the Royalty Tribunal.

[268] *Supra*, n. 48 at 15. These comments may be contrasted with those of McGraw-Hill Broadcasting (a TV station licensee) in Docket 20988, March 1, 1977, p. 20, that "It is already McGraw-Hill's experience that national and regional advertisers are beginning to view the purchase of time on the Los Angeles stations as a more efficient way to cover this large region than separate time purchases on a number of local stations." AMST would appear to agree with McGraw-Hill by suggesting that, under the retransmission consent proposals, cable systems would likely obtain consents at no cost or be paid to carry distant signals. See comments in Dockets 20988 and 21284, September 17, 1979, at 13. See also "WOR-TV's aims to improve its Image," *New York Times*, March 10, 1980, p. C17, quoting the president of RKO Television as stating that WOR-TV business was "better than it had been in years" in part because "WOR-TV is carried by satellite to cable-television systems around the country." *See also* comments of Rocky Mountain Broadcasters Association, para. 175, *supra*.

[269] *See* Nielson Station Index, *Coping with the Complexity of Cable in the 80's (1979)*.

[270] *See* "Measuring Cable Audience: Systems Differ on Need for It," *Television/Radio Age* at 82, August 13, 1979, where it is reported that "MSG's average sports event reaches roughly 100,000 viewers, for which MSG's ad rate is $650 per minute. *See also id.* at 44.

[271] Tribune Company, comments in Dockets 20988 and 21284, September 17, 1979, n. 14 at 31.

that proceeding which would dictate a change in our findings. Moreover, we are not persuaded that this information can be used to estimate elasticities of supply for policy making purposes. For one thing, information concerning first-run syndicated programming, which historically has been our major concern with respect to the syndicated exclusivity rules, is in a form suitable for analysis for only two programs. But more importantly, the elasticity of supply cannot be measured because there is no adequate method available to compare and measure the differences in quality among programs. We are aware of no information and have been cited to none that has been submitted in the Network Inquiry proceeding which contradicts our conclusion that the program production industry will continue to prosper and the supply of programming will continue to expand even with the deregulation of cable television.

234. *Dire Predictions for Program Supply Ignored.* Our *Report* concluded that the supply of television programming will continue to increase even with the elimination of the syndicated exclusivity rules. Several parties disagree with this conclusion and refer for support to a scholarly journal article on copyright liability for cable television by Besen, Manning and Mitchell which was submitted as a comment in this proceeding.[272] Specific reference is made to the belief of the authors that:

> The continuation of the FCC's exclusivity provisions will significantly diminish the potential adverse impact on program suppliers of the compulsory licensing provisions of the general revision.

MPAA claims that the Commission's "refusal to examine and weigh th[is] evidence is highly arbitrary and capricious, and raises serious questions as to the objectivity of the Commission's staff."[273]

235. Several points are noteworthy with respect to this criticism. First, the article by Besen, Mitchell and Manning was examined and weighed. The *Report in Docket 20988* describes the divergence of opinion appearing in the scholarly literature concerning the effect of reduced payments to program producers on program supply (i.e, the worst-case effect of eliminating the syndicated exclusivity rules), including specific reference to the article by Besen *et al.* Second, the conclusion of the authors of this article is based in part on the belief that "about half of the local independent's audience will be lost if two additional independent stations are imported."[274] In contrast, our analysis in the *Report in Docket 21284* has shown that UHF independent stations often are benefited and VHF independent stations sometimes are benefited by cable television within their local ADI market, even when a large number of distant signals are imported. Third, Besen *et al. make no attempt to explicate the effect of the syndicated exclusivity rules on local station audiences. Finally, the scope of the analysis by Besen et al.* is different from that of ours. A major theme in that article is that copyright holders should be able to extract the maximum economic value that cable subscribers derive from television programming and if that value is not great enough to benefit the copyright owner, the copyright owner should be able to exclude cable subscribers from the benefits of its programming. In contrast, our concern in analyzing the syndicated exclusivity rules is that the importation of programming by cable systems does not reduce the overall payments derived by program producers from television stations to the detriment of consumers, given the compulsory licensing scheme enacted by Congress. As noted above, new audience data suggests that very little or no harm will occur to local broadcast stations and therefore to program producers in the foreseeable future if the syndicated exclusivity rules are eliminated. Moreover, since the syndicated exclusivity rules act to restrict the growth of cable television and thus reduce the number of outlets to which program producers can sell their products, the rules may have the adverse effect of reducing the revenues of the program production industry.

236. Additionally, the Joint Motion interprets incorrectly the conclusion of Besen *et al.* to be necessarily in conflict with ours. Besen *et al.* conclude that the elimination of the syndicated exclusivity rules will diminish the supply of programming. The proper interpretation of this conclusion for our purposes, however, is that the authors believe, based on certain stated assumptions, that the elimination of the rules will diminish the supply of programming compared to what it otherwise would have been in the future. Our *Report in Docket 20988* showed that the supply of television programming has increased significantly from 1971 to 1977, even though syndicated exclusivity protection has been received in only a small number of cases. Furthermore, we concluded that the supply of programming will continue to increase into the foreseeable future, even with the deregulation of cable television. On the other hand, Besen *et al.* make no inferences for the *overall* supply of television programming in the future. Thus their conclusion is not necessarily inconsistent with our conclusion that if there is any impact on program supply from the elimination of the syndicated exclusivity rules, it will be manifested in a reduction in the rate of growth of program supply rather than an absolute decrease in the supply of programming.

237. *Grandfathering* Our *Notice of Proposed Rulemaking in Dockets 21284 and 20988* invited comment on the proposal that each program exhibition license in effect on April 25, 1979 be grandfathered under the existing syndicated exclusivity rules for a period of three years or until expiration of the contract, whichever occurs sooner. Our reasoning, in the *Report in Docket 20988*, was that broadcasters may receive compensation different from that anticipated at the time of negotiation of the contract. We believed that since this dislocation would be partly regulatory in nature, it may be desirable to provide a transition period by grandfathering existing program supply contracts.

238. Several parties have responded to this proposal. Broadcast interests contend that the granfathering period should be extended because contracts often run for longer than three years. In general these comments represent "votes" in favor of the proposal or an extended version of it rather than data or, in some cases, even arguments as to why it should be adopted. No comment has shown any *public* benefit in providing any grandfathering protection for existing license contracts.

239. Cable television interests, on the other hand, argue that the granfathering of existing contracts is neither necessary nor in the public interest. They cite the conclusion of the *Report in Docket 20988* that no more than about 1 percent of local station audiences will be lost due to the elimination of the syndicated exclusivity rules. A–R Telecommunications Division of Adams-Russell Company, Inc. *et al.*, argue that "this impact, which the Commission found clearly did not warrant continuation of the exclusivity rules when balanced against the benefits to the public to be gained by immediate repeal of the rules, dictates that the Commission should not institute an interim grandfathering period."

240. While we concluded that the public would be served best without the

[272] *See* S. M. Besen, W. G. Manning, and B. M. Mitchell, "Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem," 21 *Journal of Law and Economics* 67 (1978).

[273] Motion Picture Association of America, comments in Dockets 20988 and 21284, Sept. 17, 1979.

[274] *Supra*, at n. 272 at p. 31.

blackouts on distant signals resulting from the syndicated exclusivity rules, we felt that some transitional dislocations may result without grandfathering provisions because the contracts were written in contemplation of the existing rules. Upon reconsideration, however, we believe that the absence of any evidence suggesting that these transitional dislocations will redound to the detriment of the public forecloses us from extending the grandfathering provisions to cover existing contracts.[275] Given the absence of public benefits, the relatively small amount of audience impleicated in this issue, and the complexity and difficulty associated with the administration of these rules both for the recipients of benefits under it and for the Commission and these subject to it, we are not persuaded that the grandfathering proposal can be justified.

Conclusions

241. Our analysis of the effect of the syndicated exclusivity rules on television service to the public is similar in many respects to that of the effect of distant signals. The principal difference is that the syndicated exclusivity rules were adopted not only to protect local broadcasters but also to protect the continued supply of television programming. In both cases, however, we rely upon three well-established criteria for ascertaining the public interest: consumer welfare, distributional equity, and external effects.

242. In Section II we have shown in great detail that the protection afforded to local broadcast stations from restricting distant signal carriage on cable television systems disserves the public interest. We found the effect of distant signal carriage on the financial health of television broadcasters is small in relation to the normal growth in the industry's financial prosperity. Additionally, audience losses due to cable television were found to have little effect on the local programming of television stations. We concluded that distant signal carriage improves television service to cable subscribers without subjecting non-cable households to any significant risk of harm. Since these results were derived for the carriage of distant signals that are not subject to blackouts from application of the syndicated exclusivity rules, the results also apply to the elimination of the syndicated exclusivity rules, but with even greater force. Moreover, in view of these findings and in light of the system created in the 1976 Copyright Act for indemnifying copyright owners, we are unable to conclude that elimination of these rules will have adverse consequences for the supply of television programming the public receives. These rules serve no valid communications policy purpose.

243. On the other hand, we believe that the syndicated exclusivity rules impose significant costs upon the subscribers and potential subscribers of cable television. Therefore, by weighing both the expected costs and benefits of the rules to consumers, we conclude that the public will be served better without the syndicated exclusivity rules for cable television systems.

IV. Retransmission Consent

Background

244. As previously described briefly, cable television systems have no *direct* financial or contractual nexus or responsibility either to the television broadcasters whose signals they carry or to the creators or owners of the programs that are broadcast on these stations.

245. With passage of the Copyright Revision Act of 1976, Congress established the copyright obligations that were to govern the relationship among these parties. Under this statute cable television systems pay a percent of their gross revenues to the Register of Copyrights for the right to carry distant signals and for each distant signal or "distant signal equivalent." The fees payable are to some extent variable according to system size but the schedule for the larger systems provides roughly that 0.675 of 1 per centum of the system's gross revenues must be paid for the first distant signal, 0.425 of 1 per centum for the second, third, and fourth signals, and 0.2 of 1 per centum for the fifth and each additional signal. Each independent station is one distant signal equivalent. Each distant network or non-commercial educational station is one quarter of a distant signal equivalent. The money received by the Register of Copyrights is then distributed to the copyright owners whose works were carried by cable television systems by a separate Copyright Royalty Tribunal. In addition to disbursing the copyright fees paid by cable television systems, it is also the function of the Copyright Royalty Tribunal to alter the rate structure specified in the law, both to assure that the real constant dollar value of the royalty fee per subscriber is maintained and to assure that the fee structure remains appropriate if the rules of the Federal Communications Commission are amended to permit the carriage of additional distant television broadcast signals or to change the syndicated program exclusivity requirements.

246. With the enactment of this legislation, Congress spoke for the first time on an issue that was first raised with respect to cable television in the late 1940's, which was before the Supreme Court on two separate occasions, which engaged the attention of the Congress itself for almost twenty years, and was considered one of the most important and controversial of the issues involved in the revision of the copyright act.

247. During the period leading up to the enactment of this new law, the Courts, the Congress, and the Commission were each prevailed upon to remedy what was regarded as the problem created by the failure of cable television systems to make copyright payments or participate in the markets then existing for the sale and distribution of television programming. Action was thought necessary to promote economic efficiency in television program distribution markets, to prevent unfair competition between cable television systems and television broadcasters, to eliminate adverse impacts on the supply of television programming, and to protect property rights in creative works.

248. Although Congress has now amended the copyright law in response to these concerns, the mechanism chosen is still regarded by some as inadquate. Government, it is said, is still interfering in this process by setting copyright fees and participating in their distribution and this situation should be replaced by rules that establish a market mechanism for setting rates and for regulating the flow of distant signals.

249. That we undertake such an effort was forcefully urged on us by the National Telecommunications and Information Administration of the Department of Commerce in a rulemaking petition considered in connection with our *Notice of Proposed Rule Making* in this proceeding. Put in its starkest terms what is urged is that new cable television systems or those expanding or adding signals be permitted to do so only upon receipt of permission from the originating station and that we should adopt this proposal regardless of whether it has adverse consequences for local television broadcast service or whether it results simply in retransmission consent denials

[275] See *FCC v. National Citizens Committee for Broadcasting*, 435 U.S. 912, n. 24 (1978). Moreover, that there will even be private injury is not something that can be assumed given the ability of cable television operators under the provision of the rules to substitute alternative programs for those deleted.

and the cessation of cable television distant signal carriage.[276]

250. In reviewing this proposal in our *Notice of Proposed Rule Making* we noted that it had some "considerable theoretical attractiveness" para. 83, *supra* and "that a market solution to the problems of compensating owners of programming materials for their commercial use is desirable." Para. 81, *id.* We noted that:

> The existing compulsory license system substitutes regulatory judgment about the proper treatment of program rights for the normal market process that rewards holders of copyright. So, too, does the retransmission consent proposal prejudge the type of market institutions that can best deal with the protection of equities. It is argued that if broadcasters succeed in raising advertising rates to reflect distant audiences, imported stations will want to have their signals retransmitted even if no retransmission fee is paid. *Id.*

251. "The Commission's preference," we said, "would be to give markets the opportunity to work and to impose regulatory judgments on how transactions should take place only on demonstration that a private market will not work." *Id.* We also noted that the retransmission consent proposal appeared to be the functional equivalent of full copyright liability and that, in view of the recent explicit Congressional rejection of full copyright liability in its 1976 Copyright Revision Act, there were questions as to our legal authority to adopt the proposal. In order to aid us in reviewing this matter, we sought comments "on how the markets in program rights might develop, and what actions, if any, the Commission can legally take that would serve that end." *Id.*

252. The comments received in response to this invitation add very little to the store of economic information available relating to this subject. Morever, although the legal issues are briefed in considerable detail, there is little to dispel our initial doubt concerning our authority to engage in the type of regulation urged for the purposes that are urged. In fact, the continuation of this legal debate persuades us that even were there evidence of a real and immediate problem calling out for resolution, that this, among all of the regulatory tools that might be available to us, is the one most difficult to sustain because of its recent and distinct rejection by Congress. In order to demonstrate as clearly as possible that this view is correct, and not merely a retreat from responsibility in the guise of an overly narrow reading of our authority, some fairly detailed review of the arguments and history of this issue is required. For the sake of completeness, this discussion to some extent repeats that set forth in the *Notice of Proposed Rule Making*. The arguments that we ultimately find to be persuasive are twofold: (1) that this is an issue, whether labeled a matter of copyright or communications policy, that Congress considered almost *in haec verba* and chose a different path to follow, and (2) that the objectives sought by this rule—protection of program suppliers from economic injury and the preservation of existing market structures for the sale of television programming—are remote to the responsibilities assigned to this agency.

Comments

253. The principal proponent of the retransmission consent proposal continues to be the National Telecommunications and Information Administration. In fact some of the other principal commenting parties in this proceeding such as the Motion Picture Association of America and the Association of Independent Television Stations largely or entirely defer to NTIA to carry this issue. NTIA perceives the central issue before the Commission to be "how cable will develop in the major markets, rather than how it will develop in the small towns or markets" (NTIA comments, p. 7), and the critical consideration in this major-market development to be the system's importation of non-network programming. NTIA perceives the necessity for the imposition of a retransmission consent requirement in the fact that although broadcasting and cable are the two principal means for distributing non-network programming, broadcasters must negotiate directly with program producers and pay a negotiated price for program product while cable enjoys a compulsory license to carry its programming, and thus need not enter into direct negotiations or pay for it. NTIA sees this as a "skew" of the marketplace in favor of cable, which eliminating the present rules will not resolve. Indeed, NTIA argues that if the distant signal and syndicated exclusivity rules were deleted without imposing a retransmission consent requirement a number of serious "anomalies" involving exclusivity arrangements could occur.[277] To reconcile this "incompatibility" between broadcasting and cable, NTIA recommends the imposition of a retransmission consent requirement on new or expanding major-market cable systems, to "force" them to "enter the program marketplace and compete with local broadcasters for the right to distribute programs in the area served by cable." (NTIA comments, pp. 8–10). NTIA states that its retransmission consent proposal would exhibit a "rational symmetry" with other policies and processes, including the distribution system for pay cable programming, the requirement that translators, which are similar to cable, obtain rebroadcast consent from originating stations under Section 325(a) of the Communications Act, and the promotion of first-run syndicated programming. *A fortiori,* the Copyright Royalty Tribunal, "as only another government agency adjusting a government-ordained schedule," is an unsatisfactory alternative to marketplace control by retransmission consent. Although NTIA admits that it would be preferable for Congress rather than the Commission to adopt its retransmission consent proposal, NTIA notes that legislative action is not assured and therefore Commission action is appropriate.

254. With respect to the workability of its retransmission consent proposal, NTIA states that the advent of satellites, and the concomitant increase in demand for new program sources and in the number of broadcasters, nonbroadcast programming entrepreneurs, and middlemen seeking to produce them, will make retransmission consent a success now despite its failure a decade ago. Even if its prognostication were proven wrong, however, NTIA states that the marketplace answer will simply be that major-market cable will have to succeed with a service offering of enhanced reception of local signals, pay cable, and interactive services such as "Qube." On the more precise question of how its retransmission consent proposal would work in practice, NTIA suggests

[276] As set forth in the NTIA comments in this proceeding the proposal is actually somewhat more complicated. As described therein the retransmission consent fee would be a "reasonable" one (p. 9), the Commission would supervise the operation of these rules "to police abusive practices, such as 'warehousing' " (p. 10), if necessary "either by rule or on an *ad hoc* basis" the Commission could exempt smaller, rural systems or those outside the top 100 markets (p. 7), the Commission would give "*ad hoc* consideration of station claims of substantial injury" (p. 17) and "on its own investigate serious injury claims by small market stations." (p. 21).

[277] For example, a local UHF station could obtain exclusive rights for non-network programming as against other stations in its market but not against cable systems in the market carrying the same programs on distant signals; sports entrepreneurs can similarly obtain exclusivity for league games as against local commercial and STV stations but not as against cable; and if "superstations" who are refused sales by copyright owners in attempts to control the distribution of their programs, television viewers in the superstations' home markets, as well as cable viewers, may not get the programs that are withheld.

that perhaps the distant stations would be in a position to pay program suppliers more in light of their enlarged cable audience, and recoup these expenses from advertisers, or perhaps they may charge systems a fee for securing retransmission consent for them; on the other hand, systems could establish funds from subscriber revenues for programming or the whole process could be managed by brokers. In any event, "the government does not have, and should not have a blueprint here." (NTIA comments, p. 9.)

255. NTIA would grandfather existing, non-expanding major market systems. Noting that such systems "were built upon the basis of either no copyright payment, a right twice judicially-confirmed, or of compulsory licensing under the Copyright Revision Act of 1976," NTIA states that "it would be inequitable now to change the rules for them." (NTIA comments, p. 17.) NTIA would, however, continue to enforce the syndicated exclusivity rules (with the exception of the off-network program pre-clearance requirement) against such systems in the fifty largest markets and extend them to the second fifty largest markets. If its suggested program of retransmission consent with grandfathering is not adopted, then NTIA proposes that the Commission retain the syndicated exclusivity rules for the top fifty markets and extend them fully to the second fifty as well. In so doing, NTIA emphasizes that its proposal is not premised on potential impact, but rather on accommodating the public interest and in deference to longstanding territorial exclusivity practices.

256. NTIA finds the passage of the Copyright Revision Act no bar to the adoption of its retransmission consent proposal because:

> The cable copyright provisions are a compromise, taking the situation as given at that time—small town cable. NTIA's retransmission consent proposal does not disturb that resolution. Congress did not address the future of cable in large metropolitan areas, and did not foreclose the Commission from addressing this new situation under communications policy. Requiring retransmission consent for cable's independent signals in the cities, together with the grandfathering of the existing small town cable, will provide a sound communications policy framework for cable's development in new directions as well as respect the copyright compromise Congress made in 1976 for cable as it had then evolved.

NTIA comments, p. 50. More specifically, NTIA argues that under its retransmission consent proposal it would be the broadcaster, rather than the cable operator, that would be required to secure from the copyright owner the right to distribute programs to its service area as enlarged by cable. This, NTIA asserts, is entirely consistent with the Copyright Act as well as posing no practical problems for the broadcaster. Should the broadcaster charge cable systems for expenses incurred in granting retransmission consent, NTIA views the charge as "a matter for marketplace forces" and one which the Copyright Royalty Tribunal could take account of indirectly by adjusting the compulsory license fee.

257. Nevertheless, conceding the possibility that direct negotiations and payments between cable operators and copyright owners could occur, NTIA argues that the Copyright Revision Act would still not preclude Commission adoption of a retransmission consent scheme. In support of this contention, NTIA cites the provisions of Sections 801(b)(2)(B) and (C) of the Copyright Revision Act, which provide for the adjustment of the compulsory license fee at such time as the Commission amends its distant signal, syndicated and sports program exclusivity rules,[278] and the legislative history of the Act, which indicates that this authority was granted the Copyright Royalty Tribunal because the distant signal and exclusivity rules protect the copyright owner.[279] Thus, NTIA argues that the Copyright Act specifically allows the Commission to change its rules based on communications policies even though these changes might affect the copyright royalty fees payable. NTIA further states that the legislative history of the Copyright Revision Act, and indeed the entire history of attempts to resolve the cable-copyright dilemma prior to the passage of the Copyright Revision Act, reflected the fact that the Judiciary Committees of the respective Houses of Congress conscientiously avoided any interference with the jurisdiction of the Commission over matters of communications policy in their consideration of copyright legislation.[280] Thus, NTIA concludes, the thrust of the copyright scheme is that the Copyright Royalty Tribunal defers to FCC changes in communications policy rather than that the FCC defer to the cable copyright provisions in exercising its authority over communications policy under the Communications Act. NTIA also takes direct issue with the proposition that Commission adoption of its retransmission consent proposal would require the cable system operator to negotiate directly with the copyright owner, thereby countervening the express legislative intent in adopting the compulsory license scheme in that it would be "impractical and unduly burdensome to require every cable system to negotiate with every copyright holder whose work was retransmitted by a cable system."[281] NTIA concedes that the legislative intent was clearly not to have the system operator negotiate directly with the copyright owner; however, it re-emphasizes that its proposal would only require the system to negotiate with the originating broadcaster; the originating broadcaster would negotiate directly with the copyright owner. Finally, NTIA disputes the contention in the *Notice* that retransmission consent was expressly rejected by the Congress. NTIA notes that the Commerce Committee's rejection of the Commission's 1966 legislative proposal to extend Section 325(a) of the Act to cable television does not establish any lack of Commission jurisdication to adopt its proposal, citing the Supreme Court's subsequent opinion in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170–171 (1968). Indeed, it cites the fact that the recent consideration of a retransmission consent proposal by the House Communications Subcommittee in a bill to revise the Communications Act as evidence that retransmission consent is a matter of communications, rather than copyright, policy.[282]

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[278] Section 801(b)(2)(B) provides in pertinent part:

> In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by Section 111(d)(2)(B) may be adjusted to insure that the rates for the distant signal equivalents resulting from such carriage are reasonable in light of the changes effected by the amendment to such rules and regulations.

Section 801(b)(2)(C) provides in pertinent part:

> In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by Section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

[279] H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 176–177.

[280] The Report of the House Judiciary Committee stated that, while it was aware of the "interplay" between the communications and copyright elements of the legislation, the Committee has carefully avoided including in the bill any provisions which might interfere with the FCC's rules or which might be characterized as affecting "communications policy." *Id.* at 89.

[281] *Id.*

[282] H.R. 3333, 96th Cong. 1st Sess. (1976). Section 453 of the bill would have precluded carriage of any signal, local or distant, without the consent of the station or the person who "controls the exclusive rights to the program involved." In the same session rewrite bills were also introduced in the Senate. Neither of these bills, S. 611 or S. 622, contained a retransmission consent proposal.

258. NTIA finds that the Commission's jurisdiction to adopt its retransmission consent proposal as a matter of communications policy emanates from Sections 325(a), 303(g), (h), and (s) and 307(b) of the Communications Act. NTIA cites the legislative history behind Section 325(a) for the proposition that it was meant to confer on broadcasters the right to control commercial exploitation of a radio communication and that this prohibition was intended to extend to cable as well as to broadcasters.[283] NTIA also states that rebroadcast consent and copyright are two distinct legal requirements, with liabilities arising under separate statutes if one or the other is violated, and that Section 73.1207 of the Commission's rules, which implements Section 325(a), reflects communications policies such as fostering widespread communications in times of emergency and protection of privacy, and includes privately-owned non-broadcast stations and point-to-point government stations, which, like cable television, do not fall within the express language of Section 325(a) but for which consent for rebroadcast must nevertheless be secured from the Commission.

259. NTIA finds the requisite jurisdiction to apply Section 325(a) to cable television in *United States v. Southern Cable Co., supra,* and sucessor cases. Although noting that Section 325(a) was not explicitly treated in *Southwestern,* the Court generally recognized the expansive powers of the Commission to regulate interstate communications by wire and radio in holding that cable television may be regulated to the extent "reasonably ancillary to the regulation of television broadcasting," *Id.* at 178. NTIA also cites *United States v. Midwest Video Corp.,* 406 U.S. 649 (1972), for the proposition that "ancillary to broadcast" jurisdiction enunciated in *Southwestern* is not limited to preventing adverse competitive impact "but extends also to requiring CATV affirmatively to further statutory policies." 406 U.S. at 664. NTIA sees no limitation for its jurisdictional purposes in the recent decision in *FCC v. Midwest Video Corp.,* 59 L. Ed 2d 692 (1979), which vacated the Commission's access and channel capacity rules; rather NTIA finds support in its holding that the substantive provisions of the Act which delimit the obligations that can be imposed on broadcasters do not have "peculiar applicability to television broadcasting. [Their] force is not diminished by the variant technology involved in cable transmissions." 69 L. Ed. 2d at 706–7. Thus, NTIA holds that retransmission consent is reasonably ancillary not only to Section 325(a) but also to Section 303(h), which authorizes the Commission to establish areas or zones to be served by stations, Section 307(b), authorizing effective local television outlets, and Section 303(s), authorizing the promotion of UHF outlets, and Section 303(g), which empowers the Commission generally to secure "the larger and more effective use of radio." NTIA points out that satellite transmission capability and the compulsory copyright license policy present a threat to program diversity by forcing program producers to restrict the availability of their products in order to assure the continued observance of traditional territorial exclusivity. As a result, NTIA predicts that the public in some cases will be deprived of programming entirely; in others, that it will be "syphoned" to pay services; that localism and UHF development will be under-cut, and that the result would be "a skewing of the marketplace to the detriment of all." In sum, NTIA submits that its proposal is a matter of communications policy that is within the Commission's authority to adopt under the Communications Act. Indeed, NTIA contends that under the *Melody Music* doctrine [284] the Commission would be required to explain its disparate treatment of metropolitan cable systems and independent television stations should we decline to adopt NTIA's retransmission consent proposal.

260. The three television networks as well as a number of individual television licensees and licensee groups endorse the retransmission consent consept. Some of these, like WTVC *et al.* and ABC, favor retransmission consent because it will require cable to compete in the marketplace for programming. Many of the commercial broadcast commenters, including 220 Television *et al.,* Bahia de San Francisco, KTVB, Inc., and Bibb Television Inc. *et al.,* stress the fact that under the compulsory license system cable television receives a massive federal subsidy and thus competes unfairly with broadcasters.[285] 220 Television *et al.* argue that under the present compulsory license system distant signals are effectively "free goods;" they do not reflect the cost or value to the local station, the distant station, or the program supplier. ABC and others argue that this marketplace distortion is aggravated by the advent of superstations. The Association of Maximum Service Telecasters, Inc., contends that the repeal of the rules without the imposition of a retransmission consent requirement would immunize superstations as well as cable systems from competing with local broadcasters in the marketplace, thus rendering the existing program marketplace "meaningless." KOB–TV *et al.* argue that the sale of programming to superstations could destroy its sales value in individual markets thereafter, and states that since the essence of our deregulation proposal is to achieve for the public that which the unfettered marketplace can provide, repeal of the present rules without adoption of retransmission consent to create such a marketplace would be self-defeating.

261. A number of the commercial broadcasters, including KOB–TV *et al.,* Association of Maximum Service Telecasters, the National Association of Broadcasters, and Bahia de San Francisco, addressed themselves specifically to the issue of the Commission's jurisdiction subsequent to the passage of the Copyright Revision Act in 1976. All found the requisite jurisdiction, generally employing the same analysis as NTIA. KOB–TV, *et al.* and the Association of Maximum Service Telecasters argue that the Commission's authority under the Communications Act to determine that marketplace regulation of cable would be appropriate and also includes the authority to create by regulation the conditions necessary for the free market to function.

KOB–TV *et al.* and AMST also contend that Section 301(d) of the Copyright Revision Act specifically reserves the Commission's jurisdiction to adopt a retransmission consent requirement in the course of a communications policy judgment that the free market should substitute for

[283] *Inter alia,* NTIA cites the statement by Senator Dill on Section 28 of the Radio Act of 1927, the predecessor to present Section 325(a), that

> As to Section 28, providing that no person, firm or corporation shall rebroadcast the material broadcast by a station without that station's consent, it is I think, a very necessary provision. Otherwise, we would have a broadcasting station spending a large amount of money to prepare and present a program as a program from that station, and then under modern methods of rebroadcasting, it could be picked up and broadcast from other stations, and particularly over the wired wireless, and money charged for listening to it. . . 68 Cong. Rec 2880.

[284] *Melody Music, Inc. v. FCC,* 345 F. 2d 730 (1965).

[285] For example, the Smaller Market UHF Stations note that the entire cable industry spent $13,000,000 in compulsory license payments last year whereas the ABC network alone spent $570,000,000 for programming over the same period. 220 Television, Inc. *et al.* state that cable's royalty payment is roughly proportional to the fees television stations pay for music licenses—about 1 percent of operating revenues.

extrinsic regulation.[286] It is argued in this respect that the Copyright Revision Act was intended to act as a "floor," that the Commission could not relieve cable systems of their obligation to make compulsory copyright payments when they do not directly or indirectly bargain for program rights. KOB–TV *et al.* maintain that it does not, however, establish a "ceiling" on what the Commission may do to achieve the purposes of the Act. They further argue that "repeal by implication," e.g., implied repeal of Section 325(a) by the subsequent passage of the Copyright Revision Act, is disfavored as a matter of law, and that the Copyright Revision Act and Section 325(a) are not repugnant as manifest by the fact that Congress carefully distinguished between matters of communications and copyright policy in enacting the 1976 Act. The Association of Maximum Service Telecasters argues that the validity of a retransmission consent requirement turns on whether it is adopted for legitimate communications policy reasons, not on whether it is incidentally similar to, overlaps, or is more onerous than the requirements of the Copyright Revision Act. Finally, KOB–TV *et al.* argue that the Commission's doubts as to its jurisdiction to adopt retransmission consent are inconsistent with its action in adopting equal employment opportunity rules for its licensees despite passage of Title VII of the Civil Rights Act. It is contended that, just as the Commission's EEO rules have been sustained despite the fact that Title VII represents a comprehensive congressional scheme for dealing with equal employment, the Commission similarly has jurisdiction under the Communications Act to restrict the benefits that would otherwise be available under the Copyright Revision Act.

262. Finally, several of the commenters directly confront the issue of the workability of a retransmission consent requirement. The Association of Maximum Service Telecasters argues that the so-called "failure" of the Commission's very limited, experimental retransmission consent program in 1968 is not relevant to the implementation of a nationwide system in 1980, given the advent of superstations, satellites and resale carriers and strong incentives to assure its effective and economical implementation. If the proposal were adopted, it is said to be "very likely that in most cases, cable will end up paying nothing for consent, or may end up being paid to carry distant programs just as television broadcasters are paid by some of their program suppliers, most notably the major networks." The National Association of Broadcasters believes retransmission consent would work because, except where there are already exclusive contracts, program suppliers would sell rights to the highest bidder, whether it be a cable system or a broadcaster. The Association of Maximum Service Telecasters agrees, stating that cable is now so profitable program suppliers could hardly ignore it, and Metromedia, Inc. states that it is aware of two entrepreneurs prepared to act as brokers if retransmission consent were adopted. KOB–TV *et al.* cite pay cable's development as a prototype, and the Association of Maximum Service Telecasters agrees with KOB–TV *et al.* that pay cable and other nonbroadcast programming will provide a "cushion" in situations where obtaining retransmission consent proves difficult. The Post Corporation, while strongly supporting the concept of retransmission consent, states that more than simple consent should be involved. It argues that ownership of programming is the key, and to the extent that Section 325(a) fails to take the element of program ownership into account, a perplexing multitude of rules has resulted, and NTIA's retransmission consent proposal, to the extent it ignores ownership, suffers from the same defect. On the other hand, Post argues, if consent had to be sought from the program owner, marketplace forces would truly govern, and that would be the optimal approach. Finally, KOB–TV *et al.* note their preference for a regulatory rather than statutory retransmission consent scheme because of its greater flexibility.

263. Nine noncommercial television broadcast station licensees, commenting jointly also recommend the adoption of a retransmission consent requirement for all programs of public television stations if the rules on carriage of distant noncommercial stations are deleted. The licensees argue that at least in this manner they would have the opportunity to contract for exclusive rights to particular programs. They state that a retransmission consent requirement would allow a distant noncommercial station to withhold consent where it appeared that carriage of its programming would injure a local noncommercial station, and recognize that cable systems could be required to pay for use of a noncommercial station's programming. These licensees believe they are currently required to subsidize cable television operations, and assert that the Commission has jurisdiction to adopt a retransmission consent requirement.

264. The program producers that addressed the retransmission consent proposal were generally in favor of it. The Motion Picture Association of America incorporates NTIA's comments by reference. Tandem Productions, Inc. and T.A.T. Communications favor adoption of retransmission consent without grandfathering existing systems if the syndicated exclusivity rules are deleted. Tandem and T.A.T. argue that retransmission consent would afford recognition of the rights of program producers and provide them with adequate revenues to assure the continued availability and quality of program product.

265. Among the program distributors, the sports interests were particularly strong in urging the adoption of retransmission consent, arguing vigorously that it is necessary, legal, and workable. The Commissioner of Baseball and the National Football League state that the Commission failed to adequately consider the effects that elimination of the distant signal limitations would have on the supply of sports programming. It is argued that sports programming differs from other types of programming; therefore, the conclusions drawn in the *Economic Inquiry Report* are not valid as to sports programming. Baseball argues that, although the elimination of the distant signal rules and the advent of superstations will make programming generally available to more viewers, ultimately, they will deprive the American public of the amount of sports programming previously enjoyed. Importation of games into a home team's territory will threaten the latter's three sources of revenue: live gate, broadcast revenues, and "hometown fan loyalty." With unfettered importation of distant signals, Baseball fears that its weaker teams will be particularly hard hit. This would in turn result in a change in telecasting patterns, with local and regional telecasts decreasing. Baseball claims that to date technological and regulatory pressures have kept cable from saturating home teams' territories. Removal of the distant signal rules would, however, remove the "final safeguard" against the loss of large amounts of sports programming from conventional television. The National Basketball Association agrees with the thrust of these comments, but particularizes that it has two sources of revenue, its network broadcast revenues

[286] Section 301(d) of the Copyright Revision Act provides that, "Nothing in this title annuls or limits any rights or remedies under any other Federal statute."

(the crucial source) and local telecasts, both of which would be jeopardized by the elimination of the distant signal rules without the imposition of retransmission consent. NBA notes that its network ratings have decreased and that the value of its programming to local stations will also decrease. NBA stresses that the potential impact on its games as network television attractions is, however, the biggest threat. The National Collegiate Athletic Association also favors retransmission consent as a means of safeguarding its college teams' live gate attendance, and it, like Baseball, NFL and NBA, argues that distant signal carriage of competing games will force colleges to forego broadcasts to avoid cable retransmission and thus decrease, rather than increase, the availability of college sports to the public. Baseball emphasizes that copyright compensation does not solve the sports interests' problems with unregulated distant signal importation of competing games because the crucial issue for sports is control, not compensation. Madison Square Garden Communications Network suggests simply that retransmission consent be given consideration as a possible alternative to the present distant signal and syndicated exclusivity rules.

266. The sports interests also contend that the Commission has the requisite jurisdiction to adopt a retransmission consent proposal, at least with respect to sports, and that retransmission consent would be workable. Baseball and the NBA argue that the Copyright Revision Act does not bar Commission recognized retransmission consent as a communications rather than a copyright policy matter and, as did NTIA, also maintain that the legislative history of the Copyright Revision Act makes it clear that Congress did not intend to intrude on the Commission's prerogative to make communications policy. Baseball construes this prerogative to include the removal of any category of signals from the general compulsory licensing provisions. In any event, Baseball argues particularly that the legislative history of a predecessor bill to the Copyright Revision Act demonstrates that Congress specifically perceived cable carriage of sports programming to be a communications policy issue,[287] and that the sole reason Congress did not adopt legislation on the subject was that it thought the Commission would deal with the problem in the context of a pending rulemaking procedure.[288] Baseball also maintains that arguments that retransmission consent will not work are untenable. Baseball terms claim that broadcasters will not deal with cable systems "speculative," and argues that program suppliers, especially sports interests, will deal with cable.[289] Baseball argues that the 1968 retransmission consent experiment did not completely fail, and, given its circumscribed operation, could hardly have been expected to succeed. Although Baseball concedes that existing exclusivity contracts between broadcasters and program suppliers could inhibit cable operators' ability to secure retransmission consent, Baseball argues that this is a reason to phase in retransmission consent rather than reject it out of hand.

267. The United States Department of Justice and the United States Copyright Office have joined a number of individual cable television systems, cable television associations, common carriers, and WTBS-TV, Atlanta, in opposing Commission adoption of retransmission consent.

268. In contrast to the arguments of the proponents of retransmission consent, whose contentions stressed principally the necessity for its adoption, most of the opponents of retransmission consent urge as their principal argument the Commission's lack of jurisdiction to adopt a retransmission consent proposal subsequent to the adoption of the Copyright Revision Act. The foremost proponent of this view is the Department of Justice. The Department notes that Congress enjoys the prerogative of enacting patent and copyright legislation pursuant to Article I Sec. 8, Cl. 8 of the Constitution.[290] The Department states that Congress exercised that prerogative in 1976 in enacting the Copyright Revision Act, and in doing so it was fully aware of virtually all the arguments advanced by the proponents of retransmission consent. The Department argues that the legislative history of the Copyright Revision Act makes it clear that Congress intended the cable television industry to have a compulsory license to retransmit whatever broadcast signals the Commission's rules would allow, and that there is no credible evidence to suggest that Congress intended to allow the Commission to adopt the kind of retransmission consent proposal that the Congress itself had considered and rejected. The Department states that arguments of the proponents, that the royalties provided under the Act are inadequate and the system created too "regulatory," are properly addressed to, respectively, the Copyright Royalty Tribunal and the Congress, because the Commission's authority under the Communications Act does not extend to rewriting an Act of Congress. The comments of the Copyright Office also conclude that Congress established the compulsory license as the exclusive method for compensation of copyright owners and the Copyright Royalty Tribunal as the exclusive means whereby the rates may be adjusted.

269. A Congressional Research Service study on the Commission's jurisdiction to adopt retransmission consent rules also came to the same conclusion.[291]

270. Southern Satellite Systems, Superstation, Inc. (WTBS–TV, Atlanta), the Community Antenna Television Association, the Florida Cable Television Association, and A–R Telecommunications are among the other opponents of retransmission consent addressing the jurisdictional issue. They argue that Congress specifically declined to adopt a retransmission consent requirement, terming it "unduly burdensome," and that the legislative history of the Copyright Revision Act indicates that in adopting the compulsory language Congress struck a conscious balance between the copyright owners' right to payment with the viewer's right to receive diverse sources of programming. The opponents argue that the structure of Section 111 of the Act, viewed as a whole, outlines a comprehensive congressional scheme assigning either full copyright liability, compulsory licensing, or outright exemption in differing circumstances, and specifying the procedures to be followed in

[287] Baseball cites the following language from the Senate Judiciary Committee Report on S. 22:

Without prejudice to the arguments advanced [in behalf of proposals to exclude in some circumstances the carriage of organized professional sporting events from the compulsory license] . . . these issues should be left to the rulemaking process of the Federal Communications Commission, or if a statutory resolution is deemed appropriate to legislation originating in the Committee on Commerce.

S. Rep. No. 94–473, 94th Cong., 1st Sess. 80 (1975).

[288] E.g., *Notice of Proposed Rulemaking in Docket 19417*, 36 FCC 2d 641 (1972).

[289] In support of this proposition, Baseball notes that it has already negotiated a game-of-the-week package with UA-Columbia Cablevision for presentation on pay cable. It also notes that many clubs, exemplified by the New York Yankees and Mets and the Philadelphia Phillies, have contracted with cable systems or programming packagers to cablecast a number of their non-televised games.

[290] This clause grants power to Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *U.S. Const.*, Art I, sec. 8, cl. 8.

[291] Congressional Research Service, *FCC Jurisdiction to Require Retransmission Consent*, November 26, 1979.

obtaining a compulsory license, and therefore would allow no discretion to the Commission to effectively amend this complete statutory scheme by imposing a retransmission consent requirement in derogation of the compulsory license. Specifically, the commenters point to the legislative history of Section 801(b)(2)(B) of the Act for the proposition that Congress gave the Copyright Royalty Tribunal the authority to change the royalty fee only with respect to added signals, thereby underscoring the Congress' intent that Congress specifically recognized that the Commission could and indeed might change its distant signal rules but that the compulsory license *per se* could not be affected by amendment of the Commission's rules.[292] Florida Cable Television Association also notes that NTIA's "two-tiered" proposal of exempting certain systems from the retransmission consent requirement and allowing only these exempted systems to be governed by the compulsory license runs directly contrary to Section 111(C)(1) of the Act.[293] These parties contend that the Commission and the Congress have both consistently recognized that retransmission consent is primarily a copyright substitute rather than a matter of communications policy, and, as the proper body to act on an essentially copyright-related matter, Congress has consistently rejected it since 1960. The most recent evidence of this Congressional perception of retransmission consent as a copyright substitute was manifest in its rejection by the House and Senate Communications Subcommittees in recent Communications Act rewrite legislation.[294] As Southern Satellite Systems, Inc. argues, the Commission in 1968 recognized the copyright nature of retransmission consent in deferring to Congressional action on the cable copyright question before adopting it.[295] Therefore, there can be no legal justification at all for imposing a retransmission consent requirement after Congress has adopted a revised copyright act that deals comprehensively with cable. Superstation, Inc. quoted testimony by Messrs. Valenti and Geller for the proposition that the instant retransmission consent proposal is simply a means of reopening the battle against cable's compulsory license before another inappropriate forum. Florida Cable Television Association and Southern Satellite Systems are among the parties who argue that retransmission consent could not come within the ambit of the Commission's "ancillary to broadcasting" jurisdiction over cable because it is designed primarily to protect the interests of the copyright owner rather than the broadcaster, and the Commission has no direct jurisdiction over program producers, how much they are paid and by whom. Moreover, to the extent retransmission consent is premised on protecting broadcasters, CATA notes that the *Economic Inquiry Report* has shown that broadcasters would not be harmed by deletion of the distant signal rules, and therefore imposition of retransmission consent would be an attempt to cure a problem that does not exist. Finally, several of the commenters note that the Commission indicated in the past that the element of "unfair competition," which its rules have been designed in varying degrees to remedy, would be remedied by Congressional adoption of a cable copyright scheme. In this regard they maintain that the compulsory copyright license adopted by Congress is not unfair in itself and concur with the Department of Justice that any claimed inadequacies were appropriately addressed to either the Congress or the Copyright Royalty Tribunal.

271. Superstation, Inc., directly addresses NTIA's arguments in support of the necessity of adopting a retransmission consent requirement. Superstation contends that NTIA's philosophical justification for its retransmission consent proposal, that cable and broadcasting are simply alternative ways of distributing television programming, is completely in error. Cable television and broadcast television are based on different economic principles, have different revenue sources, and operate in different marketplaces. Cable is a consumer product, sold at relatively low prices, and susceptible of being cancelled if it does not serve the interests of the customer. It draws its revenue directly from its subscribers. Broadcast television, on the other hand, is not "sold" at all, and derives its revenues from advertisers, many of whom would find no equally attractive alternative as an advertising outlet. Therefore, the marketplace bidding process that works for broadcast television will not work for cable television, and NTIA's "marketplace" solution is not viable. Because NTIA's "marketplace" is one which elevates the interests of copyright owners over consumers, Superstation argues that it is not responsive to consumer demands. Superstation notes that the public interest can sometimes only be served by a governmentally-induced balancing of the rights and equities of all involved, so that even if retransmission consent did obviate the need for extrinsic regulation, this fact standing alone does not prove that the public interest will be served thereby. Superstation also faults NTIA's tacit assumption that under a retransmission consent scheme copyright owners would exercise their marketplace control in a manner consistent with the public interest; Superstation terms this assumption "catastrophically unrealistic." Retransmission consent, Superstation maintains, involves not the right to fair competition, but the right to withhold program product to maximize profits. The NTIA proposal also ignores the key fact that the principal beneficiary of copyright is intended to be the public, not artists as a class, a philosophy the compulsory license embodies. Superstation sees as the "truly sinister" aspect of NTIA's retransmission consent proposal the fact that it would have the government bow out of regulating after deciding what television services the consumer should have, which is

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[292] The cited language states that

* * * the purpose of this provision is to give the Tribunal broad discretion to reconsider the royalty rates applicable to (but only to) the carriage of any additional distant signals permitted under the rules and regulations of the FCC after April 15, 1976. The present FCC rules limiting the number of distant signals that may be carried by cable systems have the effect of protecting copyright owners by restricting the amount of television broadcast programming retransmitted into distant markets. If these rules are changed in the future to allow additional carriage of television programs it is the Committee's judgment that the royalty rates paid by cable systems should be adjusted to reflect such changes.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 176 (1976).

[293] Section 111(c)(1) of the Copyright Revision Act provides that cable carriage of secondary transmissions "shall be subject to compulsory licensing" upon compliance with certain terms and conditions set out in that Section.

[294] See n. 282, *supra.*

[295] In its *Notice of Proposed Rulemaking and Inquiry in Docket 18397*, the Commission stated:

While we believe that we must proceed to take appropriate steps to end the unfair competition aspect * * * we are also cognizant of other important developments which we should take into account. We refer specifically to important Congressional developments in the copyright field that bear directly on the issue of unfair competition * * *

* * * As stated, we must take the above consideration into account. For, our retransmission consent proposal, while stemming from our responsibilities under the Communications Act * * * necessarily also embodies considerations like copyright in its practical applications * * *. Since Congress is considering the Copyright matter, we should afford the opportunity for Congressional resolution of the unfair competition aspect, as discussed. Such resolution would constitute the Congressional guidance sought in this important area.

15 FCC 417 at 432-33.

infinitely worse than continuing government regulation.

272. Other parties also treat aspects of the necessity for retransmission consent. The Arizona Cable Television Association maintains that a marketplace solution will result absent retransmission consent if the rules are abolished because, as in the case of programming supplied for network distribution, program suppliers will demand and get more revenue from superstations. Superstation concurs, stating that the present operation of WTBS–TV is evidence that retransmission consent is unnecessary. No program supplier is forced to sell to WTBS–TV; and when one does, the prices for programming reflect the station's reception in distant cable homes. The Arizona Association also argues that even if either local stations or superstations are refused program product by some producers, the door would then be open for other programming by other producers. Finally, a number of the commenters, chief among them being the Copyright Office, note that it would be premature to judge that retransmission consent is necessary to remedy presumed inadequacies under the compulsory license system and the existing fee schedule. The compulsory license has been in existence for less than two years; nevertheless, the Copyright Royalty Tribunal's current royalty pool of $13,000,000 is almost 50 percent more than the amount Congress presumed the compulsory fee would garner. CATA further states that any comparison between the payment cable makes for programming under the compulsory license and the payment broadcasters make is simplistic, because cable television and broadcast television are two different businesses with two different sets of costs. Moreover, the Tribunal has not yet begun to disburse the fees, so it is impossible to judge whether the payments to producers will or will not prove adequate. Finally, it is argued that the Act provides a satisfactory mechanism for adjusting the fee, and its adequacy ought to be ascertained before a new payment scheme is superimposed.

273. Several of the commenters also spoke to the issue of the workability of a retransmission consent program. The Copyright Office states that the history of the growth of the cable industry, broadcasters' and copyright owners' response to it, and the impact of Commission regulation in the last ten years indicate that substituting retransmission consent for the compulsory license would result in "massive retransmission denials rather than consents." The Office cites the 1968 failed retransmission consent experiment and the unanimous opinion of cable, broadcast and program production interests in 1971 that retransmission consent simply would not work. The Office maintains that changes in the industry since 1968 have not been such as to make a difference. Most broadcasters would have no inducement to grant consents for retransmission of their own programming, and agreements between broadcasters and copyright owners are equally and in some cases even more restrictive on the ability of broadcasters to authorize retransmission than they were in 1968. Because "quitclaim" consents will not be sufficient, retransmission consent would unavoidably require cable systems to negotiate copyright licenses from individual copyright owners. Superstation notes that copyright owners would probably withhold consent because by doing so they could force major-market cable to effectively become all pay-cable, and pay cable would constitute a big second source of income, permitting them to maximize profits.

274. Superstation, Inc. states that retransmission consent is unworkable because an independent station in a major market can bid higher for program product than its counterpart cable system. Cable cannot increase its subscription rates the way broadcasters can increase their rate cards to cover increased costs. Superstation cites the tremendous costs for off-network series [296] and the increased profitability of major-market UHF stations. Even if cable systems combined to purchase programming they could not out-bid major-market independent stations, with the result that the only programming cable might procure would be the less desirable programming that no broadcaster bid on. Superstation maintains that no cable company, even the largest multiple system operator, could spend the sums necessary to procure a single program series, because to do so systems would price themselves out of existence. It charges that NTIA has failed to explain how the emergence of satellites would be the factor that would make retransmission consent succeed. Satellites have not changed the structure of the cable industry in relation to the broadcast industry so as to make retransmission consent viable. Even WTBS–TV, which is received in 5,000,000 homes, could not compete with independent stations in major markets that reach many more homes.

275. Superstation maintains that the ultimate result of retransmission consent will be that cable in major markets will be pay cable, and this result would come from the dictates of the program suppliers rather than from cable consumers. Superstation further states that retransmission consent will not increase program supply, but instead will virtually guarantee that the networks and the major program suppliers will control the market and operate so as to maximize profits by limiting production. Superstation also notes that program suppliers would buy up cable systems that go out of business, and thereby obtain control over both product and distribution facilities.

276. Southern Satellite Systems contends that retransmission consent would terminate its resale carrier business and destroy satellite delivery of superstations. In this respect Southern Satellite notes that the satellite's advent will not make retransmission consent successful; on the contrary, the blacking out of portions of WTBS–TV's broadcast day as a result of retransmission consent would make satellite transmission impossible. This result would be particularly unfortunate in view of the fact that satellite transmission, by making available programming suited to a multitude of interests, will allow the consumer to escape the domination of the three networks, thus serving Communications Act purposes. Similarly, United Video, Inc. and the miscellaneous common carriers argue that retransmission consent would destroy their service because of the inability of cable systems to get consent for all of a station's programs. This would, of course, represent a serious loss of program diversity to cable subscribers generally, but the burden would fall most heavily on small, independent cable systems that could not afford program-by-program negotiations. [297] Moreover, even if cable operators had some success, there would be no way technologically for the microwave common carriers to carry programs individually to systems obtaining checkerboard consents. The result, these commenters state, would be "an immediate end" to the microwave transmission of distant signals which has been an essential source of

[296] For example, Superstation cites the fact that in 1978 alone local television stations paid approximately $200,000,000 for syndicated programming.

[297] One author has suggested that "it would cost each CATV owner at least $33,000 a year in administrative expenses to properly clear copyrighted materials." Martin H. Seiden, *Cable Television U.S.A.*, Praeger Publisher, 1972, p. 111.

programming to the industry and the public for many years.

Discussion

277. Prior to passage of the Copyright Law Revision of 1976, cable retransmission of broadcast programs did not violate the copyright law, irrespective of whether the owner of the copyright, the originating broadcaster, or any other interested person in the distribution chain had granted its consent. See *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artist Television, Inc.*, 392 U.S. 390 (1968). The cable retransmission was not a "performance" and therefore did not constitute an infringement of the copyright. *Id.* The 1976 Act changed that. But in making the change, Congress enacted a regulatory scheme that is fundamentally inconsistent with NTIA's retransmission consent proposal.

278. Under Section 106 [298] of the 1976 Copyright Act and the definitions in Section 101, it is clear that the owner of a program copyright has the exclusive right to authorize the transmission of that program to television audiences.[299] Section 106 also states, however, that the copyright owner's exclusive right is "[s]ubject to Sections 107 through 118." Section 501(a) establishes that anyone who violates "the exclusive rights of the copyright owner as provided by Sections 106 through 118 * * * is an infringer of the copyright." Thus, infringement can lie only where the exclusive rights are violated; and those rights are defined not only by Section 106 but also by other provisions such as Section 111.

279. Section 111(c) provides an explicit limitation on the program copyright owner's Section 106 exclusive rights and on his right to claim infringement under Section 501(a). Section 111(c)(1) says:

> Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission * * * and embodying a performance or display of a work *shall be subject to compulsory licensing* upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission. [Emphasis added.]

Section 111(d) explains that to qualify for compulsory licensing, the cable system must provide a notice and any other requested information to the Copyright Office and deposit with the Register of Copyrights a statement of account and royalty fees calculated under a statutory formula (as adjusted from time to time by the Copyright Royalty Tribunal pursuant to Section 801(b)(2)).

280. Section 111(c)(2) makes it clear that the right to a compulsory license is unavailable (and an infringement action may be brought) if the cable system's willful or repeated carriage of the particular signal "is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission" or the system failed to file the notice, statement of account, or royalty fee required by Section 111(d). Section 111(c)(3) adds that the right to a compulsory license (and the accompanying immunity from an infringement suit) is forfeited if the cable system willfully alters the commercial advertising or station announcements that accompany the broadcast of the copyrighted work.[300] Section 501(c) provides that the copyright-licensed local broadcaster, in addition to the copyright owner, has standing to sue the cable system for infringement where the cable system has failed to file the notice, statement of account, or royalty fee required by Section 111(d). If the cable system alters the primary transmission in a way forbidden by Section 111(c)(3), such as by deleting commercials, both the originating broadcaster and any local broadcaster in the area into which the cable system carries the signal, have standing to sue for infringement.

281. The foregoing regulatory scheme is inconsistent with the retransmission consent proposal in several respects. Section 111(c)(1) establishes that the cable system's retransmission of the copyrighted work "shall be subject to compulsory licensing upon compliance with" certain enumerated requirements. The copyright owner is expressly deprived of one of the usual incidents of copyright protection, i.e., the right to prevent copying or to condition copying on the payment of a royalty determined by the copyright owner. Instead, the permission to copy is "compulsory" and the "royalty" is established by Congress, subject to Copyright Royalty Tribunal adjustment. Under NTIA's proposal, the copyright owner could withhold from the originating broadcaster full authority to consent to the retransmission and, thus, reserve to the copyright owner the right to grant or deny consent. The copyright owner could not (except perhaps in what NTIA describes as "warehousing" situations) be compelled to grant retransmission permission. In reality, the cable system would no longer have the "compulsory licens[e]," which Congress granted. They copyright owner and/or the broadcaster could extract a fee or fees in excess of the royalty set by statute, thus circumventing the plain language of Section 111(d). The distribution of such fees among claimants could vary dramatically from the division of royalties which the Tribunal would make. The consensual arrangements between copyright owner, broadcaster, and cable system would be governed by state contract law and not the substantially different Federal scheme in Sections 501–510 which was carefully designed to govern copyright infringement suits and remedies.

282. There is nothing in the Committee reports accompanying the Copyright Revision Act that in any way suggests that the compulsory license was not intended to cover all cable systems or that the Copyright Royalty Tribunal was not meant to be the exclusive entity for adjusting cable copyright royalties. The House Judiciary Committee report states that "the Committee has determined to maintain the basic principle of the Senate bill [S. 22] to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC." [301] The House Conference Committee report stated that "The Senate bill * * * created a compulsory license for any cable retranmission authorized by the Federal Communications Commission," and that the House bill retained the basic compulsory license scheme envisaged in the Senate bill.[302] With respect to the authority of the Copyright Royalty Tribunal to adjust copyright royalties, the House Judiciary Committee report clearly states that "Chapter 8 establishes a Copyright Royalty Commission for the purpose of periodically reviewing and adjusting statutory royalty rates for use of copyrighted materials pursuant to compulsory license provided in Section

[298] The references to "section" at this point and hereafter are to Title 17 of the United States Code.

[299] Section 106 gives the copyright owner the exclusive right "to perform the copyrighted work publicly." Section 101 defines "perform * * * publicly" to include transmission and "transmit" to include broadcast and cable carriage of television programs. See also Section 111(f)'s definitions of "primary transmission" and "secondary transmission."

[300] Section 111(c)(4) imposes certain limits on the compulsory license which Section 111(c)(1) grants as to Canadian or Mexican broadcasts retransmitted by cable systems in the United States.

[301] H. Rept. No. 94–1476, 94th Cong., 2d Sess., 89.

[302] H. Rept. No. 94–1733, 94th Cong., 2d Sess., 75.

111 (secondary transmissions by cable systems) * * *" and further that "cable and copyright owners agreed to a set of standards for the adjustment or rates which the Committee in large measure has accepted." [303]

283. We have given careful consideration to the comments relating to the retransmission consent proposal in light of this statutory scheme, with particular attention to the polarization of views between NTIA and the Department of Justice, the Copyright Office, and the Congressional Research Service. Based on our analysis of the law and the facts, we find that retransmission consent is a surrogate for full copyright liability and that, because full copyright liability was considered in detail and rejected by Congress in favor of the compulsory license system, adoption of retransmission consent rules is beyond the authority of the Commission.

284. In view of our findings relating to the effects of cable television distant signal carriage on television broadcast service to the public, no appropriate evidential base and no sound policy predicate exists for the Commission to exercise its authority to adopt the retransmission consent proposal as a means of eliminating potentially destructive economic competition. In fact, neither NTIA nor the other supporters of the retransmission consent proposal generally urge it as a policy calculated to protect local television broadcast stations from the potential adverse consequences of cable television distant signal audience diversion. In *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Supreme Court affirmed the Commission's regulatory authority over cable television, noting that "the Commission feared that CATV might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters." (footnote omitted) It concluded, in light of this, that "there is substantial evidence that the Commission cannot 'discharge its overall responsibilities without authority over this important aspect of television service' " (citations omitted). The function of the retransmission consent proposal, at least as it is articulated by NTIA, relates not at all to these considerations that were before the Supreme Court when it affirmed our regulatory authority in the cable television field. Thus, since specific authority to adopt the proposal is not found in the Communications Act and existing precedents are inapplicable, a new theoretical justification would be required if Commission jurisdiction to adopt rules of this type were to be found.

285. We find no such justification here. NTIA cites Sections 325(a), 303(g), (h), and (s) and 307(b) of the Communications Act as authority for the adoption of the rules it proposes.[304] Section 325 is inapplicable to cable television signal carriage directly for, as the Supreme Court has stated, "CATV systems do not in fact broadcast or rebroadcast." [305] Nor do we find such authority within the other cited sections or within some authority ancillary to our regulatory responsibilities under the cited sections. The retransmission consent proposal, while it would, according to its proponents, more efficiently and equitably order the markets in which cable television system operators obtain television broadcast signals, would not and is not intended to create zones to be served by particular stations or serve to allocate stations or service equitably among the several states and communities.

286. More specifically, we find no "ancillary" authority broad enough to impose retransmission consent rules on cable television systems. As developed by the courts, Section 2(a) of the Communications Act; 47 U.S.C. 152(a), "confer[s] on the Commission a circumscribed range of power to regulate cable television * * *." *FCC v. Midwest Video Corp. (Midwest II)*, 440 U.S. 689, 696, (1979). One formulation the courts have used to describe the outer bounds of that regulatory power is the statement that the cable regulations must be "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Id.* at 691, quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). Those "responsibilities," of course, are set out in various provisions of the Communications Act and have been amplified in court and Commission decisions.

287. In *Southwestern Cable, supra*, the Supreme Court held "the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness" its responsibilities under Sections 303(f) and (h) and 307(b) to create "an appropriate system of local broadcasting." 392 U.S. at 174. The Court noted the Commission's Congressionally-endorsed finding that this statutory objective had "two subsidiary goals," wider use of UHF channels and encouragement of educational broadcasting. *Id.* at 174–75. The Court said "[t]he Commission has reasonably found that the achievement of each of these purposes is 'placed in jeopardy by the unregulated explosive growth of CATV' " *Id.* at 175. The Court stressed both Congressional and Commission findings that, given the then-current state of evidence, uncontrolled distant signal importation, by "dividing the available audiences and revenues," might eliminate local broadcasting service or, at least, discourage UHF and educational television development. *Id.* at 176. *Southwestern Cable*, therefore, stands for the proposition that cable's *adverse* impact on the achievement of broadcast goals may support Commission ancillary jurisdiction over cable.

288. In *United States v. Midwest Video Corp.* (*Midwest I*), 406 U.S. 649 (1972), the Supreme Court explored another aspect of the Commission's regulatory authority over cable. In upholding the requirement that cable companies originate some programming, a 4-member plurality of the Court said that the reasonably ancillary doctrine also encompassed affirmative efforts to further statutory policies, not just negative avoidance of adverse effects as exemplified in *Southwestern Cable*. 406 U.S. at 664. The plurality said that the Commission had "authority to regulate

[303] H. Rept. No. 94–1476, 94th Cong., 2d Sess., 173.

[304] Section 325(a) states in relevant part:

* * * nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

Section 303(g) provides the Commission authority to:

Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 303(h) provides that the Commission shall:

Have authority to establish areas or zones to be served by any station;

Section 303(s) provides that the Commission shall:

Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adeqately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

Section 307(b) provides that:

In considering applications for licensees, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair efficient, and equitable distribution of radio service to each of the same.

[305] *Fortnightly Corporation v. United Artists Television*, 392 U.S. 390 (1968). *See also, Report and Order on CATV and TV Repeater Services*, 26 FCC 403, 429–430 (1959).

CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." *Id.* at 667. The particular statutory objectives involved in *Midwest I* were the goals of outlet and program diversity which the plurality traced to Sections 303(g) and 307(b) of the Act. *Id.* at 667–68.

289. The crucial concurrence in the *Midwest I* result by the Chief Justice, however, did not give any broad endorsement to the plurality's expansion of the ancillary jurisdiction doctrine. He cautioned that the program origination rule "strains the outer limits" of the Commission's jurisdiction. *Id.* at 676. He urged Congress to comprehensively reexamine the statute as it relates to cable television. *Id.* at 676. The Chief Justice did observe that "when they [i.e., cable operators] interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission." *Id.* at 676. He did not, however, explain how far his signal interruption rationale could be extended to give the Commission jurisdiction to affirmatively achieve traditional broadcast-related regulatory goals.

290. *Midwest II, supra,* did not resolve how far a majority of the Supreme Court would be willing to extend the *Midwest I* plurality's view of the reasonably ancillary doctrine. The Court in *Midwest II* invalidated the Commission's cable access and capacity rules, despite their affirmative promotion of the established broadcast regulatory goals of maximizing outlets for local expression and programming diversification. The Court held that the Commission's cable television jurisdiction necessarily must be limited by "reference to the provisions of the Act directly governing broadcasting * * *." 440 U.S. at 706. Since Sections 3(h) and 326 evidenced a Congressional reluctance to impose a non-discriminatory access requirement on broadcasters, the Court implied a similar limitation as to cable television operators. While it may not have been necessary to the result, the 6-member majority in *Midwest II* did appear to accept as a general proposition what it characterized as "[o]ur holding in *Midwest [I]* sustain[ing] the Commission's authority to regulate cable television with a purpose affirmatively to promote goals pursued in the regulation of television broadcasting * * *." 440 U.S. at 700.

291. Those parties urging the Commission to promulgate retransmission consent regulations identify Sections 303(g), (h), and (s), 307(b), and 325(a) as setting forth statutory policies that such regulations would affirmatively promote. They claim that under *Southwestern Cable,* as extended in *Midwest I* and *II,* the Commission has ancillary jurisdiction to regulate cable to promote those objectives.

292. As indicated in greater detail below, we believe that the transplantation of the requirements of Section 325(a) of the Communications Act into the field of cable television under a concept of regulation "reasonably ancillary" to our regulation of broadcasting would be fundamentally inconsistent with the recently adopted 1976 Copyright Act. There is no need to protect the functioning of Section 325 by creating a Commission rule paralleling the statutory requirement for television broadcasters because the Congress has protected those interests deemed to warrant protection by the adoption of the Copyright Act. We note, as discussed below, that Congress has specifically refused to adopt amendments to the Communications Act necessary to extend Section 325 to cable television. Its stated reason for rejecting these proposed amendments was that, in so doing, it would be determining questions as to the property rights in broadcast programs and that this determination was appropriately left for resolution in connection with changes in the copyright law.

293. Nor do we find authority under the "reasonably ancillary" doctrine in Section 303(h). That Section grants the Commission "authority to establish areas or zones to be served by any station." The most obvious purpose of this provision is, in conjunction with Sections 303(c)–(f), to guard against service-impairing electronic interference between stations. In addition, Section 303(h) works in conjunction with Section 307(b) to ensure the fair allocation of local broadcast service among communites. See *Southwestern Cable,* 392 U.S. at 174. That case establishes that the Commission, under the "reasonably ancillary" doctrine may regulate to prevent deleterious impact to local broadcast service. Such regulation entails use of the negative, impact-avoidance arm of the ancillary jurisdiction doctrine; and it requires substantial record support before such regulation of cable can be justified. It is difficult to comprehend, however, how Section 303(h) can provide an *affirmative* purpose of the *Midwest I* genre to justify retransmission consent regulations. Section 303(h) empowers *the Commission* to establish areas or zones of service. NTIA's retransmission consent proposal would empower *the broadcaster* to expand or retain the area or zone of service reached by programming.[306]

294. Section 303(a) empowers the Commission to "generally encourage the larger and more effective use of radio." Section 303(s) authorizes the Commission to promote UHF development. Section 307(b) requires "fair, efficient, and equitable distribution of radio service" among the states and communities. These provisions all demonstrate the importance of creating and preserving viable local service. Insofar as a retransmission consent requirement is necessary in that endeavor, the foregoing provisions provide the requisite statutory objectives for invocation of the "reasonably ancillary" doctrine. But in order to justify regulation under the "reasonably ancillary" doctrine, it is necessary to invoke more than a relevant statutory purpose. It is necessary to demonstrate a real factual nexus between the proposed regulation and that relevant statutory purpose. As this *Report and Order* demonstrates, the factual predicate or nexus is lacking. The unrestricted importation of distant non-network programming does not substantially threaten the viability of local broadcast service. This absence of likely harm, therefore, is fatal to any contention that the Commission has ancillary jurisdiction to impose a retransmission consent requirement.

295. In *Southwestern Cable,* 392 U.S. at 176–77, the Supreme Court noted that, on the then-existing state of knowledge, the deleterious consequences to local broadcast service could only be estimated. The Court was satisfied that there was "substantial evidence" of the need for regulation. *Id.* at 177. Plainly, the Court was impressed with Congressional committee and staff reports reflecting the urgency of the problem. The word "imperative" appears several times in the Court's opinion. *Id.* at 177. See also *Midwest II,* 440 U.S. at 706. On the current rulemaking record, however, after years of actual experience with cable and extensive economic anaylsis of that

[306] The supporters of retransmission consent also seem to rely on Section 308(a). Section 308(a) says the Commission may grant permits and licenses "only upon written application therefore received by it." This provision serves the obvious purpose of guaranteeing, along with Section 308(b) and Section 309, that the licensing process is open and public. The quoted words of Section 308(a) hardly reflect a Congressional purpose of ensuring that a broadcaster's signal is kept within limited geographical confines unless and until he consents to distant carriage by cable. The provision, therefore, is not a basis for imposing retransmission consent regulations under the "reasonably ancillary" doctrine.

experience, the urgency and necessity for regulation are lacking. What was "imperative" in 1968 is no longer demonstrably so.

296. *Home Box Office, Inc. v. FCC*, 567 F. 2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977), sharply illustrates that mere intuition or speculation or inadequately established factual predicates will not suffice to support an attempted exercise of "reasonably ancillary" jurisdiction over cable television. There the U.S. Court of Appeals for the District of Columbia Circuit overturned the Commission's pay cable anti-siphoning rules. The effect of those rules was "to restrict sharply the ability of cablecasters to present feature film and sports programs" as part of the cablecasters' pay service (as distinct from basic retransmission service). 567 F. 2d at 19. The Commission there did not attempt to justify its rules on the *Southwestern Cable* theory that pay cable programming would fragment audiences and undercut the financial viability of conventional local broadcast service. 567 F. 2d at 29. The Commission did contend, however, that the rules were within the Commission's jurisdiction to ensure nationwide broadcast service under Section 1, 47 U.S.C. 151. The theory was that cable itself would not be a nationwide service in the near future, but would outbid broadcasters for programming in markets where cable/broadcast competition for program supply did exist, and that this "could result in loss of broadcast television service to regions not served by cable." *Id.* at 33. The Court found this theory "unsupported in the record" and held that "the postulated loss of regional service is too speculative to support jurisdiction." *Id.* at 33.[307] In other words, the Commission's attempt to ground ancillary jurisdiction on a perceived need to protect the supply of programming to broadcasters was rejected by the Court because "the Commission has not established its jurisdiction on the record evidence before it." *Id.* at 34.

297. The *Home Box Office* court went on to explain why the anti-siphoning rules could not be affirmed under the Administrative Procedure Act, irrespective of the jurisdictional issue. The court set out as a basic ground rule that "regulational perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." 567 F. 2d at 36. After examining the rulemaking record, the court concluded that the Commission did not have sufficient evidence that a problem did exist. The Commission had "failed to crystallize what is in fact harmful about 'siphoning.' " Moreover, the Commission was unable to identify "any comments in a voluminous record which would support its statement" that "siphoning is 'real, not imagined.' " *Id.* at 37. Indeed, the Commission had admitted it lacked a "clear picture as to the effects of subscription [including pay cable] television upon conventional broadcasting." *Id.* at 37. The court said that "if there is any evidentiary support at all, it is indeed scanty." *Id.* at 37. Nine months before the Commission promulgated its first anti-siphoning rules, the Commission justified declining to issue such rules because it lacked adequate information and needed further experience. *Id.* at 22, 37 n. 60. The court said the "Commission has not called our attention to any data which would fill the gaps in its experience identified" at the earlier time. *Id.* at 37 n. 60. The court criticized the Commission's "choice to regulate rather than allow a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action." *Id.* [308] The court added:

> In this state of affairs, where there is no evidence of any urgent need for preventive action and where approval of the Commission's position would foreclose the possibility that data could be generated in the future that could allow fully informed decisionmaking, we are disinclined to give the Commission the "benefit of the doubt" which it argues it should have. [*Id.*]

The court went on to explain that the factual record to support the regulations as pro-competitive was incomplete and that the "Commission has not documented its case" regarding the need for the rules to prevent loss of television service to the poor and to rural areas. *Id.* at 39.

298. In the present case, the rulemaking record refutes the conjecture that cable importation of distant syndicated programs will undercut any of the Commission's broadcasting regulatory goals. [309]

299. More important, however, than our inability to find authority for the Commission to adopt this proposal under established precedents, is our inability to distinguish its policy thrust from purely copyright matters with respect to which Congress has chosen a different course. A review of both the historical record and the present debate, make clear the virtual identity of the two issues, both of which relate to the allocation of property rights in television programming and the legal position of the cable television industry in the broadcast television programming supply market.

300. As we indicated in our *Notice of Proposed Rule Making*, para. 89, the initial consideration of this proposal focused on whether Section 325(a) [310] should be amended to apply to cable television systems. Section 325(a) of the Communications Act requires broadcasters that rebroadcast the signals of other stations to obtain the permission of those stations. Its function is "to protect the rights of those having property rights in programs." [311] When the issue of whether Section 325(a) should be applied to cable television operations came before the Commission, we stated:

> It may well be that Congress would desire to protect the property right of a broadcaster

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[307] The Court also rejected as unsupported two other jurisdictional bases urged by the Commission, preservation of "the overall level of public enjoyment of television entertainment" and promotion of diversity. 567 F. 2d at 162, 167.

[308] *Accord, Home Box Office, Inc. v. FCC*, 567 F. 2d 1248, 1256 (D.C. 1978) (affirming Commission decision not to regulate program exclusivity agreements between suppliers and broadcasters).

[309] The proponents of retransmission consent say that the Commission is obliged under *Melody Music Inc. v. FCC*, 345 F. 2d 730, 733 (D.C. Cir. 1965) to explain why broadcasters seeking to rebroadcast programming must obtain the originating broadcaster's prior consent, whereas cable operators do not have to seek such consent for cable retransmissions of broadcast programming. *Melody Music* has no application to the jurisdictional question here and can not be used to salvage a jurisdictional argument that is otherwise unavailing. *Melody Music* requires equal treatment, or a reasoned explanation of differential treatment of similarly situated *broadcasters*. In any event, the simple explanation for the differential treatment here is that Congress imposed Section 325(a) on broadcasters and did not impose a comparable obligation on cable operators, nor did Congress give the Commission sufficient implied (i.e., ancillary) jurisdiction to impose such an obligation. *Melody Music* obviously does not control the actions of Congress. In any case the Supreme Court stated in *Fortnightly Corporation v. United Artists Television*, 392 U.S. 390, 400–401 (1968) and reiterated in *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974) that:

> The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry. (footnotes omitted)

While it might be argued that these are distinctions of relevance only under the copyright law, these decisions (and the 1976 Copyright Revision Act) are the explanation for the different positions of the cable and broadcast television industries in the program supply markets for which NTIA seems to be seeking an explanation.

[310] *Supra*, n. 304.

[311] *Report on Amendment of Rebroadcasting Rules*, 1 R.R. (Pt. 3) 91:1131, at 91:1134, May 15, 1952.

as against CATV retransmission as well as against rebroadcasting. For this reason, as well as because of the competitive impact involved here, we intend to recommend to Congress that an appropriate amendment to Section 325(a) be enacted * * *

"* * * By other broadcasters * * * we are asked to recognize the existence of a propriety right, and to affirm it by rules; then, it is said, we would be in a position to issue 'cease and desist orders' against any CATV system rebroadcasting a signal without permission. This course of action we do not believe appropriate. This is not the forum in which the existence or nonexistence of a private property right can be adjudicated * * *" [312]

301. This legislative proposal was made to the Congress and was rejected by both the Senate and House Committees with responsibility for its consideration. The report of the House Committee stated:

The Committee has considered the question raised by the Commission on its legislative recommendation of whether Section 325 of the Communications Act should be amended so as to prohibit transmission by CATV systems of any broadcast signals except with the express authority of the broadcast stations. In view of the pendency of copyright legislation, it is the view of the Committee that the recognition and protection of any property rights in programs broadcast by radio and television stations should more appropriately be determined within the framework of copyright legislation rather than within the framework of communications legislation. Therefore, the Committee decides against amending Section 325 * * * [313]

302. We considered the subject of retransmission consent again in the *First Report and Order in Dockets 14895 and 15233*, 38 FCC 683 (1965). There, we were requested to "construe the microwave carriage and distribution of signals by or for the benefit of CATV's as a single transaction which, in effect, constitutes 'rebroadcasting' under the existing provision of Sec. 325." *Id.* at 706 n. 37. We stated, however, that "the proposed construction is a strained one, which we are not at liberty to adopt." *Id.* In that *Report*, we recognized that cable television "stands outside of the program distribution process" and that, therefore, "the usual competitive situation" is not present. Nevertheless, we reiterated that cable television had not been found subject to the requirements of Section 325 and that Congress had not seen fit to adopt our recommendation that "restrictions on rebroadcasting embodied in Section 325 of the Communications Act should be extended to the distribution of broadcast signals by CATV's." *Id.*

303. The *Second Report and Order in Docket 14895, 15233, and 15971*, 2 FCC 2d 725 (1966) also addressed the question of retransmission consent. We stated:

As a general approach encompassing all stations, we are proposing to the Congress that it consider the question of extending the rebroadcast concept of Section 325(a) to CATV. It may be that regulation of this nature would prove a preferable and more effective means of achieving fair recognition of the exclusivity contracts of the program marketplace.

Id. at 748. We also pointed out the "anomalies which result" from the situation in which broadcasters must negotiate for programming whereas cable systems do not and expressed our concern over how this could affect the economic base of a television station serving as an outlet for local expression for all the people in its service area. *Id.* at 778–781. We concluded, as we had earlier in Docket 12433, that we should urge Congress to consider whether a provision similar to Section 325(a) should be made applicable to cable television including whether, to what extent, and under what circumstances cable systems should be required to obtain the consent of the originating broadcast station. In suggesting this approach, we observed:

We are not in a position to state whether a Section 325(a) approach would be effective and fully consistent with the public interest. We think that this is a matter warranting Congressional (and Commission) consideration, including such aspects as how a 'retransmission consent' requirement would function as a practical matter, whether systems in small communities should be dealt with specially, and whether grandfathering is appropriate and the nature of any such grandfathering.

Id. at 788.

304. The Commission again considered the matter in connection with its *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397*, 15 FCC 2d 417 (1968), in which the Commission itself proposed to apply such a requirement to the carriage of distant commercial stations on cable television systems in the 100 largest television markets and to those signals carried by cable systems in the smaller markets that were necessary to provide subscribers with signals beyond the three national television networks and one independent station. *Id.* at para. 39.

305. In making this proposal the Commission indicated that it would forbear acting until the Congress had an opportunity to act on pending copyright legislation which it was hoped would resolve the unfair competition aspect of the retransmission consent proposal and provide "the legislative guideline which the Commission has long sought. . . ." *Id.* at para. 39. As the Commission noted, the retransmission proposal "necessarily also embodies considerations like copyright in its practical applications." *Id.* at para. 40.

306. After considering the various comments filed relating to this proposal and having undertaken some limited experimentation with operation under it, the Commission rejected it stating "experience has indicated that it will simply not achieve our basic objectives." [314]

307. In putting forth its retransmission consent proposal in 1968 the Commission stated that cable competed "unfairly" with broadcasters "because CATV presently stands outside the competitive program distribution market," [315] and that retransmission consent was designed to eliminate this element of unfair competition "through direct application of market forces now operative as to analogous services." [316] During the course of Senate oversight hearings several months after issuance of the retransmission consent proposal, the Commission elaborated further on the copyright nature of retransmission consent. At one point in the hearings, Subcommittee Chairman MacDonald asked then-Commission Chairman Hyde whether retransmission consent is not "in essence copyright." Chairman Hyde responded that, "In operation it could have many of the characteristics of copyright, that is true." [317] Chairman MacDonald pressed further on the exact nature of retransmission consent:

Chairman MacDonald. Would it not be fair to say that retransmission consent has to be obtained from the copyright owner?

Chairman Hyde. I am certain that once this approach went into operation that the copyright owners would see to it in the arrangements they make with stations or networks that they reserved the rights to make separate arrangements with CATV, and it would bring CATV into the program market in a copyright sense, yes it would * * * what we have proposed is essentially a plan under which CATV systems would get access to programs in the same manner as

[312] *Report and Order in Docket 12433*, 26 FCC 2d 403, 430 (1959).

[313] *Report of the House Committee on Interstate and Foreign Commerce on H.R. 13286*, H.R. Rep. No. 89–1635, 89th Cong., 2d Sess. at 11 (1966).

[314] *Cable Television Report and Order*, 36 FCC 2d 143, 165 (1972).

[315] *Notice of Proposed Rulemaking and Inquiry in Docket 18397, supra*, at 430. It should be noted that the Commission's 1968 proposal was the same as NTIA's in that it nominally would have required the cable operator to secure consent from the broadcaster rather than the copyright owner.

[316] *Id.* at 432.

[317] Hearings on FCC oversight before the House Subcommittee on Communications and Power, 91st Cong., 2d Sess., Serial No. 91–1, 59–60 (1969).

conventional television for exhibition in the top 100 markets * * * [318]

308. A contemporary expert participant in the ongoing cable/copyright controversy in the Congress, then-Deputy Register of Copyrights George D. Cary, remarked:

When the Commission requires the CATV system to get the permission of the imported stations before it can bring these distant signals into a major market, it seems to me that this is a device for indirectly dealing with the copyright question, because as most everybody knows, radio stations do not generally own the proprietary right in the majority of the material which they broadcast, so in effect, this means that the CATV owner must deal directly with the copyright proprietor. This conclusion is made crystal clear in the clarification of this order which the Commission issued on the 24th day of January 1969, in which it said that a quit claim type of waiver from stations was not sufficient. The CATV system is going to have to get permission from the station on a program-by-program basis to import these distant signals, which obviously means they have got to get a clearance on the usage of the copyrighted material. [319]

309. In recent hearings on copyright revision before the House Judiciary Subcommittee, the Register of Copyrights gave her assessment of the nature of retransmission consent. Noting that after legislative and judicial failure to control the copyright problem in 1967 and 1968,

The FCC approached the problem directly through a regulatory device that was, in reality, the exact equivalent of a copyright. Immediately after the Supreme Court decision in *Fortnightly* the FCC imposed upon CATV the requirement of 'retransmission consent * * *' [O]nly a few 'retransmission consents' (i.e., copyright licenses) were granted * * * [320]

With specific reference to the NTIA retransmission consent proposal, the Register of Copyrights has testified that

It isn't just consent from the broadcasters, the broadcaster can't give consent unless it has authority to do so from the copyright owners. It has to have a contractual right to give that consent. So in effect you are creating a copyright. If you do, however you call it, whoever does it, it is still a copyright * * * [321]

310. Perhaps the most conclusive statements on the nature of retransmission consent, however, come from NTIA's Assistant Secretary for Communications and Information, Mr. Henry Geller. In testimony before the House Communications Subcommittee, Mr. Geller adverted to the NTIA retransmission consent proposal and stated that "* * * it was always the copyright owner that was the key. The only way the station could give consent is if it bargained and obtained that from the copyright owner. Even if you go to the station and ask for retransmission consent, the only way he can give it is to go back to the copyright owner * * *"[322] In further testimony before the Senate Communications Subcommittee Mr. Geller expressed the same thought[323] and in response Chairman Hollings, ranking minority member Senator Goldwater, and Senator Cannon, identified retransmission consent as a copyright matter rather than a matter of communications policy.[324] The retransmission consent provision in H.R. 3333 was deleted. During the 1979 Copyright Hearings Subcommittee Chairman Kastenmeier made reference to H.R. 3333's retransmission consent provision:

Earlier this year our sister House Subcommittee * * * considered legislation which would have deregulated the cable industry but at the same time imposed the equivalent of full copyright liability—retransmission consent—on cable television systems.[325]

In propounding the NTIA retransmission consent proposal to the Subcommittee, Mr. Geller testified that, "We think that the sound policy for cable's future growth, not for its past but its future, is either retransmission consent as part of Communications Act policy, or full copyright liability; if it is a matter to be considered by this Committee."[326] Chairman Kastenmeier asked a clarifying question:

Chairman. Your main recommendation appears to be that we should subject all future growth of cable to full copyright liability or the equivalent thereof while grandfathering existing service?
Mr. Geller. Yes, sir * * *[327]

311. Not only were the two issues commonly perceived to differ in name only but the legislative history of the cable copyright controversy generally, and particularly the legislative history of the Copyright Revision Act, demonstrate that Congress specifically considered the full copyright liability (retransmission consent) proposal and decided to avoid imposing on cable any copyright scheme that would require negotiations for programming on a program-by-program basis. The difficulties associated with full copyright liability were noted as early as 1965.[328]

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[318] *Id.* at 60–61.

[319] *CATV—The Fortnightly Postlude*, 16 Bull. Copyright Soc. 157, 162 (February 1969). Cary also notes that the retransmission proposal provoked a letter from Senate Judiciary Subcommittee Chairman McClellan to Chairman Hyde stating that "* * * there is a serious question concerning the jurisdiction of the Commission to impose what amounts to a requirement of copyright clearance * * *," requesting the Commission's clarification of what its future regulation of cable would be "if legislation is enacted providing for the payment of reasonable copyright fees by CATV systems, * * *" and cautioning that if a response were not forthcoming, "* * * the subcommittee would have no other alternative than to schedule a public hearing to review those aspects of the Commission's action which involve matters coming within the jurisdiction of this Subcommittee." *Id.* at 165.

[320] Hearings on Copyright Revision Before the Subcommittee on Courts, Civil Liberties, and Administration of Justice, of the House Committee on the Judiciary, 96th Cong., 1st Sess., tr. 18 (November 15, 1979) (hereinafter, "1979 Copyright Hearings").

[321] 1979 Copyright Hearings, *id.*, tr. 41.

[322] Hearings on H.R. 3333 Before the Subcommittee on Communcations of the House Interstate and Foreign Commerce Committee, tr. 38, 40. This would appear to have brought Mr. Geller into agreement with Ms. Ringer who, in her formal statement, termed retransmission consent "the exact equivalent of a copyright." *Id.* at 33.

[323] Mr. Geller stated that program consent and retransmission consent were one in the same: "* * * in order to give retransmission consent, the station has to obtain that consent from the copyright owner. So whether you call it program consent or retransmission [consent], either one, the key is the copyright owner." Hearings on S. 611 and S. 622 before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess., Serial No. 96–45, at 2112.

[324] Chairman Hollings stated, with respect to retransmission consent, that " * * * what's fundamentally involved * * * is whether we have a communications problem or whether we have an industry economic matter and I think that's really what copyright is." Senator Cannon stated "* * * this is an economic problem, and not a communications problem. The whole issue here seems to be how you are going to divide up that pie. And it really isn't a communications problem at all." Chairman Hollings further stated:

* * * with respect to the retransmission consent matter, the FCC made a study of cable and found no harm was caused by unrestricted cable signal importation. Of course, that is communications policy. On the other hand, the Copyright Act said that every cable operator should have a compulsory license and pay a fee. Now, that is copyright policy.

Id. at 2869.

[325] 1979 Copyright Hearings, *supra*, n. 314, tr. 4, emphasis added.

[326] *Id.* at 9.

[327] *Id., And see* Mr. Geller's statement, *id.* at 9–10. "* * * we are saying that when you do deal with non-network programming, which is not sold on a simultaneously basis , it is sold to particular markets, and on an exclusive basis. If the broadcaster obtains that exclusivity in the marketplace, it is there we would go to the full copyright liability or retransmission consent. They are equivalent."

[328] See Hearings on H.R. 4347, 5680, 6831 and 6835, 1st. Sess., 1965, before Subcommittee No. 3 of the House Judiciary Committee, Serial No. 8, 89th Cong. This legislation, which was the first to treat the cable copyright issue, would have imposed full copyright liability on cable systems. The then-Register of Copyright Abraham Kamenstein noted that a supplementary report prepared by the Copyright Office on cable copyright liability concluded that although the copyright owner should be compensated for use of his works by cable systems, the practical difficulties of advance clearances had to be recognized. *Id.* at 1862. The following year the House considered a second cable

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In 1969, House Subcommittee Chairman Kastenmeier noted that the process of copyright revision would continue to involve the accommodations of the legitimate interests of those who sought compensation for use of their product with the equally legitimate interests of others who need to use that product without "undue complication or cost." [329] As the Register of Copyrights subsequently stated, the fundamental principle of the Copyright Revision Act, and indeed of all copyright legislation from 1974 on, was that cable's retransmission activity should be subject to compulsory licensing with statutorily-prescribed royalties.[330]

312. The legislative history of the Copyright Revision Act plainly demonstrates that full copyright liability was specifically explored and specifically rejected by the Congress. In hearings before the House Subcommittee on H.R. 2233, testimony on the problems of full copyright liability and the preferability of compulsory licensing were expressed by both government and industry witnesses.[331] This testimony led Chairman Kastenmeier to remark at one point that the business of getting clearances and knowing what levels of rights are really being accorded may get extraordinarily difficult, particularly for users.[332] In another exchange, Committee member Herman Badillo asked Rex Bradley, then-president of the National Cable Television Association, why the Congress should establish a compulsory licensee fee for cable, instead of "[leaving] it to normal market forces to say what the payment should be?" Bradley responded by stating that, "We would like to avoid the possibility of having an unknown amount established without real control by us * * *," and noted that there is no "moderating effect of the marketplace" or "competitive forces that would keep rates reasonable."[333] Congressman Badillo further pressed his question with witnesses urging greater copyright liability, exemplified in this exchange with MPAA President Jack Valenti:

> Mr. Badillo. Yesterday, when the cable television people were here they said that it is impossible to leave the question of the fee to the normal function of the marketplace because the nature of the transmission business is such that the cable people would really be in an impossible bargaining situation. What is your reaction to that claim? Would it be possible for us merely to say that it is a copyright and then leave the question of the amount to be paid to be settled in the marketplace?
>
> Mr. Valenti. I would have to tell you that I think there would be administrative difficulties in the free play of the marketplace. That is what the compulsory license was created to avoid, such an administrative difficulty; a compulsory license covering all signals, lessening the paperwork, lessening everything.[334]

313. The Committee report accompanying the Copyright Revision Act leaves no doubt that the Congress considered the very matters that are now being argued to the Commission and that it adopted the compulsory license instead of full copyright liability:

> * * * The Committee recognizes that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined * * * to establish a compulsory license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.[335]

314. In this compromise—between the two extremes of no copyright protection (as existed prior to 1976) and full copyright protection—Congress struck what is found to be a fair balance between the rights of copyright owners and copyright users in order to advance the paramount rights of the viewing public. Viewed in this perspective, NTIA's retransmission consent proposal, with its admitted aim of making the rights of the copyright owner paramount, is not only a copyright surrogate that is beyond our jurisdiction to adopt but also is patently inconsistent with the Congressional intent because it would "skew" the balance of interests carefully and explicitly struck by the Congress.[336]

315. Notwithstanding this compelling evidence that Congress explicitly rejected full copyright liability in favor of a compulsory licensing and government-set royalties, the supporters of NTIA's retransmission consent proposal argue that Congress in 1976 specifically reserved to the Commission full authority to make "communications policy" and that this reservation includes the impact on "copyright policy." They cite the House Judiciary Committee's statement that "the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting 'communications policy' * * *."[337] As is apparent from the remainder of the Committee report, the Judiciary Committee wanted to avoid a time-consuming referral of the bill to the Commerce Committee, which has jurisdiction over "communications" legislation.[338] The characterization of the copyright legislation as not even "affecting" communications policy presupposes an absence of overlap between communications and copyright policy which is unrealistic and cannot have been the literal understanding and intent of the Congress. Indeed, the very same sentence that says the Committee has avoided "affecting 'communications policy'" speaks candidly of "the

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copyright scheme which would have allocated copyright liability depending on the market served; it also had "trigger" provisions whereby systems, on performance of certain acts, would incur full copyright liability. The committee report explained this differential treatment: "neither the full liability sought by the copyright interests nor the complete exemption sought by the community antenna interests would be appropriate or fair." H. Rept. No. 2237, 89th Cong. 2d Sess., 80 (1966).

[329] Kastenmeier, "Copyright Revision Revisited." *Bull. Copyright Soc.* 16 (June 1969), 269.

[330] Senate Communications Act rewrite hearings, *supra*, n. 317, at 3335.

[331] Among the government witnesses testifying were the Register of Copyrights and Mr. Keller, General Counsel of the Office of Telecommunications Policy. Both endorsed the compulsory license, with Mr. Keller emphasizing that it would afford fair compensation to the program producers while allowing cable to "grow and develop in response to the needs and demands of the public," and providing "stability and certainty where previously there had been none." 1974 Copyright revision hearings, at 109–116; 448–457 (1974).

[332] *Id.* at 115.

[333] *Id.* at 497.

[334] *Id.* at n. 2, 758.

[335] H. Rept. No. 74–1476, 94th Cong., 2d Sess., 8–9. *See also* the analysis of the rationale underlying the adoption of compulsory copyright licensing for cable television presented in the additional concurring views of Congressman Danielson, *id.* at 359–62. *And see* 2 Nimmer, Copyright, § 8.18[E], citing the Committee Report and stating that, "The compromise solution was to adopt in section III a compulsory license system whereby the cable operators are not required to obtain the consent of the copyright owners, nor to negotiate license fees, but copyright owners are entitled to be paid prescribed royalties for the secondary transmission of their works by cable television."

[336] It is worth noting that the Congress heard considerable testimony on compulsory licensing *per se* and applied it not only to cable television but also in other situations involving, for example, jukeboxes and phonorecords. Subcommittee Chairman Kastenmeier described the compulsory license mechanism as used when an industry goes from no liability to full liability, "a compromise between economic forces * * * a useful device to accommodate diverse interests in copyright, particularly when a change of liability is contemplated by the statute." 1979 Copyright Hearings *supra*, n. 314 at 109–110. The Register of Copyrights has observed that:

> We have reached the point where any new rights under the copyright law cannot be made exclusive rights. If a new technological development makes new forms of exploitation possible, compulsory licensing seems to offer the only solution. This is happening in the United States and it is happening just as much internationally. Compulsory licensing systems represent key provisions in the 1971 revisions of both the Berne and Universal Copyright Conventions, and in recent copyright laws in other countries.

Ringer, "copyright in the 1980's," 23 *Bull.* Copyright Soc. 229, 304–7 (1976).

[337] H.R. Rep. No. 94–1476, *supra*, at 89.

[338] *Id.*

copyright *and communications elements* of the legislation."[339] The key to the Committee's and the Congress' intent regarding the preemption of Commission regulatory authority to impose retransmission consent is in the emphasized language of the next sentence in the report:

> We would, therefore, caution the Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any actions of this Committee as a basis for any significant changes in the delicate balance of regulation *in areas where Congress has not resolved the issue.* [Emphasis added.]

The next sentence identifies "pay cable regulation" and "increased use of imported distance signals" as examples of areas where Congress has not resolved the issue but left the matters to Commission regulation. But retransmission consent is not what the Committee meant by "increased use of distant signals." The Committee had in mind Section 801(b)(2)(B) which, by clear implication, leaves the Commission free "to permit the carriage by cable systems of additional television broadcast signals." But plainly the grant of a compulsory license, not subject to withdrawal by the broadcaster or the copyright owner, was an "area" where Congress *has* "resolved the issue." The same is true as to the mechanism for setting royalties. Had the Committee intended to allow the Commission freedom to undo what the legislation had created specifically and in excruciating detail, it surely would have said so.[340]

316. Nor can we find that either major market cable systems or satellite transmission of distant signals were not within the purview of Congress in adopting the Copyright Revision Act, thereby making the application of retransmission consent to major market systems or to satellite-relayed signals a matter of communications policy within the jurisdiction of this Commission to consider. Here again it is plain that both these developments were clearly foreseen—indeed had been clearly foreseen for over a decade—at the time the Copyright Revision Act was adopted. The Commission was aware of the development of major markets cable systems as long ago as 1966,[341] and of course the Commission's 1968 retransmission consent proposal was specifically premised on cable's penetration of the major markets.[342] The Supreme Court referenced cable penetration of the major markets in its 1968 decision in *U.S.* v. *Southwestern Cable Co.*[343] Congress was also aware of major market cable penetration as early as 1965[344] in the course of committee hearings on the Copyright Revision Act. During these hearings representatives of cable corporations serving major market communities, including the cable corporation that operates a cable television system in New York City, appeared to testify.[345] Finally, the Committee considered econometric studies projecting the results of various royalty fee levels specifically on major market systems. Similar evidence also definitively lays to rest any suspicion that the Congress did not intend to include satellite-relayed signals within the universe of "distant signals" for which a compulsory fee is available. As in the case of major-market cable, satellite transmission was envisioned as long ago as 1965,[346] and the fact that satellite-relayed distant signals were intended by Congress to be subject to compulsory licensing is evident from the additional concurring views of Congressman Danielson:

> Today cable is able to do more, and often does more, than merely to intercept a signal and deliver it to the subscribers' receiving set located within the local market area of the primary transmitter. With advances in the state of the art, cable systems are now able to transmit signals by cable, microwave, and satellite, almost without limit as to distance * * *. Cable now can, and does, transmit signals far beyond the local market area. In the bill we refer to these as "distant signals." Admittedly they serve the public interest.[347]

In sum, the Congress appears to have been well aware of the trends toward cable growth in the major markets making use of satellite delivered programming.

317. The sports interests filing comments in this proceeding have complained of the lack of attention given their interests and have sought to make out a case that they deserve some separate special treatment. We consider these comments here because one of the principal requests of these parties (the National Football League, the Commissioner of Baseball, the National Basketball Association, and the National Collegiate Athletic Association) is that the retransmission consent proposal be adopted.

318. We recognized in the *Notice of Proposed Rule Making* in this proceeding (para. 43) that sports provide one of the major sources of television programming. It is also obvious that there are many differences between sports and other types of television programming and between the various types of sport events that are broadcast. There are also differences between the other types of television programming of equal magnitude—between feature films and made for television product and between off-network and first-run syndicated programs. These differences,

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[339] *Id.* (emphasis added).

[340] Section 801(b)(2)(C), by implication, leaves the Commission free to change its "syndicated and sports program exclusivity" regulations. Had Congress meant to broaden that implicit authority so as to permit the imposition of retransmission consent, presumably it would have used this Section or the legislative history accompanying it to make that intent clear. Congress did nothing of the sort. Nor is there anything in the legislative history of the savings clause in Section 301(d). The relevant reports simply quote or paraphrase that clause. See, e.g., H.P. Rep. No. 94-1476, *supra*, at 133; H.R. Conf. Rep., No. 94-1733, 94th Cong., 2d Sess. at 78-9 (1976). The conference report does make clear, however, that the legislation was intended to "establish [ ] a *single* Federal system of copyright." H.R. Conf. Rep., No. 94-1733, *supra*, at 78 (emphasis added). Congress did not contemplate that the FCC could establish a second system providing copyright-equivalent protection inconsistent with the system set forth in the 1976 law.

[341] See generally *Second Report and Order in Dockets 14895, 15233, and 15971*, 2 FCC 2d 728 (1966).

[342] See generally *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397, supra.* See also *Notice of Proposed Rule Making in Docket 18894*, 23 FCC 2d 38, (1970) which lists in Appendix B the data on existing and proposed cable systems in the 50 largest television markets and *Second Report and Order in Dockets 14895, 15971, and 15233*, 2 FCC 2d 723, para. (1968) where the Commission states "Our intention has been called to the asserted intent of CATV interests to wire up 'almost all American cities—small and large' and 85 percent of all television sets—40 million homes." (footnote omitted).

[343] 392 U.S. at 159-166.

[344] In 1965 Mr. Ernest Jennes on behalf of the Association of Maximum Service Telecasters testified in the context of copyright hearings about "CATV unlimited": that is, "multichannel systems, importing distant stations [from metropolitan centers across many hundreds of miles and several states] * * * trying to mushroom into cities and towns of all sizes where reception of local and area broadcasting stations is excellent." Hearings before Subcommittee No. 3 of the House Judiciary Committee on H.R. 4347, 5680, 6381, and 6835, Serial No. 8, *supra*, n. 332 at n. 64 (pt. 2) 1225. See also *id.*, (pt. 3), 1823. The General Counsel of the National Association of Broadcasters noted pendency of cable franchises for New York, Philadelphia, Cleveland, and other large cities); and see H. Rept. No. 2237, 89th Cong. 2d Sess., (1966), 78.

[345] E.g., William J. Bresnan, President of Cable Division of Teleprompter Corp. And see statements of Rex Bradley, President of the National Cable Television Association, *id.* at 660.

[346] *See*, e.g., Hearings of H.R. 4347, 6831, 6835, *supra*, n. 322 at n. 64, (pt. 2), 1369 (Kastenmeier statement); H. Rept. 1635, 89th Cong., 2d Sess., 18 (1966) (minority views); *Final Report of the President's Task Force on Communications Policy*, chapter 5 (1968); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397, supra*, n. 295, at 420.

[347] Additional concurring views of Representative Danielson, H. Rept. No. 94-1476, 94th Cong., 2d Sess., 359. *And see* statement of Register of Copyrights Barbara Ringer, "[T]he legal relationship between cable television and space satellite systems was well-known and much discussed in the mid-1970's * * *." Hearings on H.R. 3333 before Subcomm. on Communications of House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. at 700 (1979).

however, we do not find to be determinative for purposes of this proceeding. Thus, for example, while sports events are disadvantaged in some respects by the absence of repeat performance possibilities, they are in an advantageous position in other respects in that they are not entirely dependent for their financial success on television revenues, making the bulk of their revenues from attendance at the events themselves.

319. The argument pressed here, that sports is different and requires greater regulatory concern, is not a new one. In an earlier proceeding in which the Commission considered separate limitations on the cable carriage of sports programming, the Commission stated, summarizing the contentions of the sports interests, that:

> The argument is now put forth that sports programming is different than all other television programming and should be treated differently by the Commission's cable rules. It is argued that because sports programming is highly perishable, and because the sports industry depends heavily upon broadcast revenues for its sustenance, the public interest requires strict regulations to maintain the present pattern of distributing sports programs.[348]

The Commission found, however, that while the adoption of specific rules to cover the situation in which home games were blacked-out was appropriate,[349] there was no other basis for the separate treatment requested. Thus, we said,

> We can find no public interest rationale in terms of our national communications policies for affording sports programming additional protection against audience fragmentation. Sports is but one form of television programming, and must compete for audience with other programs provided by local television stations and cable systems. Absent convincing evidence that distant signal sports importations threaten to undermine local conventional television service, we are not prepared at this time to issue new rules to sustain the audience levels of established television broadcast stations at the expense of existing and potential cable television viewers.[44]

[44] The comments contain no evidence that local sports telecasts have been curtailed because of audience fragmentation resulting from cable sports importations, or that this is likely to occur. In fact, the audience of some television stations carried as distant signals by cable systems is significantly increased by such carriage, thereby creating a potential for increased advertiser support of the programs which they broadcast.[350]

320. The situation today remains essentially the same. Aside from anecdotal instances of alleged harm from distant signal carriage [351], the sports interests have made no credible showing that the general amount of televised sports events has been or will be seriously diminished. Available data actually suggests the contrary. Using professional baseball as an example, we find that baseball's radio and television revenues generally tended to remain relatively static between 1972 and 1975, but after 1975, most teams' revenues increased markedly.[352] Moreover, professional baseball's 1979 network contracts of $200,000,000 are twice its former contracts. In 1976 total baseball attendance was 31,300,000, whereas in 1978 it had increased to 40,600,000. Even if attendance figures for the two new clubs added during that period were excluded, total attendance would be up 5.5 million. At the same time, television audiences increased 15 percent.[353] The National Basketball Association itself performed a study of cable's effect on its teams' live gates in 1975, and concluded that, "There is no direct evidence that cable or pay television carriage of competing games have adversely affected paid attendance.[354] The Commission's most recent annual report to the Congress on the effect of the anti-blackout law concluded, with respect to professional football, that live gate attendance generally appeared to be more affected by such external factors as weather conditions, caliber of the opposing team, and the home team's season record than by televising of competing games.[355] Moreover, the television audience preferred to watch home team games over other teams' games by a 5–1 margin. [356] We find no evidence indicating that the same conclusions should not apply to collegiate sports.

321. Although sports interests cite statements in the legislative history of the 1976 Copyright Act which they argue "clearly demonstrate that the Commission has the authority to exclude sports programming from the compulsory licensing provision of the Copyright Act" [357] we do not read this language as suggesting anything other than that the Commission should act within the scope of its authority if necessary for legitimate Communications Act purposes. In rejecting a proposed separate treatment of sports in the Copyright Act, the Senate Report simply stated that:

> Without prejudice to the arguments advanced in behalf of these proposals * * * these issues should be left to the rulemaking processes of the Federal Communications Commission, or if a statutory resolution is deemed appropriate to legislation originating in the Committee on Commerce.[358]

322. In sum, we do not find anything in the comments received to change the judgment arrived at in Docket 19417, *supra*, that, except for the provisions of Section 76.67, sports programming should stand on the same footing as all other programming.

323. We also find that the savings clause in Section 301(d) of the Copyright Revision Act does not eliminate the fundamental irreconcilability between the Copyright Revision and a Commission-imposed retransmission consent requirement. Normally when two statutes deal explicitly with the same subject, Congress makes clear by a repealing clause that the later statute supersedes the earlier one. On the other hand, "repeals by implication are not favored." *United States* v. *Borden Co.*, 308 U.S. 198 (1929). In the absence of an express repealer, "[w]hen there are two acts upon the same subject, the rule is to give effect to both *if possible.*" *Id.* (emphasis added). For an implied repeal, there must be "a positive repugnancy" between the two statutes. *Id.* at 199. One common formulation of this principle is that an implied repeal will be found only to the minimum extent necessary to

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[348] *Report and Order in Docket 19417*, 54 FCC 2d 265, para. 41 (1975).

[349] 47 CFR 76.67.

[350] *Supra*, n. 348 at para. 42.

[351] Compare comments of Commissioner of Baseball, pp. 24–26, concerning certain difficulties faced by the Pittsburgh Pirates with Evan Pottack, "The Pirates: Where is Everybody," *Pittsburgh, March 1979*, p. 30 (appended as exhibit B to the October 17, 1979 comments of the NCTA); also the NBC comments of September 17, 1979 stating "WGN was told that it could not be licensed to carry the games [certain NCAA basketball games] because it was a superstation and the license could infringe on other exclusive rights" with the statement of the President of the NCAA to the House Communication Subcommittee on May 14, 1979, "The bid of WGN was $8,000; clearly not a competitive bid despite its superstation status." Examples of games allegedly not broadcast due to cable carriage are also provided in the NCAA *reply* comments. While the information provided there, some of which relates to isolated games played in 1974 and 1975, is not sufficiently detailed to reveal the precise reasons for these games not being broadcast, in the past the Association's own rules have in some circumstances counted cable carried games against the broadcast quotas permitted individual schools. Thus, the NCAA examples may be to some extent of their own creation.

[352] The Final Report of the Select Committee on Professional Sports, H. Rept. 1786, 94th Cong., 2d Sess., App. III A–2 (1977).

[353] Testimony of Gerald A. Simon, managing director, Cambridge Research Institute, 1979 Copyright hearings, *supra*, n. 314 at 149.

[354] Senate Communications Act rewrite hearings, *supra*, n. 309 at 2450.

[355] Fifth Annual Report of the Federal Communications Commission on the Effects of Public Law 93–107, 95th Cong., 2d Sess., 1978 (committee print), 21–43.

[356] *Id.* at 5, 19.

[357] Comments of Commissioner of Baseball in Dockets 20988 and 21284, September 17, 1979 at 54.

[358] S. Rep. No. 94–473, 94th Cong., 1st Sess. 80 (1975).

enable the later statute to "work." *E.g., Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 683, 691 (1975). Another somewhat overlapping formulation is that Congress will be found to have intended the repeal of the earlier statute if the later statute creates a comprehensive and pervasive regulatory scheme over the subject matter. *E.g., United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 734–35 (1975).

324. In the present instance, the Copyright Law Revision establishes just such a comprehensive and pervasive regulatory scheme over cable retransmissions of copyrighted programs. For that scheme to "work," any contrary regulatory authority must give way. More specifically, for the cable operator to be assured of retaining his statutory right to transmit the copyrighted programs, there cannot be a contrary FCC regulation which directly empowers a broadcaster (and indirectly empowers the copyright owner) to prevent such transmission by withholding consent. To preserve the statutory ceiling on fees, there cannot be a contrary FCC regulation which empowers the broadcaster (and, indirectly, the copyright owner) to extract greater fees.

325. The savings clause in Section 301(d), referred to above, does not alter our view that the 1976 law preempts the Commission's authority to impose a retransmission consent requirement. Any generalized savings clause must be interpreted in the context of the entire statute. Its general language cannot be intended to render those other, more specific regulatory provisions "nugatory." *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.* 204, U.S. 426, 437, 446 (1907). Where there is "an irreconcilable conflict between the statutory scheme [of the later statute] and the persistence of . . . [rights or] remedies" under earlier enacted law, the savings clause will not prevent an implied repeal of the earlier law. *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298–99 (1976). See, e.g., *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 388–89 (majority opinion), 410 (dissent) (1973); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 310 (majority opinion), 321 (dissent) (1963); *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co., supra*, 204 U.S. at 446. In each of these cases the savings clause stated:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

This language, insofar as it applies to preexisting Federal statutes, is indistinguishable from Section 301(d) of the 1976 copyright law. The quoted language did not prevent a finding of implied repeal of the 1890 Sherman Act and the 1914 Clayton Act by the 1958 Federal Aviation Act in *Hughes Tool* and *Pan American, supra.* Consequently, the language of 301(d) does not bar a finding that the 1976 copyright law deprived the FCC of any preexisting retransmission consent authority under the Communications Act of 1934, where such authority would be irreconcilably in conflict with the 1976 law.[359]

326. We believe that the above demonstrates that the policy grounds urged to us in favor of this proposal, on careful examination, are fundamentally related to the operation of the copyright laws and that the Congress considered these issues with a full awareness not only of the developing course of the cable television industry but with a full awareness of the various public interest tradeoffs involved in the compulsory copyright licensing system. Finally, it seems clear that what we are being asked to do here is to overrule the judgment of the Congress because "the present copyright scheme is patently inadequate" and "provides only token compensation to copyright holders" (comments of ABC) or not to do so would result in "anomalies," "skew the market," or not "end Government intrusion" (comments of NTIA). Since this agency is itself a creature of Congress we do not see how we can take it upon ourselves to correct the judgments it has made and, accordingly, believe this proposal to be beyond our authority.

327. We also sought comments in our rulemaking *Notice* on other ways to facilitate the operation of these markets including means of facilitating the development of the types of information that are required for television stations to receive value for the distant cable television audiences they receive. Virtually no comments were received in response to this invitation and while we continue to hold ourselves open to suggestions of this type in the future, it appears that all that is required at this point is a certain regularity of cable carriage and the amassing collectively of sufficient audiences to make the commercial collection of information feasible. It appears that this process is now beginning to occur on its own. Accordingly, we are not proposing to take any additional action at this time.

V. Conclusion

328. The focus of our attention throughout this proceeding has been the effect of distant signal carriage on television service to the public. We have relied upon three criteria, consumer welfare, external effects, and distributional equity, to ascertain whether our rules regarding distant signal carriage are beneficial or detrimental to the public interest. These criteria, which have been developed in the field of modern welfare economics and which couch our traditional basis of regulation in more precise terms, provide a framework to test whether the benefits to consumers from our rules exceed the costs.

329. The criterion of consumer welfare reflects our responsibility to assure "efficient" communication service by seeking the industry and regulatory structure that results in the service that consumers value most highly. In addition to the benefits that accrue only to the consumers of a service, the criterion of external effects factors into the analysis the benefits from a service that flow to society as a whole. For example, public service programming by television stations may provide an important contribution to the functioning of our democratic institutions. Finally, distributional equity focuses upon whether the benefits or costs of our rules are received disproportionately by a particular group of consumers. For example, it is possible for a rule that confers greater benefits than costs upon consumers to be socially undesirable because of an adverse distributional effect upon poor or rural residents.[360]

330. We have analyzed with great care the benefits and costs to consumers of our cable television regulations. We have found that the benefits to consumers from eliminating the distant signal carriage and syndicated exclusivity rules are substantial. Or, in other words, the costs imposed upon consumers by the rules are great. The rules artificially restrict competition and thereby deny consumers services that they are willing to pay for. The rules also have the effect of restricting diversity in television programming by delaying or impeding the provision of new cable television service in many

[359] Retransmission consent's proponents note that passage of comprehensive equal employment legislation administered by the EEOC did not deprive the FCC of concurrent jurisdiction over EEO matters. That situation is obviously distinguishable. FCC enforcement of EEO requirements *complements* and does not conflict with the EEOC's jurisdiction.

[360] For a more complete description of the criteria, *see* the *Report in Docket 21284 supra* at paras. 8–14, the *Report in Docket 20988 supra* at paras. 11–14 and the *Notice of Proposed Rulemaking in Dockets 21284 and 20988 supra* at paras. 50–53.

communities. Thus we conclude confidently that elimination of the distant signal carriage and syndicated exclusivity rules will enhance consumer welfare by promoting competition in both the economic marketplace and the marketplace of ideas.

331. Were there offsetting costs to consumers from eliminating the distant signal carriage and syndicated exclusivity rules, we would be obliged to quantify and compare both the costs and benefits, including any effects upon particular segments of our populace, and reach a judgment as to the degree of protection for local television broadcasters that is required to promote the best attainable distribution of video services. However, the evidence amassed in this proceeding demonstrates clearly that increased competition from less proximate broadcasters will not affect adversely the performance of local television broadcasters. Additionally, there is no evidence that shows that maintenance of the rules expands the supply of television programming or that elimination of the rules will threaten the continued supply of programming. Therefore we conclude that the distant signal carriage and syndicated exclusivity rules should be eliminated.

332. The factual basis of our findings is considerable. Our *Inquiry Reports* carefully examined the effect of distant signals both on the performance of local broadcasters and on the supply of television programming. In the *Report in Docket 21284* we analyzed many cases where broadcasters are operating essentially in deregulated markets because of the grandfathering provisions of our rules. We also studied every case where broadcasters claimed harm due to cable television. We monitored the financial trends of each of these stations over the most recent five year period for which we had financial data. Additionally, for the grandfathered markets and for the most extreme cases of the broadcasters claiming harm due to cable, we estimated the effect of cable television on the stations' audience and revenues to determine whether cable threatened the economic viability of the stations. Finally, we estimated the effect of cable television on the amount of local programming provided by local broadcasters. Our conclusion from this detailed analysis was that that "the effect of audience diversion on revenues, both in theory and in practice (based on the experience of those markets with extraordinarily high penetration today), simply is not sufficient to offset the general growth in demand for TV advertising except in rare cases." [361] Additionally in the *Report in Docket 20988*, having analyzed the impact of the syndicated exclusivity rules on program supply, we concluded that "the long-term financial outlook for television program production is good, with continued increases in revenues and profits expected for the industry, even with the complete deregulation of cable television." [362]

333. Despite the voluminous amount of comments we have received opposing our proposal to delete the distant signal carriage and syndicated exclusivity rules, there is no evidence in the record that shows our estimates of audience diversion due to cable television in the case studies analysis are incorrect; there is no evidence in the record disputing our finding that broadcasting revenues and profits have increased substantially; there is no debate in the record concerning our estimate of the effect of cable television on the amount of public service programming broadcast by local stations; there is no evidence contradicting our finding that the supply of programming will continue to expand even with the complete deregulation of cable television. However, in the latest round of comments, some additional stations have alleged harm due to cable television. We have carefully examined the financial results for each of these stations. We have found that cable television does not pose a threat to the economic viability of any of these stations. Therefore we affirm our conclusions that "it seems extremely unlikely that any non-cable viewers will be disadvantaged due to increased competition for television stations from cable television" [363] and that "non-cable viewers will not be disadvantaged due to the elimination of the syndicated exclusivity rules." [364] Given these findings our obligation to rescind the rules is clear.[365]

Authority for the rule amendments adopted herein is contained in the Communications Act of 1934, as amended, including Sections 2, 3, 4(i) and (j), 301, 303, 307, 308, and 309.

Accordingly, it is ordered, That effective October 14, 1980 Part 76 of the Commission's Rules and Regulations is amended as set forth in the attached Appendix E.

It is further ordered, That the proceedings in Dockets 20988 and 21284 are terminated.

[361] *Report in Docket 21284* at para. 141.

[362] *Report in Docket 20988* at para. 95.

[363] *Report in Docket 21284* at para. 141.

[364] *Report in Docket 20988* at para. 96.

[365] *HBO v. FCC* 567 F. 2d 9, 42 (D.C. Cir. 1977).

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix A

History of Signal Carriage Regulation

Frontier Broadcasting

1. The Commission was initially asked to exercise jurisdiction over cable television systems in 1956. At that time thirteen television broadcasters concerned with the impact of cable carriage of broadcast signals on local television stations asked the Commission to exercise authority over cable television under the common carrier provisions of the Communications Act.[1] This was the first serious invitation we received to restrict cable competition with television broadcasting. We pointed out that, while a cable system "would, in adhering to good business practice, be governed largely by the preferences expressed by the majority of its subscribers, the ultimate final choice of signals is the sole responsibility and prerogative of the CATV operator." 26 FCC 254. Accordingly, the Commission determined that cable systems as they then operated did not fit into the statutory scheme of the Communications Act applicable to common carriers. *Id.* at 255.

Report and Order in Docket 12443

2. A similar invitation to impose common carrier regulation on cable systems was declined in our *Report and Order in Docket 12443*, 26 FCC 403, 424 (1959). We reiterated the rationale expressed in *Frontier Broadcasting* and also considered the evidence of economic impact on local television service as a basis for regulation but found such evidence to be insufficient to restrict cable television operations. *Id.* at 430.[2] On the subject of competition from cable system signal carriage as well as other auxiliary services, the *Report* stated that it "is basically the public which must determine the question, as in all broadcasting and free enterprise businesses." 26 FCC 436, para. 86. In sum, the *Report* concluded "that we do not now know of circumstances which would justify

[1] *Frontier Broadcasting Company v. Collier*, 24 FCC 251 (1958), *recons. denied in conjunction with, Report and Order in Docket 12443*, 26 FCC 403 (1959).

[2] The Commission stated:

We have expressed above our inability to determine where the impact takes effect, although we recognize that it may well exist. Accordingly, we would find it impossible, from anything presented to us so far, to make the necessary finding, either in a particular situation or generally.

Id.

limiting or prohibiting the operation of satellites or translators, or of CATV systems" and that "we do not now envision where we could find that the public interest would be disserved by affording an opportunity for choice of service and the benefits of competition and diversity of expression" from authorization of auxiliary services. Paras. 86–87, *id.* at 436–437.[3]

Carter Mountain

3. In *Carter Mountain Transmission Corp.*,[4] the Commission was presented with the question of whether economic impact to a local television station constituted a sufficient basis to deny an authorization for a common carrier microwave facility that would be used to deliver television broadcast signals to a cable systems in the station's service area. The *Report and Order in Docket 12433* had previously considered the question of whether the Commission, under sections 307(a) and 309(a) of the Communications Act, was required to consider impact on television broadcasters in granting radio facilities to common carriers for use in providing signals to a cable system. We concluded that "it is neither proper, pertinent, nor necessary for us to consider the specific lawful use which the common carrier subscriber may make of the facilities of the carrier." 26 FCC at 431–433.[5] As a consequence, cable operators sought to meet the increased consumer demand for additional and technically improved signals by requesting microwave services from communications common carriers.

4. The Commission recognized the importance of distinguishing between economic injury to a television licensee and an injury to the general public, as we had in our *Report and Order in Docket 12443*,[6] but we were concerned that the proposed microwave service to the cable systems might destroy the only local television station in the area and deprive a substantial population in the outlying rural areas of the only local outlet and of access to any other video services. We said, "[w]e will not shut our eyes to the impact upon the public service which is our ultimate concern, when it appears that the grant may serve to deprive a substantially large number of the public of a service * * *." 32 FCC at 462. While the proposed common carrier service might improve service to cable systems in the area, it did not warrant the substantial risk of loss of television service to that area. Accordingly, we believed compelling reasons justified departure from our previous position taken in 1959. *Id.* at 465. Our interest in safeguarding the welfare of off-the-air viewers in the only local broadcast service in the area did not extend, however, to denying, the subscribers of cable services the benefits of increased diversity from the availability of distant signals unnecessarily. We therefore permitted refiling of the application if it could be shown that the cable system would carry the signal of the local station without duplication of its programs by distant signals. *Id.* at 365. Thus, our concerns did not extend to the local station itself but rather to the welfare of television viewers as a whole.

Dockets 14985 and 15233

5. The Commission imposed restrictions of general application on microwave-fed cable systems' signal carriage in the *First Report and Order in Dockets 14895 and 15233*, 38 FCC 683 (1965). While we indicated that "the development of CATV and other auxiliary means for distributing the signals of assigned stations to the public (something not envisioned at the time of the sixth report and order) now makes possible the realization of some of the most important goals [of] our allocations planning," we became increasingly concerned that cable systems, "which technically, cannot be made available to many others," develop "on a fair and orderly basis" which would not prove disruptive to our television allocations policy and which would not adversely affect the distribution of video services to different segments of society. *Id.* at 698–699. While we found "it impossible, with the data at hand, to isolate reliably the effects of CATV" on television broadcast service, *Id.* at 710, we believed that our statutory responsibilities made it incumbent upon us to initiate regulatory efforts to mediate the competition between these two communications technologies to insure that there would be a healthy co-existence between cable television and television broadcasting which would prove to be beneficial, not detrimental, to the interests of the television viewing public. We believed it imperative to plan "in advance of foreseeable events, instead of waiting to react to them." *Id.* at 701. Accordingly, as minimum regulatory measures toward this end, the Commission adopted rules which required microwave-served cable systems to carry, upon request, the signals of all local television stations and to refrain from duplicating the programs of local commercial stations either simultaneously or within 15 days before or after local broadcast.[7]

6. Our reasons for imposing these requirements stemmed from the different conditions which are found in ordinary competition among broadcasters. We considered cable's duplication of programs of a local broadcast station by carrying competing distant signals, often without carrying the local station's signal, to consitute unfair or unequal competition inconsistent with what we then conceived as cable's supplementary role

[3] Also addressed was the question whether Section 325(a) of the Communications Act was applicable to retransmissions of broadcast signals by cable systems. We recognize that "[i]t may well be that Congress would desire to protect the property right of a broadcaster" but stated that we cannot conclude "that section 325(a) in its present form includes the requirement that CATV's get the consent of the stations whose signals they carry." 26 FCC 430. The Commission was also asked "to recognize the existence of a property right, and to affirm it by rule" but in response stated that "[t]his is not the forum in which the existence or nonexistence of a private property right can be adjudicated." *Id.* We stated, however, that it would be desirable "to clarify the situation with respect to property rights" and "to place CATV under the same conditions as the broadcaster with respect to access to programs originated by other stations" and, accordingly, stated our intent to "request Congress to enact legislation requiring [cable systems to obtain the consent of the originating stations]." *Id.* at 430, 438–439.

[4] 32 FCC 459 (1962), *aff'd Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1962), *cert. denied* 375 U.S. 951 (1963).

[5] We were also asked in the same proceeding to require that microwave common carriers show that they or the cable systems they serve have the consent of the originating station whose signals they transmit. The broadcasters requesting such a requirement indicated that while a direct requirement of cable consent might be beyond the Commission's power, such a requirement could be imposed on the Commission's licensees on the basis that relaying or transmitting signals without consent constituted "piracy" and therefore reflects upon the character qualifications of the licensee. They argued that the Commission should not license facilities whose sole purpose was to engage in such activities. We rejected the contention as "without merit" and pointed out that "the matter of whether a property right exists has not been adjudicated" and that this requirement could not be imposed upon a carrier for the same reasons which we held applied to cable broadcast signal carriage. 26 FCC at 433–434.

[6] In *Report and Order in Docket 12443*, 26 FCC at 423, we pointed out "good service is shown on this record to be on occasion a result of *competition*—the competition provided by the auxiliary services." While we admitted our inability to determine from the data before us "in what situations this impact becomes serious enough to threaten a station's continued existence or serious degradation of the quality of its service," we stated that "in considering economic injury, broadcasting is a dynamic business. If one station goes under, another station, or here another form of service fulfilling many or all of the same functions, may well soon replace it." *Id.*

[7] On the same day rules for microwave-served cable systems were adopted, the Commission commenced an inquiry and rulemaking looking toward extending regulation to all cable systems. *Notice of Inquiry and Notice of Proposed Rulemaking in Docket 15971*, 1 FCC 2d 453 (1965).

to broadcasting.[8] Accordingly, the Commission adopted regulations mandating cable system carriage of local television stations in order to eliminate a "kind of barrier to competitive access" which would otherwise exist if cable systems were permitted to exclude the local station's signal from carriage. *Id.* at 703. An additional concern which prompted the adoption of this requirement was that consumers of video services not be deprived of access to a local station's signals merely because they became subscribers to a cable system. *Id.* at 703.

7. The Commission also attempted to equalize competition between cable operators and broadcasters through the adoption of program exclusivity requirements. We pointed out that "the cable system does not enter the market for programming, as would a competing broadcaster." *Id.* at 703. We noted, however, that Section 325 of the Communications Act, which forbids the rebroadcasting of any station's signal without the consent of the originating station and which in large measure allows broadcasters to obtain exclusivity against one another, had not been found applicable to cable systems. Because cable "presently stands outside of the program distribution process," we considered this situation not to be the usual competitive situation. *Id.* at 704. While we emphasized that "[w]e do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct," we believed that cable, as a supplementary service to television broadcasting, "should at a minimum give some measure of recognition to the fundamental distribution practices that have developed in the parent industry's competitive program market." *Id.* at 705–706. While we pointed out that Section 325 was not applicable to cable retransmissions and that Congress "has not seen fit to adopt [our] recommendation" of amending Section 325 to apply to cable, we stated that "reasonable nonduplication requirements will serve, in part, to achieve the equalization of competitive conditions at which the 'rebroadcasting consent' proposal is, in large part, aimed." *Id.* at 706 n. 37.[9] Thus, we clearly did not regard prevailing exclusivity practices as immutable in declining to recognize exclusivity agreements to the extent they provided protection beyond what we considered to be reasonable at the time.

8. In adopting mandatory signal carriage and program exclusivity rules, we readily acknowledged that "the rules we adopt will not solve all problems" and that "[i]f the rules should ultimately prove unnecessary or need modification in light of the passage of time, Congressional action or other factors, they can be modified or rescinded." *Id.* at 715. Our intent was to "build up a body of experience with the practical operation of both new rules and the conditions prescribed as interim procedures by our notices in these proceedings, before considering the extension of the rules to the CATV industry as a whole." *Id.* at 687.

Dockets 14895, 15233, and 15971

9. The Commission asserted jurisdiction over all cable systems the following year in the *Second Report and Order in Dockets 14895, 15233 and 15971*, 2 FCC 2d 725 (1966). We stated that "We cannot ignore the increasing risk of adverse impact on the 'public interest in the larger and more effective use of radio' (sec. 303(g))" which accompanies the development and growth of cable television, *id.* at 728, and that "our statutory powers * * * include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1, 307(b), and 303(s) of the act and to prevent frustration of the regulatory scheme by CATV operations, whether or not microwave facilities are used." *Id.* at 734.

10. The mandatory signal carriage and program exclusivity requirements were extended to non-microwave systems. However, the period of program exclusivity available to a broadcast licensee was reduced to same-day protection in recognition of "the valuable contribution of CATV in providing wider access to nationwide programming and a wider selection of programs on any particular day." *Id.* at 747.[10]

11. The Commission recognized, however, that program exclusivity in its previous as well as its present form provided only limited protection for syndicated programming and independent stations which were heavily dependent upon such programming. "Stated differently, the adoption of a uniform 'same day' rule will not, in our judgment, significantly affect the protection afforded as to nonnetwork or independent programming" because "[s]uch programming is not presented on a nationwide simultaneous or even nearly simultaneous basis." *Id.* at 748. The Commission concluded that "we must look elsewhere if we are to achieve effective relief" for syndicated programs and independent stations. *Id.*

12. We proposed to do so by recommending to Congress that it consider the question of extending the rebroadcasting concept of Section 325(a) to cable as a general approach encompassing all stations, and by initiating a new set of rules the principle feature of which would be a restriction that cable systems operating in the top 100 television markets could import signals only following an evidentiary hearing establishing that "such operation would be consistent with the public interest and particularly the establishment and healthy maintenance of UHF television broadcast service." *Id.* at 782.

13. We were especially concerned about the impact cable carriage of distant signals might have on UHF broadcasting and pointed out that both cable and UHF broadcasting "are entering the larger markets, most often in an effort to bring programming that is not now available in these markets" and that "the most critical question posed is how these two trends mesh in the ensuing years." *Id.* at 772. We conceded that the "plain fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV * * * and, correspondingly, to what its impact will be upon UHF developments in these markets." *Id.* at 773. We believed that cable carriage of "big city" VHF independents carrying "expensive, attractive nonnetwork programming" might severely damage emerging independent UHF stations especially in view of our recognition that "the nonduplication provision would afford virtually no relief" to these stations. *Id.* at 775. We stated that we had a statutory obligation to insure that the development of cable would not have unacceptable distributional effects on the public and, accordingly, we proposed to "thoroughly examine the question of CATV entry upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals." *Id.* at 776. The major market, distant signal policy and procedure was intended to ameliorate cable's impact on television broadcast service to the public and, in some measure, redress the disparate

[8] 38 FCC at 705.

[9] We also acknowledged the pendency of copyright suits in which program suppliers were attempting to establish their right to control the use by cable systems of signals carrying their programs but we declined to express any view as to the merit of these suits since we said they concerned matters beyond our jurisdication. 38 FCC at 704, n. 32.

[10] Our action constituted further acknowledgment that we did not consider prevailing exclusivity practices or our program exclusivity rules to be immutable.

competitive conditions existing between cable systems and broadcasters which stemmed from cable's operation "outside of the above program distribution process." *Id.* at 778. We believed that the case-by-case distant signal policy accompanied by the requirements carried over in modified form from the 1965 rules to be "the minimum measures * * * essential to insure that CATV continues to perform its valuably supplementary role without unduly damaging or impeding the growth of television broadcast service." *Id.* at 746.

14. While we recognized that "substantial problems affecting the public interest" could result from cable importation of distant signals into areas outside the top 100 markets, we noted that in these areas "the independent UHF (or VHF) station is much less likely to develop" and that "stations in such markets are apt to be three or less in number and network affiliated" which means that "nonduplication is effective." *Id.* at 783. We declined therefore to apply distant signal importation restrictions to these areas because we were aware "that there may be underserved areas where CATV can make its most valuable and traditional contribution." *Id.*

15. Thus, while we acknowledged the "important contribution to the public interest" which cable television performed by increasing viewing opportunities, in meeting the public's demand for good reception of multiple program choices, and in various other ways, *id.* at 781, we stated that we must "take hold of the future—to insure a situation where we or the Congress, if it chooses, can make fundamental decisions in the public interest upon the basis of adequate knowledge." *Id.* at 785. We stressed, however, "that we are not committed to the status quo—to protecting existing investment against new technological advances." *Id.* at 788. Rather, we emphasized the importance of getting the facts, *id.* at 789, and that, as we gained knowledge and experience, of revising or of terminating our procedures. *Id.* at 786.

Docket 18397

16. Experience under the new hearing approach quickly proved unsatisfactory. It was concluded that "these lengthy, complex evidentiary hearings on the economic impact issue * * * have imposed a considerable burden upon the Commission and the participating parties," and, accordingly, the decision was made to close down the burdensome major market hearings to the extent they were concerned with "impact upon the local broadcasting stations." *Id.* at 433–434.

17. Instead, the Commission proposed "to substitute a definitive policy for the evidentiary hearing procedure" by requiring cable systems within a 35-mile zone of a television station in the top 100 markets to obtain prior written permission—retransmission consent—of the originating station if they wished to import the station's signal into the market. *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, 15 FCC 2d 417, 429 (1968). On balance, we found that the evidentiary hearing procedure did not serve the consuming public, its intended beneficiary. However, experience with this process indicated that cable penetration in the major markets could be significant and, accordingly, "the unfair competition of CATV" could be "a significant factor in the development or healthy maintenance of television broadcast service." *Id.* at 431. We concluded that it would be inconsistent with our responsibilities for the regulation of television broadcasting "to permit the growth of substantial CATV operations carrying distant signals in major markets until the aspect of unfair competition is eliminated." *Id.* at 434.

18. We viewed the retransmission consent proposal as a "simpler device" "permitting market forces to eliminate the unfair competition" than the "alternative of adopting detailed nonduplication requirements" for nonnetwork programs. *Id.* at 432. We also acknowledged at the time that this approach may "not be fully effective or may have drawbacks not now foreseen." *Id.* We emphasized that the "purpose of this proceeding is to obtain all such relevant information as to what regulation would best serve the public interest." *Id.*

19. While we were particularly concerned with cable carriage of distant signals in the major markets, we also expressed some concern over distant signal importation within the 35-mile zone of local stations in other markets. Although we believed that "the nonduplication requirement is effective as to network programming," we noted that "roughly 45 percent of a network affiliate's time is devoted to nonnetwork material" and that "it is this segment which is particularly vulnerable to continued fractionalization by a plethora of distant signals." *Id.* at 440. Accordingly, we also considered the possibility of limiting cable carriage to the signals of each of the network-affiliated stations and one independent for cable systems located within the 35-mile zone of a smaller market station. *Id.* For carriage of additional distant signals, retransmission consent would have to be obtained. *Id.* In all other respects, however, the program nonduplication rules were left essentially intact. We believed that our proposed rules for the smaller markets would take into account that there might well be a need for supplementary services in these areas, *id.* at 437 n. 18, but, more importantly, might "substantially alleviate potential problems in such markets and thus cut down greatly upon the need for any evidentiary hearings in this respect." *Id.* at 439.

20. Our retransmission consent proposal, without question, represented a radical and novel departure from the Commission's previously-held positions, espoused in earlier reports, that cable systems could not be made subject to the same type of requirement imposed on broadcasters under Section 325(a) of the Communications Act. While we believed it imperative to proceed toward elimination of the unfair competition element, we implicity recognized the uniqueness of the new approach by noting that there are "other important developments which we should take into account." *Id.* at 437. "We refer specifically to important Congressional developments in the copyright field that bear *directly* on this issue of unfair competition." (emphasis added) *Id.* We pointed out that "there are substantial indications * * * there will be enactment of a copyright law providing for a fair and reasonable revision as to CATV" and that "[s]uch a revision may well reflect not just copyright but also communications and antitrust policies" and "thus constitute, to a significant degree, the legislative guideline which the Commission has long sought." *Id.* at 432–433.[11] We stated that we must take these developments into account especially in view of our recognition that our retransmission consent proposal "necessarily also embodies considerations like copyright in its practical applications." *Id.* at 433. "Since Congress is considering the copyright matter, we should afford the opportunity for Congressional resolution of the unfair competition aspect, particularly since, as discussed, such resolution would constitute the Congressional guidance sought in this important area."

[11] In the course of our discussion, we alluded to the Supreme Court's decision in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), which held that cable systems were not liable for copyright payment for the programs they received on broadcast signals. The rationale of that decision was extended to apply to programs on distant as well as local signals in *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974).

Id. Accordingly, we stated our intent to refrain from taking action on our proposal "until an appropriate period is afforded to determine whether there will be congressional resolution of this crucial issue of unfair competition, with indeed congressional guidance in this whole area." *Id.*[12]

21. The retransmission consent approach did not, however, appear to be a workable alternative. In the absence both of the hoped-for Congressional guidance and of any sign that the retransmission consent proposal was succeeding, we considered a different approach in the *Second Further Notice of Proposed Rulemaking in Docket 18397–A*, 24 FCC 2d 580 (1970), under which cable systems in the top 100 markets would be permitted to carry four independent signals, in addition to local signals, but would be required to delete commercials on the distant signals and replace them with commercials provided by local stations. We indicated that the very nature of the proposal, involving commercial substitution on distant signals, required that it dovetail with copyright legislation. In so stating, we emphasized, however, that the "issue of fairness to copyright owners" is "not a matter which can be resolved by this Commission." *Id.* at 585. We expressed concern over the question whether our proposal would enable the copyright owner to be treated fairly, but stated that "[o]nly the Congress can impose what it believes to be fair compensation in the circumstances" and that "the arena for definitive resolution of the issue remains the Congress, not this agency." *Id.* We did, however, prepare an analysis demonstrating how a compulsory payment mechanism might be developed. *Id.* at Appendix A. We also pointed out that under this proposal, the "carriage and same day nonduplication requirements would continue." *Id.* at 586. We further suggested that there might be other alternatives warranting consideration such as "whether it would be useful to employ an effective nonduplication requirement for nonnetwork programming." *Id.* at 588.

22. Our interest in arriving at a suitable solution that would allow cable to deliver new video services to consumers without endangering the availability of video services to off-the-air television viewers led to our consideration of new proposals and the abandonment of our earlier approaches as means to resolving this regulatory dilemma. Accordingly, by letter of August 5, 1971, the Commission advised Congressional committees considering cable-related legislation of a new regulatory plan for cable television which, "with appropriate review by Congress," could break the regulatory impasse which had continued for almost six years and which could "provide necessary background for Congressional resolution of the copyright issue" relating to cable carriage of copyrighted materials on television broadcast signals. *Cable Television Proposals*, 31 FCC 2d 115 (1971). We stated that "our objective throughout has been to find a way of opening up cable's potential to serve the public without at the same time undermining the foundation of the existing over-the-air broadcast structure." *Id.* We determined that our retransmission consent and commercial substitution proposals "simply will not wash." *Id.* at 117. Our intention was "to break new ground, largely unexplored" which necessitated that we "proceed with caution." *Id.* at 115. We added that "further delay, in our view, would disserve the public and deny the nation tangible benefits." *Id.* While we recognized that "the continued economic health of those who create program material is crucial to both broadcasting and cable," we concluded "that copyright policy is most appropriately left to the Congress and the courts." *Id.* at 115–116. We therefore made plain that we would not continue to deprive consumers in the hope that the copyright complications engendered by a new technology might be resolved.

23. We noted that program exclusivity "is a matter that has both copyright and regulatory implications" and stated our intention "to study whether present or future considerations call for altering our existing CATV program exclusivity rules (Section 74.1103), which in effect protects only the network programming of network affiliates." *Id.* And we advised Congress that we would observe cable television's impact on local broadcast service very carefully under our proposed new regulatory plan and would take "prompt action" wherever necessary including affording adversely affected stations "effective nonnetwork nonduplication protection." *Id.* at 122. Accordingly, we did not envision any syndicated programming rules of general applicability as part of the proposed regulatory program we transmitted for Congressional review.

The 1972 Cable Television Report and Order

24. The cable television regulatory plan outlined in the Commission's transmittal letter to Congress of August 5, 1971, was subsequently adopted by the Commission in the *Cable Television Report and Order, supra*, but not without several changes. The major fundamental difference was the inclusion of rules providing exclusivity for syndicated programming which, together with the other changes, stemmed from the achievement of a "Consensus Agreement" which itself was the product of negotiations by interested parties concerning our August 5, 1971, proposal.[13] We concluded that incorporation of the new elements into our cable television program would "not disturb the basic structure of our August 5 plan" and would serve the public interest and, for these reasons, we adopted them as part of our *Cable Report and Order*. 36 FCC 2d 165–168.[14]

25. We pointed out that "the carriage of distant television broadcast signals by cable television systems has been center stage in the continuing controversy before the Commission, the Congress, and the Courts" and that in resolving the issues in this area, "our basic objective" has been "to get cable moving so that the public may receive its benefits, and to do so without jeopardizing the basic structure of over-the-air television." *Id.* at 164. We believed that this could best be accomplished by restricting the number of distant signals that a cable system may carry based on the size of the market in which it is located and the estimated ability of the market to absorb additional competition. By offering consumers of cable services an additional, but limited, number of signals, we expressed optimism that cable systems would be given the necessary impetus "to develop in the larger markets without creating an unacceptable risk of adverse impact on local television broadcast service" and, at the same time, our limitations would provide an incentive for the development of nonbroadcast services. *Id.* at 165.

26. We indicated that these signal carriage rules and policies represented

[12] In our *Memorandum Opinion and Order in Docket 18397*, 22 FCC 2d 589 (1969), the Commission indicated that it would grant "very few requests for experimental operations" under the retransmission consent proposal and that the rules adopted in 1966, as amended by subsequent orders, governed during the pendency of the proposed rulemaking in this docket. The Commission's actions in Docket 18397 led some leading observers to refer to this interim period as a "freeze" on cable growth, particularly in the major markets. However, other commentators have suggested that the freeze actually commenced with the hearing requirement under the 1966 rules. See MacAvoy, "Memorandum on Regulatory Reform in Broadcasting," (April 2, 1976).

[13] See Consensus Agreement, Appendix D of the *Cable Television Report and Order, supra.*

[14] We also concluded that to entertain further comment in this area would serve very little purpose in terms of securing the public interest. 36 FCC 2d at 168.

our judgment at the time "as to: (a) the amount of distant signal competition that can be introduced into particular types of markets without having adverse impact on local television service and (b) the effect of distant signal carriage on the supply of television programming." *Id.* at 168. We acknowledged that in making these judgments, "[t]he answers rest in the complex economics of, and interrelationships between, the three industries involved as well as on expectations of future developments in the industries and in the economy generally." *Id.* As we had on previous occasions, we admitted our uncertainty and our inability to forecast how cable would evolve. We decided on a "conservative, pragmatic" approach which would permit us to add to our existing program in a significant way and "evaluat[e] our experience." *Id.* at 169. In so deciding, we authorized "not four distant signals", as proposed, but a more limited number (particularly in the smaller markets), and provided the added protection of non-network program exclusivity (particularly in the larger markets where independent stations generally operate). *Id.* We also considered it "wholly wrong to halt cable development on the basis of conjecture, for example, as to its impact on UHF stations" especially in view of our determination that our approach would not have impact adverse to the public interest. *Id.* Accordingly, we established through our 1972 signal carriage rules standards of television service that vary with market size in accordance with the estimated ability of these television markets to withstand additional distant signal competition.

27. Our justification for the "additional program exclusivity rules" was that they would "protect local broadcasters" and "insure the continued supply of television programming," the latter of which, we pointed out, "is fundamental to the continued functioning of broadcast and cable television alike." *Id.* at 169.[15] We provided "the most extensive protection" "in the top 50 markets from which the bulk of program supplier revenue is derived and where these restrictions are consequently most needed to insure the continued health of the television programming industry." *Id.* [16] We added that this "protection will also assist independent stations (including many UHFs) that are very largely concentrated in these markets." *Id.* We further stated that in the second 50 television markets, syndicated exclusivity protection would afford "additional, although limited, protection to local broadcasters." *Id.*

28. The Commission declined to extend protection in markets below 100 because in these markets "the number of distant signals is very strictly limited under the rules" and because, "network programming protection is, we believe, adequate to preserve local service." *Id.*[17] Moreover, we stated that to impose syndicated exclusivity protection in these markets "would make these markets even less desirable for new cable construction" and that, in any event, such protection "is of only marginal benefit to copyright holders who derive the substantial bulk of their revenues from the top markets." *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 341 (1972).

29. Our *Cable Television Report and Order, supra*, represented a comprehensive regulatory plan governing cable carriage of broadcast signals which permitted an increase in television programming available to consumers of cable services and a modicum of additional competition in the area of home video entertainment and information services. Despite an element of uncertainty, the Commission expressed a willingness to experiment with additional competition in the video services and, accordingly, the 1972 signal carriage rules constituted an important first step toward increased reliance on competition to serve consumers' interests and needs. In adopting this major cable regulatory program, including the incorporation of the syndicated exclusivity portion of the "Consensus Agreement", we emphasized that the Commission "retains full freedom, and indeed, responsibility to act as future developments warrant" and that, "as we gain experience and insight, we retain the flexibility to act accordingly—to make revisions, major or minor—and to keep pace with the future of this dynamic area of communications technology." *Id.* at 167.

Revisions in the Signal Carriage Rules Since 1972

30. As our understanding of the competitive relationship between cable television and broadcasting has increased through experience and insight, we have since 1972 cautiously but steadily eliminated restrictions on cable carriage of broadcast signals wherever it has been shown that such revisions would lead to expanding the supply of programs available to cable subscribers without simultaneously creating risks of serious harm to the welfare of off-the-air television viewers. This has led to increases in the supply of network news,[18] foreign language,[19] religious,[20] and late-night [21] programming to cable consumers and to our exempting cable systems with fewer than 1,000 subscribers from the signal importation and syndicated exclusivity restrictions.[22] By far the most significant change in our signal carriage rules was the elimination of the "leapfrogging rules" in *Report and Order in Docket 20487*, 57 FCC 2d 625 (1976), where we in essence concluded that the marketplace would secure the public interest more surely than administrative rules. This change in favor of additional diversity and in the direction of freedom of choice for consumers of video services subsequently proved to be a valuable impetus to the development of satellite distribution of broadcast programming to cable systems, a notable example of cost-reducing technology serving to increase the diversity of offerings available to consumers of video services.

The 1976 Copyright Law Revision

31. Our earlier concerns that cable systems were not subject to copyright

[15] *But cf. Cable Television Proposals, supra*, at 115–116, where we stated that while "the continued health of those who create program material is crucial to both broadcasting and cable," "that copyright policy is most appropriately left to the Congress and the courts."

[16] *Teleprompter Corp.* v. *CBS, Inc., supra*, held, however, that the Copyright Act of 1909 did not afford copyright holders the right either to preclude or to charge royalties for the simultaneous transmission into distant markets by cable systems of a copyrighted work exhibited on a broadcast station. To the extent that the intent of the syndicated exclusivity rules was "to permit copyright holders to distribute programming in particular markets either by broadcast alone or, if they wish, by both broadcast and through distant signal carriage," as stated in our *Reconsideration, supra*, at 342, we ascribed a property right to copyright owners—the right to license a television broadcast exhibition of a copyrighted work and simultaneously to preclude its presentation in other markets through the mechanism of cable television—at a time when the existence of the right as a matter of copyright law was very much in doubt and which the Supreme Court later held did not exist under copyright law.

[17] *Cable Television Report and Order, supra* at 181.

[18] *Carriage of Network News Programs—CATV, Notice of Proposed Rulemaking in Docket 19859*, 43 FCC 2d 813 (1978); *Report and Order*, 57 FCC 2d 68 (1976).

[19] *Specialty Stations—CATV, Notice of Proposed Rulemaking in Docket 20553*, 54 FCC 2d 425 (1975); *First Report and Order*, 58 FCC 2d 442 (1976); *recons. denied*, 60 FCC 2d 661 (1976).

[20] *Id.*

[21] *Cable Late-Night Television Programming, Notice of Proposed Rulemaking in Docket 20028*, 46 FCC 2d 446 (1974); *Report and Order*, 48 FCC 2d 699 (1974); *Memorandum Opinion and Order*, 54 FCC 2d 1182 (1975).

[22] *First Report and Order in Docket 20561*, 63 FCC 2d 956 (1977); *Second Report and Order*, 68 FCC 2d 18 (1978).

liability for the retransmission of copyrighted materials on broadcast signals were ultimately addressed by Congress on October 19, 1976, when it enacted the General Revision of the Copyright Law, Pub. L. 94–553, 17 U.S.C. 101 *et seq.* (1976) (effective January 1, 1978), which redefined the rights of, and limitations upon, copyright owners in the use of their works. Among other things, the Copyright Law Revision of 1976 provided a complusory licensing procedure applicable to the retransmission of broadcast signals. Specifically, Congress provided in Section 111(c)(1) of the new Act that:

> secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

32. Indeed, the new law reflected a Congressional judgment that it would be impractical for cable operators to negotiate copyright clearances for non-network programs on distant broadcast signals as well as a Congressional awareness that the compulsory licensing procedure in this area constituted a major departure from traditional copyright practices.[23] Thus, Congress struck a new balance between consumers and copyright owners. The copyright owner would be compensated for the adverse effects distant signal carriage of non-network programming might have on the value of copyrighted works by means of royalty payments based upon cable systems' gross revenues. On the other hand, cable subscribers would have reasonable access to copyrighted programs on distant signals carried pursuant to Commission rules, regulations, and authorizations. Accordingly, while the compulsory licensing process limits the copyright owner in setting the terms and conditions for the use of copyrighted materials presented on television broadcast signals, particularly the flexibility to market programs on a geographically-restricted basis under the new copyright law, it allows the public to benefit by the wider dissemination of works carried on television broadcast signals.

[23] See *Report of the House Committee on the Judiciary, Copyright Law Revision, supra,* at 89:

> In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.
>
> Congress provided for a compulsory licensing mechanism in Sections 115 (mechanical royalties) and 116 (jukebox) as well as in Secton 111 concerning secondary transmissions by cable systems.

Appendix B

N–1334–FCC, November 1979

Audience Diversion Due to Cable Television: Response to Industry Comments

Rolla Edward Park

A Rand Note
prepared for the
FEDERAL COMMUNICATIONS COMMISSION

Rand
SANTA MONICA, CA. 90406

Preface

This Note is a contribution to the Federal Communications Commission's *Inquiry into the Economic Relationship between Television Broadcasting and Cable Television*, Docket 21284. It discusses comments by representatives of the broadcasting and motion picture industries on an earlier Rand study, *Audience Diversion Due to Cable Television: A Statistical Analysis of New Data*, R–2403–FCC, April 1979. The work was performed pursuant to contract 0298 with the Federal Communications Commission.

Abstract

Analysis of broadcasting and motion picture industry criticisms of an earlier Rand report leaves unchanged the earlier report's conclusion that "* * * TV broadcasting will continue to prosper, despite increasing competition from cable." Some of the criticisms are accepted and used to produce revised projections of audience diversion due to cable. The effect of others is investigated using sensitivity analysis. Other criticisms are matters of judgment; on these, there is no reason to prefer the industry's approach to Rand's.

Acknowledgments

I appreciate helpful comments on an earlier draft by my Rand colleagues Willard Manning and Bridger Mitchell. Steven Zecola of the Federal Communications Commission also made useful comments and in addition worked hard to obtain all of the data on nonduplication protection status that I used in this study. David Nicoll of the FCC took care of administrative matters cheerfully and competently. Ethel Lang of Rand typed two versions of this Note with admirable precision, dispatch, and good humor.

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I. Introduction and Summary

A recent Rand report prepared for the Federal Communications Commission concludes that "* * * TV broadcasting will continue to prosper, despite increasing competition from cable."[1] The conclusion is based on a statistical analysis of data on cable and off-the-air television audiences.

The conclusion, and the analysis upon which it is based, have elicited critical comments from the broadcasting and motion picture industries.[2] This Note is my reply to the industry criticisms. I accept some of the criticisms and check the effect that some of the others would have on my results. None of them alters the conclusion stated in my earlier report.

Summary

In Section II, I estimate new audience share equations and apply them to simulate the effect of cable on broadcast stations' audience size. The revised estimates differ from those in my earlier report for a number of reasons, most importantly because I now distinguish between distant network signals that are blacked out on the cable to provide nonduplication protection[3] to local affiliates, and those that are not. The effect of this and the other changes is small; the revised audience diversion projections (shown in Tables 3 and 4 below) are not much changed from those in my earlier report.[4]

In Section III, I discuss six major industry criticisms of my earlier report:

- Data problems.
- Different effects in different time periods.
- Treatment of total audience.
- Distinction between stations and programs.
- Differences in off-the-air reception.
- Different effect on independents.

My new estimates in Section II avoid some of the problems. Others turn out not to be problems at all. I am able to check the sensitivity of my results to adopting the industry position on the first four criticisms and find that my results are affected very little by any of them. There is no simple way to do a sensitivity analysis of the other two criticisms, but neither is there any reason to prefer the industry-suggested approach to mine.

II. Revised Estimates of Audience Share Equations and Audience Diversion

Motivated in part by the industry comments on my earlier report (1979a), I have estimated new audience share equations and applied them to make new projections of audience diversion due to cable television. Although the new estimates differ from the earlier ones in a number of ways, the resulting audience diversion projections are changed very little.

How the Estimates Differ From the Earlier Ones

These are the ways in which the new estimates differ from the earlier ones:

- A few keypunch errors in the data have been corrected.
- Separate equations have been estimated for each portion of the television viewing day (daytime, early fringe, prime time, late fringe,[5] as well as the full broadcast day).
- I have taken account of the fact that some distant network signals are (sometimes) blacked out on the cable to protect local network stations

[1] Park (1979a).

[2] *Joint Motion* (1979). Fisher (1979). Schink (1979). Association of Independent Television Stations (1979). Charles River Associates (1979).

[3] Defined below (p. 3).

[4] Park (1979a, Tables 7 and 8, pp. 35–36).

[5] See Appendix B for definitions.

("nonduplication protection").[6]

• The definition of local stations has been revised.

Here I discuss only these *changes* in the way the audience share equations were estimated. For a comprehensive description of the new application of the estimation method, see Park (forthcoming). For the old application, see Park (1979a).

Correction of Keypunch Errors

While getting the data ready for the new estimates, the FCC staff and I discovered and corrected a few errors:

• Three station call signs were mispunched with the result that one station looked like two different stations, one received off the air and one on the cable. Example: The cable observation for WLOX in county 10 was punched as WLDX.

• Six parent and satellite pairs were not combined in the data. Example: In county 7, data for KARD and its satellite KCKT are combined in the new data, but not in the old.

• Three affiliation codes were incorrectly punched with the result that an independent station was counted as a network affiliate. Example: KTVT in county 21, an independent station, had affiliation code 200 in the old data, indicating affiliation with CBS.

The substantive corrections have very little effect on the resulting estimates. In addition, a few other (non-substantive) errors that have no effect at all on the estimates were corrected. The corrected data are reproduced in full in a companion note (Park, 1979b).

Separate Equations for Different Parts of the Day

In (1979a), I estimated final (second-stage) equations for the full-day and prime-time time periods only. The equations for the other time periods may well be substantially different. We know, for example, that independent stations typically attract larger audience shares during the early fringe time period than they do during the rest of the day. Consequently, I now estimate final equations for all five time periods.

Nonduplication Protection

In my earlier work I made no distinction between distant network stations whose programs are blacked out on the cable when they duplicate those of a local station, and those that are never blacked out.

In fact, of course, one expects their audience shares to be quite different. Those that are blacked out should have small shares, if only because they are carried only part of the time. Those that are not blacked out should have larger shares. They compete with local stations throughout the day and may in some cases supply popular network programming that is not even carried by local stations (for example, in a two-station market).

Consequently, I distinguish between distant network stations that are blacked out and those that are not in my new estimates and estimate "attractiveness indices" (defined below) for the following station types:

NVL: local network VHF.
NUL: local network UHF.
IVL: local independent VHF.
IUL: local independent UHF.
NVD: distant network VHF blacked out.
NUD: distant network UHF blacked out.
NVDB: distant network VHF not blacked out.
NUDB: distant network UHF not blacked out.
IVD: distant independent VHF.
IUD: distant independent UHF.

Definition of Local Stations

As before, the audience share equations are estimated using observations on local stations only—all such stations in 121 counties.[7] The set of stations considered to be local is slightly different, however. Before, local stations were all those assigned to the ADI[8] market of which the county is a part, and distant stations were stations from other markets. The new definition is the same with two exceptions. Stations are counted as local if they receive nonduplication protection against some other station, and they are counted as distant if they are blacked out to provide nonduplication protection to some other station, regardless of whether the county is in their ADI or not.

Table 1 shows the number of stations (VHF and UHF combined) in the various categories. Of the 334 stations (105+216+13) that would have been counted as local network stations under the old definition, 13 are now excluded because they are sometimes blacked out. On the other hand, 14 stations previously counted as distant are now defined as local, since they receive nonduplication protection.

[6] Nonduplication protection is available on request to stations located within 35 miles of a cable system (or within 55 miles for stations in below-100 markets). If asked to do so, the cable system must delete programs broadcast by any lower priority station, when those programs duplicate those of the requesting station. See *Cable Television Regulations*, Subpart E for details.

[7] An "observation" consists of the local station's audience share together with information on the competition (both local and distant) that it faces.

[8] Area of dominant influence, defined by ARB to be all those counties in which a market's stations attract a plurality of viewing hours.

Table 1

COUNTS OF STATIONS OF DIFFERENT TYPES

	Network			
	Receives Nonduplication Protection	Neither Protected Nor Blacked Out	Blacked Out	Independent
Off-the-Air Viewing				
Same ADI	105 NL	216	11 NDB	23 IL
Distant ADI	14	101 ND	95	11 ID
Cable Viewing				
Same ADI	105 NL	216	13 NDB	23 IL
Distant ADI	14	211 ND	173	93 ID

NOTES: Station categories are as follows:

NL: Local network
ND: Distant network not blacked out
NDB: Distant network blacked out
IL: Local independent
ID: Distant independent

Many more distant stations are received on the cable than off the air—nearly twice as many network stations and over eight times as many independents. The distant network stations are fairly evenly divided between those that are sometimes blacked out and those that are not.

Revised Audience Share Equations

As in (1979a), I hypothesize that each station type can be assigned an attractiveness index a_i such that the audience tends to divide among available signals in proportion to $a_i/\Sigma a_j$, where the summation is over all of the available signals. I allow the attractiveness indices to differ off the air and on the cable. In particular, I expect them to be higher on the cable for local UHF stations and for all distant stations, because of improved reception on the cable. Thus the model is

$$SHR_{io}=\Sigma a_{jo}D_{ij}/\Sigma a_{jo}M_{jo}+u_{io}$$
and (1)
$$SHR_{ic}=\Sigma a_{jc}D_{ij}/\Sigma a_{jc}M_{jc}+u_{ic},$$

where the summations are over the 10 station types, D_{ij} is a dummy variable equal to 1 if the ith station is of type j and O otherwise, and M_{jo} and M_{jc} are the numbers of available signals of type j off the air and on the cable, respectively.

I estimate the audience share equations by a two-stage procedure; see Park (forthcoming) for details. First-stage nonlinear regressions (Appendix Table A.1) provide estimates of the parameters of the co-variance matrix. These are then used in a nonlinear, nondiagonally weighted regression to obtain second-stage generalized least squares estimates of the attractiveness indices (Appendix Table A.2).

The precision of the estimates can be increased by constraining the model. As before, I assume that cable increases the attractiveness of local UHF stations, both network and independent, by the same multiple, K. That is, if the off-the-air indices are a_{NUL} and a_{IUL}, the cable indices are $K(a_{NUL})$ and $K(a_{IUL})$.

In addition, I assume that being blacked out part of the time on the cable reduces the attractiveness of distant network stations, both VHF and UHF, by the same multiple, BLK. That is, if the cable indices for stations that are not blacked out are a_{NVD} and a_{NUD}, then for those that are blacked out $a_{NVDB} = BLK\ (a_{NVD})$ and $a_{NUDB} = BLK\ (a_{NUD})$.

The constrained estimates are shown in Table 2. Both the K constraint and the BLK constraint are acceptable hypotheses (using an F test at the .05 level) in all time periods.

Local UHF stations have higher indices on the cable than they do off the air, undoubtedly because reception is improved by cable. The improvement factor K is quite precisely estimated; it differs somewhat from one time period to another, ranging up to 1.45 in prime time.

Stations blacked out to provide nonduplication protection have lower indices on the cable than do stations that are not blacked out. The blackout factor BLK ranges from .40 in prime time

when there is a lot of duplication to .90 in early fringe when there is very little.

The estimated attractiveness indices are for the most part in accord with prior expectations. Local stations handicapped by lack of network affiliation or by UHF transmission have lower indices than do network VHF stations; independent UHF stations, which suffer from both handicaps and which, in addition, often broadcast weaker programs than do VHF independents, have the lowest indices of all local stations.

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Table 2

SECOND STAGE CONSTRAINED AUDIENCE SHARE EQUATIONS

	Network[a]			Independent[a]							
	L	D	DB	L	D	BLK	K	$\hat{\sigma}$	$\hat{\rho}$	R_1^2	R_2^2
Full Day											
Off-the-air viewing											
VHF	1.00	.07	.10	.57	-.25			.999	.672	.671	.440
	(b)	(1.8)	(2.8)	(3.3)	(2.4)						
UHF	.47	.14	.19	.23	-.03						
	(10.1)	(.6)	(.9)	(4.0)	(.1)						
Cable viewing											
VHF	1.00	.38	.19	.56	.40	.50	1.37	.460			
	(b)	(9.1)	(d)	(3.4)	(6.0)	(4.9)	(12.7)				
UHF	.64	.16	.08	.32	.25						
	(c)	(1.4)	(d)	(c)	(3.4)						
Daytime											
Off-the-air viewing											
VHF	1.00	.06	.10	.52	-.11			1.214	.629	.582	.353
	(b)	(1.2)	(2.4)	(2.5)	(.7)						
UHF	.33	-.05	.32	.25	-.18						
	(6.8)	(.2)	(1.3)	(.5)							
Cable viewing											
VHF	1.00	.30	.13	.54	.39	.44	1.41	.669			
	(b)	(6.0)	(d)	(2.4)	(4.1)	(2.9)	(8.2)				
UHF	.46	.04	.02	.35	.26						
	(c)	(.3)	(d)	(c)	(2.5)						
Early Fringe											
Off-the-air viewing											
VHF	1.00	.07	.10	.93	-.18			1.353	.724	.528	.336
	(b)	(1.4)	(2.1)	(3.1)	(1.3)						
UHF	.43	-.00	.29	.47	-.09						
	(7.4)	(.0)	(1.1)	(4.4)	(.2)						
Cable viewing											
VHF	1.00	.34	.31	1.17	.76	.90	1.22	.656			
	(b)	(5.8)	(d)	(3.5)	(5.9)	(3.8)	(9.5)				
UHF	.33	.07	.06	.57	.54						
	(c)	(.5)	(d)	(c)	(4.0)						
Prime Time											
Off-the-air viewing											
VHF	1.00	.06	.13	.53	-.33			.876	.512	.717	.466
	(b)	(1.6)	(3.3)	(3.7)	(3.1)						
UHF	.58	.27	.20	.11	.16						
	(12.3)	(1.0)	(.8)	(2.6)	(.5)						
Cable viewing											
VHF	1.00	.42	.17	.41	.30	.40	1.45	.401			
	(b)	(10.3)	(d)	(3.1)	(4.9)	(5.1)	(13.1)				
UHF	.84	.29	.12	.15	.14						
	(c)	(2.2)	(d)	(c)	(2.1)						
Late Fringe											
Off-the-air viewing											
VHF	1.00	.02	.12	.23	-.26			1.156	.597	.584	.322
	(b)	(.4)	(2.7)	(1.3)	(2.0)						
UHF	.41	.39	.18	.20	-.12						
	(8.0)	(1.3)	(.7)	(2.9)	(.4)						
Cable viewing											
VHF	1.00	.33	.19	.25	.30	.57	1.38	.751			
	(b)	(5.3)	(d)	(1.1)	(2.8)	(3.0)	(8.1)				
UHF	.57	.09	.05	.28	.18						
	(c)	(.5)	(d)	(c)	(1.5)						

NOTES: The dependent variable is the station share of total audience during each time period. Estimated coefficients are "attractiveness indices" in equation (1). Asymptotic t-statistics are in parentheses. See Park (1979c) for a description of the nonlinear generalized least squares estimation method used, and a description of $\hat{\sigma}$, $\hat{\rho}$, R_1^2, and R_2^2

[a] L indicates local stations. D indicates distant stations not blacked out. DB indicates distant network stations blacked out to provide non-duplication protection to local stations.

[b] This coefficient is normalized to one as a reference value—not estimated.

[c] This coefficient is constrained to equal K times the corresponding off-the-air coefficient. K is an estimated multiplier.

[d] This coefficient is constrained to equal BLK times the corresponding cable coefficient for distant network stations that are not blacked out. BLK is an estimated multiplier.

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The indices for distant stations off the air do not convey much information, because they are highly reception-dependent. They depend mostly on how close out-of-market stations happen to be to our sample counties. The estimated negative indices for some such stations are anomalies, but not very important ones. I do not use these values in the application of the model. Furthermore, when I reestimated the equations with all indices constrained to be non-negative, the other coefficients changed very little (Appendix Table A.3).

Distant stations on the cable generally have smaller indices than do comparable local stations. The index for distant network VHF stations not blacked out is quite precisely estimated to be between 30 and 42 percent of that local VHF network stations in the different time periods. The index for distant independents (both VHF and UHF) tends to be about 75 percent of the index for their local counterparts. Indices for distant UHF stations on the cable are always smaller than those for comparable VHF stations, presumably reflecting less attractive programming on the UHF stations, and also perhaps residual picture quality differences even on the cable.

Revised Audience Diversion Projections

Tables 3 and 4 use the new audience share equations for the full day time period to simulate the effect of cable on local station audience in 10 hypothetical markets, clustered to represent top-50, second-50, and below-100 market conditions. For each hypothetical market, I show the effect of three different distant signal packages:

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Table 3

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 99	102-103	98- 99
				0	0	6	11	96- 97		96- 97	99-100	96- 97
				0	3	6	11	96- 96		95- 96	98- 99	96- 97
3	0	1	1	0	0	2	16	97- 98		97- 98	102-104	97- 98
				0	0	6	16	93- 95		93- 94	97- 99	93- 95
				0	3	6	16	92- 94		92- 94	96- 97	93- 94
3	0	0	2	0	0	2	8	98- 99			101-102	98- 99
				0	0	6	8	96- 97			98- 99	96- 97
				0	3	6	8	95- 96			97- 98	96- 96
3	0	0	0	0	0	3	20	94- 95				94- 95
				0	0	6	20	90- 92				90- 92
				0	3	6	20	89- 91				89- 91
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 98				96- 98
				0	0	5	17	93- 94				93- 94
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	94- 96	100-101			95- 97
				0	0	5	18	90- 92	94- 96			91- 93
				0	3	5	18	89- 91	93- 94			90- 91
2	0	0	0	1	0	2	24	90- 92				90- 92
				1	0	5	24	86- 88				86- 88
				1	3	5	24	85- 87				85- 87
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 99				96- 99
				0	0	4	29	89- 92				89- 92
				0	3	4	29	87- 89				87- 89
1	1	0	0	1	0	1	31	87- 89	94- 97			89- 92
				1	0	4	31	80- 82	85- 87			81- 84
				1	3	4	31	78- 80	82- 85			79- 82
1	0	0	0	2	0	1	41	77- 80				77- 80
				2	0	4	41	70- 72				70- 72
				2	3	4	41	68- 70				68- 70

[a] Average present penetration in markets of each type. Data supplied by FCC Cable Bureau.

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 4

LONG-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 98		95- 98	105-107	96- 99
				0	0	6	27	90- 92		90- 92	98-100	91- 93
				0	3	6	37	85- 88		85- 88	95- 98	86- 89
3	0	1	1	0	0	2	26	95- 97		94- 96	104-106	95- 97
				0	0	6	30	87- 90		87- 89	95- 98	88- 90
				0	3	6	37	82- 85		82- 85	91- 94	83- 85
3	0	0	2	0	0	2	27	93- 96			103-105	95- 97
				0	0	6	30	86- 89			94- 96	87- 90
				0	3	6	38	80- 83			89- 92	82- 84
3	0	0	0	0	0	3	30	91- 93				91- 93
				0	0	6	32	84- 87				84- 87
				0	3	6	43	78- 81				78- 81
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 96				94- 96
				0	0	5	31	86- 89				86- 89
				0	3	5	41	80- 83				80- 83
2	1	0	0	0	0	2	32	90- 93	99-102			92- 95
				0	0	5	36	82- 85	90- 92			84- 86
				0	3	5	45	75- 78	83- 86			76- 79
2	0	0	0	1	0	2	48	81- 85				81- 85
				1	0	5	51	71- 74				71- 74
				1	3	5	62	62- 65				62- 65
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 99				97- 99
				0	0	4	31	89- 91				89- 91
				0	3	4	39	82- 85				82- 85
1	1	0	0	1	0	1	52	78- 82	90- 95			82- 86
				1	0	4	57	64- 68	73- 77			67- 71
				1	3	4	67	55- 59	64- 68			58- 62
1	0	0	0	2	0	1	74	59- 63				59- 63
				2	0	4	76	45- 48				45- 48
				2	3	4	83	37- 39				37- 39

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

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• Those allowed by existing rules. This varies depending on market rank and the number of stations in the market. Neglecting specialty and noncommercial stations, the maximum numbers are three independents in top-50 markets with no independents of their own, and two networks in markets with only one local network station. The actual numbers for each hypothetical market are the first of the three distant signal lineups shown in the tables.

• A larger number of stations that might be carried if the present rules regarding independent signal carriage were relaxed. In actuality, this number will depend on the system operators' perceptions of how many new subscribers an additional distant station would attract, compared with the cost of importing the additional station. I simply assume that the number is six in top-50 markets,[9] five in the second-50 markets, and four in below-100 markets.

• All of the above plus additional stations that might be carried if rules regarding carriage of network signals were also relaxed. My assumption here is that a full complement of three duplicate distant networks would be carried in all markets in addition to those allowed by current rules.

I use attractiveness indices estimated for distant VHF stations on the cable for all distant signals.[10] To the extent that less attractive UHF stations are actually carried, my projections may tend to overstate the actual diversion due to cable.

Near-term projections for each of the resulting 30 cases are shown in Table 3, and Table 4 shows long-term projections. The near-term projections are based on present cable penetration levels in markets of each type. The long-term projections are based on (usually much higher) ultimate equilibrium penetration levels estimated in Park (1971).[11] These are in all likelihood conservative estimates of cable penetration for the market as a whole; that is, they probably overstate the penetration actually to be expected, and hence overstate the potential audience diversion due to cable. The reason is that the equation is a system penetration equation, not a market penetration equation. It explains the fraction of homes passed by cable that subscribe, not the fraction of all homes in the market. Hence to the extent that some portions of the market remain unwired, I would expect average penetration in the market as a whole to fall short of the values shown.

The projections show the audience if there is cable in the market, as a percentage of the audience if there is no cable. In all cases, I show a range of values. The lower end of the range is calculated assuming that cable does not lead to increased TV viewing—households that subscribe to cable if it exists would watch as much TV if cable did not exist. The upper end of the range assumes that cable does result in increased viewing, which partially offsets the diversion of audience to distant signals.

In the larger (three-network) markets, projected audience diversion in the near term is minimal—6 percent or less under present regulations, and 13 percent or less under the most relaxed regulations. In smaller markets (fewer than three networks), projected diversion ranges form 8 to 23 percent currently. The maximum projected diversion is 32 percent for a single station market under relaxed regulations. In all cases, UHF stations are not hurt as much by cable as are VHF stations; in some instances, they may actually be helped.

Long-term diversion patterns are similar to the short-term patterns, but the magnitudes are larger. Projected diversion ranges up to 24 percent in markets with three network stations under the most relaxed cable regulations, and much higher than that in markets with only one or two stations.

There is reason to believe that my projections substantially overstate the amount of diversion in small markets. The reasons is that the projections assume that everyone would watch local stations if there were no cable. This is a fairly good approximation in most large markets, but not in many smaller markets where stations from adjacent markets attract substantial audiences off the air. Indeed, a study by the National Cable Television Association (1978) shows that audience diversion off the air is almost as large as it is on the cable in many of the markets that it studied. On this ground, the effect of cable may be much smaller than shown in Tables 3 and 4 for many small markets.

III. Discussion of Industry Criticisms

I find the following major criticisms in the industry comments on my earlier work.

1. There are problems with the data "* * * primarily related to the 'local' versus 'distant' definition." (*Joint Motion*, pp. 12–15; also Association of Independent Television Stations, pp. 17–20).

2. Failure to consider differences in diversion during different times of the day (*Joint Motion*, pp. 17–19; Fisher, pp. 1–3; Charles River Associates, passim).

3. The total audience equation is unreliable, and the overall results are quite sensitive to how total audience is treated (Fisher, pp. 3–14).

4. Failure to distinguish between additional network *stations* and additional network *programs* (Fisher, pp. 14–15).

5. Failure to account for differences in reception quality in different parts of a county (Fisher, pp. 15–17).

6. Failure to account for differential effect of additional distant independent signals on local independents (Fisher, p. 17; also Schink, passim).

I shall discuss each of these criticisms in turn in the light of the revised estimates presented in the preceding section of this Note.

Data Problems

The *Joint Motion* (p. 14) refers to "* * * serious problems with the data for 35 of the 121 counties * * *" and then goes on to specify the "problems" in 14 of the 35. In one county, the problem is a key punch error that has been corrected in the data used for the revised estimates in this Note. In two others, the "problem" is that all reportable stations are local; the *Joint Motion* incorrectly claims that such counties contribute nothing to the analysis. In fact, they contribute to the estimates of the error covariance matrix, which plays a central role in my generalized least squares analysis.

In the 11 other listed counties, the "problem" is that one local station (or in one case, two local stations) has no off-the-air audience.[12] In the revised data, there are 15 local commercial stations (out of 358 total) in 13 counties with off-the-air NWC [13] equal to zero.[14]

[9] This corresponds to the assumption in schink and Thanawala (1978).

[10] Specifically, I use .38 for primary network signals (which are not blacked out), .19 for duplicate network signals (which are), and .40 for independents.

[11] I assume price of cable service equals $90 per year, median family income equals $16,000 per year, and UHF set penetration equals 100 percent, all approximating current values. Color set penetration is set equal to .5, approximately the mean value in the sample used to estimate the equation, since the coefficient on the color set variable was completely insignificant in the estimated equation. For each market situation, I calculate penetration at the center of the market and penetration halfway out to the B-contour, and average the two figures to obtain the estimates shown in the table for the market as a whole.

[12] In two of these counties, the offending station is no longer considered to be local by the definition used for the revised data; see Section II above.

[13] NWC is net weekly circulation, the percent of TV households that watches the station at least once a week.

[14] The 15 stations include three VHF and six UHF network affiliates, and six UHF independents.

The *Joint Motion* seems to maintain that zero off-the-air audience is by itself reason to exclude a station from the sample. That contention is false. It is a fact of life that some stations get little or no audience in some parts of their own markets. One of the benefits of cable is that it improves reception so that these stations can attract some audience in previously dead areas.[15]

However, zero off-the-air audience *may* serve as a warning that some of these stations are not representative of the relatively close-in areas that we want to draw inferences for. To check this, I measured the approximate distance from the station's assigned city to the principal city of the county, for each of the stations with zero NWC. The results are shown in Table 5.

[15] Thus the contention of Independent Television Stations (1979, p. 18) that the effect of cable should be measured so as to *exclude* the effect of improved reception is difficult to understand. To exclude improved reception would be to exclude an important real effect.

The *Joint Motion* singled out for special discussion KXON in county 18, 125 miles distant. There is certainly a strong case for considering this not to be typical of relatively close-in portions of a market. In contrast are the two San Francisco UHF independents which have zero reported NWC *in their home county*. There is no question but that these are local stations, and there is no reason to exclude them from the sample just because they have no off-the-air audience. In between, the question of which stations ought to be included and which excluded is a matter of judgment. The advantage of including stations (at least up through WZTV at 65 miles) is that it bolsters a sample that is in any case somewhat thin in independent stations. The advantage of excluding stations (down through WHAE at 40 miles) is that it reduces the extent to which the observations are atypical of the 35-mile zone which we are particularly interested in.

Table 5

APPROXIMATE DISTANCE FROM SAMPLE COUNTIES TO STATIONS WITH OFF-THE-AIR NWC EQUAL TO ZERO

County	Station	Type	Distance
5	KGSC	IU	0
5	KDTV	IU	0
29	WHTV	NU	30
90	KLAA	NU	30
41	WHAE	IU	40
157	KXTX	IU	45
47	WYEA	NU	50
4	KLAA	NU	55
47	WHAE	IU	65
147	WZTV	IU	65
60	KMEG	NU	70
87	WTVK	NU	70
142	KXON	NV	70
140	KXON	NV	95
18	KXON	NV	125

Anyhow, I checked the effect of excluding *all* of the stations with off-the-air NWC equal to zero, and found it to be small. In the reduced sample, there are no observations for these stations, nor are they counted among the competing stations received off-the-air.[16]

[16] All of them are carried and attract positive audience on the cable, so they count among competing stations on the cable.

The second-stage constrained share equation for the full-day time period is in Appendix Table A.4. Audience diversion projections based on these estimates are shown in Tables 6 and 7. Excluding these stations makes very little difference to the projections, and what difference there is, is usually in the direction of *less* diversion.

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Table 6

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Using Attractiveness Indices Estimated with Sample That Excludes Local Stations with Off-the-Air NWC Equal to Zero

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 99	101-102	99-100
				0	0	6	11	96- 97		96- 97	99-100	97- 98
				0	3	6	11	96- 97		96- 97	98- 99	96- 97
3	0	1	1	0	0	2	16	97- 99		97- 98	101-103	97- 99
				0	0	6	16	94- 95		93- 95	97- 98	94- 95
				0	3	6	16	93- 94		93- 94	96- 97	93- 94
3	0	0	2	0	0	2	8	98- 99			100-101	98- 99
				0	0	6	8	96- 97			98- 99	96- 97
				0	3	6	8	96- 96			97- 98	96- 97
3	0	0	0	0	0	3	20	94- 96				94- 96
				0	0	6	20	91- 92				91- 92
				0	3	6	20	89- 91				89- 91
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 98				96- 98
				0	0	5	17	93- 95				93- 95
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	95- 96	99-101			96- 97
				0	0	5	18	91- 93	94- 96			92- 93
				0	3	5	18	90- 91	93- 94			90- 92
2	0	0	0	1	0	2	24	91- 93				91- 93
				1	0	5	24	87- 88				87- 88
				1	3	5	24	85- 87				85- 87
Below-100 Markets												
3	0	0	0	0	0	1	29	97- 99				97- 99
				0	0	4	29	90- 92				90- 92
				0	3	4	29	88- 90				88- 90
1	1	0	0	1	0	1	31	87- 90	94- 96			89- 92
				1	0	4	31	81- 83	85- 88			82- 85
				1	3	4	31	79- 81	83- 85			80- 82
1	0	0	0	2	0	1	41	77- 80				77- 80
				2	0	4	41	70- 73				70- 73
				2	3	4	41	68- 71				68- 71

[a] Average present penetration in markets of each type. Data supplied by FCC Cable Bureau.

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 7

LONG-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Using Attractiveness Indices Estimated with Sample That Excludes Local Stations with Off-the-Air NWC Equal to Zero

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 99		96- 98	103-106	97- 99
				0	0	6	27	91- 93		90- 93	97-100	92- 94
				0	3	6	37	87- 90		86- 89	94- 97	87- 90
3	0	1	1	0	0	2	26	95- 98		94- 97	102-105	96- 98
				0	0	6	30	88- 91		88- 90	94- 97	89- 91
				0	3	6	37	83- 86		83- 85	90- 93	84- 87
3	0	0	2	0	0	2	27	94- 96			101-104	95- 98
				0	0	6	30	87- 90			93- 96	88- 91
				0	3	6	38	82- 85			88- 91	83- 86
3	0	0	0	0	0	3	30	92- 94				92- 94
				0	0	6	32	85- 88				85- 88
				0	3	6	43	79- 82				79- 82
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 97				94- 97
				0	0	5	31	87- 90				87- 90
				0	3	5	41	81- 84				81- 84
2	1	0	0	0	0	2	32	91- 94	99-101			93- 95
				0	0	5	36	83- 86	90- 93			85- 87
				0	3	5	45	76- 79	83- 87			78- 81
2	0	0	0	1	0	2	48	82- 86				82- 86
				1	0	5	51	72- 75				72- 75
				1	3	5	62	63- 67				63- 67
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 99				97- 99
				0	0	4	31	89- 92				89- 92
				0	3	4	39	83- 86				83- 86
1	1	0	0	1	0	1	52	79- 83	89- 94			83- 87
				1	0	4	57	66- 69	74- 77			69- 72
				1	3	4	67	57- 60	65- 68			60- 63
1	0	0	0	2	0	1	74	60- 64				60- 64
				2	0	4	76	46- 49				46- 49
				2	3	4	83	38- 40				38- 40

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

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I cannot discuss the "problems" in the other 24 counties, since the *Joint Motion* failed to identify them.

Conclusion

Some of the data problems identified in the industry comments are not problems at all. Others are, and have been corrected. Still others may or may not be, but they make very little difference to the audience diversion projections.

Different Effects of Audience Diversion in Different Time Periods

The audience share equations in Table 2 strongly support the industry contention that shares differ significantly by day part. In particular, attractiveness indices for independent stations on the cable—VHF and UHF, local and distant—are substantially larger during the early fringe time period than they are at other times of the day. This raises two questions about my audience diversion projections in Tables 3 and 4, which are based on the full-day equation only.

1. Would the projections differ if they were based on audience diversion calculated separately for the individual day parts?

2. An excellent brief econometric study by Charles River Associates (1979) shows quite convincingly that audience during different time periods has different effects on stations' revenue. Another study using an accounting approach (Roger Cooper and Associates, undated) reaches the same conclusion.[17] If these differences were taken into account, would the effect of cable on local station *revenue* differ from its effect on local station audience?

The answer to the first question is no; composite audience diversion projections built up from the four individual time period equations[18] differ only slightly from those based directly on the full-day equation. These composite projections are in Appendix Tables A.5 and A.6.[19]

The off-the-air (0) and cable (C) shares are calculated using the equations in Table 2. Cable penetration is assumed to be .41; this corresponds to a somewhat larger fraction of audience because the fraction of homes using TV is higher in cable households than it is in off-the-air households. Hours (0) that off-the-air households watch the local station is calculated as the product of hours per week in the time period and off-the-air (0) values for share, fraction of TVH, and homes using TV. Hours (C) that cable households watch the local station is similarly calculated using corresponding cable (C) values. C_o is hours that cable households would watch the local station if they did not have cable. It is calculated in the same way as cable hours (C) except using off-the-air (0) shares. The total hours that the local station is watched if there is no cable is the sum of hours (0) and hours

[17] The two studies differ markedly as to the relative value of the different time periods to independent stations, however. Charles River Associates concludes that audience during prime time and late fringe is of no value at all to independents; whereas Roger Cooper and Associates (who study only independents) find that these two time periods are *more* valuable than the others are.

[18] The four time periods (daytime, early fringe, prime time, and late fringe) exclude 33 weekend hours that are included in the 140 weekly hours for the full-day time period—see Appendix B. Thus, strictly speaking, the two sets of projections are not quite comparable. However, the effect of this discrepancy is certainly very small.

[19] As an example of how the calculations are done, consider the effect of cable on audience share for the station shown on the very last line of Table A.5. (The effect on share is the same as the effect on audience assuming that the self-selection hypothesis is true.) The calculations are summarized in the following table:

Period	Hours Per Week	Share 0	Share C	Fraction of TVH 0	Fraction of TVH C	Homes Using TV 0	Homes Using TV C	Hours 0	Hours C_o	Hours C	Total Hours Without Cable	Total Hours With Cable
F	140.0	1.	.255	.59	.41	.287	.313	23.71	17.97	4.58	41.68	28.29
D	47.5	1.	.282	.59	.41	.210	.339	5.89	4.65	1.31	10.54	7.20
E	15.0	1.	.177	.59	.41	.414	.426	3.66	2.62	.46	6.28	4.12
P	24.5	1.	.282	.59	.41	.596	.628	8.62	6.31	1.78	14.93	10.40
L	20.0	1.	.292	.59	.41	.153	.178	1.81	1.46	.43	3.27	2.24
Composite	107.0										35.02	23.96

(C_o); total hours if there is cable is the sum of hours (0) and hours (C). These sum to 35.02 and 23.96, respectively, for the four time periods. Thus the effect of cable is to reduce local station viewing hours to 68 percent of what they would have been without cable. This is the smaller of the two composite estimates shown in Table A.5; it is just the same as the corresponding estimate based on the full-day equation in Table 3.

The answer to the second question, surprisingly, is also no; using the revenue weights estimated by Charles River Associates or Roger Cooper and Associates [20] similarly has little effect on the projections. The revenue projections based on separate time period audience diversion projections and separate values of audience in the different time periods are shown in Tables 8 and 9 (Charles River weights) and Tables 10 and 11 (Roger Cooper weights for independents, Charles River weights for affiliates).[21] For the most part, any differences between these revenue projections and the audience projections in Tables 3 and 4 are no larger than one percentage point. The exception is projections for UHF independents using Charles River weights. With audience as the metric, these stations were helped by cable, or at worst, hurt less than VHF stations. Their projected revenues, however, are reduced by about the same amount as are those of VHF stations. This result is, however, dependent on the choice of Charles River weights. Revenue projections using Roger Cooper weights are almost the same as the audience projections in Tables 3 and 4.

[20] Specifically, the weights from the second equation in the table following p. 5 for network affiliates, and from the second equation in the table following p. 6 for independents, Charles River Associates (1979); and the weights for all 12 stations, Roger Cooper and Associates (undated, p. 2):

In estimating the equations, Charles River Associates added weekend hours not counted by ARB in any of the four individual time periods (see footnote above, p. 22) to the daytime time period. Again, this discrepancy in treatment certainly has only a negligible effect on my results.

[21] The calculations are a straightforward extension of those for Appendix Tables A.5 and A.6 described in the footnote above. Pursuing the example of the station on the very last line of Table A.5 (and Table 8), the calculations start where those previously described leave off:

Multiplying total hours by the Charles River Associates revenue weights gives total revenue with and without cable in existence. Summing revenue over time periods, we find that the effect of cable is to reduce local station revenue to 68 percent of what it otherwise would have been-just the same as its effect on aggregate audience.

Time Period	Charles River Associates		Roger Cooper and Associates	
	Affiliates	Independents	Affiliates	Independents
Daytime	-27.87	153.88	--	50
Early Fringe	287.70	401.51	--	121
Prime Time	198.06	27.46	--	147
Late Fringe	517.40	-174.76	--	173

Time Period	Total Hours		Revenue Weights	Total Revenue	
	Without Cable	With Cable		Without Cable	With Cable
F	41.68	28.29	128.14	5341	3625
D	10.54	7.20	-27.87	-294	-201
E	6.28	4.12	287.70	1807	1185
P	14.93	10.40	198.06	2957	2060
L	3.27	2.24	517.40	1692	1159
Composite	35.02	23.96		6162	4203

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Table 8

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION REVENUE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Composite Estimates Based on Audience Share Equations for Four Time Periods and Using Charles River Associates Revenue Weights

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		99- 99	100-100	99- 99
				0	0	6	11	96- 97		96- 97	97- 98	96- 97
				0	3	6	11	96- 97		96- 96	97- 97	96- 97
3	0	1	1	0	0	2	16	97- 98		98- 98	99- 99	97- 98
				0	0	6	16	94- 95		93- 94	94- 95	94- 95
				0	3	6	16	93- 94		92- 93	93- 94	93- 94
3	0	0	2	0	0	2	8	98- 99			99-100	98- 99
				0	0	6	8	96- 97			96- 97	96- 97
				0	3	6	8	96- 96			96- 96	96- 96
3	0	0	0	0	0	3	20	94- 95				94- 95
				0	0	6	20	90- 92				90- 92
				0	3	6	20	89- 90				89- 90
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 97				96- 97
				0	0	5	17	93- 94				93- 94
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	94- 95	100-101			95- 97
				0	0	5	18	91- 92	95- 96			92- 93
				0	3	5	18	89- 91	93- 95			90- 91
2	0	0	0	1	0	2	24	91- 92				91- 92
				1	0	5	24	86- 88				86- 88
				1	3	5	24	85- 86				85- 86
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 98				96- 98
				0	0	4	29	89- 91				89- 91
				0	3	4	29	87- 89				87- 89
1	1	0	0	1	0	1	31	87- 89	95- 97			89- 91
				1	0	4	31	80- 82	86- 88			82- 84
				1	3	4	31	78- 80	83- 85			80- 82
1	0	0	0	2	0	1	41	77- 79				77- 79
				2	0	4	41	70- 72				70- 72
				2	3	4	41	68- 70				68- 70

[a] Average present penetration in markets of each type. Data supplied by FCC Cable Bureau.

[b] The base (100 percent) is the revenue if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 9

LONG-TERM EFFECT OF CABLE ON LOCAL STATION REVENUE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Composite Estimates Based on Audience Share Equations for Four Time Periods and Using Charles River Associates Revenue Weights

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 98		97- 98	99-100	97- 98
				0	0	6	27	91- 93		91- 92	92- 94	91- 93
				0	3	6	37	86- 88		86- 88	88- 90	86- 88
3	0	1	1	0	0	2	26	95- 97		96- 97	98- 99	95- 97
				0	0	6	30	88- 90		87- 89	89- 90	88- 90
				0	3	6	37	83- 85		82- 84	84- 86	83- 85
3	0	0	2	0	0	2	27	94- 96			97- 99	94- 96
				0	0	6	30	87- 89			88- 89	87- 89
				0	3	6	38	81- 83			82- 84	81- 83
3	0	0	0	0	0	3	30	91- 93				91- 93
				0	0	6	32	85- 87				85- 87
				0	3	6	43	78- 80				78- 80
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 95				94- 95
				0	0	5	31	87- 89				87- 89
				0	3	5	41	80- 83				80- 83
2	1	0	0	0	0	2	32	90- 92	100-102			92- 94
				0	0	5	36	83- 85	91- 93			84- 86
				0	3	5	45	75- 77	84- 87			77- 79
2	0	0	0	1	0	2	48	81- 84				81- 84
				1	0	5	51	71- 74				71- 74
				1	3	5	62	62- 65				62- 65
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 98				97- 98
				0	0	4	31	89- 91				89- 91
				0	3	4	39	82- 85				82- 85
1	1	0	0	1	0	1	52	78- 81	91- 94			82- 86
				1	0	4	57	65- 67	75- 78			68- 71
				1	3	4	67	55- 58	66- 69			59- 62
1	0	0	0	2	0	1	74	59- 63				59- 63
				2	0	4	76	45- 48				45- 48
				2	3	4	83	37- 39				37- 39

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] The base (100 percent) is the revenue if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 10

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION REVENUE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Composite Estimates Based on Audience Share Equations for Four Time Periods and Using Roger Cooper and Associates Revenue Weights

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 98	101-102	98- 99
				0	0	6	11	96- 97		96- 96	99- 99	96- 97
				0	3	6	11	96- 97		95- 96	98- 99	96- 97
3	0	1	1	0	0	2	16	97- 98		96- 97	101-102	97- 98
				0	0	6	16	94- 95		93- 94	96- 97	94- 95
				0	3	6	16	93- 94		92- 93	95- 96	93- 94
3	0	0	2	0	0	2	8	98- 99			100-101	98- 99
				0	0	6	8	96- 97			98- 98	96- 97
				0	3	6	8	96- 96			97- 98	96- 96
3	0	0	0	0	0	3	20	94- 95				94- 95
				0	0	6	20	90- 92				90- 92
				0	3	6	20	89- 90				89- 90
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 97				96- 97
				0	0	5	17	93- 94				93- 94
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	94- 95	100-101			95- 97
				0	0	5	18	91- 92	95- 96			92- 93
				0	3	5	18	89- 91	93- 95			90- 91
2	0	0	0	1	0	2	24	91- 92				91- 92
				1	0	5	24	86- 88				86- 88
				1	3	5	24	85- 86				85- 86
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 98				96- 98
				0	0	4	29	89- 91				89- 91
				0	3	4	29	87- 89				87- 89
1	1	0	0	1	0	1	31	87- 89	95- 97			89- 91
				1	0	4	31	80- 82	86- 88			82- 84
				1	3	4	31	78- 80	83- 85			80- 82
1	0	0	0	2	0	1	41	77- 79				77- 79
				2	0	4	41	70- 72				70- 72
				2	3	4	41	68- 70				68- 70

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] The base (100 percent) is the revenue if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets.

Table 11

LONG-TERM EFFECT OF CABLE ON LOCAL STATION REVENUE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Composite Estimates Based on Audience Share Equations for Four Time Periods and Using Roger Cooper and Associates Revenue Weights

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 98		95- 96	103-105	96- 98
				0	0	6	27	91- 93		89- 91	96- 98	91- 93
				0	3	6	37	86- 88		84- 86	93- 96	86- 88
3	0	1	1	0	0	2	26	95- 97		93- 95	101-104	95- 97
				0	0	6	30	88- 90		87- 88	93- 95	88- 90
				0	3	6	37	83- 85		81- 83	89- 91	83- 85
3	0	0	2	0	0	2	27	94- 96			101-103	94- 96
				0	0	6	30	87- 89			92- 94	87- 89
				0	3	6	38	81- 83			87- 89	82- 84
3	0	0	0	0	0	3	30	91- 93				91- 93
				0	0	6	32	85- 87				85- 87
				0	3	6	43	78- 80				78- 80
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 95				94- 95
				0	0	5	31	87- 89				87- 89
				0	3	5	41	80- 83				80- 83
2	1	0	0	0	0	2	32	90- 92	100-102			92- 94
				0	0	5	36	83- 85	91- 93			84- 86
				0	3	5	45	75- 77	84- 87			77- 79
2	0	0	0	1	0	2	48	81- 84				81- 84
				1	0	5	51	71- 74				71- 74
				1	3	5	62	62- 65				62- 65
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 98				97- 98
				0	0	4	31	89- 91				89- 91
				0	3	4	39	82- 85				82- 85
1	1	0	0	1	0	1	52	78- 81	91- 94			82- 86
				1	0	4	57	65- 67	75- 78			68- 71
				1	3	4	67	55- 58	66- 69			59- 62
1	0	0	0	2	0	1	74	59- 63				59- 63
				2	0	4	76	45- 48				45- 48
				2	3	4	83	37- 39				37- 39

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] The base (100 percent) is the revenue if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets.

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Conclusion

Audience projections are not affected by taking into account differences in diversion among different periods of the day. Revenue projections, which in addition take into account different values of audience during different time periods, are about the same as the audience projections, except possibly for UHF independent stations. For UHF independents, the results depend on which set of estimated revenue weights one uses. Using one set, projected revenues are reduced by cable by more than is projected audience; using the other set, projected revenue is much the same as projected audience for all types of stations.

Senstivity to Treatment of Total Audience

Most of Fisher's critique (11 out of 19 pages) is devoted to criticism of the total audience equation.[22] He concludes that the equation has so many problems that one might just as well use weighted averages for off-the-air and cable total audience instead of audience predicted by the equation. I reached the same conclusion in my earlier report, but used a different kind of average in my projections. To calculate average audience, I substituted into the total audience equation mean values for all variables except the dummy variable that distinguishes off-the-air and cable audience.

Fisher incorrectly claims (pp. 10–11) that using his averages rather than my averages can make a large difference in some markets. His "demonstration" that this is true for a two-UHF and one-UHF network station market is incorrect—*arithmetically in error.*[23] In fact, it makes almost no difference at all which averages are used. Projections based on Fisher's weighted averages and my revised audience share equation for the full day[24] are shown in Tables 12 and 13. They differ from the projections using my averages (Tables 3 and 4) by at most one percentage point.

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[22] Park (1979a, pp. 11–23).

[23] Fisher's example is cable carrying five distant independents into the second-50 market with two VHF and one UHF affiliates (1979a, Table 8, p. 36). The correct calculation for one of the VHF network affiliates, following the same format as the example in Park (1979a, pp. 31–33), is:

If there is cable: The fraction of noncable households using television is .280, and the fraction for cable households is .299 (Fisher's weighted averages). Cable penetration is .36. Therefore, total audience in noncable households is $.280\times.64T$, and total audience in cable households is $.299\times.36T$. A network VHF station's share of this audience is calculated using the attractiveness indices estimated in (1979a, Table 6). Its share in noncable households is $1/(2+.45)=.408$; its share in cable homes is $1/(2+.61+5\times.32)=.238$. Thus its total audience is $.408\times.280\times.64T+.238\times.299\times.36T=.0987T$.

If there is no cable and cable does not lead to increased viewing: Of those households that would not subscribe to cable if it were offered, the fraction using television is .280. The corresponding fraction of households that would subscribe if they could is .299; these are more avid viewers, even in the absence of cable. The station attracts a .408 share of both portions of the audience, for a total of $.408\times.280\times.64T+.408\times.299\times.36T=.1170T$.

If there is no cable and cable does lead to increased TV viewing: Of those households that would not subscribe to cable if it were available, the fraction .280 is using television. The fraction for households that would subscribe is the same. They would watch more if they did subscribe, but without cable they are indistinguishable from the others. The station gets a .408 share of both portions. Its total audience is $.408\times.280\times.64T+.408\times.280\times.36T=.1142T$.

These three audience calculations are the basis for the audience diversion projection. The network VHF station's audience with cable (.0987T) is 84 percent of its audience without cable if the self-selection hypothesis is true (.1170T), and 86 percent of its audience without cable if the self-selection hypothesis is false (.1142T). Thus the correct range is from 84–86 percent using Fisher's weighted averages, compared with 84–87 percent calculated in (1979a) using my averages and 79–80 in Fisher's erroneous calculation. Similar calculations for the UHF affiliate yield a range of 92–94, compared with 92–95 in (1979a) and 84–86 in Fisher.

[24] This Note, Table 2.

Table 12

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Estimates Using Fisher's Weighted Average Total Audience Figures

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 99	102-103	98- 99
				0	0	6	11	96- 97		96- 97	99-100	96- 97
				0	3	6	11	96- 96		95- 96	98- 99	96- 97
3	0	1	1	0	0	2	16	97- 98		97- 98	102-103	97- 98
				0	0	6	16	93- 94		93- 94	97- 98	94- 95
				0	3	6	16	92- 93		92- 93	96- 97	93- 94
3	0	0	2	0	0	2	8	98- 98			101-101	98- 99
				0	0	6	8	96- 97			98- 99	96- 97
				0	3	6	8	95- 96			97- 98	96- 96
3	0	0	0	0	0	3	20	94- 95				94- 95
				0	0	6	20	90- 91				90- 91
				0	3	6	20	89- 90				89- 90
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 97				96- 97
				0	0	5	17	93- 94				93- 94
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	94- 96	100-101			95- 97
				0	0	5	18	91- 92	94- 96			91- 93
				0	3	5	18	89- 91	93- 94			90- 91
2	0	0	0	1	0	2	24	91- 92				91- 92
				1	0	5	24	86- 88				86- 88
				1	3	5	24	85- 86				85- 86
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 98				96- 98
				0	0	4	29	89- 91				89- 91
				0	3	4	29	87- 89				87- 89
1	1	0	0	1	0	1	31	87- 89	94- 96			89- 91
				1	0	4	31	80- 82	85- 87			82- 83
				1	3	4	31	78- 80	83- 84			80- 81
1	0	0	0	2	0	1	41	77- 79				77- 79
				2	0	4	41	70- 72				70- 72
				2	3	4	41	68- 70				68- 70

[a] Average present penetration in markets of each type. Data supplied by FCC Cable Bureau.

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 13

LONG-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Estimates Using Fisher's Weighted Average Total Audience Figures

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 97		95- 97	105-107	96- 98
				0	0	6	27	90- 92		90- 92	98-100	91- 93
				0	3	6	37	85- 88		85- 87	95- 97	86- 88
3	0	1	1	0	0	2	26	95- 96		94- 96	104-106	95- 97
				0	0	6	30	88- 89		87- 89	95- 97	88- 90
				0	3	6	37	82- 85		82- 84	91- 93	83- 85
3	0	0	2	0	0	2	27	94- 95			102-104	95- 97
				0	0	6	30	87- 88			94- 96	88- 89
				0	3	6	38	81- 83			89- 91	82- 84
3	0	0	0	0	0	3	30	91- 93				91- 93
				0	0	6	32	85- 87				85- 87
				0	3	6	43	78- 80				78- 80
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 95				94- 95
				0	0	5	31	87- 89				87- 89
				0	3	5	41	80- 83				80- 83
2	1	0	0	0	0	2	32	90- 92	99-101			92- 94
				0	0	5	36	82- 84	90- 92			84- 86
				0	3	5	45	75- 77	83- 86			77- 79
2	0	0	0	1	0	2	48	82- 84				82- 84
				1	0	5	51	71- 73				71- 73
				1	3	5	62	62- 65				62- 65
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 98				97- 98
				0	0	4	31	89- 91				89- 91
				0	3	4	39	83- 85				83- 85
1	1	0	0	1	0	1	52	79- 81	91- 94			82- 85
				1	0	4	57	65- 67	73- 76			67- 70
				1	3	4	67	56- 58	64- 67			58- 61
1	0	0	0	2	0	1	74	60- 63				60- 63
				2	0	4	76	45- 47				45- 47
				2	3	4	83	37- 39				37- 39

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

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Conclusion

Fisher's criticism of my total audience equation is irrelevant to my projections. I use the equation only to calculate a sort of average total audience. The audience diversion projections are insensitive to whether I use my averages or Fisher's averages.

Distinction Between Network Stations and Network Programs

In my earlier study, I distinguished among distant network signals only on the basis of whether they are VHF or UHF stations. As pointed out in (1979a, p. 9), and reemphasized by Fisher (1979, pp. 14–15), this treatment may mask significant differences in the attractiveness of distant stations. I have gone part way toward correcting this problem in this Note by further distinguishing between stations that are sometimes blacked out on the cable to provide nonduplication protection to local network affiliates, and those that are not. One expects, and the results confirm, that the former are less attractive than the latter.

Some important differences may nevertheless remain unaccounted for in the new results. For example, consider a market with two local network stations. If the cable system carries only one distant station affiliated with the missing network, we would expect that station to be just about as attractive as the local stations. In contrast, if it carries three distant stations affiliated with one of the networks already represented in the market, we would expect their attractiveness indices to be much smaller, even if they were never blacked out. Even my new estimates fail to distinguish between the two situations.

Rather than complicate the model to take such differences into account (a strategy that, in my judgment, is unlikely to be productive), I ran the simulations shown in Tables 14 and 15 to see what difference this additional complication might make. For these simulations, I assume that distant primary network stations have attractiveness indices equal to one.[25] The resulting diversion projections differ from those in Tables 3 and 4 only for one- or two-station markets. In such markets, the Table 14 and 15 projections show quite a lot more diversion due to cable operating under present rules (2 to 7 percentage points more in the near term, 5 to 12 percentage points more in the long term) and somewhat more for cable operating under relaxed rules (1 to 4 near term, 3 to 6 long term). For policy purposes, however, one is perhaps most interested in the *incremental* effect of relaxing the rules, and this is projected to be *smaller* in Tables 14 and 15 than in Tables 3 and 4.

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[25] Rather than .38, which was estimated by lumping together all distant VHF affiliates not blacked out on the cable. I continue to use .19 as the index for duplicate networks on the cable, assuming that these stations are blacked out part of the time.

Table 14

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Assuming Attractiveness Index of Distant Primary Network Signals = 1.00

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 99	102-103	98- 99
				0	0	6	11	96- 97		96- 97	99-100	96- 97
				0	3	6	11	96- 96		95- 96	98- 99	96- 97
3	0	1	1	0	0	2	16	97- 98		97- 98	102-104	97- 98
				0	0	6	16	93- 95		93- 94	97- 99	93- 95
				0	3	6	16	92- 94		92- 94	96- 97	93- 94
3	0	0	2	0	0	2	8	98- 99			101-102	98- 99
				0	0	6	8	96- 97			98- 99	96- 97
				0	3	6	8	95- 96			97- 98	96- 96
3	0	0	0	0	0	3	20	94- 95				94- 95
				0	0	6	20	90- 92				90- 92
				0	3	6	20	89- 91				89- 91
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 98				96- 98
				0	0	5	17	93- 94				93- 94
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	94- 96	100-101			95- 97
				0	0	5	18	90- 92	94- 96			91- 93
				0	3	5	18	89- 91	93- 94			90- 91
2	0	0	0	1	0	2	24	88- 90				88- 90
				1	0	5	24	85- 86				85- 86
				1	3	5	24	84- 85				84- 85
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 99				96- 99
				0	0	4	29	89- 92				89- 92
				0	3	4	29	87- 89				87- 89
1	1	0	0	1	0	1	31	82- 85	88- 91			84- 87
				1	0	4	31	78- 80	82- 84			79- 81
				1	3	4	31	76- 79	80- 83			78- 80
1	0	0	0	2	0	1	41	70- 72				70- 72
				2	0	4	41	66- 69				66- 69
				2	3	4	41	65- 68				65- 68

[a] Average present penetration in markets of each type. Data supplied by FCC Cable Bureau.

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 15

LONG-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Assuming Attractiveness Index of Distant Primary Network Signals = 1.00

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 98		95- 98	105-107	96- 99
				0	0	6	27	90- 92		90- 92	98-100	91- 93
				0	3	6	37	85- 88		85- 88	95- 98	86- 89
3	0	1	1	0	0	2	26	95- 97		94- 96	104-106	95- 97
				0	0	6	30	87- 90		87- 89	95- 98	88- 90
				0	3	6	37	82- 85		82- 85	91- 94	83- 85
3	0	0	2	0	0	2	27	93- 96			103-105	95- 97
				0	0	6	30	86- 89			94- 96	87- 90
				0	3	6	38	80- 83			89- 92	82- 84
3	0	0	0	0	0	3	30	91- 93				91- 93
				0	0	6	32	84- 87				84- 87
				0	3	6	43	78- 81				78- 81
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 96				94- 96
				0	0	5	31	86- 89				86- 89
				0	3	5	41	80- 83				80- 83
2	1	0	0	0	0	2	32	90- 93	99-102			92- 95
				0	0	5	36	82- 85	90- 92			84- 86
				0	3	5	45	75- 78	83- 86			76- 79
2	0	0	0	1	0	2	48	76- 80				76- 80
				1	0	5	51	68- 71				68- 71
				1	3	5	62	59- 62				59- 62
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 99				97- 99
				0	0	4	31	89- 91				89- 91
				0	3	4	39	82- 85				82- 85
1	1	0	0	1	0	1	52	72- 75	81- 85			75- 78
				1	0	4	57	61- 64	68- 72			63- 66
				1	3	4	67	52- 55	60- 63			55- 58
1	0	0	0	2	0	1	74	47- 50				47- 50
				2	0	4	76	39- 41				39- 41
				2	3	4	83	31- 34				31- 34

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

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Conclusion

My results in this Note distinguish between stations that are blacked out to provide nonduplication protection and those that are not. This distinction does not change the audience diversion projections very much from those in my earlier report. If one further assumes that distant primary network stations are just as attractive as local affiliates, the projected diversion due to cable in one- and two-station markets is increased, but the projected incremental diversion due to relaxing present rules is decreased.

Differences in Off-the-Air Reception

Fisher (1979, pp. 15–17) criticizes my assumption concerning off-the-air reception.[26] In (1979a) (and in this Note as well), I assume that a station that attracts any audience at all off the air in a particular county can be received anywhere in that county.[27] Fisher (1979, pp. 15–17) apparently advocates using a different, somewhat more complex, assumption, one which he previously employed in an early cable TV study (1966). He assumed that each station's NWC [28] measures the fraction of households in the county that can receive it.[29]

The histograms plotted in Fig. 1 strongly suggest that neither Fisher's assumption nor mine is perfectly correct. The histograms show the number of stations received in my sample counties, by off-the-air and cable households respectively, that have NWC falling in each 10 percent interval from 0 to 100.[30]

[26] There is no difference between Fisher and me over cable reception. All subscribers to a particular cable system can receive all of the stations carried by that system. (Fisher mentions blackouts to provide nonduplication protection in the context of cable reception. I agree with him that it is important to distinguish between stations that are blacked out and those that are not, and I do so in this Note.)

[27] In addition, for all of my results except those in Tables 6 and 7, I further assume that 15 local stations with no off-the-air audience in the county can also be received there.

[28] Net weekly circulation, the percent of all TV households that watch the station at least once a week.

[29] Fisher further assumed that any household's ability to receive any one station is independent of its ability to receive any others. The result is that all television households in the county are divided into groups of different sizes, each of which can receive one of the possible combinations of signals. In a simple example, say there are two stations received in the county. Station A's NWC is .7, and station B's is .4. Then Fisher's assumptions imply that 28 percent of the television households can receive both A and B, 42 percent receive A but not B, 12 percent receive B but not A, and 18 percent receive neither. (These percentages are calculated as follows: $.7 \times .4 = .28$; $.7 \times (1 - .4) = .42$; $(1 - .7) \times .4 = .12$; $(1 - .7) \times (1 - .4) = .18$.)

In a formal sense, this second (independence) assumption is perfectly compatible with my treatment of reception patterns: If all TV households can (by my assumption) receive each of the stations, then all of them can receive all of the stations. (The calculation is just $1 \times 1 = 1$.)

[30] All have positive NWC except for the 15 local stations that are assumed to be receivable even though their off-the-air NWC equals zero.

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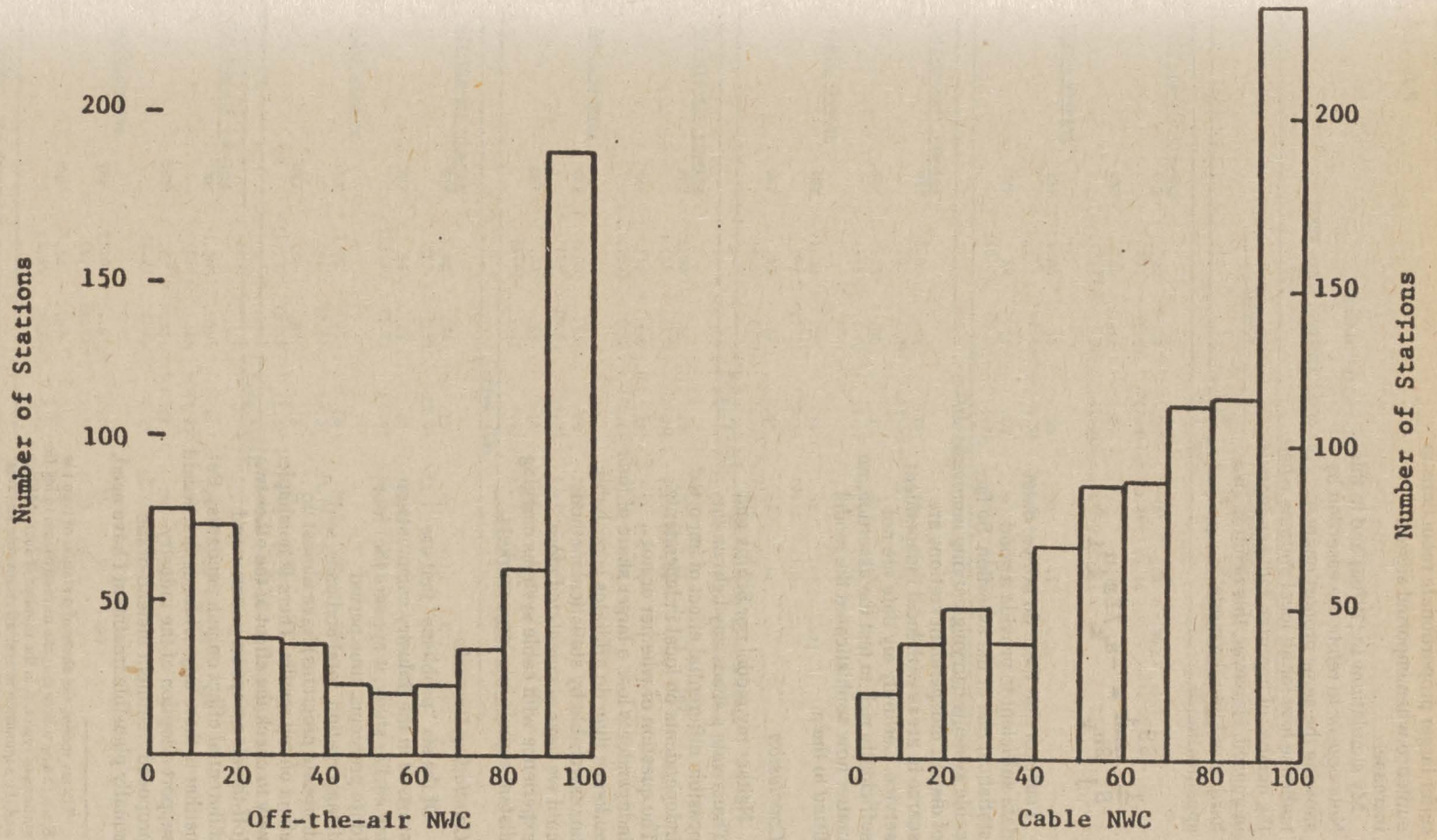


Fig. 1--Frequency count of all stations received in 121 counties by their net weekly circulation off the air and on the cable

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Fisher's assumption equates NWC and receivability. If the assumption were correct, all stations carried on the cable should have NWC equal to 100 percent in cable households, since there is no question but that they are received on the cable. They do not; there are many stations with NWC substantially smaller than 100 percent in cable households.

On the other hand, if my assumption were correct, the cable and off-the-air histograms should have the same appearance. If all stations received by anyone can be received by everyone, then only programming differences remain to account for different NWC. There is no reason to expect that the distribution of programming differs much between stations on the cable and stations received off the air, so the NWC distributions should be similar as well. They are not, implying that there are in fact off-the-air reception differences within counties.

Conclusion

I can see no reason to substitute Fisher's more complex (and necessarily unrealistic) assumption about off-the-air reception patterns within counties for my simpler (and necessarily unrealistic) assumption.

Differential Effects of Distant Signals on Independent Stations

It has been asserted that allowing cable systems to carry additional independent stations will take more audience from local independents than it will from local network affiliates. (See, for example, Schink (1979).) This may or may not be true; I know of no statistical evidence that either supports or refutes the assertion.[31]

The simulations in Schink and Thanawala (1978) *appear* to support it by showing a larger proportionate audience loss for independents than for affiliates when the number of imported independents is increased. However, as pointed out by the FCC (1979) and confirmed by Schink (1979), this is simply a result of the assumed specification of the model. The logistic transformation of the dependent variable together with the linear form of the right-hand side of the equation assure that stations with smaller initial audience shares (like independents) will suffer larger proportionate reductions in audience when imported signals increase.

My simulations in (1979a) and in this Note *appear* to refute the assertion by showing the same proportionate audience loss for all local stations when the number of imported independents is increased. However, this result is also hard wired into the model specification.[32]

$$\frac{1}{S_j}\frac{\partial S_j}{\partial n_k} = -a_k/\Sigma a_i n_i ,$$

I suspect that there do not yet exist data sufficient to provide a good statistical test of the assertion. So far, cable systems carrying varying numbers of distant independent stations are scarce in areas with local independent service. Certainly my data are not sufficiently rich to test the assertion, no matter how sophisticated the model fitted to them.

Conclusion

Neither my model nor Schink and Thanawala's sheds any light on the possible differential effect of imported independents on local independents. The question of whether or not independents lose a larger share of their audience than do affiliates is probably unanswerable by statistical methods until we have accumulated more experience with cable systems carrying distant signals into large markets.

Concluding Remarks

Of the six "problems" that are stressed in the industry comments on my earlier study, it appears that four (data problems, time period disaggregation, total audience, and duplicate programs) have almost no effect on my results. There is no simple way to check the effect of the other two (off-the-air reception patterns and differential effect on independents). But neither is there any evidence that would support adoption of the industry-proposed treatment instead of the equally plausible treatment I have used.

[31] There is some *case study* evidence against the assertion to be found in the grandfathered market analysis by the FCC (1979). The effect of cable on the audience of the seven independent stations studied there (pp. 84–88) is much the same as its effect on all local stations in the six grandfathered markets that were also studied (pp. 74–84).

[32] In my model, the share of a station of type j is $S_j = a_j/\Sigma a_i n_i$, where a_i is the attractiveness index for stations of type i, n_i is the number of such stations, and the summation is over all receivable stations. The proportionate effect of increasing the number of stations of type k on station j's share is

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Appendix Tables
A.1—A.6

Appendix Table A.1

FIRST STAGE AUDIENCE SHARE EQUATIONS

	Network[a]			Independent[a]			
	L	D	DB	L	D	$\hat{\sigma}$	$\hat{\rho}$
Full Day							
Off-the-air viewing							
VHF	1.00	.02	.13	.50	-.16	.992	.657
	(b)	(.5)	(2.9)	(2.8)	(1.0)		
UHF	.40	.12	.29	.23	.27		
	(8.7)	(.5)	(1.0)	(3.4)	(.6)		
Cable viewing							
VHF	1.00	.36	.20	.51	.44	.458	
	(b)	(7.6)	(5.9)	(3.0)	(4.8)		
UHF	.59	.15	.18	.23	.29		
	(10.7)	(1.0)	(.9)	(2.8)	(2.9)		
Daytime							
Off-the-air viewing							
VHF	1.00	.01	.11	.44	-.13	1.210	.621
	(b)	(.3)	(2.3)	(2.1)	(.7)		
UHF	.28	.00	.31	.25	.30		
	(5.8)	(.0)	(1.1)	(3.1)	(.5)		
Cable viewing							
VHF	1.00	.29	.14	.48	.41	.621	
	(b)	(5.1)	(3.4)	(2.1)	(3.3)		
UHF	.43	.07	-.05	.25	.34		
	(6.5)	(.4)	(.3)	(2.2)	(2.4)		
Early Fringe							
Off-the-air viewing							
VHF	1.00	.01	.10	.82	-.11	1.343	.707
	(b)	(.1)	(1.8)	(2.7)	(.6)		
UHF	.34	.02	.35	.36	.25		
	(5.9)	(.1)	(1.0)	(3.4)	(.4)		
Cable viewing							
VHF	1.00	.31	.29	1.13	.87	.652	
	(b)	(4.6)	(4.8)	(3.2)	(4.6)		
UHF	.40	.05	.14	.50	.64		
	(5.4)	(.2)	(.4)	(3.2)	(3.2)		
Prime Time							
Off-the-air viewing							
VHF	1.00	.04	.15	.49	-.19	.871	.499
	(b)	(.9)	(3.4)	(3.3)	(1.3)		
UHF	.55	.29	.27	.15	.17		
	(11.5)	(1.0)	(.9)	(2.8)	(.4)		
Cable viewing							
VHF	1.00	.43	.18	.39	.31	.400	
	(b)	(9.5)	(6.3)	(2.9)	(4.4)		
UHF	.83	.29	.23	.09	.16		
	(14.8)	(1.8)	(1.3)	(1.4)	(2.1)		
Late Fringe							
Off-the-air viewing							
VHF	1.00	-.01	.14	.23	-.18	1.151	.586
	(b)	(.2)	(2.7)	(1.3)	(1.0)		
UHF	.37	.20	.27	.19	.26		
	(7.2)	(.6)	(.9)	(2.6)	(.5)		
Cable viewing							
VHF	1.00	.34	.21	.25	.32	.750	
	(b)	(4.7)	(3.9)	(1.0)	(2.4)		
UHF	.54	.07	.06	.18	.24		
	(6.4)	(.3)	(.2)	(1.5)	(1.6)		

NOTES: The dependent variable is the station share of total audience during each time period. Estimated coefficients are "attractiveness indices" in equation (1). Asymptotic t-statistics are in parentheses. See Park (1979c) for a description of the nonlinear generalized least squares estimation method used and a description of $\hat{\sigma}$ and $\hat{\rho}$.

[a] L indicates local stations. D indicates distant stations not blacked out. DB indicates distant network stations blacked out to provide non-duplication protection to local stations.

[b] This coefficient is normalized to one as a reference value--not estimated.

Appendix Table A.2

SECOND STAGE UNCONSTRAINED AUDIENCE SHARE EQUATIONS

	Network[a]			Independent[a]	
	L	D	DB	L	D
Full Day					
Off-the-air viewing					
VHF	1.00	.07	.11	.57	-.25
	(b)	(1.8)	(2.8)	(3.2)	(2.4)
UHF	.45	.12	.23	.28	-.03
	(9.7)	(.5)	(1.0)	(4.0)	(.1)
Cable viewing					
VHF	1.00	.38	.19	.56	.40
	(b)	(9.1)	(6.7)	(3.4)	(6.0)
UHF	.65	.15	.15	.28	.25
	(12.0)	(1.1)	(1.0)	(3.5)	(3.3)
Daytime					
Off-the-air viewing					
VHF	1.00	.06	.10	.52	-.11
	(b)	(1.2)	(2.4)	(2.4)	(.7)
UHF	.31	-.02	.28	.28	-.18
	(6.4)	(.1)	(1.1)	(3.4)	(.5)
Cable viewing					
VHF	1.00	.30	.14	.53	.38
	(b)	(5.9)	(3.9)	(2.4)	(4.0)
UHF	.47	.06	-.04	.29	.27
	(2.2)	(.4)	(.2)	(2.6)	(2.5)
Early Fringe					
Off-the-air viewing					
VHF	1.00	.07	.10	.92	-.18
	(b)	(1.4)	(2.1)	(3.1)	(1.3)
UHF	.44	-.05	.36	.45	-.09
	(7.3)	(.2)	(1.1)	(4.1)	(.3)
Cable viewing					
VHF	1.00	.33	.31	1.17	.76
	(b)	(5.8)	(5.9)	(3.5)	(5.9)
UHF	.53	.02	.18	.61	.54
	(7.0)	(.1)	(.7)	(3.9)	(3.9)
Prime Time					
Off-the-air viewing					
VHF	1.00	.06	.13	.51	-.33
	(b)	(1.6)	(3.3)	(3.4)	(3.1)
UHF	.57	.24	.24	.17	.15
	(a)	(1.0)	(1.0)	(3.0)	(.5)
Cable viewing					
VHF	1.00	.42	.17	.41	.29
	(b)	(10.2)	(6.7)	(3.1)	(4.9)
UHF	.85	.27	.21	.11	.14
	(15.5)	(1.8)	(1.3)	(1.8)	(2.1)
Late Fringe					
Off-the-air viewing					
VHF	1.00	.02	.12	.22	-.27
	(b)	(.4)	(2.7)	(1.3)	(2.1)
UHF	.41	.40	.17	.21	-.12
	(7.8)	(1.2)	(.6)	(3.0)	(.4)
Cable viewing					
VHF	1.00	.33	.19	.25	.29
	(b)	(5.3)	(4.3)	(1.1)	(2.8)
UHF	.57	.09	.03	.23	.19
	(7.0)	(.5)	(.2)	(1.9)	(1.5)

NOTES: The dependent variable is the station share of total audience during each time period. Estimated coefficients are "attractiveness indices" in equation (1). Asymptotic t-statistics are in parentheses. See Park (1979c) for a description of the nonlinear generalized least squares estimation method used.

[a] L indicates local stations. D indicates distant stations not blacked out. DB indicates distant network stations blacked out to provide nonduplication protection to local stations.

[b] This coefficient is normalized to one as a reference value--not estimated.

Appendix Table A.3

SECOND STAGE AUDIENCE SHARE EQUATIONS
WITH ATTRACTIVENESS INDICES
CONSTRAINED TO BE NON-NEGATIVE

		Network[a]			Independent[a]			
		L	D	DB	L	D	BLK	K
Full Day								
Off-the-air viewing								
	VHF	1.00	.08	.07	.57	.00		
		(b)	(2.1)	(2.0)	(3.4)	(e)		
	UHF	.47	.16	.21	.23	.00		
		(10.2)	(.7)	(1.0)	(4.0)	(e)		
Cable viewing								
	VHF	1.00	.38	.18	.56	.44	.46	1.37
		(b)	(9.1)	(d)	(3.4)	(6.3)	(4.8)	(12.8)
	UHF	.65	.16	.08	.32	.27		
		(c)	(1.3)	(d)	(c)	(3.5)		
Daytime								
Off-the-air viewing								
	VHF	1.00	.06	.09	.52	.00		
		(b)	(1.2)	(2.2)	(2.5)	(e)		
	UHF	.33	.00	.32	.25	.00		
		(6.8)	(e)	(1.3)	(3.3)	(e)		
Cable viewing								
	VHF	1.00	.30	.13	.54	.41	.43	1.41
		(b)	(5.9)	(d)	(2.3)	(4.2)	(2.9)	(8.2)
	UHF	.46	.05	.02	.35	.27		
		(c)	(.3)	(d)	(c)	(2.6)		
Early Fringe								
Off-the-air viewing								
	VHF	1.00	.08	.08	.93	.00		
		(b)	(1.5)	(1.7)	(3.1)	(e)		
	UHF	.44	.00	.30	.47	.00		
		(7.5)	(e)	(1.1)	(4.4)	(e)		
Cable viewing								
	VHF	1.00	.34	.30	1.17	.80	.86	1.22
		(b)	(5.8)	(d)	(3.5)	(6.1)	(3.7)	(9.6)
	UHF	.53	.06	.06	.57	.57		
		(c)	(.4)	(d)	(c)	(4.1)		
Prime Time								
Off-the-air viewing								
	VHF	1.00	.08	.09	.53	.00		
		(b)	(2.0)	(2.4)	(3.6)	(e)		
	UHF	.39	.30	.22	.11	.00		
		(12.4)	(1.2)	(.9)	(2.6)	(e)		
Cable viewing								
	VHF	1.00	.43	.16	.41	.32	.37	1.44
		(b)	(10.3)	(d)	(3.1)	(5.2)	(4.9)	(13.2)
	UHF	.85	.29	.11	.15	.15		
		(c)	(2.1)	(d)	(c)	(2.2)		
Late Fringe								
Off-the-air viewing								
	VHF	1.00	.02	.09	.23	.00		
		(b)	(.6)	(2.2)	(1.3)	(e)		
	UHF	.42	.41	.21	.20	.00		
		(8.1)	(1.3)	(.8)	(2.9)	(e)		
Cable viewing								
	VHF	1.00	.34	.18	.25	.34	.34	1.37
		(b)	(5.3)	(d)	(1.1)	(3.1)	(2.9)	(8.2)
	UHF	.57	.08	.04	.27	.21		
		(c)	(.5)	(d)	(c)	(1.7)		

NOTES: The dependent variable is the station share of total audience during each time period. Estimated coefficients are "attractiveness indices" in equation (1). Asymptotic t-statistics are in parentheses. See Park (1979c) for a description of the nonlinear generalized least squares estimation method used.

[a] L indicates local stations. D indicates distant stations not blacked out. DB indicates distant network stations blacked out to provide non-duplication protection to local stations.

[b] This coefficient is normalized to one as a reference value—not estimated.

[c] This coefficient is constrained to equal K times the corresponding off-the-air coefficient. K is an estimated multiplier.

[d] This coefficient is constrained to equal BLK times the corresponding cable coefficient for distant network stations that are not blacked out. BLK is an estimated multiplier.

[e] The non-negativity constraint is binding for this coefficient.

Appendix Table A.4

SECOND STAGE CONSTRAINTED AUDIENCE SHARE EQUATION
ESTIMATED WITH SAMPLE THAT EXCLUDES LOCAL STATIONS
WITH OFF-THE-AIR NWC EQUAL TO ZERO

	Network[a]			Independent[a]			
	L	D	DB	L	D	BLK	K
	Full Day						
Off-the-air viewing							
VHF	1.00	.10	.11	.61	-.26		
	(b)	(2.6)	(2.8)	(3.9)	(2.5)		
UHF	.52	(.08)	.18	.27	-.04		
	(10.4)	(.4)	(.9)	(3.8)	(.2)		
Cable viewing							
VHF	1.00	.39	.18	.59	.36	.47	1.30
	(b)	(9.3)	(d)	(3.5)	(5.3)	(4.8)	(12.6)
UHF	.67	.12	.06	.35	.27		
	(c)	(1.0)	(d)	(c)	(3.5)		

NOTES: The dependent variable is the station share of total audience during the full-day time period. Estimated coefficients are "attractiveness indices" in equation (1). Asymptotic t-statistics are in parentheses. See Park (1979c) for a description of the nonlinear generalized least squares estimation method used.

[a] L indicates local stations. D indicates distant stations not blacked out. DB indicates distant network stations blacked out to provide nonduplication protection to local stations.

[b] This coefficient is normalized to one as a reference value--not estimated.

[c] This coefficient is constrained to equal K times the correspondong off-the-air coefficient. K is an estimated multiplier.

[d] This coefficient is constrained to equal BLK times the corresponding cable coefficient for distant network stations that are not blacked out. BLK is an estimated multiplier.

Appendix Table A.5

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION: Composite Estimates Based on Equations for Four Time Periods (Daytime, Early Fringe, Prime Time, Late Fringe)

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Stations Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 99	101-102	98- 99
				0	0	6	11	96- 97		96- 97	99- 99	96- 97
				0	3	6	11	96- 97		95- 96	98- 99	96- 97
3	0	1	1	0	0	2	16	97- 98		96- 98	101-102	97- 98
				0	0	6	16	94- 95		93- 94	96- 98	94- 95
				0	3	6	16	93- 94		92- 93	95- 96	93- 94
3	0	0	2	0	0	2	8	98- 99			100-101	98- 99
				0	0	6	8	96- 97			98- 98	96- 97
				0	3	6	8	96- 96			97- 98	96- 96
3	0	0	0	0	0	3	20	94- 95				94- 95
				0	0	6	20	90- 92				90- 92
				0	3	6	20	89- 91				89- 91
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 98				96- 98
				0	0	5	17	93- 94				93- 94
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	94- 96	100-102			95- 97
				0	0	5	18	91- 92	95- 97			91- 93
				0	3	5	18	89- 91	94- 95			90- 92
2	0	0	0	1	0	2	24	91- 93				91- 93
				1	0	5	24	86- 88				86- 88
				1	3	5	24	85- 87				85- 87
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 99				96- 99
				0	0	4	29	90- 92				90- 92
				0	3	4	29	87- 90				87- 90
1	1	0	0	1	0	1	31	87- 89	95- 97			89- 92
				1	0	4	31	80- 82	86- 88			82- 84
				1	3	4	31	78- 80	83- 86			80- 82
1	0	0	0	2	0	1	41	77- 80				77- 80
				2	0	4	41	70- 73				70- 73
				2	3	4	41	68- 71				68- 71

[a] Average present penetration in markets of each type. Data supplied by FCC Cable Bureau.

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Appendix Table A.6

LONG-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION: Composite Estimates Based on Equations for Four Time Periods (Daytime, Early Fringe, Prime Time, Late Fringe)

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Stations Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 98		95- 97	103-105	96- 99
				0	0	6	27	91- 93		90- 92	96- 99	91- 93
				0	3	6	37	86- 89		85- 87	93- 96	86- 89
3	0	1	1	0	0	2	26	95- 97		94- 96	102-104	95- 97
				0	0	6	30	88- 90		87- 89	93- 95	88- 90
				0	3	6	37	83- 86		82- 84	89- 92	83- 86
3	0	0	2	0	0	2	27	94- 96			101-103	95- 97
				0	0	6	30	87- 89			92- 94	88- 90
				0	3	6	38	81- 84			87- 90	82- 85
3	0	0	0	0	0	3	30	91- 93				91- 93
				0	0	6	32	85- 87				85- 87
				0	3	6	43	78- 81				78- 81
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 96				94- 96
				0	0	5	31	87- 89				87- 89
				0	3	5	41	81- 83				81- 83
2	1	0	0	0	0	2	32	90- 93	100-103			92- 94
				0	0	5	36	82- 85	91- 94			84- 87
				0	3	5	45	75- 78	85- 88			77- 80
2	0	0	0	1	0	2	48	82- 85				82- 85
				1	0	5	51	71- 74				71- 74
				1	3	5	62	63- 66				63- 66
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 99				97- 99
				0	0	4	31	89- 91				89- 91
				0	3	4	39	83- 86				83- 86
1	1	0	0	1	0	1	52	78- 82	92- 95			83- 86
				1	0	4	57	64- 68	75- 78			68- 71
				1	3	4	67	56- 59	66- 70			59- 62
1	0	0	0	2	0	1	74	60- 64				60- 64
				2	0	4	76	46- 49				46- 49
				2	3	4	83	37- 40				37- 40

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

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Appendix B

DATA DESCRIPTION

Data Description

All of the data used in this study are reproduced in Park (1979b). Unless otherwise stated, the data are from the ARB (American Research Bureau) Arbitron Television 1977 County Coverage, CATV-Controlled Counties. The items included are as follows:

County

County number is arbitrarily assigned. County name and state are also shown.

Market

The number shown for the market is its rank according to ARB area of dominant influence (ADI) [33] television households (TVH). The ranking is for 1977–1978.[34] A list that translates market ranks to market names precedes the data tables. A "1" or "2" following the decimal point is arbitrarily assigned to distinguish between markets that tied in the ARB rankings.

[33] A market's ADI includes (with a few exceptions) all those counties within which a market's stations attract more viewers than any other market.

[34] Television Markets and Rankings Guide, 1977–78, Arbitron Television, New York.

Time Zone

The code for the time zone in which the county is located is:

1 Eastern
2 Central
3 Mountain
4 Pacific

Income

Median family income in 1969 for the county is from *County and City Data Book, 1972, A Statistical Abstract Supplement*, U.S. Department of Commerce.

COTVH

COTVH is the number of television households (in hundreds) in the county as estimated by ARB for 1977–1978.[35] Numbers are shown separately for non-cable households (0 for off the air) and for cable households (C). Cable penetration in the county (COPEN) is calculated from COTVH as C/(O+C).

SYSTVH

The number of households (in hundreds) passed by the cable television system's installed trunk and feeder cable are from FCC records. The numbers come from reports that cable systems are required to make to the FCC annually on Form 325. C indicates the number of subscribing households; 0 is the number of households passed by the cable that do not subscribe. The latter number is calculated by subtracting reported subscribers from reported homes passed. In some cases, due to definitional or reporting problems, the result is a negative number. If so, nonsubscribing households passed is set equal to zero. System penetration (SYSPEN) is calculated using SYSTVH as C/(O+C).

[35] As of January 1, 1978.

INTAB

INTAB households (the units here are single households, not hundreds) are those included in ARB's survey sample, reported separately for off-the-air and cable households.

LCLSHR

Local share is the share of full-day (or total) audience captured by local stations, shown separately for off-the-air and cable viewers. Counties with an off-the-air local share less than 70 are excluded from the analysis in this report.

HUT

Homes using television is (roughly) the fraction of television households that are watching telvision at any given time. It is reported separately for five different time periods or "day parts," some of which are defined differently in different time zones, as follows:

	Eastern and Pacific	Central and Mountain
TOTAL (or FULL DAY)	6:00 am–2:00 am Monday–Sunday	6:00 am–2:00 am Monday–Sunday
DAYTIME	6:00 am–4:30 pm Monday–Friday	6:00 am–3:30 pm Monday–Friday
EARLY FRINGE	4:30 pm–7:30 pm Monday–Friday	3:30 pm–6:30 pm Monday–Friday
PRIME TIME	7:30 pm–11:00 pm Monday–Sunday	6:30 pm–10:00 pm Monday–Sunday
LATE FRINGE	11:00 pm–2:00 am Monday–Friday	10:00 pm–2:00 am Monday–Friday

The fraction of homes using television is calculated from ARB reports of total hours watched as in the following example. ARB estimates that non-cable households in our County 1 watched a total of 718,800 hours per week during the TOTAL or FULL-DAY period. There are 18,100 such households; if they all had watched TV all the time, they would have watched a total of 2,534,000 hours (18,000 households times 20 possible hours per day times 7 days per week). Thus on average over the FULL-DAY period, .284 is the fraction watching TV at any given time.

Station

Call sign and channel assignment (from the Television Markets and Rankings Guide, 1977–78) are shown for each station reported to be watched in the county. In a few cases, data for parent and satellite stations are combined. Then the first letter of the call sign is replaced by an asterisk. In such cases SHAREs are combined by adding parent and satellite SHAREs, and NWCs (net weekly circulations) are combined by taking the maximum of parent and satellite NWC.

AFFIL

Affiliation codes are as follows:

1 ABC
2 CBS
3 NBC
4 Independent commerical

5 Noncommercial

The first number in the three-digit sequence is primary affiliation; the second, if nonzero, is secondary affiliation; and the third is tertiary affiliation all of which comes from the Television Markets and Rankings Guide, 1977–78.

P

Nonduplication protection codes for network affiliates are as follows:

0 Station is blacked out to provide nonduplication protection to some other station.

1 Station is neither blacked out nor protected.

2 Station receives nonduplication protection against one or more other stations.

Nonduplication protection status was determined by the FCC staff based on an application of Subpart F of the *Cable Television Regulations*, telephone interview with cable system operators, and a review of ARB nonduplication editing proecdures. The procedure was as follows:

1. Set P = theoretical protection status per Subpart F.

2. If P is compatible with observed audience shares, stop.

3. Set P = actual protection status in 1977 as determined by talking to the system operator on the telephone.

4. If P is compatible with observed audience shares, stop.

5. Check ARB records to see if ARB was in 1977 editing their audience data as though the station had some protection status not equal to P. If so, set P = editing protection status.

MKT

MKT is the rank of the ADI market to which the station is assigned, according to the list that precedes the data tables. With a few exceptions, if the station's market is the same as the county's market, the station is counted as a local station; otherwise, it is classified as a distant station. The exceptions are:

- All stations with nonduplication protection code equal to 2 are counted as local stations, regardless of what market the county is in.
- All stations with nonduplication protection code equal to 0 are counted as distant stations, regardless of what market the county is in.

Share

Station share is the number of households watching a particular station, expressed as a percentage of households watching any station. SHARE is reported separately for each of five time periods, and separately for off-the-air and cable viewers. Shares may not add to 100 because of rounding or because some stations that are watched are not included in the ARB report (notably foreign stations and stations that individually receive very low viewing in the ARB sample).

NWC

Net weekly circulation is the percentage of households (off the air and cable separately) that watch the station at least once a week.

References

Association of Independent Television Stations, Inc.; Caucus for Producers, Writers and Directors; Metromedia, Incorporated; Motion Picture Association of America, Inc.; National Association of Broadcasters; National UHF Broadcasting Association; Screen Actors Guild, *Joint Motion for Revision of Procedures*, FCC Docket 21284, June 22, 1979. (Referred to in text as *Joint Motion*.)

Association of Independent Television Stations, *Comments*, FCC Docket 21284, September 17, 1979.

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47 *Code of Federal Regulations*, Part 76, as amended through 1975. (Referred to in text as *Cable Television Regulations*.)

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Schink, George R., and Sheela Thanawala, *The Impact of Cable TV on Local Station Audience*, Wharton EFA, Inc., Philadelphia, Pa., March 1978.

Appendix C

A Case Study Analysis of Non-Commercial Television Stations in Grandfathered Markets

1. A separate analysis for non-commercial television stations was performed in the *Report in Docket 21284* because the financial results for these stations were not as readily available to the Commission, as they were for commercial stations and their sources of revenues are different from those of commercial stations. Ideally, we would like to (1) assess the economic viability of non-commercial stations by monitoring their revenues and profits over a number of years and (2) determine the impact of cable television on their economic viability. Unfortunately, we were frustrated partially in attempting to achieve either of these objectives, in part, because non-commercial stations do not routinely report their financial results to the Commission. Furthermore, not one non-commercial television station has offered us any financial data in this proceeding concerning its economic viability. Finally, we also suffer from a lack of a sound theoretical and/or empirical basis from which to determine or assess factors influencing the amount of money or the value of goods that viewers contribute to non-commercial television stations. This is true because a reduction in the number of viewing hours of non-commercial stations does not imply necessarily a reduction in viewer contributions or revenues for these stations, as it does for commercial stations. Faced with these limitations, we restricted our study of non-commercial stations to an analysis of station audience, including that of net weekly circulation audience. Overall audience trends for non-commercial

stations over the past five years were monitored. Additionally, the impact of cable television on the audiences of these stations was estimated. While we were aware that viewer contributions are only one of several sources of revenue for non-commercial stations, we felt that for cable television to threaten the economic viability of these stations, it must *at least* divert a significant amount of audience from these stations.[1]

2. Before proceeding, we note that we were able to uncover only three scholarly studies of the effect of cable television on non-commercial stations. The Carnegie Commission on the Future of Public Broadcasting reports that "by enhancing reception of television signals, and through the importation of out-of-town signals, CATV can assist in extending public broadcasting service to the public." [2] The second study by Avery, Long, and Traudt concludes that "cable subscribers are as likely, if not more so, as non-cable viewers to make voluntary contributions to their local public television stations."[3] [4] It should be noted that not one comment in this proceeding has produced any definitive findings of the effect of cable television on non-commercial television stations. Although Donald E. Agostino, in a study funded by the Corporation of Public Broadcasting, found that cable television caused "only very slight fractionization of the audience," he concludes that the impact of cable television merits further investigations.[5]

3. Our study examined seventeen non-commercial television stations in fourteen markets. Three of these markets were studied in the "Grandfathered Market Analysis" of commercial stations in the *Report in Docket 21284*. The other eleven markets, containing fourteen non-commercial station, were chosen because they also are characterized by high cable penetration, at least 30 percent in 1972, and a large number of imported signals. Our conclusion from studying these cases was that whatever adverse effect cable may have had on these stations' audiences, it generally has not been large enough to offset other factors contributing to their audience growth. Of particular significance, we found that cable television often provides audience gains to both VHF and UHF non-commercial stations within their local service area because of improvement in signal reception. It is important to note that these gains are realized by stations facing substantial competition from cable television because of extraordinarily high marketwide cable penetration and the large number of distant signals imported by the cable systems.

4. The Commission's analysis of the effect of distant signals on non-commercial television stations has been found to be unacceptable by several parties. For example, the National Association of Educational Broadcasters (NAEB) claims that there is not "the slightest indication that the Commission has more than minimally examined the effect of the deletion of its distant signal carriage and syndicated exclusivity restrictions upon public broadcasters."[6] Additionally, the Joint Motion contends that "the effect of the FCC's proposed action with respect to distant signals on non-commercial (ETV) stations is virtually ignored."[7] We disagree with these assessments. In addition to searching the literature for scholarly research and carefully examining the comments in this and in other proceedings before the Commission [8], we prepared a detailed report on the effect of distant signals on non-commercial stations which included 85 pages of economic data and analysis.[9] We believe that terms such as "virtually ignored" or "minimally examined" certainly cannot be used to describe accurately our procedure for analyzing the effect of distant signals on non-commercial stations.

5. We have directed our analysis specifically to assess the possible effect of changes in our existing rules.[10] For example, the sample for our study of non-commercial stations was chosen to include local non-commercial stations operating in markets with high cable penetration and a large number of distant commercial signals.[11] However, this is not to say, as the Joint Comments allege, that "the study fails to examine the audience impact of importation of distant non-commercial stations on the local public broadcast service." [12] Five stations in our sample also faced additional competition from the importation of distant non-commercial signals. Any negative effect of cable on these stations' audiences was found to be minimal. Therefore, while several parties found the results for these stations to be inconclusive, we disagree with these assessments. For example, the NAEB finds "the data gathered in the remaining six [sic] markets [into which distant non-commercial stations were imported] yield no positive conclusions concerning the effect of distant signal importation. Two of the markets studied showed apparent gains in "rating" and "share," two markets showed a loss in "rating" and "share," while data were unavailable in the other two markets." [13] However, the facts in our *Report* demonstrate that all five stations which face additional competition from distant non-commercial stations received gains in their NWC audience from cable television.[14] [15] Furthermore, to produce meaningful conclusions, the study is not required to show only audience gains or losses to non-commercial stations from cable television, but to identify the effect, if any, of cable television on these stations' ability to serve the

[1] In fact, only about 15 percent of the support for public stations comes directly from television viewers as individuals.

[2] The Carnegie Commission on the Future of Public Broadcasting, *A Public Trust*, 366–367 (1979).

[3] R.K. Avery, J.F. Long, and P.J. Traudt of the Department of Communications, University of Utah, "The Effect of CATV on Awareness and Local Financial Support of a Public Television Station," March 1978, prepared for the Corporation for Public Broadcasting.

[4] We note that one party in this proceeding, Joint Comments of Nine Non-commerical Television Broadcast Stations, criticize the results of the study by Avery, Long and Traudt. This party claims that cable subscribers, having greater disposable income, tend to be the very viewers on whom public television depends most heavily for relatively large voluntary contributions. Having no data on this point, we will not attempt to estimate the validity of the criticism, nor the potential effect of this criticism, if it is valid, on the outcome of the study.

[5] *See* Donald E. Agostino, "The Cable Subscribers Viewing of Public Television: A Comparison of Public Television Use Between Broadcast Viewers and Cable Subscribers Within Selected Markets," February 1978. *See also* Agostino, Comments on Studies of the Impact of Cable Television on Audience Shares, Docket 21284, February 8, 1978.

[6] The National Association of Educational Broadcasters, Comments, Docket 21284, September 17, 1979.

[7] Association of Independent Television Stations, Inc., *et al.*, Joint Motion for Revision of Procedures, Docket 21284, June 22, 1979 at 26.

[8] We have processed numerous petitions for special relief from the cable carriage of distant non-commercial stations. *See, e.g., Cablevision Systems* 70 FCC 2d 1931 (1979).

[9] *See* Appendix C, *Report in Docket 21284*.

[10] Our rules specify that cable systems may carry any non-commercial station, in the absence of objection filed pursuant to Section 76.7 (i.e. provision for special relief) by any local non-commercial educational station or state or local educational television authority.

[11] We do not isolate specifically the effect of our syndicated exclusivity rules in the analysis of non-commercial stations because the vast majority of stations in our sample do not operate in markets receiving this protection to any significant degree. Moreover, non-commercial stations themselves exercise no rights under these rules.

[12] Joint Comments, *supra*, at n. 9, at 4.

[13] *Supra* at n. 5, at 9.

[14] For a discussion of why net weekly circulation is a more appropriate measure of the impact of cable television on non-commercial stations than "ratings" or "share," *see, e.g.*, the Comments of the Public Broadcasting Service in this proceeding, dated March 15, 1978.

[15] We have been assuming, in the special relief context, that the percentage NWC of the local non-commercial station would be reduced by 50 percent in cable households by the importation of one distant non-commercial station. *See, e.g. Norman Cable* 67 FCC 2d 1084 (1978). The evidence uncovered in this proceeding demonstrates clearly that this assumption was invalid.

public. The overall increases in audiences that these stations generally receive, irrespective of the impact of cable television, suggests strongly that their ability to serve the public is not threatened by cable television. For instance, the largest audience loss attributable to cable for *any* station in our sample of non-commercial stations (whether or not they compete against distant non-commercial stations) is between 11 and 15 percent (depending on whether share or rating data are employed). Yet, this station has realized a 20 percent overall gain in its average 9 AM–Midnight audience over the past five years and a 110 percent increase in NWC audience over the same period. Therefore, we find that there is no indication that the service provided by local non-commercial stations is affected adversely by cable television, even in cases where distant non-commercial stations are imported.

6. NAEB also finds that "the study of non-commercial licensees measures only audience impact and not economic viability, which the Commission acknowledges is the fundamental concern of a licensee." [16] Additionally, the Joint Comments claim that "increased cable penetration is likely to decrease the absolute amounts of voluntary contributions from viewers * * * which will likely be in greater than linear relationships to increases in cable subscribership." [17] Viewer contributions are only one of several sources of revenue for non-commercial stations. In this respect public television stations are somewhat protected from whatever impacts might result from changes in contribution patterns resulting from the growth of cable television operations. For example, membership contributions and auctions accounted for only 15% of the revenues derived by public television licensees in 1976.[18] We are aware that governmental contributions under the Public Broadcasting Financing Act of 1975 and in some other situations are tied to viewer contributions. We find, however, no reason or evidence to suggest that viewer contributions to local non-commercial stations will decrease because of the importation of distant signals. Thus our analysis of audience suggests that the economic viability of non-commercial stations is not threatened by cable television. In any case, governmental funding formulas are not irrevocable and are subject to change over time. We see no reasons why governmental funding of public television would decrease because the programming from these stations is made more widely available through cable television carriage. In fact, the federal contribution to public television has increased markedly over the past decade.

7. The Joint Comments also contend that "since the value of the study depends on its data being typical, the failure to specify how the markets were selected is a serious problem that calls into question the validity of any generalization based solely on these markets." [19] We must emphasize that not only is our sample not chosen to be typical, but its value is enhanced exceedingly by the fact that it is atypical. The markets selected represent cases where there are extraordinarily high levels of cable penetration and a large number of distant signals. The sample includes the three markets of the "Grandfathered Market Analysis" which contain non-commercial stations, and all other markets with at least 30 percent cable penetration in 1972 that contain a local non-commercial station. If distant signals are to affect adversely the service provided by local non-commercial stations, it is in these markets where the effect will be seen. If there is no adverse effect in these markets, it is extremely unlikely that there will be an adverse effect from distant signals in other markets. The markets selected provide an excellent indication of the effect of cable in an unregulated market.

8. There also are several specific criticisms raised in the comments concerning our analysis of non-commercial stations. For example, the Joint Motion specifies three instances of typographical errors and also questions the use of audience figures of less than one percent. It contends that "errors of this type indicate a lack of precision that may prejudice the significance of all data reported in this Appendix, as well as the conclusions reached by the staff." [20] This contention is unfounded. For example, the computation of audience ratings below 1 percent for individual counties (rather than rounding to zero) increases the precision of the results by making use of all available viewing data for non-commercial stations. The Joint Motion interprets mistakenly our calculations for station ratings in individual counties (which turn out to be less than one percent) to be " 'symbol[s]' used by the rating services to indicate an audience level 'below minimum standards' ".[21] However, these figures are not "symbols" provided by the rating services but rather are actual viewing statistics for individual stations that are derived from our multiplication of county rating (i.e., the average percentage of homes using television in a county) by each individual station's share of total viewing in that county. Arbitron does not provide individual station ratings by county. Hence, our calculations increase the precision of the reported audience estimates. Additionally, while there are some typographical errors in the study, there is no confusion possible concerning the correct identification of the stations to which the errors apply. The correct classification of all three stations in question is highlighted both in the keynote summary table (Table I, Appendix C) and at the start of the analysis for each specific case (Item 1.A). Hence, these typographical errors are of no consequence to the conclusions reached in the *Report*.

9. The Joint Comments claims "that [a] close look [at the Yakima market] shows the study to be totally unreliable." [22] The major criticism here is that the impact from cable is analyzed and averaged over the entire ADI, rather than analyzed only for those counties which are close to the principal city of the licensee. Additionally, the parties note that the study includes no data for Yakima county, which is part of the ADI. Before addressing these comments, it should be noted that Arbitron Television does not provide viewing data for cable and non-cable households in counties where less than 10 percent of the television households subscribe to cable television. Where data are not available for a county, we extrapolate the average viewer behavior of cable subscribers in the entire market for whom data are available to the cable subscribers that are not otherwise represented in the impact measurements. In the Yakima market, extrapolation is required for only 5 percent of the total number of cable subscribers. We estimate the effect of cable on local station audiences over the entire ADI because this is the area in which the local television stations receive a preponderance of viewing. The study is designed to provide a reliable and accurate indication of the impact of cable television on local non-commercial station audiences in an essentially unregulated market. Thus, we view the criticisms raised by the Joint Comments to be without validity.

[16] *Supra* at n. 5 at 9.

[17] *Supra* at n. 9 at 4.

[18] The Public Broadcasting Service, Comments, Docket 21284, March 15, 1978, Appendix A, Table 4.

[19] *Supra* at n. 9 at 7.

[20] *Supra* at n. 6, at 29.

[21] *Id.* at 29.

[22] *Supra* at n. 9 at 5.

10. The Joint Comments also question which systems were considered "major" and what proportion of the cable homes within a market had to receive the distant signals over cable before those signals were counted as available on cable in that market. The answer is that we selected all cable systems that served principal cities in the television markets. In this way, we are certain that at least a majority of the cable subscribers in a market have access to the signals that are listed as available on cable in that market.

11. Finally, the Joint Comments claim that other factors such as increases in UHF receiver penetration and increases in radiated power and antenna height cannot act to offset the adverse impact of cable indefinitely. The belief is that "with lower if not truly zero population growth, particularly in certain areas of the country, secular growth in the number of homes served by particular public stations will stop if not actually decline at some point." [23] It should be noted, however, that only three of the seventeen stations analyzed operate at maximum radiated power. Other factors which can also serve to increase both station audience and viewer contributions include marketing techniques such as revised program schedules. Finally, the Census Bureau predicts that population will continue to increase throughout this decade. Thus, we believe that factors leading to the overall audience growth of non-commercial stations generally will continue to offset any losses attributable to cable television into the foreseeable future.

12. In conclusion, we find that the criticisms of our analysis do not disprove our conclusion that the effect of distant signals on local non-commercial audience is minimal. Cable television usually increases the net weekly circulation of local non-commercial stations even in markets with extraordinarily high cable penetration and a large number of distant signals. In cases where there is some diversion of audience due to cable, these losses usually are more than offset by other factors which act to increase station audiences and audience size is not the sole determinant of revenues for non-commercial stations.

13. Existing rules do not limit the number of distant non-commercial educational television stations that a cable system may carry except when there is objection to such carriage by local educational stations. In those instances where there is an objection, the Commission attempts to determine, on the basis of the facts presented, whether the viewing public in the area would in fact be injured by the signal carriage proposed. [24] This relatively unrestricted carriage was authorized because, in the Commission's view, in the absence of objection, "the widest possible dissemination of educational and public television programming is clearly of public benefit and should not be restricted." [25]

14. Although there are many differences between the commercial and public stations relating to possible impacts resulting from cable distant signal carriage, we do not believe these weigh in favor of more restrictive regulation with respect to carriage of public stations. Rather, we believe that the policy of encouraging the widest possible dissemination of public television station programming should be further encouraged by a liberalization of our rules which act to restrict carriage of non-commercial stations in markets where objections are filed.

15. Because these stations are so heavily dependent on tax revenues, it seems to us that we should be especially cautious in denying citizens as much access to their output as possible. Although perhaps ultimately justifiable if necessary for the preservation of the public television system itself, it is anomalous for government, and particularly the federal government, to contribute toward the creation of a system of public television as an alternative source of diverse programming to that supplied by the commercial stations while at the same time restricting the public's access to additional sources of the programming created by the system. In recent years the public resources made available to public broadcasting have been greatly expanded [26] and while strong arguments can be made that even greater funding is necessary, [27] it seems to us that the free flow of information from this system is fundamentally desirable and that it is unlikely that cable television operations will sharply impact on public contributions to local stations, and highly unlikely that overall revenues will be significantly affected.

[23] *Id.* at 10.

[24] For a discussion of the application of the existing rules see *Public Cable Co.* 64 FCC 2d 701 (1977), *aff'd sub nom. Colby-Bates-Bowdoin Educational Telecasting Corp. v. FCC*, 574 F. 2d 639 (1st Cir. 1978).

[25] *Cable Television Report and Order, supra*, at paragraph 95.

[26] The federal contribution, for example, increased 293% from 1970 to 1977.

[27] See *A Public Trust, the Report of the Carnegie Commission on the Future of Public Broadcasting* (1979).

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APPENDIX D

STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * /market	mkt #	local** sigs.	1973% catv pen.	1978% catv pen.	1973 9-mid aud. (000s)	1978 9-mid. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. income (000's)	1978 op. income (000's)	% chg
WBZ (N,V) Boston, MA	6	3N,3I,4E	7	10	179	185	3			49			41
WCVB (A,V) Boston, MA	6	3N,3I,4E	7	10	145	175	21			91			268
WNAC (C,V) Boston, MA	6	3N,3I,4E	7	10	158	146	(8)			41			35
WXNE (I,U) Boston, MA	6	3N,3I,4E	7	10		9							
WSBK (I, U) Boston, Ma	6	3N,3I,4E	7	10	50	56	12			186			297
WLVI (I,U) Boston, MA	6	3N,3I,4E	7	10	39	52	33			158			(-)to(+)
BOSTON MKT. Boston, MA	6	3N,3I,4E	7	10	581	623	7	58,167	104,048	79	19,492	39,531	103
KTCM (N/A,V) Helena, MT	210	1N	41	42	1	2	100			199			50
KCRG(A,V) Cedar Rapid, IA	70	4N, 2E	7	9	22	32	45			120			85
WREX (A,V) Rockford, IL	100	3N	14	37	23	22	(4)			68			123
KODE (A,V) Joplin, MO	113	3N	20	26	18	21	17			55			109
WEHT(C,U) Evansville, IN	87	3N, 2E	7	17	21	20	(5)			139			(-)to(+)
KHQ (N,V) Spokane, WA	75	3N, 3E	20	23	31	36	16			121			724
WBTV (C,V) Charlotte, NC	34	3N,2I,4E	8	8	81	82	1			89			70
WWBT (N,V) Richmond, VA	56	4N, 3E	11	9	32	32	0			80			100
KTVE (A,V) Eldorado, AR	106	3N, 1E	16	21	12	14	17			77			33

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * /market	mkt #	local** sigs.	1973% catv pen.	1978% catv pen.	1973 9-mid aud. (000s)	1978 9-mid. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. income (000's)	1978 op. income (000's)	% chg
WALB (N/A,V) Albany, GA	150	1N	20	30	29	31	7			80			116
WJHG(A,V)Panama City, FL	178	2N	25	26	9	14	56			33			(9)
KLTV (A/N,V) Tyler, TX	158	1N	42	47	14	19	36			88			139
WBTW(C/A,V) Florence SC	158	1N, 1E	23	28	26	28	8			94			123
KCMT(N/A,V)Alexandria, MN	152	1N, 1E	28	25	25	29	16			110			343
WWNY (C/A,V) Watertown, NY	164	1N, 2E	38	40	16	15	(6)			43			44
WDAM(N,V) Laurel, MS Hattiesburg MS	167	1N	21	21	17	18	6			108			170
KALB(N/A,V), Alex., LA	171	1N	28	37	21	19	(10)			61			37
KAIT(A,V)Jonesboro, AR	172	1N, 2E	22	29	11	17	55			128			215
KPLC (N,V) Lake Charles, LA	173	1N	12	30	11	17	55			117			160
KYCU (C/A/N/V) Cheyenne, WY	176	1N	35	47	14	13	(7)			101			89
WLUC (C/A/N,V) Marquette, MI	178	IN, 1E	48	52	16	17	6			80			157
KECC (C,V) El Centro, CA	184	2N	76	61	2	2	0			50			(-)to(-)
WLOX (A,V) Biloxi-Gulf Port, MS	183	1N, 1E	35	65	10	18	80			148			207

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * /market	mkt #	local** sigs.	1973% catv pen.	1978% catv pen.	1973 9-mid aud. (000s)	1978 9-mid. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. income (000's)	1978 op. income (000's)	% chg
KQTV(A,V)St. Joseph, MO	181	1N	28	46	14	12	(14)		105				204
KMVT (N/A/C, V) Twin Falls, ID	195	1N	57	39	7	6	(14)		93				133
KEYC (C,V) Mankato, MN	186	1N	46	35	13	11	(15)		116				275
WABG (A,V) Greenwood Greenville, MS	192	1N, 1E	35	40	11	15	36		74				(3)
WBBJ (A,V) Jackson, TN	190	1N, 1E	29	33	10	15	50		111				75
KREX (C/A/N,V) Grand Junction CO	188	1N	36	41	5	7	40		98				124
WHSV(A,V)Harrisburg, VA	199	1N	21	31	10	11	10		65				394
KVOS(C,V)Bellingham, WA	197	1N	38	48	8	4	(50)		(25)				(77)
WBKO (A,V) Bowling Green, KY	198	1N, 1E		7	6	12	50		81				140
KTVO(A,V)Ottumwa, IA	202	1N	19	26	14	14	0		84				191
WAGM (C/A/N,V) Presque Isle, ME	201	IN, 1E	39	37	6	7	17		84				212
WSLA(C,V) Selma, AL	208	IN		38	3/	4			1829				(-)to(+)
KIVA (N,V) Farmington, NM	205	1N	46	48	1	3	200		92				(-)to(+)

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * /market	mkt #	local** sigs.	1973% catv. pen.	1978% catv pen.	1973 9-mid aud. (000s)	1978 9-mid. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. income (000's)	1978 op. income (000's)	% chg
KOAI (N,V) Flagstaff, AZ	207	1N	73	55	4	4	0			57			(11)
KNOP (N,V) North Platte, NE	209	1N, 1E	21	26	4	5	25			105			184
WBKB (C,V) Alpena, MI	211	1N, 1E		53	1/	3							
KYUS (N,V) Miles City, MT	212	2N	55	59	NA	NA	NA			76			11
WIBW (C/A,V) Topeka, KS	131	2N, 1E	23	28	28	25	(11)			78			124
KTSB (N,U) Topeka, KS	131	2N, 1E	23	28	8	10	25			154			(-)to(+)
WMAZ (C/A,V) Macon, GA	147	2N, 1E	33	40	29	28	(3)			98			150
WCWB (N, U) Macon, GA	147	2N, 1E	33	40	4	8	100			131			4829
WKTV (N,V) Utica, NY	151	2N	49	48	19	18	(5)			57			30
WUTR (N,U) Utica, NY	151	2N	49	48	5	8	60			136			(-)to(-)
WCTV (C,V) Tallahassee, FL	140	2N, 2E	27	30	28	31	11			66			60
WECA (A, U) Tallahassee, FL	140	2N, 2E	27	30	1/	6							
WTVY (C,V) Dothan AL	157	2N	21	20	24	22	(8)			114			171

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * /market	mkt #	local** sigs.	1973% catv pen.	1978% catv pen.	1973 9-mid aud. (000s)	1978 9-mid. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. income (000's)	1978 op. income (000's)	% chg
WDHN (A,U) Dothan, AL	157	2N	21	20	3	3	0			72			18
WTOK (C/A, V) Meridian, MS	169	2N, 2E	21	26	18	20	11			76			135
WHTV (N/A,V) Meridian, MS	169	2N, 2E	21	26	3/	2	NA			2206			(-)to(+)
WFTV (A.V) Orlando, FL	40	3N, 1E	21	26	37	62	68			164			541
WBOC (C/A/N, U) Salisbury, MD	168	1N, 1E	46	58	12	14	17			78			74
WBNS (C,V) Columbus, OH	32	3N, 1E	9	25	79	77	(3)			91			139
WTHR (A,V) Indianapolis, IN	20	3N,2I,3E	11	16	61	71	16			98			195
KBHK (I,U) San Fran. CA	5	3N,8I,3E	20	30	35	45	29			247			(-)to(+)
WFLD (I,U) Chicago, IL	3	3N,5I,2E	2	3	55	120	118			130			(-)to(+)
WKBD (I,U) Detroit, MI	7	3N,3I,1E,1C	1	2	66	90	36			114			271
WKBS (I,U) Philadelphia PA	4	4N,9I,4E	15	17	62	61	(2)			167			2250
WCFT (C,U) Tuscaloosa, AL	189	1N	31	40	3	5	67			127			228
KYFL (N,V) Yuma, AZ	184	2N	76	61	3	5	67			162			(+)to(-)

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * /market	mkt #	local** sigs.	1973% catv pen.	1978% catv pen.	1973 9-mid aud. (000s)	1978 9-mid. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. income (000's)	1978 op. income (000's)	% chg
WTVC(A,V)Chattanooga, TN	73	3N,1I,2E	7	11	30	36	20			128			227
WTVM (A,V) Columbus, GA	121	3N, 3E	18	30	28	30	7			61			79
WTVW (A,V) Evansville, IN	87	3N, 2E	7	17	28	31	11			89			153
KCBJ (A,U) Columbia, MO	139	3N	19	23	4	8	100			173			92
Billings, Mont, Market	161	2N	34	35	17	18	6			124			203
Casper/Riverton, WY	178	2N	42	55	12	11	(8)			136			235
Cheyenne, Wyoming	176	1N, (2S)	35	47	14	13	(7)			101			89
Grand Junction, Colorado	188	1N, (2S)	36	41	7	11	57			98			124
Great Falls, Montana	175	2N	30	35	16	17	6			69			155
Helena, Montana	210	1N	41	42	1	2	100			199			50
Idaho Falls, Idaho	163	3N, 1E	27	28	20	26	30	1,506	3,294	119	291	478	64
Miles City/Glendive, MT	212	2N	55	59	1	1	0			110			196
Missoula/Butte, MT	153	2N, (3S)	39	39	23	25	9			105			193
Rapid City, SD	166	2N,3E,(4S)	31	33	18	24	33			116			160
Twin Falls, Idaho	195	1N	57	39	7	6	(14)			93			133

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * /market	mkt #	local** sigs.	1973% catv pen.	1978% catv pen.	1973 9-mid aud. (000s)	1978 9-mid. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. income (000's)	1978 op. income (000's)	% chg
KRGV (A,V) McAllen-Brownsville, TX	138	2N	30	21	13	16	23			330			242
KOMO (A,V) Seattle, WA	18	3N,1I,3E	20	23	93	103	11			123			184
KATU (A,V) Portland, OR	22	4N,1I,3E	12	14	51	72	41			138			297
WUHQ (A,U) Battle Creek, MI	39	4N, 1E	8	21	10	40	300			291			(-)to(+)
WTTV (I,V) Bloomington IN	20	3N,2I,3E	11	16	50	45	(10)			106			95
KTVB (N,V) Boise, ID	141	3N, 1E	6	7	16	17	6			118			332
WHIZ (N/A/C, U) Zanesville, OH	203	1N	54	53	5	7	40			54			80
WTOG (I,U) Tampa-St. Pete, FL	17	4N,1I,2E	10	16	24	44	83			344			699
WSIL (A,V) Harrisburg, IL	76	3N,2E,(1S)	10	18	12	19	58			92			114
KPOB (Satellite) Poplar Bluff, MO	76	3N,2E,(1S)	10	18		Included In WSIL							

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * /market	mkt #	local** sigs.	1973% catv pen.	1978% catv pen.	1973 9-mid aud. (000s)	1978 9-mid. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. income (000's)	1978 op. income (000's)	% chg
KTVR (Terminated operations in 1975, facility converted to noncommercial station) Le Grande, OR													
WOR (I,V) New York, NY	1	3N,6I,6E	5	10	105	237	126		45			69	
WNEW (I,V) New York, NY	1	3N,6I,6E	5	10	273	412	51		69			102	
WPIX (I,V) New York, NY	1	3N,6I,6E	5	10	168	289	72		173			1342	
XETV (I,V) San Diego, CA	28	3N,1I,1E	27	37	18	21	17	4/					
KZAZ (I,V) Tucson, AZ	91	3N,1I,1E	10	12	4	5	25		90			(+)to(-)	
KTVU(I,V) San Fran. CA	5	3N,8I,3E,	20	30	66	94	424		136			382	
KMPH(I,U) Fresno-Tulare,CA	69	3N, 1I	8	8	7	15	114		337			2538	
WFFT(I,U) Ft. Wayne, IN	98	3N, 1I	3	11	1/	14							
WHME(I,U)South Bend, IN	78	3N,1I,1E,	4	17	1/	3							

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * /market	mkt #	local** sigs.	1973% catv pen.	1978% catv pen.	1973 9-mid aud. (000s)	1978 9-mid. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. income (000's)	1978 op. income (000's)	% chg
KSTW(I,V)Seattle-Tacoma,WA	18	3N,1I,3E,	20	23	22	44	100			383			(-)to(+)
SAN FRANCISCO, CA	5	3N,8I,3E	20	30	511	613	20	62,337	123,238	98	19,072	48,875	141
WXOW(N,U)LACROSS, WI	126	3N, 1E	30	36	4	6	50			204			217
WBNW(N,V)CHARLOTTE AMALIE, VI										38			120

1/ STATION NOT IN OPERATION IN 1973

2/ SATELLITE STATION INCLUDED

3/ STATION WAS SATELLITE IN 1973; AUDIENCE NOT LISTED

4/ STATION LICENSED IN MEXICO; FINANCIAL DATA NOT AVAIABLE

*CODE	**CODE
N=NBC	N=NETWORK STATION
A=ABC	I=INDEPENDENT
C=CBS	E=EDUCATIONAL
I=INDEP.	C=CANADIAN
V=VHF	S=SATELLITE
U=UHF	

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BILLING CODE 6712-01-C

Appendix E

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

§ 76.5 [Amended]

1. In § 76.5, paragraphs (p), (q), (r), (s), (t), (ii), (jj), and (kk) are deleted.

2. In § 76.7, paragraph (h) is revised to read as follows:

§ 76.7 Special relief.

* * * * *

(h) On a finding that the public interest so requires, the Commission may determine that a system community unit operating or proposing to operate in a community located outside the 48 contiguous states shall comply with the provisions of Subparts D, F, and G of this part in addition to the provisions thereof otherwise applicable.

* * * * *

§ 76.57 [Amended]

3. In § 76.57, paragraphs (c) and (d) are deleted.

4. In § 76.59, paragraphs (d) and (e) are deleted, and paragraphs (b) and (c) are revised to read as follows:

§ 76.59 Provisions for smaller television markets.

* * * * *

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry any additional television signals.

(c) Where the community is located wholly or partially within one of the major television markets listed in § 76.51(a) and also wholly or partially within a smaller television market, the carriage provisions for the major markets shall apply.

5. In § 76.61, paragraphs (c), (d), (e), and (f) are deleted, and the caption, introductory language, and paragraph (b) are revised to read as follows:

§ 76.61 Provisions for the major television markets.

Where a system serves a community that is located in whole or in part within a major television market, that community unit shall carry television broadcast signals only in accordance with the following provisions:

* * * * *

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this Section, any such community unit may carry any additional television signals.

* * * * *

§ 76.63 [Removed]

6. Section 76.63 is deleted.

7. In § 76.65, paragraphs (a) and (b) are deleted, the caption is amended, and paragraph (c) is redesignated paragraph (a) and is amended to read as follows:

§ 76.65 Determination of signal contours.

(a) When, for purposes of ascertaining broadcast station rights to cable carriage, reference is made to Grade B contours §§ 76.57(a), 76.59(a), and 76.61(a), such contours shall be the field intensity contours defined in § 73.683(a) of this chapter: *Provided, however,* That such rights as to signals carried or authorized for carriage on or before August 26, 1977, shall be determined by reference to the contour prediction rules adopted in the *Sixth Report and Order in Dockets 8736, 8975, 8976 and 9175,* 41 FCC 148 (1952) as amended by *Report and Order in Docket 17253,* FCC 70-345, 22 FCC 2d 354 (1970).

§§ 76.151-76.161 [Removed]

8. Sections 76.151 through 76.161 are deleted.

§ 76.305 [Amended]

9. In § 76.305, paragraph (a)(5) is deleted.

July 22, 1980.

Separate Statement of Charles D. Ferris, Chairman

Re: *Elimination of Cable Distant Signal and Syndicated Exclusivity Rules.*

By today's action, the FCC has removed the regulatory debris of a previous decade; we have thus expanded the choices that consumers will have in the future.

Both restrictions we have struck down today were conceived during a time when regulatory policy was guided by hunch as often as by facts. Unfortunately, our rules have too often served the interests of one industry at the expense of another in the well-intended but mistaken belief that they would therefore serve the communications consumers. In fact, the syndicated exclusivity rules were openly the result of a Commission-ratified compromise struck by various commercial interests without benefit of public scrutiny or comment.

Yet, as we have not confirmed, these rules, when subjected to thorough analysis, lack the slightest hint of justification in terms of the overall interest of television viewers. Cable has not and will not destroy broadcasting, as was once feared. Broadcasting profits have continued to grow at a fast pace, depite cable's rapid expansions. In fact, our staff has found that cable has in many cases improved the profitability of broadcast stations by improving the reception of an otherwise weak UHF signal.

It is also clear that removing the "protection" of exclusivity arrangements will not "destroy" the supply of program materials. This regulatory protection is in fact rarely requested by local broadcasters and would, in any event, provide a small scope of security to a relatively limited number of programs even if they were applied.

The program supply market can now develop undistorted by this artifical regulatory scheme. It will adjust to a new reality where advertising rates will reflect both the distant as well as the local viewer and the value of syndicated rights will account for viewers who can watch programs at times that are more convenient to them.

Today's action results from two changes in the FCC's regulatory approach. First, we are now commited to submitting outdated rules and innovative proposals to rigorous analysis, and to do so with the benefit of expanded public input. We have replaced regulatory intuition with regulatory analysis.

Second, we have rediscovered that the best protection of consumers is gained, not by protecting particular industries, but by increasing consumer choice. Today's action allows cable systems to provide the signals and programs for which their subscribers are willing to pay. By broadening the range of options available to television viewers, we insure that the future development of video services is responsive to their needs and not the dictates of a regulatory body.

We have also rejected a proposal forwarded by the National Telecommunications and Information Administration to substitute for our syndicated exclusivity rules a system of retransmission consent. This proposal has some theoretical appeal, although its practical application would be burdensome and could well prove to frustrate consumer choice more than even our current rules.

Whatever its appeal, however, we are without jurisdiction to implement this proposal. It is clear from the legislative history of the 1976 Copyright Revision Act that Congress considered and rejected such a plan and decided instead to adopt a system of compulsory licensing for cable. In the face of that choice, we cannot adopt a conflicting scheme.

Congress itself provides the proper forum for parties to seek to change the compensation arrangements set forth in the 1976 Act and subsequent actions of the Copyright Royalty Tribunal.

Dissenting Statement of Commissioner Robert E. Lee in re Cable Television Signal Carriage

Free Lunch

I dissent to authorizing unlimited distant signals for CATV systems without including a syndicated exclusivity provision in the rules or at least a time for adjustment before a change in the exclusivity rules would become effective.

The majority has rationalized this decision by calling it pro-competitive. I disagree. How can this situation be competition? The broadcaster and the program supplier negotiate in the marketplace and establish a market price for the product which includes exclusivity. The CATV system takes the programming without participating in the marketplace and without any regard for the contractual rights of those who have participated. It uses this programming for its own profit.

I recognize that copyright legislation is supposed to be the solution for this problem. With syndicated exclusivity protection in our rules, it may be. As one who lived through the "Consensus Agreement," the development of our 1972 rules, and the Copyright Act, I can assure my colleagues that maintaining syndicated exclusivity was the understanding of all of the participants. It was one of the premises of the copyright legislation.

The majority say that payment for the product one uses to make a profit is not our concern, but it is. A long line of cases starting with *Southwestern Cable* clearly hold that authorizing signal carriage and establishing the ground rules for that carriage from the public interest viewpoint is the essence of the Commission's responsibility regarding CATV.[1] One aspect of our public interest concern, according to several of my colleagues, is fair play in the marketplace.[2] "Diversity" as an end in itself does not justify the Commission's disregard for a fairly functioning marketplace, particularly when that diversity is simply a matter of timing; no programming will be excluded.

I do recognize that times change and that the participants in the marketplace must adjust to change. I simply do not think that, on a warm day in July, the Commission should instantaneously change all of the ground rules governing the functioning of this marketplace and leave the participants without any time to adjust. Instead, I would have preferred to see the Commission authorize distant signals and phase out the syndicated exclusivity protection. The wiser and fairer decision in this proceeding would have been to provide a date certain in the future for the end of syndicated exclusivity protection. With knowledge of what our rules will be and of the period of time for adjustment, the parties could then renegotiate their contracts, settle the copyright issue, and establish a new marketplace environment that includes all of the participants. By allowing this period of adjustment, the Commission could extricate itself from its concerns about distant signal carriage without leaving chaos in the wake of its decision.

Because the Commission has chosen to upset the marketplace without providing for any reasonable period of adjustment, I dissent.

Dissenting Statement of FCC Commissioner James H. Quello in re Report and Order in Docket 20988 (Syndicated Exclusivity) and Docket 21284 (Distant Signal Carriage)

Over the past years in office I have more than supported cable deregulation—I have advocated it. I actively supported: the removal of the leapfrogging rules and the feature film restrictions, the waiver for the ARTEC cable system in Arlington, the deregulation of earth stations, the exemptions for smaller systems, stabilization of franchise fees and a host of other measures that I believed—and continue to believe—advanced the development of cable.

However, I strongly believe that elimination of syndicated exclusivity is inequitable, not needed, not wanted by a significant number of cable TV owners and operators, and is counter to long-term public interest.

I have dissented to the Report and Order in its entirety in order to honor specific requests from the Chairman of the Committee which deals with copyright, the upcoming Chairman of the Commerce Committee, and a number of other interested Congressmen and Senators, all of whom have urged that this Commission, before undertaking any significant revision of the distant signal restrictions or syndicated exclusivity rules, should first coordinate such steps with appropriate committees in the Congress.

Congressional leaders most involved with communications and copyright specifically requested that the FCC defer action until after the Copyright Royalty Tribunal review in September 1980. Among those writing were Congressman Robert W. Kastenmeier, Chairman of the subcommittee with copyright responsibility and oversight, and Congressman John Dingell, upcoming Chairman of the House Interstate and Foreign Commerce Committee. Four key members of the Judiciary Committee, Congressmen Moorhead, Railsback, Swift and Sawyer in a jointly signed letter stated:

> We know that Congressman Kastenmeier, Chairman of the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, stated in his March 13 letter to you on this subject, a willingness for his subcommittee to review the need for legislation in this area in the next Congress. He also stressed the importance of allowing the Tribunal the opportunity to complete its first full years of duties without changing the environment within which the affected industries must function. We would like to join in urging that the Commission postpone any significant revision of the syndicated exclusivity and distant signal rules until Congress has had the opportunity to revisit this issue with the benefit of the results of the Tribunal's first recommendations.

Other Congressional leaders who wrote letters urging deferring action were Senators Birch Bayh and Don Riegle and Congressmen Danielson and Mazzoli. I agree with their expressed concern that precipitate action could upset the delicate balance of the copyright and communications policies under the 1976 Copyright Act. The action of the majority in adopting the Report and Order flaunts the requests of these concerned congressional interests.

Aside from congressional warnings, I would have urged the retention of the syndicated exclusivity rule but would have been willing to eliminate those rules limiting distant signal importation by cable systems. As to the matter of retransmission consent, I would prefer to reserve judgment as to the legality of such requirement as well as the advisability in light of the 1976 Copyright Act.

However, I am uncomfortable with the concept of expropriating a valuable property—a television program—with neither consent from nor compensation to the owner of that property. Although the Copyright Act of 1976 purported to deal with this problem, it is widely conceded that it has utterly failed to do so in any meaningful way. My second concern is the total disregard by the majority of the contract rights of both syndicators and broadcasters and the consequences of that disregard. Where the majority tends to view the importation of syndicated programs as

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[1] The *HBO* and *NARUC II* cases referenced by the majority deal with Commission restraints on the nonbroadcast services of CATV and, thus, have no bearing on this situation. The courts objected to FCC restrictions on CATV activities which really were competitive.

[2] Carriage of signals without any accommodation of the exclusivity rights of the broadcasters and program suppliers reminds me of the current problem pay programmers are having with the theft of their signals. My colleagues have been outraged by that situation. I don't see how this is different.

some kind of free lunch for viewers, experience has taught me that there is no free lunch. Producers of programs must have incentives and the virtual total loss of control of their productions after the initial sale to a broadcaster goes a long way toward eliminating the necessary incentives and creating a condition of program anarchy.

Companies in both cable and broadcasting with a larger future stake in cable rather than broadcasting urge the retention of syndicated exclusivity (Storer, Cox, GE, etc.).

The Commission's Economic Report relied upon by the majority has received widespread criticism on methodology and objectivity. Statements in the Storer filing in response to the Notice of Proposed Rulemaking are particularly significant.

The Report's chief defect is that the outside economists retained to prepare them had previously and publicly prejudged the questions they were retained to study. In consequence their conclusions were merely expectable and can be described, at best, as seriously flawed and negligently so. This assessment is harsh but plainly correct: the Reports pick and choose among the record materials, favoring those which support the "desired" conclusions while discounting, distorting, or even ignoring those which do not. An NCTA submission on impact was accepted uncritically while a NAB submission (the Wharton Study) was not. Two Cooper studies on behalf of INTV were not even discussed in the Report; nor was the study by Professor Fisher of MIT or ABC's smaller market study.

Even the Broadcast Bureau's telling critique of the economic analyses was largely ignored. Significantly, the Bureau had pointed out that they lacked analytical depth, failed to use current data, and should have employed a "more balanced appraisal."

Not content with elevating selective analysis to an art form, the economists also ignored completely the question of impact during fringe time—the period of cable's greatest impact and independent television's greatest vulnerability. Moreover, they dealt with "average audience losses" in a way which recalls the six-footer drowning in a lake with an "average" depth of only three feet. The *Park* study had projected audience losses of 41% and 30% in single-station and two-station markets below the top 100, respectively, but the Economic Inquiry Report concludes that "in all but the most extreme cases the additional audience loss will be less than 10 percent in the foreseeable future." (Par. 117). The "averaging" process, of course, shrouds the true and devastating impact on at least 50 single-station markets subject to Park's predicted 41% audience diversion.

In short, the economic "analyses" are objective only in the same sense that PLO might objectively analyze the Egyptian-Israeli peace treaty. And this would be apparent to a reviewing court which, although not permitted to substitute its policy judgment for that of the agency, can and does require that the agency base its rulings on a coherent record.

If a study or any evidence indicated that they syndicated exclusivity rule imposed a significant burden hampering the growth and development of cable television, I would carefully weight that factor. To the contrary, the current pace of cable growth is exploding! Broadcasters are in an almost desperate rush to get into the business.

Also, if it could be shown that the public stood to gain more than it will lose through abandonment of the rule, my choice would be clear; the public must be served. Arguments extolling the virtues of "time diversity" notwithstanding, we are abandoning an incentive for true diversity of programming—the production and distribution of programming not now available. We are simply providing more conduits for recirculation of the same material over and over again. I believe we can do better in promoting the public interest than assuring the presentation of "Bonanza" at all hours of the day and night.

During the Commission's deliberation of this issue, I considered a possible moratorium on abandonment of the rule. This course seemed attractive at first glance because it would protect existing syndication contracts for a period of time. However, I could not reconcile my fundamental concern about the inequity of unbridled use of a product by some entity which neither produced it nor purchased its use.

The Congress has recognized that the existing Copyright Law is flawed. As mentioned before, leading members of Congress who are most responsible for eliminating these flaws have asked the Commission to postpone action on both syndicated exclusivity protection and unlimited signal carriage until the Congress and the Copyright Tribunal have more opportunity to deal with the problems. I fail to understand why—despite those reasonable entreaties—the majority felt constrained to move with such unseemly haste.

Finally, I note that the television industry today is generally prospering quite admirably, and cable television continues to expand by leaps and bounds. Cable with all types of program and pay products available is now viable for major markets. It is a very desirable additional service to those consumers who can afford to pay a monthly fee. It is not a boon to the poor in the ghettos who must rely on a TV service free of additional financial requirements. I believe there is a vital public interest in both preserving a free TV service to the consumer and yet encouraging a diversified pay service to those who can afford a monthly fee. The viewing public today has the present advantage of program diversity in various forms with more options assured for the future. It seems to me that this Commission in its efforts to readjust public interest benefits must not take out of one and put into the other until the scales are completely unbalanced. In my opinion, the long-term public interest considerations in retaining syndicated exclusivity requirements are more persuasive than those elusive benefits proclaimed by the majority in the Report and Order.

I dissent to adoption of the Report and Order.

Dissenting Statement of Commissioner Abbott Washburn re Distant Signal and Syndicated Program Exclusivity Rules

Instead of acting in today's premature fashion to eliminate, posthaste, the distant signal and syndicated exclusivity rules, a more judicious approach on the part of the Commission would have been to conduct an oral argument before making final determination. The record of these proceedings is voluminous and the report itself, with accompanying appendices, exceeds 500 pages. Still, even after reviewing the record, questions persist which it would have been useful to have heard addressed by the parties before the Commission. An oral argument with give-and-take from the bench would also have given us helpful new insights into the issues.

Now, in my view, is *not* the time for the Commission to be changing the ground rules under which the 1976 Copyright Act was drafted. Congressman Kastenmeier, Chairman of the Judiciary Subcommittee, has written us, saying:

The 1976 Copyright Act was written against the backdrop of existing communications law and regulations. * * * It is impossible to completely separate copyright law and communications policy as the Copyright Act of 1976 is now written. Therefore, I would urge the Commission to delay taking any action which would disturb the delicate balance of copyright and communications policy until the Copyright Royalty Tribunal has been given an opportunity to carry out its 1980 review and Congress is in a position to respond, if necessary.

It's all very well to say, as the item does, that this is not our business—that we're not responsible, Congress is. But meanwhile there are basic inequities here, inequities which some cable industry spokesmen themselves recognize. Cable is going through the

revolving door on the other fellow's push. We at the FCC, in my judgment, cannot just blind our eyes to these inequities—for they have a bearing on how the communications facilities are used "in the public interest," and that's our business under the 1934 Act.

In May, at the National Cable Television Association convention, Congressman Van Deerlin, Chairman of the Subcommittee on Communications, stated that the Copyright Tribunal is not working, and predicted that "sooner rather than later, Congress will have to revise copyright policy for the cable television industry."

So Congress is doing some re-thinking. The Royalty Tribunal has not had adequate opportunity to function, and to complete its first five-year review required by the Copyright Act. Chairman Kastenmeier, Senator Riegel, Congressman Dingle and other Members of the House and Senate have urgently requested us not to act precipitously. Is this a good time, therefore, to change the ground rules? No, it is a *bad* time; and I can see no real reason for our racing to such action. As Chairman Kastenmeier in his March 13 letter to Chairman Ferris on the proposal to deregulate cable said: "We did not contemplate such a sweeping change in the regulatory structure when we drafted Pub. L. 94–533."

Contrary to the language of the Opinion and Order, the studies upon which today's action relies are *not* conclusive. For example, the item goes to great lengths to minimize the probable impact on TV stations of the elimination of syndicated exclusivity. But there is little evidence to support this contention in situations where cable penetration is 40 to 50% of TV households in a community. This cannot but have a serious diluting effect on the viewership of the local station. Many eyeballs will shift to the other signals. How many? No one knows. Yet the cable industry is predicting future market penetrations on this order of magnitude.

Finally, I am very concerned by the action of the majority in deleting the exclusivity rules without providing a transition period for those who entered into contracts in good faith reliance on our rules. These parties will now be prejudiced through no fault of their own, a result which is unjust and unfair. Instead, I would have preferred to have provided for a reasonable period of time in which existing contracts, entered into in reliance on our rules, would have remained in effect. To this end, I offered an unsuccessful motion to include language in the Order that would have provided a grace period of up to three years for the orderly phasing out of existing contracts. This would also have given the Congress needed time in which to make necessary adjustments to the Copyright Act.

In summary, I must dissent to this unnecessary and ill-timed deletion of the rules, an action which unfairly and immediately voids legal contracts made in good faith on the basis of our rules.

Separate Statement of Commissioner Joseph R. Fogarty in re Report and Order in Docket 20988 and 21284—Cable Television Syndicated Exclusivity and Signal Carriage Rules

At the commencement of this rule making proceeding,[1] I stated that the Commission's existing cable television rules and policies "assumed harm to the public interest before it materialized and placed a heavy burden of proof on new technology and additional services to show that they would not injure the status quo," and that "this regulatory approach and policy has been misguided from the standpoint of economic reality, consumer welfare, and the larger public interest." I further stated that "something more than mere conjecture or intuitive assumptions should be required before we impose regulatory constraints and burdens on one industry or technology in favor of another," and that "In an era of explosive technological innovation, the public interest is better served by regulatory deference to the marketplace and competitive forces until experience, rather than speculation, demonstrates the existence of problems or inadequacies."

The extensive record amassed in this proceeding only serves to confirm these fundamental observations. The deletion of these unnecessary and counterproductive rules is firmly premised in the public interest and this action has my complete approval and support.

Separate Statement of Commissioner Tyrone Brown re Report and Order in the Matter of Cable Television Syndicated Program Exclusivity Rules (Docket 20988)

When we issued our *Notice of Proposed Rulemaking* in this proceeding I voted enthusiastically for our proposals because I saw no basis in communications policy for continuing the syndicated exclusivity rules. The record in this proceeding has more than borne out my initial tentative conclusion.

I also voted to include in our *NPRM* a proposal providing for a transition period to ameliorate any dislocations resulting from the deletion of our rules. Given the evidence in the record, I have concluded that such a transition period is unnecessary.

The record indicates that of those cable systems subject to our rules, only 27 percent have been required to provide syndicated exclusivity protection. Other evidence demonstrates that even if all stations now entitled to program protection requested it, a maximum of 4.4 percent of all television households in the nation would be affected. This figure would rise to only 9 percent under any reasonable projection of future cable development.

In light of the minuscule impact that a change in our rules will cause, I see no need to provide for a transition period. These rules have restricted consumer choices long enough without counterveiling public interest benefit.

Separate Statement of Commissioner Anne P. Jones re Report and Order in Docket 20988 and 21284—Cable Television Syndicated Exclusivity and Signal Carriage Rules

I concur in the decision to eliminate these rules because I agree that the extensive record developed in these proceedings fails to show that they serve any valid public policy purpose. As well described in the Report and Order, the rules owe their existence to what now, with the benefit of hindsight, seems rather clearly to have been an exaggerated fear of the threat posed by cable television to television broadcasters and their ability to serve the public. The burden was therefore on those who would retain the rules to demonstrate the need or desirability for their retention in the public interest, and in my judgment this burden was not met.

The reason my vote is a concurrence is that I do not fully agree with the heavy implication in the Report and Order that for some years into the future the threat of harm to broadcast television by cable is negligible. Whether this is true depends in large measure on whether cable remains what it has been: primarily a retransmission mechanism. To the extent, however, that cable begins to realize its great potential as a mechanism for providing diverse programming, as well as myriad other services, it may be that our estimates of a maximum 48% market penetration and 10% audience diversion nationwide will prove too modest. I do not intend by this caveat to imply that if cable begins to pose a more substantial and immediate threat than the record shows it does now the Commission should respond.

[1] Separate Statement of Commissioner Joseph R. Fogarty, 71 FCC 2d 949–50 (1979). *See also Vanhu, Inc.*, Separate Statement of Commissioner Joseph R. Fogarty, 65 FCC 2d 991, 992 (1977).

either at all or in any particular way. I merely say that I believe cable's threat to television broadcasting is more problematical than the language of the Report and Order seems to imply, although I fully agree that on the present record any such perceptible threat does not justify retention of these rules.

On the matter of retransmission consent, I wish to express my agreement with the conclusion in the Report and Order as to the effect of the 1976 amendments to the Copyright Act. I have carefully considered the arguments of NTIA and others and I continue to be troubled by the argument that the compensation required under the present statutory scheme by cablecasters to program owners is unreasonably low. I have concluded, however, that, Commission authority in this area has been preempted by the statutory compulsory licensing scheme and arguments concerning the adequacy of the compensation to program owners under that scheme should be directed to the Copyright Tribunal or to Congress—and not to this agency.

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Part IV

Department of Transportation

Urban Mass Transportation Administration

Project Management Procedures for Grantees

DEPARTMENT OF TRANSPORTATION

Urban Mass Transportation Administration

49 CFR Part 658

[Docket No. 80-G]

Project Management Procedures for Grantees

AGENCY: Urban Mass Transportation Administration, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Urban Mass Transportation Administration (UMTA) is proposing guidelines for its grant in aid recipients in the management of their projects. The purpose of these guidelines is to promote effective project management and thereby ensure the prudent use of Federal and local funds in mass transit projects.

DATE: Comments must be received on or before December 8, 1980.

ADDRESS: Comments must be submitted to UMTA Docket No. 80-G, 400 7th Street, S.W., Washington, D.C. 25090. All comments and suggestions received will be available for examination in room 9320 at the above address between 8:30 a.m. and 5:00 p.m., Monday through Friday. Receipt of comments will be acknowledged by UMTA if a self-addressed stamped postcard is included with each comment.

FOR FURTHER INFORMATION CONTACT: Timothy Wolgast, (202) 426-4011.

SUPPLEMENTARY INFORMATION: All comments received before the expiration of the comment period will be considered before final action is taken on this proposal. Comments received after the expiration of the comment period will be considered to the extent feasible.

The administration has determined that this regulation is not a significant regulation under the criteria in the DOT Order for Improving Government Regulations (44 FR 11042, February 26, 1979).

Under the DOT Order, a full evaluation is not warranted because the expected economic impact of the proposed regulation is minimal. The Circular is a compilation of existing policies, procedures, and interpretations and does not introduce any new material dealing with project management.

The provisions of OMB Circular A-95 apply to this Notice of Proposed Rulemaking. It covers the following programs as listed in the Catalog of Federal Domestic Assistance (CFDA):

20.205 Highway Research, Planning, and Construction
20.500 Urban Mass Transportation Capital Grants
20.501 U.M.T. Capital Improvement Loans
20.503 U.M.T. Managerial Training Grants
20.504 Mass Transportation Technology (R. & D. Program)
20.505 U.M.T. Technical Studies Grants
20.506 U.M.T. Demonstration Grants
20.507 U.M.T. Capital and Operating Assistance Formula Grants
20.510 U.M.T. Planning Methods Research and Development (U.T.P.S.)

Discussion of proposal: These proposed guidelines provide external project management guidance for recipients pursuant to sections 3, 5, 6, 8, and 10 of the Urban Mass Transportation Act of 1964, as amended, and Title 23, sections 103(c)(4) and 142. The guidelines replace "Guidelines for Project Administration," *External Operating Manual*, Chapter III, UMTA 1000.2, Chg. 2, dated March 11, 1974. They also supersede UMTA C 2300.2, "Letter of Credit Procedures for Recipient Organizations Under the Treasury Regional Disbursing Office System," dated March 21, 1978.

The contents of the proposed document include recipient responsibilities for project supervision, project reporting requirements, amendments and budget revisions, property management, record retention, closeout procedures, suspension and termination, financial management, cost allocation plans, audits, payment procedures, and special requirements.

Recipients will be responsible for maintaining adequate internal controls in order to adequately safeguard grant funds and resources. Recipients will also be held responsible for administration of the project and compliance with terms and conditions of the grant agreement and requirements stated in these guidelines and other applicable regulations and circulars.

Those items in the proposed circular which are mandatory are indicated by the words "shall," "required," and "must." Those items which are included as suggested formats or procedures are indicated by such words as "may," "should," or "would."

In consideration of the foregoing, it is proposed that Title 49 of the Code of Federal Regulations be amended by adding a new Part 658 to read as follows:

PART 658—PROJECT MANAGEMENT GUIDELINES FOR GRANTEES

Sec.
658.1 Purpose.
658.3 Applicability.
658.5 Project management procedures for grantees.
Appendix—UMTA Circular 5010.1—UMTA Project Management Guidelines for Grantees.

Authority: 49 U.S.C. § 1601 (the Urban Mass Transportation Act of 1964, as amended); 23 U.S.C. § 103 and § 142; 42 U.S.C. § 7506; 49 CFR 1.51; OMB Circular No. A-102, (42 FR 45828); Treasury Circular 1075 (31 CFR Part 205); DOT Order 4600.1B.

§ 658.1 Purpose.

(a) This part prescribes UMTA procedures and requirements for the management of projects by recipients of Federal financial assistance under sections 3, 5, 6, 8, and 10 of the Urban Mass Transportation Act of 1964, as amended, and provisions of other laws administered by the Urban Mass Transportation Administrator.

(b) This part implements the project and financial management provisions of OMB Circular A-102, with the exception of Attachment O, Procurement, and Attachment B, Bonding and Insurance, which are implemented by Part 666 of this Chapter. This part also implements the applicable provisions of Department of Transportation Order 4600.9B, "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments."

§ 658.3 Applicability.

(a) This part applies to all recipients of Federal financial assistance under sections 3, 5, 6, 8, and 10 of the Urban Mass Transportation Act of 1964, as amended, sections 103(e)(4) and 142 of Title 23 U.S.C., and section 175 of the Clean Air Act Amendments of 1977.

§ 658.5 Project management procedures for grantees.

In accepting Federal assistance, each recipient to which this part applies agrees to adhere to the procedures and requirements of UMTA Circular 5010.1, "Project Management Procedures for Grantees," which is set out in Appendix A.

Appendix—UMTA Project Management Guidelines for Grantees (UMTA C 5010.1)

1. *Purpose.* This circular provides project management guidance for grant recipients pursuant to Sections 3, 5, 6, 8, and 10 of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1601 *et seq.*; Sections 103(e)(4) and 142 of Title 23 U.S.C., and § 175 of the Clean Air Act Amendments of 1977, 42 U.S.C. § 7505.

2. *Cancellation.* a. "Guidelines for Project Administration," External Operating Manual (EOM), Chapter III, UMTA 1000.2, Chg. 2, dated 3-11-74.

b. UMTA C 2300.2, "Letter of Credit Procedures for Recipient Organizations Under the Treasury Regional Disbursing

Office System," dated 3–21–78 (previously issued as UMTA C 5200.1).

3. *References.* a. Office of Management and Budget (OMB) Circular A–102, "Uniform Administrative Requirements for Grants-In-Aid to State and Local Governments," dated 9–12–77.

b. Office of Management and Budget (OMB) Circular A–110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations," dated 7–30–76.

c. Sections 3, 5, 6, 8, 10 and 19 of the Urban Mass Transportation Act of 1964, as amended. 49 U.S.C. § 1601 *et seq.*

d. Title 23, United States Code. Highways.

e. Title 42, United States Code. The Public Health and Welfare.

f. "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970," 42 U.S.C. § 4601 *et seq.*

g. Office of Management and Budget (OMB) Circular A–21, Revised, "Cost Principles for Educational Institutions," dated 2–26–79.

h. Federal Management Circular (FMC) 74–4, "Cost Principles Applicable to Grants and Contracts with State and Local Governments," dated 7–18–74.

i. OMB Circular A–73, "Audit of Federal Operations and Programs," dated 3–15–78.

j. Department of the Treasury Circular 1075, 4th Revision, December, 1977.

k. Part 205, Chapter II, Title 31 CFR.

l. Chapter 2000, Part 6, Treasury Fiscal Requirements Manual.

m. UMTA C 1155.1, "UMTA Interim Equal Employment Opportunity Policy and Requirements for Grant Recipients," dated 12–30–77.

n. UMTA C 1160.1, "UMTA Guidelines for Title VI Information Specific to UMTA Programs," dated 12–30–77.

o. UMTA C 1165.1, "UMTA Interim Minority Business Enterprise Policy and Grant Requirements for Grant Recipients," dated 12–30–77.

p. UMTA C 4220.1, "Third-Part Contracting Guidelines," in final drafting.

q. UMTA C 4530.1, "Land Acquisition and Relocation Assistance Under the Urban Mass Transportation Act of 1964, as amended," 3–21–78.

r. OMB Circular A–122, "Cost Principles for Non-Profit Organizations," dated 6–27–80.

s. Department of Health and Human Services (HHS) Publication No. OASC–10, "A Guide for Local Government Agencies—Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government." (Guides are also available for universities and non-profit organizations. They may be obtained from HEW Regional Offices or the Government Printing Office Washington, D.C.)

4. *Background.* This circular provides general guidance relating to project management procedures for grantees under Sections 3, 5, 6, 8, and 10 of the Urban Mass Transportation Act of 1964, as amended. Sections 103(e)(4) of 142 of Title 23 of the United States Code (U.S.C.), and Section 175 of the Clean Air Act Admendments of 1977, 42 U.S.C. § 7505. These procedures are intended to assist grantees in administering UMTA-funded projects and meeting the various grant responsibilities and reporting requirements. For additional guidance on specific areas such as civil rights, relocation, cost principles, and third party contracting, refer to materials listed above in paragraph 3, References. Recipients should also be aware of the applicable environmental, elderly and handicapped, and other regulatory requirements.

Theodore C. Lutz,

Administrator.

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CHAPTER I—PROJECT ADMINISTRATION

I. Project Administration and Management

1. *Introduction.* This circular is intended to provide grantees with procedures and guidelines to be applied in administering UMTA grants, cooperative agreements, and/or loans, (hereafter collectively referred to as "grants") and addresses projects under Sections 3, 5, 6, 8, and 10 of the Urban Mass Transportation Act of 1964 as amended, Title 23 U.S.C. Sections 103(c)(4) and (142), and Section 175 of the Clean Air Act Amendments of 1977, 42 U.S.C. § 7505.

Chapter I of this circular deals with Project Administration and Management, Chapter II with Financial Management, and Chapter III with Payment Procedures. The terms grantee and recipient as used hereafter apply to all assistance recipients. The term "project" refers to the grant or cooperative agreement project described in the agreement signed by UMTA and the recipient.

2. *Notice of Project Approval.* When a project has been approved, the recipient is notified of that approval by a letter from UMTA. This letter also sets forth any special conditions under which the project is approved and transmits copies of the grant agreement and the approved project budget. Effective on the date of the approval letter, the recipient may begin to incur costs on the project. However, requisistions for Federal grant or loan funds will not be honored until the grant or loan agreement has been executed by both UMTA and the grantee. In addition, for Section 3 and Section 5 projects, a proper authorizing resolution must be received by UMTA before requisitions will be paid.

a. *Project Authority.* In general, the UMTA regional offices are the responsible UMTA authorities in project management for all projects except those under Sections 6, 10, and 11, responsibility for which remains with UMTA headquarters offices in Washington, D.C. Regional offices should be kept informed of the status of those projects for which headquarters offices are responsible.

b. *Execution of Grant Agreement.* The cognizant UMTA office will send *four* copies of the grant agreement to the recipient after project approval. The recipient should execute and date the copies in accordance with the instructions provided and return *two* of them to the appropriate UMTA office. UMTA must be advised *promptly* if the grant document cannot be executed by the recipient within 60 days.

3. *Grantee Responsibilities for Project Administration and Management.* The recipient is responsible for administration and management of the project and compliance with terms and conditions of the grant agreement and the requirements stated in this circular and other applicable circulars and regulations. It is the responsibility of the recipient to: a. Provide continuous administrative and management direction of project operations;

b. Provide, directly or by contract, adequate technical inspection and supervision by qualified professionals of all work in progress,

c. Assure conformity to grant agreements, applicable statutes, codes, ordinances, and safety standards.

d. Maintain the project work schedule developed during the first quarter of the project and constantly monitor the performance to *assure that schedules are met* and other performance goals are being achieved.

e. Keep expenditures within the latest approved project budget;

f. Assure compliance with UMTA requirements on the part of agencies, consultants, contractors, and subcontractors working under approved third party contracts or interagency agreements; and

g. Request and withdraw Federal cash only in amounts and at times as needed to make payments that are immediately due and payable.

4. *Project Reporting Requirements.* UMTA requires several types of reports in order to adequately monitor project progress. The procedures are designed to place responsibility on recipients for management of day-to-day operations of UMTA grant-supported projects.

a. *Quarterly Progress Reports.* UMTA requires quarterly progress performance reports on all projects, except Section 5 Operating. Recipients of Section 5 Operating Assistance grants need only submit a quarterly Statement of Revenues and Expenses instead of a quarterly progress report (Figure I–1 is a sample of a Statement of Revenues and Expenses). UMTA may also require other special reports or quarterly project management meetings due to the magnitude and complexity of major projects. Final project reports are required before grant closeout and are briefly discussed in paragraph I–13.

As a minimum, each quarterly performance report shall address the following, relating the narrative to individual budget line items: (1) A comparison of actual accomplishments to the objectives established for the period. Accomplishments should include items such as specifications written, bids solicited, bid protests, contracts awarded, equipment received, and equipment disposed of. For planning projects, accomplishments should include items such as major work tasks started, completed, or in progress for each budget line item; also, the percent of work completed and the percent of the budget expanded by budget line items should be included. Where possible, accomplishments (represented by quantitative data such as hours worked, units, tasks, or sections completed, etc.) should be related to expenditures for the same period. Recipients must submit an activity schedule (bar chart, critical path exhibit) by the time the first quarterly report is submitted;

(2) Reasons why objectives were not met, identifying problem areas and the planned approach to resolution of the problems;

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high cost units;

(4) Significant events affecting the project, both positively and negatively;

(5) Projected activities for the next quarter and steps anticipated in carrying them out;

(6) Changes in scope, budget, and activities since last quarter;

(7) Anticipated changes in upcoming activities whether or nor prior approval or amendments are needed; and

(8) Estimated completion dates, percent complete, and funds required for completion (not required for Section 8 projects).

Photographs, though not required, are helpful in evaluating progress on capital projects.

b. *Financial Reports.* Financial reports may either be in the form of a Financial Status Report or a Report of Federal Cash Transactions. These reports are discussed separately in Chapter II of this circular and should accompany the

quarterly progress reports when submitted to UMTA.

c. *Minority Business Enterprise (MBE) Reports.* UMTA C 1165.1 contains requirements for quarterly MBE reports. Grantees may submit such reports together with the other quarterly reports described herein. See UMTA C 1165.1 for details on the MBE reports, including applicable threshold limits.

d. *Significant Events.* Between required quarterly progress reporting dates, events may occur which significantly impact the project.

Reporting shall include events which will either delay completion of the project or will otherwise impact the attainment of the project objectives or schedule. In such cases, the recipient shall inform the cognizant UMTA office as soon as possible (normally within a week) after such conditions develop. Conditions in this category include: (1) Problems, delays, or adverse conditions which will materially affect the ability to attain program objectives, prevent the meeting of time schedules and goals, or preclude the attainment of project work units by established time periods. This disclosure should convey the action taken or contemplated, and any Federal assistance needed to resolve the situation.

(2) Favorable developments or events which enable meeting time schedules and goals sooner than anticipated or producing more work units than originally projected.

e. *Report Due Dates.* Quarterly reports are to be submitted to the cognizant program office within 30 days after the end of the calendar quarter. At year-end, grantees may submit reports within 90 days of the end of the period. The original and one copy of each report should be submitted to the appropriate office. (For Section 175 grants, one copy of the report should also be sent to EPA.) Note that *payments may be withheld for failure to submit these reports on time.*

5. *Budget Revisions and Project Amendments.*—a. *General.* A grant obligates the recipient to undertake and complete the project as described in the grant agreement. The grant budget, as used in this circular, means the approved financial plan for both UMTA and recipient shares to carry out the purpose of the grant. This plan is the financial expression of the approved project. During the course of the project it may become necessary to *revise* the budget or *amend* the grant agreement.

b. *Budget Revisions.* A budget revision is defined as a transfer of funds between direct or indirect cost line items which does not affect the scope, design, or total dollar amount of the project. The approved project budget is enclosed with the project approval letter. The recipient is responsible for controlling and monitoring all project undertakings to ensure they are in accordance with the approved budget. Recipients must obtain UMTA concurrence for budget revisions if the proposed revisions meet the criteria contained in paragraph 5c below. All requests for budget revisions should be sent to the appropriate UMTA regional or headquarters office. Recipients should notify the appropriate UMTA office of all budget revisions even if no prior UMTA approval is required.

c. *Approval Requirements for Budget Revisions.* The recipient must request *prior approval* from UMTA for certain proposed budget revisions. Approval requests should be sent to the appropriate UMTA office. Requests must be made whenever: (1) The Federal share exceeds $100,000 and the cumulative amount of transfers in the proposed revision among direct cost categories exceeds or is expected to exceed ten percent of the total grant budget. No transfer is permitted which would cause UMTA funds to be used for purposes other than those specified in the grant agreement;

(2) The revision involves the transfer of amounts between indirect and direct costs;

(3) The revisions pertain to the addition, or deletion of items requiring approval in accordance with the provisions of Federal Management Circular 74–4, "Cost Principles Applicable to Grants and Contracts With State and Local Governments" or Office of Management and Budget Circular A–21, Revised, "Cost Principles for Educational Institutions." This includes equipment items; or

(4) The revision would transfer funds between construction and nonconstruction work.

d. *Budget Format.* If a revised budget is required, it should include the same overall information as the current approved project budget. It is recommended the revised budget follow a three column format: Column A, the current approved budget, Column B, the change in each line item, and Column C, the revised budget line items (Column A plus Column B). In accordance with the above, the original and two copies of a proposed revision, dated, numbered consecutively, together with an explanation of each change, should be submitted to UMTA for approval. This explanation should identify and fully explain those events which have made a budget revision necessary and their impact on the project. In cases where the recipient makes a change in the project budget which does not require prior UMTA approval under paragraph 5c above, a copy of the revised budget and an explanation should be submitted to UMTA as part of the next quarterly progress report, for information purposes only.

e. *Project Amendments.* Project amendments are required when the recipient desires to:

(1) Change the scope of the project;

(2) Alter the design of the project;

(3) Increase the amount of Federal funds; or

(4) Change administrative procedures.

These activities may be undertaken prior to the issuance of an amendment, *if approved in writing,* in advance, by UMTA.

f. *Required Documents—Amendments.* Any request to amend the grant must be submitted by letter to the appropriate UMTA regional or headquarters office. Grant amendment requests should contain an original and one copy of:

(1) A letter of request;

(2) Specific identification, explanation, and justification of the change in scope of project, design, or funding;

(3) A revised Standard Form (SF) 424 if there is a change in the grant amount or the project period;

(4) A proposed revised budget and budget form 80–RO–186, and

(5) If required, evidence of the availability of appropriate local matching funds.

Note that amendments to transfer a grantee to the letter of credit payment method do not require these documents.

g. *Other Requirements—Amendments.* Upon submission by the recipient of a proposed change, and depending on the extent of the change in scope, design, and funding being proposed, UMTA will determine whether it is necessary to hold new public hearings, prepare a new environmental impact statement, revise the annual element of the Transportation Improvement Plan (TIP), require possible local action by the planning organization, and/or submit additional documentation. Additionally, a new 13(c) certification by the U.S. Department of Labor may be required for Section 3 and Section 5 projects.

h. *Amendment Approval.* Approval of an increase in funding for a Federal grant or loan, or a change in project scope will depend upon the adequacy of the justification presented by the recipient and the availability of funds.

6. *Use and Disposition of Project Property.*—a. *Definitions.* The following definitions apply for UMTA property management standards: (1) *Real property.* Real property means land,

including land improvements, structures, and appurtenances affixed thereto, excluding movable machinery and equipment.

(2) *Personal property.* Personal property of any kind except real property. It may be tangible-having physical existence, or intangible-having no physical existence, such as patents, inventions, and copyrights.

(3) *Nonexpendable personal property.* Nonexpendable personal property means tangible personal property having a useful life of more than one year and an acquisition cost of $300 or more per unit. Recipients subject to Accounting Standards Board regulations may use the CASB standard of $500 or more per item and a useful life of two or more years.

(4) *Expendable personal property.* Expendable personal property refers to all tangible personal property other than nonexpendable property.

b. *Real Property Standards.* The following requirements concern the use and disposition of real property funded partly or wholly by UMTA: (1) Title to real property shall be vested in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the original grant as long as needed.

(2) The recipient shall obtain approval by UMTA for the use of the real property in other projects when the grantee determines that the property is no longer needed for the original grant purposes. Use in other projects shall be limited to those under other Federal grant programs, or programs that have purposes consistent with those authorized for support by the grantor.

(3) When the real property is no longer needed as provided in (1) and (2) above, the recipient shall request disposition instructions from UMTA. The recipient will receive one of the following disposition instructions from UMTA: (a) The recipient may be permitted to retain title after it compensates UMTA in an amount computed by applying the Federal percentage of participation in the cost of the original project to the fair market value of the property.

(b) The recipient may be directed to sell the property and pay UMTA an amount computed by applying the Federal percentage of participation in the cost of the original project to the proceeds from sale (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(c) The recipient may be directed to transfer title to the property to UMTA provided that in such cases the recipient shall be entitled to compensation computed by applying the recipient's percentage of participation in the cost of the program or project to the current fair market value of the property.

c. *Federally Owned Nonexpendable Personal Property.* Title to federally owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally owned property in their custody to the Federal agency. Upon completion of the agreement, or when the property is no longer needed, the grantee shall report the property to UMTA for further agency utilization. UMTA will issue appropriate disposition instructions to the recipient after completion of the agency's review.

d. *Property Management Standards for Other Nonexpendable Property.* Nonexpendable personal property acquired entirely with local funds is the property of the recipient. Recipients are free to use and dispose of this property as they see fit unless the property is included as revenue financing for a subsequent grant. When other nonexpendable tangible property is acquired by a recipient with project funds, title shall not be taken by UMTA but shall vest in the grantee subject to the following conditions: (1) *Right to transfer title.* For items of nonexpendable personal property having a unit acquisition cost of $1,000 or more, UMTA may reserve the right to require the grantee to transfer the title to the Federal Government or to a third party named by UMTA when such third party is otherwise eligible under existing statutes. Under such conditions the property shall be appropriately identified in the grant or otherwise made known to the grantee in writing. UMTA will issue disposition insturctions within 120 calendar days after the end of the Federal support of the project for which it was acquired.

(2) If UMTA does not reserve the right to transfer title, the grantee shall use the property in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original project or program, the recipient shall use the property in connection with its other federally sponsored activities, in the following order of priority: (a) Activities sponsored by UMTA.

(b) Activities sponsored by other Federal agencies.

(3) *Shared Use.* During the time that nonexpendable personal property is used on the project or program for which it was acquired, the grantee shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the property was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by UMTA; second preference shall be given to projects or programs sponsored by other Federal agencies. If the property is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by UMTA. User charges should be considered if appropriate.

(4) *Insurance.* For captial grants the grantees must maintain insurance/self-insurance adequate to cover facilities and/or equipment during the useful life. When the insured property is damaged or destroyed, UMTA must be reimbursed for its share of the insured claim.

e. *Disposition Standards for Other Nonexpendable Property.* When the *recipient no longer needs the property* for which it maintained title, nor uses the property in connection with its other sponsored activities, the property shall be disposed of in accordance with the following standards:

(1) For nonexpendable property with a unit acquisition cost of *less than $1,000:* The recipient may use the property for other activities without reimbursement to UMTA or sell the property and retain the proceeds.

(2) For nonexpendable personal property with a unit acquisition cost of *$1,000 or more* the recipient must request disposition instructions from UMTA. The request for instructions should include the following information: a list of the equipment to be disposed, individual dates of purchase; unit acquisition cost, current fair market value, current condition of the equipment, and proposed disposition. The UMTA project manager will issue instructions to the recipient within 120 days with regard to the following procedures: (a) If the grantee is instructed to ship the property elsewhere, the grantee will be reimbursed by the benefiting Federal agency with an amount computed by applying the percentage of the grantee's participation in the grant program to the current fair-market value of the property, plus any shipping or interim storage costs incurred.

(b) If the grantee is instructed to otherwise dispose of the property, it will

be reimbursed by UMTA for such costs incurred in its disposition.

(c) If disposition instructions are not issued within 120 calendar days after reporting, the grantee must sell the property and reimburse UMTA an amount computed by applying the percentage of Federal participation in the cost of the original project or program. The grantee will be permitted to retain $100 or 10 percent of the proceeds, whichever is greater, for the grantee's selling and handling expenses.

(d) The project to be credited in a disposition action is the project under which the property was purchased.

f. *Disposition Standards for Expendable Personal Property.* When the *total inventory value* of expendable personal property for which the grantee has title *exceeds $1,000* at the end or termination of the Federal grant, the recipient may retain the property for its own use or sell the property. In either case, the recipient must compensate UMTA for the Federal share in the cost. The amount of compensation is computed by applying the percentage of Federal participation in the grant to the current fair-market value of the property.

g. *Property Management Controls and Record Keeping Procedures for Nonexpendable Personal Property.* The recipient must maintain adequate control over its nonexpendable personal property. At a minimum, the recipient shall meet the following requirements:
(1) Property records must be maintained accurately and provide for a description of the property, manufacturer's serial number or other identification number, acquisition date and cost, source of the property, percentage of Federal funds used in the purchase of property, location, use, and condition of the property, and ultimate disposition data including sales price or the method used to determine current fair market value if the grantee reimburses UMTA for its share;

(2) A physical inventory of property must be taken and the results reconciled with the property records at least once every two years to verify the existence, current utilization, and continued need for the property;

(3) A control system must be in effect to insure adequate safeguards to prevent loss, damage, or theft to the property. Any loss, damage, or theft of nonexpendable property must be investigated, fully documented, and if UMTA-owned, reported to UMTA. UMTA must be reimbursed for the Federal share of the fair market value of this property.

(4) Adequate maintenance procedures must be implemented to keep the property in good condition; and

(5) Proper sales procedures must be established for unneeded property to assure competition and the highest possible returns.

h. *Certification of Use of Project Equipment.* At the start of *each* calendar year, UMTA recipients must submit to the appropriate UMTA regional office a Certification of Use of Project Equipment. The certification is only for the useful life of project facilities/equipment, beginning with the date of purchase/installation of such items, and is dependent on the maintenance of an adequate property management record system. This certification should state by individual items under each grant that: (1) Equipment and facilities acquired under the grant continue to be used for the purpose for which the grant was approved;

(2) Equipment and facilities do not exceed the needs of the transit operations;

(3) None of the equipment or facilities have been sold, damaged, lost, or otherwise taken out of transit service;

(4) A physical inventory and verification has been taken at least once during the preceding two year period; and

(5) Exceptions to the above reporting items must be fully explained (e.g., the date the item was sold, buyer's name, and price paid.)

In addition, UMTA may request to examine the property or require a copy of the physical inventory of nonexpendable property be forwarded to UMTA is it is determined to be necessary or if the grantee is not submitting the annual certification.

7. *Third Party Contracting.* Third party contracts are those entered into by the recipient for the procurement of supplies, equipment, construction, and other services required to execute a grant project. Recipients must follow certain procedures to insure that these materials and services are obtained in free and open competition, prices are fair and reasonable, and are in compliance with the provisions of applicable Federal, State, and local laws. this includes affording procurement opportunities to minority business enterprises. For information on specific third party contracting standards, see OMB Circular A–102, Attachment O (UMTA is currently drafting guidelines to implement OMB Circular A–102 Procurement Standards which will shortly be released to UMTA grantees).

8. *Retention of Project Records.*—a. *Length of Retention.* Financial records, supporting documentation, statistical records, and all other records pertinent to a grant must be retained by recipients and made readily available to authorized representatives of the U.S. Department of Transportation and/or the Comptroller General of the United States for a period of three years after completion of the project, with the following qualifications: (1) If any litigation, claim, or audit is started before expiration of the three-year period, the records must be retained until all litigation, claims, or audit findings involving the records have been resolved.

(2) Records for nonexpendable property acquired with Federal funds must be retained for three years after final disposition.

(3) When records are transferred to, or maintained by UMTA, the three-year retention requirement does not apply.

b. *Retention Period.* The retention period starts on the date of submission of the final expenditure report, or on the date of submission of the annual Financial Status Report for grants that are renewed annually. Recipients desiring to substitute microfilm copies for original records should obtain prior approval from the appropriate UMTA program office.

c. *Transferring Records.* UMTA may request recipients to transfer certain records to UMTA's custody when it is determined that such records have long-term retention value. To avoid duplicate recordkeeping, UMTA may request that recipients retain records continuously needed for joint use.

9. *Special Requirements.*—a. *Hatch Act Requirements.* Chapter 15 of Title 5 of the United States Code (Hatch Act) provides that all State or local agency employees who are engaged in an activity financed by Federal Government grants or loans may not be candidates for elective office or use their positions to influence public elections. Furthermore, those State and local agencies receiving Federal assistance are prohibited from coercing their employees into making political contributions. Exceptions to the general Hatch Act prohibition do exist, such as that for persons holding elective office. State and local agencies should contact the appropriate UMTA Regional Counsel or the Office of Chief Counsel if they have any questions about the specific applicability of these provisions to their situation.

b. *Relocation Program Administration.* The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et. seq.*) authorizes grants for relocation

payments to carry out an approved program for the relocation of families, individuals, businesss concerns, and non-profit organizations. When a project involves relocation or land acquisition, the grantee must submit a certification of compliance with that Act as part of the grant application.

The certification of compliance is acquired by the recipient at the local and/or State level. The grantee should refer to UMTA Circular 4530.1, "Land Acquisition and Relocation Assistance Under The Urban Mass Transportation Act of 1964, as amended" for further instructions.

c. *Housing Replacement Requirements.* No person can be displaced from his/her residence because of a project until the grantee has made decent, safe, and sanitary replacement housing available to them. Such replacement housing must be located in areas generally not less desirable with respect to public utilities and public and commercial facilities, reasonably accessible to their places of employment, at rents or prices within their financial means, and must be fair housing (i.e., open to all persons regardless of race, color, religion, sex, or national origin). No grant agreement which involves displacement will be awarded without UMTA's prior approval of a relocation plan. UMTA will not give such concurrence until it has determined that adequate replacement housing has been made available to all persons to be displaced. When relocation is involved in the project, grantees must follow instructions contained in UMTA C 4530.1. UMTA may waive these requirements at its discretion. Where State or local law conflicts with Federal law, the grantee must comply with Federal law in order to be reimbursed. Costs incurred to comply with State laws which are not expressly authorized by Federal law are not eligible project costs.

d. *Agreements—Relocation and/or Rearrangement of Utilities and Facilities.* The construction of transit systems may require the relocation and/or rearrangement of privately and publicly owned facilities. These facilities include, but are not limited to: (1) systems and physical plant for producing, transmitting or distributing communications, electricity, gas, oil, crude products, water, steam, waste, storm water, or other like substances; (2) publicly owned fire and police signal systems; and (3) railroads and streets, which directly or indirectly serve the public or any part thereof. Relocating and/or rearranging utilities and facilities necessary to accommodate an UMTA funded transit system may be considered an UMTA project activity and thereby legally eligible for funding from the UMTA share of project funds (UMTA funding). Exception to this includes those situations where State or local law expressly prohibits the financing of such by the public entity. Additional information is contained in UMTA C 4530.1.

(1) *Eligibility For UMTA Funding.* In order to qualify for UMTA funding, the recipient must execute an agreement for relocating or rearranging facilities with the entity responsible for the facilities prescribing the procedures for the relocation and/or rearrangement of the facilities for the purpose of accommodating the construction of the UMTA funded project. These agreements are distinguishable from third party contracts in that: (a) Only actual allowable, allocable, and reasonable costs are reimbursable, and no profit is allowed; and

(b) Reimbursement is limited to the amount necessary to relocate and/or rearrange the facilities to effect a condition equal to the existing utility facilities. Generally, reimbursement would not provide for greater capacity, capability, durability, efficiency or function, or other betterments. Agreements with governmental entities are further distinguishable in that "overhead" type cost are not eligibile for reimbursement from UMTA funds.

e. *Leasing Agreements—Project Equipment and Facilities.* The recipient may enter into a contract for the leasing of its project equipment and facilities with a private operator. Under this arrangement the recipient should include the following provisions in the proposed lease agreement: (1) Unless otherwise agreed to by UMTA, project equipment shall be operated by the lessee to serve the best interest and welfare of the project sponsor and the public.

(2) Lessee shall maintain project equipment at a high level of cleanliness, safety, and mechanical soundness under maintenance procedures outlined by the project sponsor. The project sponsor and/or UMTA shall have the right to conduct periodic maintenance inspections for the purpose of confirming the existence, condition, and the proper maintenance of the project equipment.

(3) Title to the project equipment shall at all times remain with the recipient. Upon termination of the lease agreement or if the lessee goes out of business, the project equipment shall be returned to the project sponsor in the same condition as when it was received by the lessee, reasonable wear and tear resulting from use thereof alone excepted.

(4) Lessee shall carry proper insurance covering losses that may be incurred as a result of the operation and maintenance of project equipment, and the project sponsor shall be a named-insured upon any such insurance policies maintained by lessee. Lessee shall provide project sponsor with certificates indicating that such insurance is in effect.

f. *Advance Land Acquisition Loans.* The Urban Mass Transportation Act of 1964, as amended, authorizes UMTA to make loans to States, local public bodies, and agencies thereof to finance the acquisition of real property and interests in real property for use as right-of-ways, station sites, and related purposes. Projects funded as loans are managed similarly to grant projects with the following minor exceptions: (1) Actual construction of mass transportation facilities must begin within 10 years from the date of the loan;

(2) Loans are to be repaid at the end of the ten-year period in cash, in one lump sum of both principal and interest; and,

(3) Within the ten-year period, a loan can be converted to a capital grant.

For further information the grantee should contact the cognizant UMTA regional office.

g. *Copyrights and Rights in Data.* All "subject data" first produced in the performance of an UMTA grant is the sole property of UMTA. The recipient agrees not to assert any rights or equity and not to establish any claims to statutory copyright in such data. Except for its own internal use, the recipient may not publish or reproduce such data or authorize others to do so without the written consent of UMTA until such time as UMTA may have released such data to the public. This requirement is waived for Section 6 grants to educational institutions.

h. *Patent Rights.* All recipients must notify the appropriate UMTA office of any inventions, improvements, or discoveries conceived or actually reduced to practice by the recipient or its employees in the course of or under the terms of this contract. UMTA determines whether or not and where a patent application will be filed, as well as the disposition of all rights in such inventions, improvements and/or discoveries, including title to and rights under any patent application or patent that may be issued. The determination of UMTA on all these matters will be accepted as final, and the recipient

agrees that it will be execute all documents to effect the determination.

i. *Published Reports.* The following statement must appear on the cover or title page of any published report concerning UMTA projects: "The preparation of this report has been financed in part through a grant from the U.S. Department of Transportation, Urban Mass Transportation Administration, under the Urban Mass Transportation Act of 1964, as amended."

10. *On-site Inspections.* UMTA may conduct periodic on-site inspections of projects to evaluate the effectiveness of the recipient's arrangement for supervision and inspection and to evaluate the work done on the project and adherance to the grant agreement. In addition, site visits may be made when information received from a recipient indicates an event with significant impact on the project. On-site inspections may also be made to determine whether civil rights laws, regulations, and agreements are adequately carried out. Inspection of and concurence by UMTA in project work does not relieve the recipient of its responsibilites and liabilities.

a. *UMTA Project Team.* UMTA may assign a project team from within its office to monitor projects under its authority. This team will work directly with the recipient in project monitoring, planning, development, and implementation.

b. *Quarterly Project Management Meetings.* Quarterly project management meetings may also be instituted with selected recipients. The quarterly meetings, to be held by the respective UMTA regions, in cooperation with the appropriate headquarters offices, provide construction management briefings, status/progress reports on the project, discussion of all accomplishments and problems, and site inspection if appropriate. These meetings do not replace quarterly written reports unless a specific exemption is granted by UMTA.

11. *Suspension of the Project.* If UMTA determines that the recipient has failed to comply with the terms and conditions of the grant agreement, including the civil rights requirements, UMTA will notify the recipient in writing of its intent to suspend the grant. UMTA may withhold further payments and/or prohibit the recipient from incurring additional obligations pending corrective action by the recipient or a decision to terminate the project for cause. This includes work being performed by third party contractors or consultants. Suspension will not invalidate obligations properly incurred by the grantee and concurred in by UMTA *prior* to the date of suspension and/or termination, to the extent that they are noncancellable. The recipient may appeal. The appeal is made to the appropriate UMTA regional or headquarters office. Upon receipt of the appeal, UMTA will make a decision.

12. *Termination of the Project.* A project may be terminated either for convenience or cause. a. *Termination For Cause.* UMTA may terminate the grant, in whole or in part, at any time before project completion, whenever it determines that the grantee has failed to comply with the conditions of the grant including civil rights compliance or failure to make reasonable progress. UMTA will promptly notify the recipient in writing of its intent to terminate and the reasons thereof and the effective date. The recipient may appeal. Upon receipt and evaluation of the appeal, UMTA will render its final decision on the termination of the project including the effectve date. Payments made to the recipient or recoveries by UMTA will be in accordance with the terms of the grant agreement and the legal rights and liabilities of both parties as defined in the agreement.

b. *Termination For Convenience.* UMTA or the recipient may terminate a grant in whole or in part, when both parties agree that the continuation of the project would not produce results commensurate with the further expenditure of funds. Both parties must agree upon the termination conditions, including the effective date and, in case of partial terminations, the portions to be terminated. The recipient may not incur new obligations for the terminated portion after the effective date and must cancel as many outstanding obligations as possible. UMTA will evaluate each noncancellable obligation to determine its eligibility for inclusion in project costs. Settlement will be made in accordance with the terms and conditions of the grant agreement. UMTA allows full credit to the recipient for the Federal share of the noncancellable obligations properly incurred by the recipient prior to termination.

13. *Project Closeout Procedures.* Closeout is the process by which UMTA determines that all responsibilites and work by the recipient have been completed. Grant projects should be closed out within 90 days after completion of the activity for which the project was funded. Closeout marks the last stage in the life cycle of an UMTA project. Final closeout activity will begin immediately after all costs are incurred on the project and all work activities under the project are completed and accepted by UMTA. For EPA Section 175 grants, closeout must be concurred in by EPA.

Property records must be maintained as long as the property is used by the grantee, even if the grant has been closed. Such property must be included in the certification of property.

a. *Final Financial Settlement.* Recipients must immediately notify UMTA when all project activities have been completed and all costs for these activities have been incurred. UMTA will then initiate final financial settlement of the project. Project settlement will include: (1) On-site inspection of the project by an UMTA representative, where appropriate;

(2) Preparation and submission to UMTA of the recipient's certification of project completion within 90 days of such completion. The following information is required for *all* projects and should be submitted to the appropriate program office;

(a) A final Request for Advance or Reimbursement (SF 270), if the requisition method of receiving funds is utilized, or a final Request for Payment on Letter of Credit (SF 183) if paid by Letter of Credit—*marked last requisition/request before close-out,* or a check payable to the Urban Mass Transportation Administration for the full amount of any Federal grant funds received by the grantee but unexpended (necessary adjustments to the Federal share of costs will be made during the final audit review);

(b) A list of equipment purchased for the project, identified individually by serial number or other distinguishing designation and a description of disposition, if any. The grantee must follow the procedures in Chapter I–6 for disposing of nonexpendable personal property. If applicable, an invention statement should also be submitted;

(c) A final Financial Status Report, (SF 269). Section 8 projects require a Financial Status Report only at project closeout. See Figure I–2 for an example of a completed Section 8 Financial Status Report.

(d) A Report of Federal Cash Transactions, (SF 272) if applicable;

(e) Final project budget, if different from the latest approved budget;

(f) For Section 5 Operating Assistance Grants only—a copy of a final audit report; and

(g) Other reports, such as a final progress report, if required as a condition of the grant.

b. *Adjustments to Federal Share of Costs.* Necessary adjustments to the Federal share of cost will be made after

receipt and analysis of the required close-out information by the appropriate UMTA office. Final project audits will be initiated by UMTA upon receipt of the project closeout information listed in paragraph 13a(2).

c. *Final Financial Audit.* A final financial audit of the books and accounts will be arranged by the appropriate UMTA office and any audit findings settled. UMTA retains the right to recover any costs disallowed as a result of final audit. The project will be considered closed when UMTA notifies the recipient and forwards final grant payments, or when an appropriate refund of Federal grant funds has been received from the grantee and acknowledged by UMTA. This occurs after resolution of all audit findings.

Additional information on Final Audits is located in Chapter II, paragraph 6h(3).

BILLING CODE 4910-57-M

(SAMPLE)

STATEMENT OF REVENUES AND EXPENSES
Tonawanda Regional Transit Authority
January 1, 1977 through June 30, 1977

Expenses:			$404,400
Transportation	$150,200		
Maintenance & Equipment	95,000		
Traffic and Advertising	5,000		
Administrative & General	41,300		
Insurance and Safety	15,000		
Taxes and Rents	12,900		
Depreciation & Amortization	83,000	- (Ineligible)	
Interest	2,000	- (Contra Expense)	
Revenues:			$121,800
Passenger Farebox	$101,200	- (Revenue)	
Tokens & Transfers	2,000	- (Revenue)	
Charter Bus	14,000	- (Non-Transportation)	
Advertising	3,100	- (Local Share)	
CETA	1,300	- (Revenue)	
Interest	200	- (Contra Expense)	
Subsidies:			$155,200
City of Tonawanda	$125,000		
Revenue Sharing	10,000		
State Elderly Fares	15,200		
Contributed Services	5,000	- (Contributed Services Operating Expense & Local Share)	

Figure 1-1
Page 1 of 1

A Section 8 Project's Final Financial Status Report

FINANCIAL STATUS REPORT

(Follow instructions on the back)

1. FEDERAL AGENCY AND ORGANIZATIONAL ELEMENT TO WHICH REPORT IS SUBMITTED: UMTA	2. FEDERAL GRANT OR OTHER IDENTIFYING NUMBER: PA 08-9999	OMB Approved No. 80-R0180	PAGE 1 OF 1 PAGES
3. RECIPIENT ORGANIZATION (Name and complete address, including ZIP code): MPO, Anytown, PA 19999	4. EMPLOYER IDENTIFICATION NUMBER	5. RECIPIENT ACCOUNT NUMBER OR IDENTIFYING NUMBER	6. FINAL REPORT [X] YES [ ] NO; 7. BASIS [ ] CASH [X] ACCRUAL
	8. PROJECT/GRANT PERIOD (See instructions): FROM (Month, day, year) 7-1-79 TO (Month, day, year) 6-30-80	9. PERIOD COVERED BY THIS REPORT: FROM (Month, day, year) 7-1-79 TO (Month, day, year) 6-30-80	

10. STATUS OF FUNDS

PROGRAMS/FUNCTIONS/ACTIVITIES ▶	(a)	(b)	(c)	(d)	(e)	(f)	TOTAL (g)
a. Net outlays previously reported	$	$	$	$	$	$	$ 0
b. Total outlays this report period							1,448,600 *
c. *Less:* Program income credits							
d. Net outlays this report period (*Line b minus line c*)							
e. Net outlays to date (*Line a plus line d*)							
f. *Less:* Non-Federal share of outlays							
g. Total Federal share of outlays (*Line e minus line f*)							
h. Total unliquidated obligations							
i. *Less:* Non-Federal share of unliquidated obligations shown on line h							
j. Federal share of unliquidated obligations							
k. Total Federal share of outlays and unliquidated obligations							
l. Total cumulative amount of Federal funds authorized							
m. Unobligated balance of Federal funds							

11. INDIRECT EXPENSE — a. TYPE OF RATE (*Place "X" in appropriate box*) [ ] PROVISIONAL [ ] PREDETERMINED [ ] FINAL [X] FIXED

b. RATE	c. BASE	d. TOTAL AMOUNT	e. FEDERAL SHARE

12. REMARKS: *Attach any explanations deemed necessary or information required by Federal sponsoring agency in compliance with governing legislation.*

13. CERTIFICATION: I certify to the best of my knowledge and belief that this report is correct and complete and that all outlays and unliquidated obligations are for the purposes set forth in the award documents.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL: William Penn

DATE REPORT SUBMITTED: 8-14-80

TYPED OR PRINTED NAME AND TITLE: William Penn

TELEPHONE (*Area code, number and extension*)

269-101

* See attached "Final Project Budget"

STANDARD FORM 269 (7-76)
Prescribed by Office of Management and Budget
Cir. No. A-110

SECTION 8

PROJECT BUDGET *

PROJECT BUDGET LINE ITEM / DESCRIPTION	PROJECT COST	FINAL BUDGET	FINAL COST
ADMINISTRATION			
1.1 MPO Secretariat	41,600	41,600	43,000
1.2 Program Monitoring and Management	87,400	87,400	85,000
1.3 Project and Program Review	9,600	9,600	9,000
SUBTOTAL	138,600	138,600	137,000
COMPREHENSIVE TRANSPORTATION PLANNING PROGRAM			
2.1. Surveillance			
1. Urban Transportation Data Requirements	8,000	10,000	11,000
2. Traffic Volume			
3. Highway Accident			
4. Transit Service	60,000	60,000	56,000
5. Transportation Attitudinal Survey	6,400	6,000	6,000
6. Environmental Impact	18,600	17,000	16,000
7. Land-Use and Socio Economic (See Element 2.2.2)			
2.2. Long-Range Element			
1. Long-Range Plan Review	64,400	64,400	65,000
2. Land-Use & Socio Economic Data Maintenance & Forecasting	33,200	33,200	33,000
3. Travel Demand Forecasting	15,400	15,400	16,000
2.3. Transportation System Management Element			
1. Traffic Sign Inventory Management System	20,000	Ø	Ø
2. Bikeway Planning Program	12,000	12,000	14,000
3. Transit Management			
1. Transit Scheduling Management Studies	36,000	46,000	47,000
2. Elderly and Handicapped Needs Studies	84,000	89,000	90,000
3. Para-Transit Program Development	37,000	42,000	43,000
2.4 Transportation Improvement Program	20,000	20,000	21,500
2.5 Prospectus, Annual Report, UPWP, Service Description Manual	46,400	46,400	45,000
2.6. Public Involvement and Information			
1. Public Involvement Effort	28,800	28,800	28,600
2. Public Information Program	19,200	19,200	19,500
SUBTOTAL	509,400	509,400	511,000
SPECIAL AND SUPPORT ACTIVITIES			
3.1. Local Activities			
1. Aviation Master Plan Development Program			
2. Station Area Design and Development Studies	N/A		
3. Technical Assistance and Information Dissemination			
4. Specialized Trip Generation Studies			
5. Energy Conservation Planning Program	16,000	30,000	32,000
3.2. Regional Activities			
1. Transit Impact Study	750,000	736,000	730,000
2. Regional Transportation Communication and Liaison	12,000	12,000	12,600
3. Coordination and Review	16,000	16,000	18,400
4. Policy Development	8,000	8,000	7,000
3.3. Statewide Activities			
1. Waterports Systems			
2. Rail Plan			
SUBTOTAL	802,000	802,000	800,000
TOTAL PROJECT COST	1,450,000	1,450,000	1,448,600

*As Reported on Attached SF 269

BILLING CODE 4910-57-C

Chapter II—Financial Management

II. Financial Management

1. Internal Controls

a. *General.* Recipients are responsible for establishing and maintaining an adequate system of internal controls. These controls should adequately safeguard grant funds and resources, check the accuracy and reliability of the grant accounting and financial data, promote operational efficiency, and encourage adherence to prescribed managerial policies.

b. *Accounting Survey.* Department of Transportation auditors or their designated representatives may visit the recipient shortly after project approval to inspect the recipient's system of internal controls and accounting procedures. Auditors will check for the types of internal and financial control standards located in paragraphs 1c and 1d below (additional information on audits is contained in paragraph 6). Ordinarily, these field visits will be limited to new recipients administering large, complex projects or recipients who have encountered difficulties in administering previous UMTA projects. Soon after completing an inspection, the Office of Inspector General (OIG) issues to the appropriate UMTA program office a report on the results of the field review. The cognizant UMTA office will provide copies of the report to the recipient and will initiate actions necessary to correct reported deficiencies.

c. *Internal Control Standards.* The internal controls comprise a well-documented, organized operating system (policies, structure, division of staff functions, procedures, staff qualifications, etc.) designed to provide the recipient with effective financial and operational control over all aspects of its grant projects. The following are elements of an adequate system of internal control:

(1) The recipient's operating policies should be clearly stated, systematically communicated throughout the organization, conform with applicable laws and external regulations and policies, and promote execution of authorized activities effectively, efficiently, and economically.

(2) An organizational structure should define and assign responsibility for performance of all duties necessary to carry out project functions.

(3) Responsibility for assigned duties and functions of the recipient should be classified according to authorization, performance, recordkeeping, custody of resources, and review, to provide proper internal checks on performance and to prevent unauthorized, fraudulent, or irregular acts.

(4) The performance of all duties and functions of recipient personnel should be properly supervised. All performance should be subject to adequate review under an effective internal audit and management review program: to determine whether performance is effective and efficient; to assure that economical management policies are adhered to, that applicable laws, regulations, and grant conditions are obeyed; that unauthorized, fraudulent, or irregular transactions or activities are prevented, and to determine the fiscal integrity of financial transactions and reports.

(5) Qualifications of officials and other personnel as to education, training, experience, competence, and integrity should be appropriate for the responsibilities, duties, and functions assigned to them.

(6) All grantee personnel should be fully aware of assigned responsibilities and understand the nature and consequence of performance. Each person should be held fully accountable for the honest and efficient discharge of duties and functions including, where applicable, the custody and administration of funds, property, and compliance with grant regulations and legal requirements.

(7) A system of forward planning embracing all phases of the recipient's operation should be developed to determine and justify financial, property, and personnel requirements, and to carry out project operations effectively, efficiently, and economically.

(8) Recipients using Letter of Credit or receiving advances by Treasury check should determine their disbursing patterns and mail time so that cash withdrawals can be timed as closely as possible to actual cash disbursements. Recipients should also ensure that requirements for maintaining minimum cash balances are met (see Chapter III).

(9) An adequate system of authorization, recordkeeping, and transaction coding procedures should be designed by the recipient to insure compliance with applicable laws, regulations, and internal management policies. This system should prevent illegal or unauthorized transactions and provide proper accounting records for the expenditure of grant funds.

(10) An adequate and efficient operating information system should provide prompt, essential, and reliable operating and financial data to those officials responsible for making decisions or reviewing performance.

(11) Effective procedures should be implemented to ensure that needed goods and services are acquired at the lowest possible cost; goods and services paid for are actually received; quality, quantity, and prices are in accordance with applicable contracts or other authorization by grantee officials; and such authorizations are consistent with applicable statutes, regulations, policies, and grant conditions.

(12) All funds, property, and other resources for which grantees are responsible shall be appropriately safeguarded and periodically inventoried to prevent misuse, unwarranted waste, deterioration, destruction, or misappropriation.

d. *Financial Management System.* The recipient should establish and maintain an adequate financial management system. This system should:

(1) Supply accurate, current, and complete disclosures of financial results of each project in accordance with UMTA reporting requirements (see Chapter I, paragraph 4);

(2) Contain records which adequately identify the source and application of funds. These records should include information pertaining to contract awards and authorizations (grant, procurement, and loan), obligations, unobligated balances, assets, liabilities, outlays, costs, and income;

(3) Provide effective control and accountability of all funds, property, and other assets. Recipients should adequately safeguard these assets and assure that they are used solely for authorized project purposes;

(4) Be capable of providing comparisons of actual and budgeted amounts for each project activity; i.e., budget line item; provide financial data necessary for efficient and economic planning, control, measurement, and evaluation of all project activities; and permit preparation of summaries and reports using line items included in the approved budget;

(5) Provide for procedures to determine whether costs are reasonable, allowable, and allocable in accordance with provisions of Federal Management Circular (FMC) 74–4, OMB Circular A–21, Revised, or OMB Circular A–122, as appropriate; and

(6) Maintain accounting records supported by source documentation for each entry.

2. Cost Allocation Plan/Indirect Cost Proposal

a. *Definitions.* Under federally funded grant programs, recipients may incur costs of both a direct and indirect nature. Direct costs are those that can

be identified specifically with a particular project.

These costs may be charged directly to a grant project. Indirect costs are those:

(1) Incurred for a common or joint purpose benefiting more than one cost objective, and

(2) Not readily assignable to the cost objectives specifically benefits, without effort disproportionate to the results achieved.

The term "indirect costs" applies to costs incurred by other offices within the recipient organization in supplying goods, services, and facilities to the recipient. Examples of indirect costs are operation and maintenance of buildings and expenses of department heads and their immediate staff. Principles and standards for determining costs applicable to grants and contracts with State and local governments (instrumentalities thereof and public bodies) are presented in FMC 74–4, OMB Circular A–21, Revised, or OMB Circular A–122, and the appropriate Department of Health and Human Services publications. Appendix 1 of this circular consists of questions and answers regarding cost allocation plans. These questions are excerpted from HHS brochure OASC–10. This brochure also contains sample formats for cost allocation plans.

b. *Types of Plans.* There are two types of cost allocation plans. The first plan covers distribution of costs of support services provided to local government agencies and is referred to as a consolidated local government-wide cost allocation plan. The second plan covers distribution of costs within an individual recipient or contractor agency, including costs of services allocated to it under the *consolidated local government-wide cost allocation plan,* for all work performed by that agency. This second type of plan is commonly referred to as an *indirect cost proposal.* Sample plans are described in Appendix 2.

c. *Preparation of Plan.* A cost allocation plan must be developed annually by local government agencies that intend to seek UMTA reimbursement for indirect costs. The plan is subject to audit by the Federal Government to determine that:

(1) All activities of local government departments have been considered;

(2) Distribution of indirect costs is based on a method(s) reasonably indicative of the amount of services provided,

(3) Services provided are necessary for successful conduct of Federal programs;

(4) Level of costs incurred are reasonable,

(5) Costs for central local government services are charged in conformance with local government-wide cost allocation plan, and

(6) Costs claimed are allowable in accordance with FMC 74–4, OMB Circular A–21, Revised, or OMB Circular A–122;

Plans supporting the distribtion of joint costs incurred by recipient must be retained by them and made available for audit review. Four steps are basic in preparing a cost allocation plan:

(1) Identifying costs of each type of service to be claimed;

(2) Determining the method for allocating each type of service cost of users;

(3) Mathematically allocating these costs to users, and

(4) Summarizing amounts allocating if using a single, formal, comprehensive local government-wide plan.

d. *General Requirements.* Cost allocation plans must be submitted to the "cognizant" or "lead" Federal agency for review and approval. Cognizance is generally assigned to the Federal agency having the greatest dollar involvement with a grantee orgnaization within a given State or locality. If UMTA is the cognizant agency, cost allocation plans should be sent to the appropriate UMTA regional office. Plans will be forwarded by the regional office to the Office of Inspector General for review and comment. A cost allocation plan is required to support the distribution of administrative costs related to the grant program. Such costs could be either direct or indirect. All costs in the plan must be supported by formal accounting records to substantiate the propriety of eventual charges. The allocation plan of the recipient should cover all applicable costs. It should also cover costs allocated under plans of other agencies or organizational units which are to be included in the costs of other Federally sponsored programs. To the extent feasible, cost allocation plans of all agencies rendering services to the recipient should be presented in a single document. Whether or nor UMTA is the cognizant agency, an approved cost allocation must accompany the grant application if the recipient intends to charge indirect costs to the project. The cost allocation plan should contain but need not be limited to the following:

(1) The nature and extent of services provided and their relevance to Federally sponsored programs;

(2) Items of expense to be included;

(3) Methods to be used in distributing cost; and

(4) Appropriate civil rights data. (Format for MBE programs is described in UMTA C 1165.1, Attachment C. A similar format should be used for EEO cost allocation plans.)

Costs covered by the plan may be charged to the project upon approval of the plan. A revised cost allocation plan must be submitted to the lead agency when the estimated cost is expected to exceed the previously approved plan by more than 10 percent.

e. *Specific Requirements.* The cost allocation plan should contain, but not necessarily be limited to, the following:

(1) Individual position or group classifications for direct staff services,

(2) The annual salary rate or salary range for each position classification with estimated average salary charged to the project for each rate;

(3) The estimated period services as provided by each position classification, estimated percentage of time each position will devote to the project, and the estimated cost of each;

(4) The nature and extent of services provided by each position classification;

(5) Details of other direct charges including the nature of charges and estimated costs; and

(6) All categories of indirect costs, proposed methods, and the basis for allocating them to the project, total indirect costs, and the estimated amount to be charged to the project.

It is important to note that although personnel services should be estimated on a percentage-of-time basis for planning purposes, only *actual time charged* to the project as supported by adequate time sheets will be eligible for reimbursement.

f. *Review of a Plan.* UMTA, when the cognizant Federal agency, will be responsible for review and acceptance of plans required under this circular. Recipients' allocation plans must be approved by UMTA before costs covered by the plan can be requisitioned under the project.

Once a review has been conducted by UMTA, it is expected that Federal auditors will be able to reach an agreement with the local government agency on any findings. If a local government disagrees with the auditor's findings, it is then the responsibility of UMTA to act as the negotiating agency for the Federal Government, and to resolve differences in coordination with other Federal agencies.

Whenever UMTA or any lead agency gives prior approval to a government-wide cost allocation plan or indirect cost proposal, such approval is formalized, distributed to all interested Federal agencies, and applicable to all

Federal grants in accordance with FMC 74–4.

3. Cost Standards

a. *General.* Recipients must follow the guidelines contained in FMC 74–4 "Cost Principles Applicable to Grants and Contracts with State and Local Governments", OMB Circular A–21, Revised "Cost Principles for Educational Institutions", or A–122, "Cost Principles for Nonprofit Organizations" in determining whether project costs are allowable or unallowable. Project costs should specifically relate to the purpose of the grant agreement and the latest approved project budget. Care should be exercised when incurring costs to ensure that all expenditures meet the criteria of eligible costs. Failure to exercise proper discretion may result in expenditures for which use of project funds cannot be authorized.

b. *Allowable Costs.* The following section briefly outlines the criteria which enables project costs to be classified as allowable. More specific guidelines can be found in FMC 74–4, A–21, or A–122, as needed. To be allowable under a grant program, costs must meet the following general criteria:

(1) Be necessary and reasonable for proper and efficient administration of the grant program, be allocable under these principles, and, except as specifically provided in this circular, not be a general expense required to carry out the overall responsibilities of State or local governments;

(2) Be authorized or not prohibited under State or local laws or regulations;

(3) Conform to any limitation or exclusions set forth in these principles, Federal laws, or other governing limitations as to types or amounts of cost items;

(4) Be consistent with policies, regulations, and procedures that apply uniformly to both federally assisted and other activities of the unit of government of which recipient is a part;

(5) Be treated consistently through application of generally accepted accounting principles appropriate to the circumstances;

(6) Not be allocable to or included as a cost of any other Federally financed program in either current or prior periods; and

(7) Be net of all applicable credits.

For information on specific cost standards, see Appendix 3 of this circular.

4. Program Income

a. *General.* Program income is the gross income earned by the recipient from project activities. These earnings *exclude interest* earned on advances (see paragraph III–1) and may include income from service fees, sale of commodities, usage or rental fees, and royalties on patents and copyrights. All project income earned during the grant period may be retained by the recipient, and, according to the grant agreement, is generally deducted from the total project costs for the purpose of determining the net costs on which the Federal share of costs will be based.

b. *Supporting Documentation.* Recipients must maintain records to permit full accounting of all program income. This includes a record of the source, purpose, and amount of all program income as well as a duplicate validated deposit slip for each receipt and currently posted accounting records.

5. Financial Reporting Requirements

a. *General.* Except for Sections 8 and 175 grants, UMTA utilizes two standard financial reporting forms, the Financial Status Report (SF 269) and the Report of Federal Cash Transactions (SF 272), to monitor project funds. This is required by the Office of Management and Budget and is specified in Attachment H, OMB Circulars A–102 and A–110. Note that *payment can be withheld for failure to submit either financial or narrative reports in a timely manner.*

b. *Disclosure Criteria.* The following criteria are basic to full disclosure in financial reports by recipients:

(1) All essential financial facts relating to the scope and purpose of each financial report and applicable reporting period should be completely and clearly displayed in the reports.

(2) Reported financial data should be accurate and timely. The requirement for accuracy does not rule out inclusion of reasonable estimates when precise measurement is impractical, uneconomical, unnecessary, or conducive to delay.

(3) Financial reports should be based on the required supporting documentation maintained under an adequate accounting system that produces information which objectively discloses financial aspects of events or transactions.

(4) Financial data reported should be derived from accounts that are maintained on a consistent, periodic basis, material changes in accounting policies or methods and their effect must be clearly explained.

(5) Reporting terminology used in financial reports to UMTA should be consistent with receipt and expense classifications included in the latest approved project budget.

c. *Financial Status Report (SF 269).*

(1) For all but Section 8 and Section 175 grants, recipients must submit an original and one copy of the SF 269 to report the status of funds on all nonconstruction and construction projects when the recipient receives payment through the Letter of Credit or by reimbursement. Financial Status Report forms can be obtained from the cognizant UMTA regional office. The SF 269 should be prepared on an accrual basis.

(2) A Financial Status Report bearing an original signature should be submitted quarterly, no later than 30 days after the end of each calendar quarter, 90 days after the end of each year, to the appropriate UMTA office. Reports are required every quarter until the project has been completed. A narrative progress report should accompany the SF 269 so that project expenditures and programs can be analyzed concurrently. A completed sample copy of the SF 269 is included as Figure II–1. The report should be prepared by budget line item code, except for Section 5 operating projects, which should be reported by budget line item since not all line items have codes. Instructions for completing the form are provided on the reverse side of the form.

d. *Report of Federal Cash Transactions (SF 272).*

(1) Recipients must complete and submit this report if they receive funds in advance by direct Treasury check. *Grantees that are paid by UMTA Letters of Credit do not use this form.* Instructions for completing the SF 272 are found on the reverse side of the form. Note that recipients should estimate in the "remarks" block, the amount of *Federal* funds that will be required during each month of the ensuing quarter for each project involved. This information is needed to plan Federal cash outlays. Copies of the SF 272 can be obtained from the cognizant UMTA regional office.

(2) The recipient submits the SF 272 (one copy with original signature) to the appropriate UMTA regional or headquarters office 15 working days following the end of each quarter. Recipients requesting advances under $10,000 per month may be waived from this requirement by the UMTA program office if the program manager determines that the information provided on the SF 269 is sufficient to monitor the project. Recipients receiving over $1 million per year may be required to submit this report monthly. The UMTA program manager determines whether this report will be submitted. A sample copy of the SF 272 is included as Figure II–2.

6. *Audit.*

a. *Introduction.* OMB Circular A–102, Attachment P establishes audit

requirements for State and local governments that receive Federal Assistance. It provides for independent audits of financial operations. UMTA grant recipients will be audited on an organization-wide basis rather than on a grant-by-grant basis. The overall purpose of the audits is to determine whether:

(1) Financial operations are conducted properly,

(2) The financial statements are presented fairly;

(3) The organization has complied with laws and regulations affecting the expenditure of federal funds;

(4) Internal procedures have been established to meet the objectives of federally assisted programs; and

(5) Financial reports to the Federal Government contain accurate and reliable information.

b. *Audit Contents.* Organization-wide audits will include, as a minimum, an examination of the system of internal control (see paragraph II–1 above), the systems established to ensure compliance with laws and regulations affecting the expenditure of Federal funds, financial transactions and accounts, and the financial statements and reports of recipient organizations. The audit will be used to determine whether:

(1) There is effective control over and proper accounting for revenues, expenditures, assets, and liabilities;

(2) The financial statements are presented fairly in accordance with generally accepted accounting principles;

(3) The Federal financial reports (including Financial Status Reports, Cash Reports, and claims for advances and reimbursements) contain accurate and reliable financial data, and are presented in accordance with the terms of applicable agreements and Attachment H of OMB Circulars A–102 or A–110;

(4) Federal funds are being expended in accordance with the terms of applicable agreements and those provisions of Federal law or regulations that could have a material effect on the financial statements or on the awards tested.

c. *Audit Frequency.* Audits will usually be performed annually, but not less frequently than every two years. While Attachment P does not limit UMTA's authority to audit recipients, if independent audits arranged by recipients meet Attachment P requirements, UMTA will rely on them. Any additional audit work will then build on the audit work already done.

d. *Audit Standards.* Audits shall be made in accordance with the GAO "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions," the "Guidelines for Financial and Compliance Audits of Federally Assisted Programs," any OMB-approved compliance supplements, and generally accepted auditing standards established by the American Institute of Certified Public Accountants.

e. *Testing Cost Eligibility.* A representative sample of costs shall be tested to determine whether they:

(1) Are necessary and reasonable for the proper administration of the program;

(2) Conform to any limitations or exclusions in the award;

(3) Were given consistent accounting treatment and applied uniformly to both federally assisted and other activities of the recipient;

(4) Were net of applicable credits;

(5) Did not include costs properly chargeable to other federally assisted programs;

(6) Were properly recorded (i.e., correct amount, date) and supported by source documentation;

(7) Were approved in advance, if subject to prior approval in accordance with FMC 74–4, A–21, or A–122;

(8) Were incurred in accordance with competitive purchasing procedures, if covered by Attachment O of OMB Circular A–102; and

(9) Were allocated equitably to benefiting activities, including non-Federal activities.

f. *Irregularities.* If auditors become aware of irregularities in the recipient organization, the auditor must immediately notify both UMTA and recipient management officials. Irregularities include falsification of records, misappropriation of funds, and conflicts of interest.

g. *Audit Report Contents.* Audit reports shall include:

(1) Financial statements, including footnotes, of the recipient organization.

(2) The auditors' comments on the financial statements, which should:

(a) Identify the statements examined, and the period covered.

(b) Identify the various programs under which the organization received Federal funds, and the amount of the awards received.

(c) State that the audit was done in accordance with the standards in paragraph d; and

(d) Express an opinion as to whether the financial statements are fairly presented in accordance with generally accepted accounting prinicples. If an unqualified opinion cannot be expressed, state the nature of the qualification.

(3) The auditors' comments on compliance and internal control, which should:

(a) Include comments on weaknesses in and noncompliance with the systems of internal control, separately identifying material weaknesses,

(b) Identify the nature and impact of any noted instances of noncompliance with the terms of agreements and those provisions of Federal law or regulations that could have a material effect on the financial statements and reports, and

(c) Contain an expression of positive assurance with respect to compliance with requirements for tested items, and negative assurance for untested items.

(4) Comments on the accuracy and completeness of financial reports and claims for advances or reimbursement of Federal Agencies.

(5) Comments on corrective action taken or planned by the recipient.

h. *Retention of Work Papers and Reports.* Work papers and reports shall be retained for a minimum of three years from the date of the audit report unless the auditor is notified in writing by the cognizant agency of the need to extend the retention period. The audit work papers shall be made available upon request to UMTA and the General Accounting Office or its designees.

i. *UMTA Responsibilities.* UMTA is responsible to:

(1) Obtain or make quality assessment reviews of the work of non-Federal audit organizations and provide the results to other interested audit agencies. (If a non-Federal audit organization is responsible for audits of recipients that have different cognizant audit agencies, a single quality assessment review should be arranged.)

(2) Assure that all audit reports of recipients that affect federally assisted programs are received, reviewed, and distributed to appropriate Federal audit officials. These officials will be responsible for distributing audit reports to their program officials.

(3) Whenever significant inadequacies in an audit are disclosed, the recipient organization will be advised and the auditor will be called upon to take corrective action. If corrective action is not taken, UMTA shall notify the recipient organization and other Federal awarding agencies of the facts and its recommendations. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies.

(4) Assure that satisfactory audit coverage is provided in a timely manner and in accordance with the provisions of OMB Circular A–102, Attachment P.

(5) Provide technical advice and act as a liaison between Federal agencies, independent auditors, and recipient organizations.

(6) Maintain a follow-up system on audit findings and investigative matters to assure that audit findings are received.

(7) Inform other affected audit agencies of irregularities uncovered. The audit agencies, in turn, shall inform all appropriate officials in their agencies. State or local government law enforcement and prosecuting authorities shall also be informed of irregularities within their jurisdiction.

j. *Third Party Contract Audits.*

(1) *Responsibility for Audit.* In monitoring third party contracts to ensure that the project is carried out in a sound, economical, and efficient manner, certain specific financial reviews should be made by professionals either within the recipient organization but independent of the actual project office or by outside auditors. The need for and nature of these reviews depends on the type and amount of third party contract(s) involved.

(2) *Procedures for Audit.*

(a) *Outside Audit Services.* Many UMTA recipients assign proposal evaluation and contract monitoring duties to their own auditors or financial management personnel. However, some recipients do not employ individuals qualified to make these required reviews internally and therefore, must obtain these services elsewhere. Two ready sources for audit services are qualified independent accounting firms and contract auditors from agencies and departments of the Federal Government. For example, the Defense Contract Audit Agency (DCAA) maintains a continuing audit function at certain contractor locations which receive Department of Defense contracts. DCAA also accommodates casual audit requests from non-Defense agencies for audits at other locations where the overall Government interest and effectiveness so dictate.

(b) *Costs.* costs of third party audit surveillance and proposal evaluation are eligible for reimbursement by UMTA so long as they are included in the project budget. UMTA recommends that recipients seek guidance from the cognizant Federal auditor in regard to audit contract agreements.

(c) *Use of Outside Audit Services.* Recipient requests to obtain outside audit sources to review and monitor third party contracts should be forwarded to the cognizant Federal auditor along with a copy of the proposed contract-agreement and a detailed description of the work to be performed. The Federal auditor reviews requests for outside assistance in light of the type of contract proposed and amount of project funds involved. Furthermore, the Federal auditor determines whether a Federal contract audit organization could be used instead of an independent public accountant (IPA).

(d) *Use of Independent Accountants.* When an independent accountant is used, recipients apply standard procedures for third party contracts. A complete package must be submitted to appropriate UMTA regional offices showing proposed audit coverage, billing rates by labor classification, and the proposed form of contract between the recipient and the IPA.

(3) *Payment for Outside Audit Services.*

(a) *General.* If another Federal agency is to be used, UMTA makes the necessary arrangements for conducting reviews. UMTA pays the total cost of the audit for recipients and records this payment in its project accounting records by assigning a unique requisition number and reducing the undisbursed grant balance by the total audit cost.

(b) *Reimbursement Procedures.* UMTA sends an "Audit Payment Notification and Certification" letter to inform recipients of the amount of cost for audit services. Because UMTA pays the total cost of this audit, *under the requisition method,* the letter instructs recipients to include the total amount of audit costs on the next requisition for payment as a cost incurred and as a Federal disbursement.

A copy of the letter signed by the recipient certifying that total audit costs have been recorded as a Federal disbursement in the recipient's records must accompany the next requisition submitted to UMTA. *Under the Letter of Credit method,* recipients must certify that total audit costs have been recorded both as a Federal disbursement and as a project cost for which the recipient did not make a disbursement. Recipients must then disburse their own funds to bring their portion of project support to the level set forth in the grant contract. Recipients must not include the amount in a request for Letter of Credit payment (SF 183) since UMTA is paying for the audit. The amount is shown as a disbursement (Federal share only) and advance received (100%) on the SF 183.

BILLING CODE 4910-57-M

FINANCIAL STATUS REPORT

(Follow instructions on the back)

1. FEDERAL AGENCY AND ORGANIZATIONAL ELEMENT TO WHICH REPORT IS SUBMITTED	2. FEDERAL GRANT OR OTHER IDENTIFYING NUMBER	OMB Approved No. 80-R0180	PAGE	OF	PAGES
UMTA	NY-03-0315		1	1	

3. RECIPIENT ORGANIZATION (Name and complete address, including ZIP code)	4. EMPLOYER IDENTIFICATION NUMBER	5. RECIPIENT ACCOUNT NUMBER OR IDENTIFYING NUMBER	6. FINAL REPORT	7. BASIS
Tonawanda Transit Authority 367 Tremont Street Tonawanda, New York 14120			☐ YES ☒ NO	☐ CASH ☒ ACCRUAL

8. PROJECT/GRANT PERIOD (See instructions)		9. PERIOD COVERED BY THIS REPORT	
FROM (Month, day, year)	TO (Month, day, year)	FROM (Month, day, year)	TO (Month, day, year)
1-1-78	9-30-80	10-1-78	12-31-78

10. STATUS OF FUNDS

PROGRAMS/FUNCTIONS/ACTIVITIES ▶	(a) 10.10.10	(b) 10.10.15	(c) 10.23.16	(d) 10.26.17	(e) 10.28.15	(f)	TOTAL (g)
a. Net outlays previously reported	$ 5,000	$ 6,000	$ 14,000	$ 3,000	$ 8,000	$	$ 36,000
b. Total outlays this report period	1,000	2,000	2,000	2,000	2,000		9,000
c. *Less:* Program income credits	N/A	N/A	N/A	N/A	N/A		-0-
d. Net outlays this report period (*Line b minus line c*)	1,000	2,000	2,000	2,000	2,000		9,000
e. Net outlays to date (*Line a plus line d*)	6,000	8,000	16,000	5,000	10,000		45,000
f. *Less:* Non-Federal share of outlays	1,000	1,000	2,000	1,000	2,000		7,000
g. Total Federal share of outlays (*Line e minus line f*)	5,000	7,000	14,000	4,000	8,000		38,000
h. Total unliquidated obligations	5,000	7,000	10,000	6,000	3,000		31,000
i. *Less:* Non-Federal share of unliquidated obligations shown on line h	1,000	2,000	2,000	1,000	500		6,500
j. Federal share of unliquidated obligations	4,000	5,000	8,000	5,000	2,500		24,500
k. Total Federal share of outlays and unliquidated obligations	9,000	12,000	22,000	9,000	10,500		62,500
l. Total cumulative amount of Federal funds authorized	12,000	20,000	24,000	11,000	13,000		80,000
m. Unobligated balance of Federal funds	3,000	8,000	2,000	2,000	2,500		17,500

11. INDIRECT EXPENSE	a. TYPE OF RATE (*Place "X" in appropriate box*) ☐ PROVISIONAL ☐ PREDETERMINED ☐ FINAL ☐ FIXED			
	b. RATE	c. BASE	d. TOTAL AMOUNT	e. FEDERAL SHARE

12. REMARKS: *Attach any explanations deemed necessary or information required by Federal sponsoring agency in compliance with governing legislation.*

13. CERTIFICATION

I certify to the best of my knowledge and belief that this report is correct and complete and that all outlays and unliquidated obligations are for the purposes set forth in the award documents.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	DATE REPORT SUBMITTED
	1-5-79
TYPED OR PRINTED NAME AND TITLE	TELEPHONE (*Area code, number and extension*)
James W. Bradle Assist. Gen. Manager	(703) 472-5800

205 101

SAMPLE

STANDARD FORM 269 (7-76)
Prescribed by Office of Management and Budget
Cir. No. A-110

INSTRUCTIONS

Please type or print legibly. Items 1, 2, 3, 6, 7, 9, 10d, 10e, 10g, 10i, 10l, 11a, and 12 are self-explanatory, specific instructions for other items are as follows:

Item	Entry
4	Enter the employer identification number assigned by the U.S. Internal Revenue Service or FICE (institution) code, if required by the Federal sponsoring agency.
5	This space is reserved for an account number or other identifying numbers that may be assigned by the recipient.
8	Enter the month, day, and year of the beginning and ending of this project period. For formula grants that are not awarded on a project basis, show the grant period.
10	The purpose of vertical columns (a) through (f) is to provide financial data for each program, function, and activity in the budget as approved by the Federal sponsoring agency. If additional columns are needed, use as many additional forms as needed and indicate page number in space provided in upper right; however, the totals of all programs, functions or activities should be shown in column (g) of the first page. For agreements pertaining to several Catalog of Federal Domestic Assistance programs that do not require a further functional or activity classification breakdown, enter under columns (a) through (f) the title of the program. For grants or other assistance agreements containing multiple programs where one or more programs require a further breakdown by function or activity, use a separate form for each program showing the applicable functions or activities in the separate columns. For grants or other assistance agreements containing several functions or activities which are funded from several programs, prepare a separate form for each activity or function when requested by the Federal sponsoring agency.
10a	Enter the net outlay. This amount should be the same as the amount reported in Line 10e of the last report. If there has been an adjustment to the amount shown previously, please attach explanation. Show zero if this is the initial report.
10b	Enter the total gross program outlays (less rebates, refunds, and other discounts) for this report period, excluding disbursements of cash realized as program income. For reports that are prepared on a cash basis, outlays are the sum of actual cash disbursements for goods and services, the amount of indirect expense charged, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an *accrued* expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received and for services performed by employees, contractors, subgrantees, and other payees.
10c	Enter the amount of all program income realized in this period that is required by the terms and conditions of the Federal award to be deducted from total project costs. For reports prepared on a cash basis, enter the amount of cash income received during the reporting period. For reports prepared on an accrual basis, enter the amount of income earned since the beginning of the reporting period. When the terms or conditions allow program income to be added to the total award, explain in remarks, the source, amount and disposition of the income.
10f	Enter amount pertaining to the non-Federal share of program outlays included in the amount on line e.
10h	Enter total amount of unliquidated obligations for this project or program, including unliquidated obligations to subgrantees and contractors. Unliquidated obligations are: Cash basis—obligations incurred but not paid; Accrued expenditure basis—obligations incurred but for which an outlay has not been recorded. Do not include any amounts that have been included on lines a through g. On the final report, line h should have a zero balance.
10j	Enter the Federal share of unliquidated obligations shown on line h. The amount shown on this line should be the difference between the amounts on lines h and i.
10k	Enter the sum of the amounts shown on lines g and j. If the report is final the report should not contain any unliquidated obligations.
10m	Enter the unobligated balance of Federal funds. This amount should be the difference between lines k and l.
11b	Enter rate in effect during the reporting period.
11c	Enter amount of the base to which the rate was applied.
11d	Enter total amount of indirect cost charged during the report period.
11e	Enter amount of the Federal share charged during the report period. If more than one rate was applied during the project period, include a separate schedule showing bases against which the indirect cost rates were applied, the respective indirect rates the month, day, and year the indirect rates were in effect, amounts of indirect expense charged to the project, and the Federal share of indirect expense charged to the project to date.

FEDERAL CASH TRANSACTIONS REPORT

(See instructions on the back. If report is for more than one grant or assistance agreement, attach completed Standard Form 272-A.)

Approved by Office of Management and Budget, No. 80-R0182

1. Federal sponsoring agency and organizational element to which this report is submitted: UMTA

2. RECIPIENT ORGANIZATION

Name: Tonawanda Transit Authority

Number and Street: 367 Tremont Street

City, State and ZIP Code: Tonawanda, New York 14120

SAMPLE

3. FEDERAL EMPLOYER IDENTIFICATION NO.

4. Federal grant or other identification number: NY-03-0315

5. Recipient's account number or identifying number:

6. Letter of credit number: N/A

7. Last payment voucher number:

Give total number for this period

8. Payment Vouchers credited to your account:

9. Treasury checks received (whether or not deposited): 4

10. PERIOD COVERED BY THIS REPORT

FROM (month, day, year): 10-1-78

TO (month, day year): 12-31-78

11. STATUS OF FEDERAL CASH *(See specific instructions on the back)*		
	a. Cash on hand beginning of reporting period	$ 1,155
	b. Letter of credit withdrawals	N/A
	c. Treasury check payments	40,160
	d. Total receipts (*Sum of lines b and c*)	40,160
	e. Total cash available (*Sum of lines a and d*)	41,315
	f. Gross disbursements	40,852
	g. Federal share of program income	642
	h. Net disbursements (*Line f minus line g*)	40,210
	i. Adjustments of prior periods	-0-
	j. Cash on hand end of period	$ 1,105

12. THE AMOUNT SHOWN ON LINE 11J, ABOVE, REPRESENTS CASH REQUIREMENTS FOR THE ENSUING *Days*	13. OTHER INFORMATION	
	a. Interest income	$ -0-
	b. Advances to subgrantees or subcontractors	$ -0-

14. REMARKS (*Attach additional sheets of plain paper, if more space is required*)

15. CERTIFICATION

I certify to the best of my knowledge and belief that this report is true in all respects and that all disbursements have been made for the purpose and conditions of the grant or agreement

AUTHORIZED CERTIFYING OFFICIAL

SIGNATURE: John L. Wins

DATE REPORT SUBMITTED: 1-5-79

TYPED OR PRINTED NAME AND TITLE: John L. Wins Assistant General Manager

TELEPHONE: (Area Code) 703 (Number) 472-1345 (Extension) 5800

THIS SPACE FOR AGENCY USE

272-101

STANDARD FORM 272 (7-76)
Prescribed by Office of Management and Budget
Cir. No. A-110

INSTRUCTIONS

Please type or print legibly. Items 1, 2, 8, 9, 10, 11d, 11e, 11h, and 15 are self explanatory, specific instructions for other items are as follows:

Item	*Entry*
3	Enter employer identification number assigned by the U.S. Internal Revenue Service or the FICE (institution) code. If this report covers more than one grant or other agreement, leave items 4 and 5 blank and provide the information on Standard Form 272–A, Report of Federal Cash Transactions—Continued; otherwise;
4	Enter Federal grant number, agreement number, or other identifying numbers if requested by sponsoring agency.
5	This space reserved for an account number or other identifying number that may be assigned by the recipient.
6	Enter the letter of credit number that applies to this report. If all advances were made by Treasury check, enter "NA" for not applicable and leave items 7 and 8 blank.
7	Enter the voucher number of the last letter-of-credit payment voucher (Form TUS 5401) that was credited to your account.
11a	Enter the total amount of Federal cash on hand at the beginning of the reporting period including all of the Federal funds on deposit, imprest funds, and undeposited Treasury checks.
11b	Enter total amount of Federal funds received through payment vouchers (Form TUS 5401) that were credited to your account during the reporting period.
11c	Enter the total amount of all Federal funds received during the reporting period through Treasury checks, whether or not deposited.
11f	Enter the total Federal cash disbursements, made during the reporting period, including cash received as program income. Disbursements as used here also include the amount of advances and payments less refunds to subgrantees or contractors, the gross amount of direct salaries and wages, including the employee's share of benefits if treated as a direct cost, interdepartmental charges for supplies and services, and the amount to which the recipient is entitled for indirect costs.
11g	Enter the Federal share of program income that was required to be used on the project or program by the terms of the grant or agreement.
11i	Enter the amount of all adjustments pertaining to prior periods affecting the ending balance that have not been included in any lines above. Identify each grant or agreement for which adjustment was made, and enter an explanation for each adjustment under "Remarks." Use plain sheets of paper if additional space is required.
11j	Enter the total amount of Federal cash on hand at the end of the reporting period. This amount should include all funds on deposit, imprest funds, and undeposited funds (line e, less line h, plus or minus line i).
12	Enter the estimated number of days until the cash on hand, shown on line 11j, will be expended. If more than three days cash reqirements are on hand, provide an explanation under "Remarks" as to why the drawdown was made prematurely, or other reasons for the excess cash. The requirement for the explanation does not apply to prescheduled or automatic advances.
13a	Enter the amount of interest earned on advances of Federal funds but not remitted to the Federal agency. If this includes any amount earned and not remitted to the Federal sponsoring agency for over 60 days, explain under "Remarks." Do not report interest earned on advances to States.
13b	Enter amount of advance to secondary recipients included in item 11h.
14	In addition to providing explanations as required above, give additional explanation deemed necessary by the recipient and for information required by the Federal sponsoring agency in compliance with governing legislation. Use plain sheets of paper if additional space is required.

FEDERAL CASH TRANSACTIONS REPORT
CONTINUATION

(This form is completed and attached to Standard Form 272 only when reporting more than one grant or assistance agreement.)

Approved by Office of Management and Budget No. 80-R0182

1. FEDERAL SPONSORING AGENCY AND ORGANIZATIONAL ELEMENT TO WHICH THIS REPORT IS SUBMITTED

2. RECIPIENT ORGANIZATION *(Give name only as shown in item 2, SF 272)*

3. PERIOD COVERED BY THIS REPORT *(As shown on SF 272)*

FROM *(month, day, year)* TO *(Month, day, year)*

4. List information below for each grant or other agreement covered by this report. Use additional forms if more space is required.

FEDERAL GRANT OR OTHER IDENTIFICATION NUMBER *(Show a subdivision by other identifying numbers if required by the Federal Sponsoring Agency)*	RECIPIENT ACCOUNT NUMBER OR OTHER IDENTIFYING NUMBER	FEDERAL SHARE OF NET DISBURSEMENTS	
		NET DISBURSEMENTS *(Gross disbursements less program income received)* FOR REPORTING PERIOD	CUMULATIVE NET DISBURSEMENTS
(a)	(b)	(c)	(d)
		$	$
5. TOTALS *(Should correspond with amounts shown on SF 272 as follows: column (c) the same as line 11h; column (d) the sum of lines 11h and 11i of this SF 272 and cumulative disbursements shown on last report. Attach explanation of any differences.)*		$	$

272-201

STANDARD FORM 272-A (9-76)
Prescribed by Office of Management and Budget
CIR. NO. A-110

BILLING CODE 4910-57-C

Chapter III—Payment Procedures

III. Payment Procedures

1. General

a. *Payment Methods.* UMTA uses three methods in making cash payments to grantees:

(1) Letter of Credit (LOC).

(2) Advance by Treasury check.

(3) Reimbursement by Treasury check.

Under the first two methods, UMTA provides cash advances to grantees before each outlays are actually made. Under the third method, UMTA reimburses grantees for work already performed and financed with their own working capital.

The Department of the Treasury prescribes regulations governing advances (payments) to recipients for financing operations under Federal grant and other programs. These regulations require that cash advances to a recipient must be limited to the minimum amounts needed and must be timed so as to be in accord only with the actual, immediate cash requirements of the recipient in carrying out the approved project. The timing and amount of cash advances must be as close as administratively feasible to the actual disbursements by the recipient for direct project costs and the proportionate share of allowable indirect costs.

b. *Restrictions.* No UMTA grant program may:

(1) Require physical segregation of cash depositories for Federal grant funds which are provided to a recipient; or

(2) Establish any eligibility requirements for cash depositories in which Federal grant funds are deposited by recipients, with the exception of the following cases:

(a) Any monies advanced to a recipient which are subject to the control or regulation of the United States or any of its officers, agents, or employees (public funds as defined in Treasury Circular No. 176, as amended) must be deposited in a bank with Federal Deposit Insurance Corporation (FDIC) insurance coverage and the balance exceeding the FDIC must be collaterally secured.

(b) Consistent with the national goal of expanding the opportunities for minority business enterprises, recipients and subgrantees shall be encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Office of Minority Business Enterprise, Department of Commerce, Washington, D.C. 20230.

c. *Interest Income.* Under the Department of Treasury regulations, recipients are not permitted to retain Federal cash in large amounts for long periods of time. UMTA requires recipients to remit all income earned on advances of Federal funds, except interest earned on advances to States or instrumentalities of a State as provided by the Intergovernmental Cooperation Act of 1968 (Pub. L. 90–577).

2. Letter of Credit Payment Method (LOC).

a. *Objectives.*

(1) To provide funds to a recipient organization (grantee) promptly in an amount to meet the immediate cash disbursement need; and

(2) To preclude the withdrawal of funds from the U.S. Treasury any sooner than absolutely necessary to meet the disbursements of the grantee or the subgrantees/third party contractors.

b. *Policy.*

(1) A recipient organization is required to limit and time withdrawals under the LOC to minimum amounts needed to meet the actual, *immediate* cash disbursement requirements in carrying out the approved grant. The timing and amount of withdrawls must be as close as is administratively feasible to the actual disbursements made by the recipient organization for the Federal share of direct and allowable indirect grant costs. The recipient organization is authorized to make a withdrawal only on a *"cash basis"*, which is the amount being paid out for bills and invoices that have been received and are due for payment, and not on an "accrued expenditure" basis—the receipt of goods or services for which payment may not yet be due.

(2) Cash payments made by the recipient to secondary recipients must conform to the same standards of timing and amount as apply to payments by UMTA to recipients, including the furnishing of reports of cash disbursements and balances.

(3) Primary recipient organizations must develop procedures whereby secondary recipient organizations can obtain funds from the primary recipient organization as needed for disbursement.

(4) Recipients must use LOC funding method on all projects when the following three conditions exist:

(a) There is or will be a continuing relationship between a recipient and UMTA for at least a 12-month period and the total amount of advances to be received within that period from UMTA is at least $120,000.

(b) The recipient has established or demonstrated to UMTA the willingness and ability to establish procedures that will minimize the time elapsing between the transfer of funds and their disbursement by the recipient, *and*

(c) The grantee's financial management system meets the standards for fund control and accountability prescribed in Chapter II of this circular.

c. *Procedures to Apply for Letter of Credit.* Following is a brief outline of the LOC procedures under the U.S. Treasury Regional Disbursing Office (RDO) System. Additional information is available in Treasury Circular No. 1075.

(1) The cognizant headquarters or regional office, in concert with the Office of Inspector General, makes a determination that a recipient organization should be funded through the LOC technique and sends the recipient organization Standard Form 1194, Authorized Signature Card for Payment Voucher on Letter of Credit (see Figures III–1 and III–2).

(2) The recipient organization completes and returns three original SFs 1194, including a Signatory Authorization and Certification, and the Designation of Depository, if desired, to the appropriate regional office.

(3) UMTA reviews the completed SF 1194 and, when approved, forwards the original to the appropriate RDO.

(4) UMTA prepares SF 1193A, Letter or Credit, in duplicate. The original is transmitted to the appropriate RDO and the duplicate is forwarded to the recipient organization.

(5) Upon approval of the LOC, UMTA forwards a letter to the grantee specifying drawdowns allowed by project number.

(6) UMTA furnishes the recipient organization a supply of SF 183s, Request for Payment on Letter of Credit and Status of Funds Report (Contact the appropriate regional or headquarters program office).

(7) Following the effective date of the LOC, the recipient organization executes and submits SF 183 to the appropriate RDO in order to receive grant funds to meet immediate cash disbursement needs and forwards a copy to the appropriate UMTA office.

(8) The RDO mails a Treasury check directly to the recipient organization or to the depository designated by the recipient organization for credit to its account.

(9) The Request for Payment on LOC ordinarily must be drawn:

(a) not more frequently than once daily; and

(b) in an amount no less than $5,000 but no more than $5,000,000, unless so stated on the LOC.

(10) In the event a recipient organization receiving funds by a LOC demonstrates an unwillingness or inability to establish procedures to minimize the time elapsing between the withdrawal of funds under the LOC and the disbursement of such funds, UMTA may cancel the LOC to the extent of the undisbursed balance not obligated in good faith in execution of the Federal project as authorized, and require the recipient organization to finance its operations with its own working capital.

(11) While UMTA encourages the issuance of consolidated LOCs by grantee rather than by individual grant, this may not always be administratively feasible. This may occur when a recipient has grants administered by both regional and headquarters offices. The decision as to the number of LOCs issued will be made by the UMTA program offices involved.

d. *Recipient Organization Requirements.*

(1) *Authorized Signature Cards.* SF 1194, Authorized Signature Card for Payment Vouchers on Letter of Credit, must contain the signature of the individuals authorized by the recipient organization to sign SF 183's. The number of individuals so authorized should be between two and six. The recipient organization must submit three original Standard Forms 1194 to the appropriate UMTA office. An illustration and instructions for completing SF 1194 are shown in Figure III–1.

The RDO accepts only the signatures of persons named on the current signature card on file. A recipient organization must, therefore, immediately submit to the appropriate regional office new signature cards whenever there is an addition or deletion in the persons authorized to sign SF 183s. A superseding signature card is not required for any change in the title or position of a person so authorized if the person's authority to sign Standard Form 183 remains unchanged.

(2) *Designation of Depositor.* U.S. Treasury checks may be mailed directly to a depository designated and authorized by the recipient for credit to the recipient's bank account. In order to adopt this provision, the recipient must complete Section I and forward the Designation of Depository for Direct Deposit of Grant Funds to the depository for completion of Section II of the form. After the form is fully completed, the recipient must forward the original and one copy to the appropriate regional office. An illustration and instructions for completing this format are shown in Figure III–2.

The recipient organization must execute a power of attorney only when the depository requires such an authorization in order to receive checks directly from the U.S. Treasury Department for credit to the recipient's bank account. The recipient must execute a new designation whenever changes in the account number or depository are made.

(3) *Request for Payment on Letter of Credit (SF 183).* The recipient organization must execute an SF 183, Request for Payment on Letter of Credit and Status of Funds Report, each time funds are needed to meet current cash disbursement needs. An illustration and instructions for completing this form are shown in Figure III–3.

Note.—UMTA grantees may not use TFS form 5401 to request payment under letter of credit. This form is only used when a grantee is paid by a Federal Reserve Bank. UMTA grantees are paid by Teasury Regional Disbursing Offices, which require the SF 183.

(4) *Distribution of SF 183.* The recipient organization must distribute the executed SF 183 as follows:

(a) *Original, Duplicate, and Quintuplicate:* Mail *directly* to the Treasury Regional Disbursing Office shown on the recipient's copy of SF 1193A. (The RDO prepares and mails the Treasury check to the recipient organization or the recipient organization's depository).

(b) *Triplicate.* At the same time, mail *directly* to the appropriate UMTA regional or headquarters program office, *not* to the UMTA address on the SF 183.

(c) *Quadruplicate.* Retained by the recipient organization for its files.

It is recommended that recipients use *original* sets of SF 183's. These can be obtained from all UMTA regional offices. Some Treasury RDO's *may* accept copies; however the SF 183 instructions call for an *original* to be sent to the RDO.

(5) *Planning Letter of Credit Withdrawals.* The recipient organization must exercise sound financial judgment and planning to insure that the requirements for maintaining minimum cash balances are met. In preparing the SF 183, careful consideration of the timing of payments to contractors is required in order to determine when funds are needed. Consideration of mail time required for transmission of SF 183 to the RDO and for transmission of the Treasury check to the recipient organization or its depository, also is necessary.

For example, if $20,000 is needed on the fifteenth of the month in order to provide funds to a contractor to meet the terms of the contract, and normal mail time from the date the SF 183 is submitted to the date the Treasury check is received by the depository or the recipient organization is seven days, then on approximately the eighth of the month the recipient organization should mail the SF 183 to the RDO.

Once the LOC system has been in operation a short time, the recipient organization should have determined its disbursing pattern and calculated mail time so that withdrawals can be timed as close as possible to actual cash disbursements. Cash controls must be maintained by the recipient on a current basis so that cash balances do not exceed the *immediate* needs for the recipient organization's disbursements. Recipients may *not* draw down cash which will not be used for two or more weeks after receipt. Cash *must* be dispersed within three days.

An illustration and instructions for completing a suggested Federal Cash Control Register are shown in Figure III–4. If properly maintained, the cash control register provides the information necessary for completing Section II of an SF 183. Please note that the Federal Cash Control Register is maintained on a "fiscal year-to-date" basis, and not an "inception-to-date" basis.

e. *Deficient or Rejected SF 183.*

(1) *Deficient SF 183.* If a deficiency on the SF 183 is detected, a deficiency notice will be issued. A deficient SF 183 is not ordinarily rejected. However, repeated deficiencies of a similar nature by the same recipient organization may be cause for rejection with UMTA's concurrence. The following are reasons for the issuance of deficiency notices:

(a) There is a difference between the name and address information of the drawer on the SF 183 and the name and address of the drawer on the related SF 1193A;

(b) The address of the payee on the SF 183 is different from the address of the payee on the related SF 1193A;

(c) The Federal program agency approved payment, but other information on the SF 183 was incomplete or inaccurate;

(d) The cents are left off the amounts in Section I, II, and/or III;

(e) The Amount Requested in Section I is less than $5,000 and is not the final drawdown on the available balance; and

(f) The signature(s) of the official(s) authorized to certify request for payment differs slightly (example: using first two initials and last name instead of the full signature) from the signature(s) on the SF 1194 but otherwise compares favorably, and the Treasury disbursing office approves payment.

(2) *Rejection of SF–183.* The SF 183 will also be examined for errors, deficiencies, or omissions of a more severe nature which may necessitate the rejection of the request. There are definitive reasons for the rejection of an SF 183 and the Treasury disbursing office will contact UMTA prior to any rejection. The reasons for rejection are:

(a) An unauthorized or invalid signature, (erasures, painting over with correction fluid, or tape overs are unacceptable.)

(b) The amount requested in Section I is greater than the available balance;

(c) The name of the payee to whom the check is to be issued is not identical to the name of the payee shown in the "Treasury Checks To Be Made Payable To:" block of the related SF 1193A;

(d) The "Amount Requested" block in Section I is left blank, erased, painted over with correction fluid, or taped over;

(e) Discrepancies exist elsewhere on the SF 183 and the Treasury disbursing office cannot obtain correction information from the Federal program agency and/or its own file;

(f) The amount requested is more than $5,000,000 and UMTA has not provided an amendment to the related LOC authorizing drawdowns of more than $5,000,000;

(g) There are excessive funds in the hands of the recipient organization as determined by Treasury and/or UMTA; and

(h) A written request has been received from UMTA to withhold payment for a reason other than those listed above. The Director, Office of Accounting, must provide signed written confirmation of this request.

f. *Excessive or Premature Withdrawals.* When excessive cash is being held by recipients, UMTA must request a refund of the excessive cash and, if the recipient is not a State government or an instrumentality of the State, the interest earned on those funds. The only exceptions to the requirement for prompt refunding are when the funds involved:

(1) Will be disbursed by the recipient organization within *seven* calendar days, or

(2) Are less than $10,000 and will be disbursed within 30 calendar days.

Excess cash for a project under the LOC may *not* be used for another project, even if it is under the LOC. The excess cash *must be returned* as stated above.

These exceptions to the requirement for prompt refunding should *not* be construed as approval for a recipient organization to maintain excessive funds. They are applicable *only* to excessive amounts of funds which are erroneously drawn.

The return of funds is accomplished as follows:

(1) UMTA requests the recipient to remit the excessive cash and any interest to UMTA by a check made payable to the Urban Mass Transportation Administration. If a single check is used to remit both the premature withdrawal and the interest, the amount attributable to each must be separately identified.

The check(s) must be mailed to the Office of Accounting, UAD–20, and must be accompanied by a memorandum explaining the purpose of the check(s) and identifying the project number. A copy of the check and the memorandum should be sent to the appropriate regional or program office.

(2) The recipient must record that portion of the remittance representing the amount prematurely withdrawn (excluding interest) as a disbursement on line 5 ("Less: Actual Disbursements, Fiscal Year to Date") on subsequent requests for payment.

(3) UMTA will authorize an increase in the recipient's LOC in the amount of the premature withdrawal only.

g. *Revocation of LOC.* A LOC will be revoked when it has been determined that the recipient organization has demonstrated an unwillingness or inability to establish procedures to withdraw only those amounts necessary to meet current disbursement needs and to time withdrawals as closely as possible to the actual cash disbursements. The amount authorized under the LOC credit will be decreased to the amount withdrawn plus the amount already obligated in good faith in executing the Federal project as authorized. Once this remaining balance has been withdrawn, the LOC will be revoked.

3. Advance by Treasury Check

a. Recipients that do not qualify for LOC's may still receive advances by Treasury check if certain conditions are met. Recipients may recieve cash payments upon request to UMTA before cash outlays are made, or according to a predetermined payment schedule before payments are made by the recipient. This advance funding method will be used when the following conditions exist:

(1) Annual advances to a recipient aggregate to less than $120,000, or there will not be a continuing relationship for at least one year between UMTA and the grantee.

(2) The recipient has established or demonstrated to UMTA a willingness and ability to establish procedures minimizing the time elapsing between a transfer of funds and their disbursement by the recipient.

(3) The recipient's financial management system meets the standards for fund control and accountability prescribed in Chapter II of this circular.

b. Cash advances will be limited to the minimum amount needed, and timed to meet the *actual, immediate cash requirements* of grantees in carrying out the purposes of approved programs or projects. The timing and amount of cash advances should be as close as is administratively feasible to actual disbursements by recipients for direct program costs and for proportionate shares of allowable indirect costs. For example, if disbursements are made by a recipient on a monthly, biweekly, or any other regular cycle, and the amounts involved would so warrant, issuance of advance Treasury checks should be timed accordingly.

c. Funds are requested by preparing the Request For Advance or Reimbursement, SF 270 (See paragraph 5 below for details).

4. Reimbursement by Treasury Check

When a recipient receiving cash advances has demonstrated to UMTA an unwillingness or inability to establish procedures to minimize the time lag between cash advances and disbursement thereof, UMTA, unless prohibited by the statutes governing the program(s) in question, will terminate advance financing and require the recipient to finance it with its own working capital. Payments to the recipient are then made by Treasury check to reimbuse the recipient for cash actually disbursed. A Request for Advance or Reimbursement is submitted to UMTA for this purpose (see paragraph 5 below).

5. Request for Advance or Reimbursement (SF 270)

a. *General.* Recipients submit this form to receive payment for all projects when LOC is not used. Copies of the SF 270 can be acquired from the appropriate regional office. No other documentation need accompany this form. An original and two copies should be sent to the cognizant UMTA office.

b. *Instructions.* Instructions for completing an SF 270 are printed on its reverse side. In addition, the following instructions should assist recipients in completing this form (see Figure III–5).

(1) Only the total columns on this form should be completed. In addition, all figures may be rounded to the nearest dollar, i.e., amounts of $.50 or over should be rounded to the higher dollar

and amounts under $.50 should be rounded to the lower dollar. For example: if the non-Federal share is computed to be $2,572.70, the amount reported should be $2,573.

(2) *Block #5*—All requisitions should be numbered consecutively beginning with #1 as the first requisition.

(3) *Block #8*—The first requisition covers the date of the grant approval letter through the end of the period for which reimbursement is requested. When a requisition requests reimbursement only, this "ending" date will be the same date which outlays are reported on line 11a of this form. If reimbursement and/or an advance is being requested, the "ending" date should reflect the period through which the advance funds are needed.

All requisition report periods should run consecutively. For example, if a requisition is submitted for the period 1/1/80 to 3/31/80, the next requisition will begin from 4/1/80.

(4) *Block #9*—The name of the recipient organization should be exactly as indicated on the grant contract.

(5) *Block #11*—Line A—The "as of" date should be the date for which the recipient has actual costs recorded. This date should be the same as the "to" date in Block #8 unless the recipient is requesting an advance.

Line B—Represents investment income, proceeds from the sale of equipment, or rental income.

Line D—Represents the estimated expenditures for the advance period, both UMTA share and local share.

Line F—⅓ or 20% of line E, depending on the funding ratio for a particular project. If anything other than these percentages, the reasons should be specified.

Line G—⅔ or 80% of line E, depending on the funding ratio for a particular project.

Line H—Total of previous requisiton(s) *submitted*. This line should not represent actual checks received because the recipient may have submitted a requisition which is in the process of being paid. Requisition #1 on this line should be zero.

Note that recipients should only complete the "total" column of Block #11, unless the grant award letter or grant agreement specified that there is more than one funding source supporting the project. In such cases, separate columns should be utilized for each funding source.

c. *Review of the SF 270.* Each SF 270 for funds will be reviewed in light of the periodic progress reports and financial reports required for that project. Changes requiring grant amendments or prior approval of a budget revision must be approved before funds for these changes are requisitioned (see Chapter I, paragraph 5).

6. Excessive Payments (Overpayments) to Grantees

a. UMTA project managers will be alert to any information which may evidence a potential overpayment or other amounts due UMTA. The following are possible reasons for payments becoming due UMTA:

(1) insufficient non-Federal funds to match Federal payments,

(2) the sale of project equipment, or

(3) excessive Federal funds in the project account.

Such payments must be made promptly to UMTA. The grantee is instructed to:

(1) Make checks payable to "Urban Mass Transportation Administration";

(2) Mail checks to: Office of Accounting, UAD–20, Urban Mass Transportation Administration, 400 7th Street, S.W., Washington, D.C. 20590.

(3) Specify applicable project number(s) on the check,

(4) Provide written explanation as to purpose of payment, and

(5) Send copy of the check and the explanatory letter to the appropriate program office.

BILLING CODE 4910-57-M

URBAN MASS TRANSPORTATION ADMINISTRATION
LETTER OF CREDIT - TREASURY RDO SYSTEM
DESIGNATION OF DEPOSITORY FOR DIRECT DEPOSIT OF GRANT FUNDS

Section I (To be completed by recipient organization)

Name of Project: _____(1)_____

The _____(2)_____

has been designated as the depository for all funds to be received directly from grant (project) number(s) _____(3)_____ executed with the Urban Mass Transportation Administration for deposit to

_____(4)_____
(Account Name and Number)

_____(5)_____
(Name)

_____(6)_____
(Address and Zip Code)

_____(7)_____
(Title of Executive Officer)

_____(8)_____
(Signature of Executive Officer)

_____(9)_____
(Date)

Section II (To be completed by the depository)

The account identified in Section I has been established with the bank. All necessary documentation, including a power of attorney when necesary, which legally enables this depository to receive U.S. Government checks directly from the U.S. Treasury Department for deposit to

_____(10)_____ without the payee's
(Account Name and Number)

endorsement have been received and are in the depository's custody.

_____(11)_____
(Name of Bank)

_____(12)_____
(Address and Zip Code where checks should be mailed)

(13) The Depository is a minority-owned bank participating in the Federal Minority Bank Deposit Program? Yes___ No___

The Depository hereby agrees to immediately notify the Recipient Organization when a deposit is made in the above account.

_____(14)_____
(Title of Authorized Bank Officer)

_____(15)_____
(Signature of Authorized Bank Officer)

_____(16)_____
(Date)

URBAN MASS TRANSPORTATION ADMINISTRATION
LETTER OF CREDIT - TREASURY RDO SYSTEM
INSTRUCTIONS FOR DESIGNATION OF DEPOSITORY FORMAT

NOTE: This form is not necessary if the recipient organization chooses to receive the check directly from Treasury. This form is not supplied. Each recipient organization must type an original and two copies as illustrated.

Block Number

1. Enter as provided by the UMTA program officer.

2. Enter name, address and ZIP code of depository designated to receive Treasury checks.

3. Enter project number(s) -- use supplemental sheet if necessary.

4. Enter name of recipient organization's bank account and number.

5. Enter name of recipient organization.

6. Enter complete address of recipient organization.

7. Enter title of Executive Officer for recipient organization.

8. Signature of Executive Officer for recipient organization (person who signed grant agreement).

9. Enter date form signed by Executive Officer for recipient organization.

10. Enter name and account number of recipient organization's bank account.

11. Enter name of recipient organization's bank.

12. Enter complete address of recipient organization's bank where Treasury checks are to be mailed.

13. Enter title of authorized bank officer for recipient organization's bank.

14. Enter signature of authorized bank officer for recipient organization's bank.

15. Enter date form signed by authorized bank or Treasury Officer for recipient organization's bank.

SAMPLE OF STANDARD FORM 1194

Standard Form 1194 6 Treasury FRM 1000 Fiscal Service Bureau of Accounts	**AUTHORIZED SIGNATURE CARD FOR PAYMENT VOUCHERS ON LETTER OF CREDIT**	Letter of Credit Number Federal Reserve Bank

Letter of Credit Issued in Favor of *(Recipient)*	Issued by *(Federal Agency)*

SIGNATURES OF INDIVIDUALS AUTHORIZED TO DRAW ON THE CITED LETTER OF CREDIT	☐ ONLY ONE SIGNATURE REQUIRED ON PAYMENT VOUCHERS or ☐ ANY TWO SIGNATURES REQUIRED TO SIGN OR COUNTERSIGN
Typed Name and Signature	Typed Name and Signature
Typed Name and Signature	Typed Name and Signature
I CERTIFY THAT THE SIGNATURES ABOVE ARE OF THE INDIVIDUALS AUTHORIZED TO DRAW PAYMENT VOUCHERS FOR THE CITED LETTER OF CREDIT. DATE AND SIGNATURE OF AUTHORIZING OFFICIAL *(Recipient)*	APPROVED: DATE AND SIGNATURE OF AGENCY CERTIFYING OFFICER

1194-101

PREPARATION OF SF 1194

NOTE: 1. In preparing the SF 1194, Authorized Signature Card For Payment Vouchers on Letter of Credit if a mistake is made or a change is necessary, a new SF 1194 must be prepared because erasures or corrections of any kind are not acceptable.

2. When a new SF 1194 is being submitted to reflect a name change or addition of any individual authorized to withdraw on a LOC, allow at least 10 days for processing the SF 1194 before submitting a Request for Payment on Letter of Credit and Status of Funds Report, SF 183.

Block Number	Explanation
1.	Leave blank--to be completed by UMTA.
2.	Line through the words "Federal Reserve Bank" and enter the name of the Treasury Regional Disbursing Office servicing and recipient organization.
3.	Enter the name and address of the recipient organization. If additional space is required, use the reverse side of the form.
4	Enter "Urban Mass Transportation Administration" plus the address an eight-digit accounting station symbol. UMTA's eight-digit accounting station symbol is 69-08-8701. The address is: UMTA, Office of Accounting, UAD-20, 400 7th Street, S.W., Washington, D.C. 20590.
5.	Leave blank.
6.	Enter an "X". (All SF 183 for withdrawals against a letter of credit must be countersigned).

Preparation of Standard Form 1194: (cont'd)

Block Number	Explanation
7.	Enter the typed names and the signatures of officials of the recipient organization authorized to execute SF 183, Request for Payment on Letter of Credit and Status of Funds Report. Cross out any of these blocks that are not used.
8.	Enter the date, typed name, title and the signature of the recipient organization's official who is authorized to certify the authenticity of the signature of individuals authorized to execute SF 183.
9.	Leave Blank -- to be completed by UMTA.

REQUEST FOR PAYMENT ON LETTER OF CREDIT AND STATUS OF FUNDS REPORT

SECTION I—REQUEST FOR PAYMENT

AGENCY STATION SYMBOL	LETTER-OF-CREDIT NUMBER	DOCUMENT NUMBER	AMOUNT REQUESTED $
NAME AND ADDRESS OF U.S. AGENCY	NAME AND ADDRESS OF DRAWER		PAID BY *(Treasury Use Only)*
NAME AND ADDRESS OF TREASURY DISBURSING OFFICE	MAKE TREASURY CHECK PAYABLE TO:		VOUCHER APPROVED *(Treasury Use Only)*
			CHECK NUMBER *(Treasury Use Only)*

SECTION II—STATUS OF FEDERAL FUNDS *(Must Be Completed By Drawer)*

ITEMS	ESTIMATED NO. OF DAYS SUPPLY	AMOUNT
1. FEDERAL FUNDS ON HAND *(Beginning of Federal Fiscal Year)*		$
2. ADD: ADVANCES RECEIVED, FISCAL YEAR TO DATE		
3. ADD: COLLECTIONS, REFUNDS, AND/OR MISCELLANEOUS RECEIPTS		
4. Subtotal		
5. LESS: ACTUAL DISBURSEMENTS, FISCAL YEAR TO DATE		
6. FEDERAL FUNDS ON HAND AT TIME OF THIS REQUEST		
7. ADD: AMOUNT OF THIS REQUEST FOR PAYMENT		
8. ADD: UNPAID REQUESTS FOR PAYMENT PREVIOUSLY SUBMITTED		
9. TOTAL →		$
10. OUTSTANDING ADVANCES TO SUB-GRANTEES—NUMBER TOTAL $		*Treasury Use Only*

SECTION IIA—REMARKS *(Drawers Use)*

SECTION III—CLASSIFICATION OF THE AMOUNT OF THIS REQUEST *(Must Be Completed By Drawer)*

PROGRAM, GRANT NO. OR OTHER IDENTIFYING NO.	AMOUNT	PROGRAM, GRANT NO. OR OTHER IDENTIFYING NO.	AMOUNT
	$		$

TOTAL *(Must Agree with Amount of this Request for Payment)* $

SECTION IV—CERTIFICATION *(Must Be Completed By Drawer)*

I certify that this Request for Payment has been drawn in accordance with the terms and conditions of the Letter of Credit cited and that the amount for which drawn is proper for payment to the drawer or for credit to the account of the drawer at the drawer's bank. I also certify that the data reported above is correct and that the amount of the Request for Payment is not in excess of current needs.

DATE	SIGNATURE	TITLE
DATE	COUNTERSIGNATURE	TITLE

Standard Form 183
December 1975
Prescribed By Dept. of Treasury
I T FRM 6-2000

ORIGINAL—Drawer will forward this copy to Treasury Disbursing Office.

183-102

INSTRUCTIONS FOR PREPARING AND DISTRIBUTING AN SF 183 REQUEST FOR PAYMENT ON LOC AND STATUS OF FUNDS REPORT

NOTICE TO DRAWER

SF 183 is shown on Page 1 of Figure III-3. Extreme care must be exercised to prepare an SF 183 correctly and completely in order for the appropriate Treasury Regional Disbursing Office to process the request for payment without delay. If a recipient repeatedly fails to prepare the SF 183 correctly and completely, the Treasury Regional Disbursing Office may reject future requests for payment.

Withdrawals on the LOC must be made only in amounts necessary to meet current disbursement needs. Such withdrawals ordinarily must be made not more frequently than once daily, in amounts no less than $5,000 but no more than $5,000,000 unless so stated on the LOC.

All Dollar Amounts Which Are Entered On the SF 183 Must Be Shown To Two Places Past The Decimal. Example $25,000.00

SECTION 1 - REQUEST FOR PAYMENT

Block Number

1. Agency Station Symbol. Enter the eight digit agency station symbol, 69-08-8701, (also appears on the SF 1193A Letter of Credit).

2. Letter-of-Credit Number. Enter the eight digit Letter-of-Credit number which appears on your related LOC.

Block
Number

3. Document Number. Enter the appropriate document number. For each LOC, the document number of the first SF 183 must begin with "001", and each SF 183 prepared thereafter for each letter of credit must progress in consecutive ascending order. Alphabetical designations must not be used as part of the document number. Amendments to the LOC must not interrupt the progression of the number assigned to the Requests for Payment by the drawer.

4. Amount Requested. Enter the total amount of this request for payment which must be the same as the amount requested on line 7 of Section II and the total in Section III.

5. Name and Address of U.S. Agency. Enter the name and address of the Federal "Issuing Agency" which apears on your related LOC.

6. Name and Address of Drawer. Enter the name and address of the recipient organization (drawer). This information must be identical to that entered in the "In Favor Of" block on your related LOC.

7. Name and Address of Treasury Disbursing Office. Enter the name and address of the Treasury disbursing center or Treasury regional office which appears on your related LOC.

8. Make Treasury Check Payable To. Enter the information exactly as it appears in the "Treasury Checks to be Made Payable To:" block on your related LOC.

SECTION II - STATUS OF FEDERAL FUNDS

Block Number

1. Federal Funds on Hand. Enter the total amount of undisbursed Federal funds received under this LOC which were in the hands of the recipient organization (drawer) on the first day of the current Federal fiscal year. This amount includes all Federal funds on deposit with a commercial bank or maintained as imprest funds and received but undeposited Treasury checks.

2. Advances Received, Fiscal Year to Date. Enter the total amount of all Federal funds received under this letter of credit during the current Federal fiscal year to date.

3. Collections, Refunds, and/or Miscellaneous Receipts. Enter the total amount of all collections, refunds, and/or miscellaneous receipts of funds received during the current Federal fiscal year to date. Examples of items to be included in this amount are:

   a. Cumulative Federal funds advanced to a secondary recipient organization and, subsequently, determined to be in excess of immediate disbursement needs, which have been returned to the primary recipient during the current Federal fiscal year.

   b. Cumulative Federal share of proceeds from the sale of real property, personal property, and/or services received during the current Federal fiscal year which are available to the primary recipient to pay the cost of any approved program activity.

c. Cumulative interest earned during the current Federal fiscal year on Federal funds withdrawn from this LOC prior to actual disbursement needs of the recipient organization. In Section II A - Remarks, indicate the amount of such interest and whether that amount has been remitted to UMTA.

4. Subtotal. Enter the sum of the amounts reported on lines 1, 2, and 3 of Section II.

5. Actual Disbursements, Fiscal Year to Date. Enter the total amount of actual cash disbursements of Federal Project funds during the current Federal fiscal year to date. Any interest earned on funds prematurely withdrawn from this LOC and returned to UMTA must be included in the amount shown on this line.

6a. Federal Funds on Hand at Time of This Request. Enter the amount reported on Line 4 minus the amount reported on Line 5.

6b. Estimated Number of Days Supply. Enter the estimated number of workdays until the amount reported on Line 6a will be disbursed. The estimate includes the day on which the funds will be disbursed. For example, if the request for payment is prepared on a Tuesday and the recipient organization expects to disburse the Federal funds on hand on the same day it is preparing the request for payment, this represents a zero day supply of Federal funds.

7a. Amount of This Request for Payment. Enter the total amount of this request for payment, which must be the same as the amount requested in Section I and the total in Section III.

7b. Estimated Number of Days Supply. Enter the estimated number of workdays from the estimated day of receipt until the amount reported on Line 7a will be disbursed. This estimate includes the expected day of receipt but does not include the day of disbursement. For

example, if the recipient expects to receive the Federal funds requested on a Friday and disburse these funds on Monday of the following week, this represents a one day supply of Federal funds assuming Saturday and Sunday are not work days.

8. Unpaid Requests for Payment Previously Submitted. Enter the total amount of the request(s) for payment which have been submitted to the RDO but for which the recipient organization has not yet received payment. Do not include the amounts of rejected Requests for Payment.

9. Total. Enter the sum of the amounts reported on Lines 6, 7 and 8.

10a. Outstanding Advances to Sub-Recipients - Total $. Enter the difference between the total amount of Federal funds advanced to secondary recipient(s) and the total amount of Federal funds disbursed by secondary recipient(s).

10b. Outstanding Advances to Sub-Recipients - Number. Enter the number of recipients maintaining the outstanding balances reported on Line 10a of this request for payment as "Outstanding Advances to Sub-Recipients". If there are no secondary recipients involved, "N.A." must be entered for non-applicable.

SECTION II A - REMARKS

The recipient organization (drawer) should enter any additional explanation, related to Section II - Status of Federal Funds, deemed appropriate. This includes the date through which funds are requested, the purpose of the request and if a final payment for a particular project.

SECTION III - CLASSIFICATION OF THE AMOUNT OF THIS REQUEST

Since a request for payment may include funds for more than one grant or project, it is extremely important that Section III be properly completed to show the amount of the request for payment applicable to each grant or project. Therefore, for each grant or project for which funds are being requested, enter the appropriate project number, fund code, and the amount of funds requested for each project.

The total of this section must be the same as the "Amount Requested" under Section I and the "Amount of This Request for Payment" under Section II.

SECTION IV - CERTIFICATION

Block Number

1. Date. Enter the date(s) this SF 183 is certified.

2. Signature and Countersignature. Two of the designated officials of the recipient organization authorized to certify requests for payment on the SF 1194, Authorized Signature Card for Payment Vouchers on Letter of Credit, on file with the Treasury disbursing center or Treasury regional office servicing the related LOC shall affix their signatures. These signatures must be identical to those on the current SF 1194.

3. Title. Enter the titles of the designated officials of the recipient organization certifying this SF 183.

11. Distribution of the Form.

NOTE: FORWARDING POINTS ARE PRINTED ON THE BOTTOM OF EACH COPY.

1. Original, Duplicate and Quintuplicate. Forward to the Treasury disbursing center or Treasury regional office servicing the related LOC.

2. Triplicate. At the same time the recipient organization mails the designated copies in 1. above to the appropriate Treasury RDO, the triplicate copy must be sent to the UMTA regional or headquarters office (Do not send the triplicate copy to the Office of Accounting which is shown in the "Issuing Agency" block on your Letter of Credit, SF 1193A.)

3. Quadruplicate. Retained by the recipient organization (drawer).

FEDERAL CASH CONTROL REGISTER

REQUEST FOR PAYMENT SUBMITTED				U.S. TREASURY CHECKS RECEIVED			COLLECTIONS, REFUNDS, AND/OR MISCELLANEOUS RECEIPTS			DISBURSEMENTS			BALANCE OF FEDERAL CASH ON HAND	
DOCUMENT NUMBER SF 183	DATE OF REQUEST	AMOUNT REQUESTED	AMOUNT FY TO DATE	DATE DEPOSITED	CHECK AMOUNT	AMOUNT FY TO DATE	DATE DEPOSITED	CHECK AMOUNT	AMOUNT FY TO DATE	DATE DIS-BURSED	AMOUNT	AMOUNT FY TO DATE	DATE	AMOUNT
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
						POST CUMU-LATIVE AMOUNT ON LINE 2 OF SF 183			POST CUMU-LATIVE AMOUNT ON LINE 3 OF SF 183			POST CUMU-LATIVE AMOUNT ON LINE 5 OF SF 183		

PREPARATION OF FEDERAL CASH CONTROL REGISTER

Column Number	Instructions
1.	Enter the document number from SF 183.
2.	Enter date of request from SF 183.
3.	Enter amount requested as shown on line 7 of SF 183.
4.	Self-explanatory.
5.	Enter date Treasury check deposited as shown on notification received from bank.
6.	Enter amount of Treasury check from notification received from bank.
7.	Self-explanatory.
8.	Enter date of deposit.
9.	Enter amount of deposit.
10.	Self-explanatory.
11.	Enter date funds disbursed to payee by recipient organization.
12.	Enter amount disbursed to payee by recipient organization.
13.	Self-explanatory.
14.	Enter the date of the last entry in either column (5), (8) or (11) which causes a change in the balance in column (15).
15.	Enter amount obtained by subtracting cumulative total in column (13) from the cumulative total in column (7) plus column (10).

REQUEST FOR ADVANCE OR REIMBURSEMENT

(See instructions on back)

Approved by Office of Management and Budget, No. 80-R0183

PAGE 1 OF 2 PAGES

1. TYPE OF PAYMENT REQUESTED
a. "X" one, or both boxes: [X] ADVANCE [X] REIMBURSEMENT
b. "X" the applicable box: [ ] FINAL [X] PARTIAL

2. BASIS OF REQUEST: [X] CASH [X] ACCRUAL

3. FEDERAL SPONSORING AGENCY AND ORGANIZATIONAL ELEMENT TO WHICH THIS REPORT IS SUBMITTED: UMTA

4. FEDERAL GRANT OR OTHER IDENTIFYING NUMBER ASSIGNED BY FEDERAL AGENCY: NY-09-0123

5. PARTIAL PAYMENT REQUEST NUMBER FOR THIS REQUEST: 2

6. EMPLOYER IDENTIFICATION NUMBER

7. RECIPIENT'S ACCOUNT NUMBER OR IDENTIFYING NUMBER

8. PERIOD COVERED BY THIS REQUEST
FROM (month, day, year): 3-1-78
TO (month, day, year): 4-30-78

9. RECIPIENT ORGANIZATION
Name: Tonawanda Transit Authority
Number and Street: 367 Tremont Street
City, State and ZIP Code: Tonawanda, NY 14120

10. PAYEE (Where check is to be sent to different than item 9)
Name:
Number and Street:
City, State and ZIP Code:

11. COMPUTATION OF AMOUNT OF REIMBURSEMENTS/ADVANCES REQUESTED

PROGRAMS/FUNCTIONS/ACTIVITIES ▶	(a) N/A	(b) N/A	(c) N/A	TOTAL
a. Total program outlays to date (As of date) 3-31-78	$	$	$	$ 90,157
b. Less: Cumulative program income				1,215
c. Net program outlays (Line a minus line b)				88,942
d. Estimated net cash outlays for advance period				11,836
e. Total (Sum of lines c & d)				100,778
f. Non-Federal share of amount on line e				26,628
g. Federal share of amount on line e				74,150
h. Federal payments previously requested				5,725
i. Federal share now requested (Line g minus line h)				68,425
j. Advances required by month, when requested by Federal grantor agency for use in making prescheduled advances — 1st month				N/A
2nd month				N/A
3rd month				N/A

12. ALTERNATE COMPUTATION FOR ADVANCES ONLY

a. Estimated Federal cash outlays that will be made during period covered by the advance	$
b. Less: Estimated balance of Federal cash on hand as of beginning of advance period	
c. Amount requested (Line a minus line b)	$

13. CERTIFICATION

I certify that to the best of my knowledge and belief the data above are correct and that all outlays were made in accordance with the grant conditions or other agreement and that payment is due and has not been previously requested.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL: Sylvester Snodgrass III

DATE REQUEST SUBMITTED: 4/5/78

TYPED OR PRINTED NAME AND TITLE: Sylvester Snodgrass III
General Manager

TELEPHONE (AREA CODE, NUMBER, EXTENSION): (319)123-345

This space for agency use

SAMPLE SECTION 9 REQUEST FOR
ADVANCE OR REIMBURSEMENT
Figure III-5a

INSTRUCTIONS

Please type or print legibly. Items 1, 3, 5, 9, 10, 11c, 11e, 11f, 11g, 11i, 12 and 13 are self-explanatory; specific instructions for other items are as follows:

Item	Entry
2	Indicate whether request is prepared on cash or accrued expenditure basis. All requests for advances shall be prepared on a cash basis.
4	Enter the Federal grant number, or other identifying number assigned by the Federal sponsoring agency. If the advance or reimbursement is for more than one grant or other agreement, insert N/A; then, show the aggregate amounts. On a separate sheet, list each grant or agreement number and the Federal share of outlays made against the grant or agreement.
6	Enter the employer identification number assigned by the U.S. Internal Revenue Service, or the FICE (institution) code if requested by the Federal agency.
7	This space is reserved for an account number or other identifying number that may be assigned by the recipient.
8	Enter the month, day, and year for the beginning and ending of the period covered in this request. If the request is for an advance or for both an advance and reimbursement, show the period that the advance will cover. If the request is for reimbursement, show the period for which the reimbursement is requested.
Note:	The Federal sponsoring agencies have the option of requiring recipients to complete items 11 or 12, but not both. Item 12 should be used when only a minimum amount of information is needed to make an advance and outlay information contained in Item 11 can be obtained in a timely manner from other reports.
11	The purpose of the vertical columns (a), (b), and (c), is to provide space for separate cost breakdowns when a project has been planned and budgeted by program, function, or activity. If additional columns are needed, use as many additional forms as needed and indicate page number in space provided in upper right; however, the summary totals of all programs, functions, or activities should be shown in the "total" column on the first page.
11a	Enter in "as of date", the month, day, and year of the ending of the accounting period to which this amount applies. Enter program outlays to date (net of refunds, rebates, and discounts), in the appropriate columns. For requests prepared on a cash basis, outlays are the sum of actual cash disbursements for goods and services, the amount of indirect expenses charged, the value of in-kind contributions applied, and the amount of cash advances and payments made to subcontractors and subrecipients. For requests prepared on an accrued expenditure basis, outlays are the sum of the actual cash disbursements, the amount of indirect expenses incurred, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received and for services performed by employees, contracts, subgrantees and other payees.
11b	Enter the cumulative cash income received to date, if requests are prepared on a cash basis. For requests prepared on an accrued expenditure basis, enter the cumulative income earned to date. Under either basis, enter only the amount applicable to program income that was required to be used for the project or program by the terms of the grant or other agreement.
11d	Only when making requests for advance payments, enter the total estimated amount of cash outlays that will be made during the period covered by the advance.
13	Complete the certification before submitting this request.

GPO: 1977—041-030/0200

REQUEST FOR ADVANCE OR REIMBURSEMENT

(See instructions on back)

Approved by Office of Management and Budget. No. 80-R0183

PAGE 1 OF 2 PAGES

1. TYPE OF PAYMENT REQUESTED
a. "X" one, or both boxes: [X] ADVANCE [X] REIMBURSEMENT
b. "X" the applicable box: [ ] FINAL [X] PARTIAL

2. BASIS OF REQUEST: [X] CASH [ ] ACCRUAL

3. FEDERAL SPONSORING AGENCY AND ORGANIZATIONAL ELEMENT TO WHICH THIS REPORT IS SUBMITTED

4. FEDERAL GRANT OR OTHER IDENTIFYING NUMBER ASSIGNED BY FEDERAL AGENCY: NY-05-4099

5. PARTIAL PAYMENT REQUEST NUMBER FOR THIS REQUEST: 002

6. EMPLOYER IDENTIFICATION NUMBER

7. RECIPIENT'S ACCOUNT NUMBER OR IDENTIFYING NUMBER

8. PERIOD COVERED BY THIS REQUEST
FROM (month, day, year): 1-1-77
TO (month, day, year): 9-30-77 (should include advance period)

9. RECIPIENT ORGANIZATION
Name: Tonawanda Trans. Authority
Number and Street: 367 Tremont Street
City, State and ZIP Code: Tonawanda, NY 14120

10. PAYEE (Where check is to be sent if different than item 9)
Name:
Number and Street:
City, State and ZIP Code:

11. COMPUTATION OF AMOUNT OF REIMBURSEMENTS/ADVANCES REQUESTED

PROGRAMS/FUNCTIONS/ACTIVITIES ▶		(a)	(b)	(c)	TOTAL
a. Total program outlays to date (As of date) 6-30-77		$	$	$	$ 312,600
b. *Less:* Cumulative program income					104,500
c. Net program outlays (*Line a minus line b*)					208,100
d. Estimated net cash outlays for advance period					103,400
e. Total (*Sum of lines c & d*)					311,500
f. Non-Federal share of amount on line e					240,800
g. Federal share of amount on line e					70,700
h. Federal payments previously requested					40,700
i. Federal share now requested (*Line g minus line h*)					30,000
j. Advances required by month, when requested by Federal grantor agency for use in making prescheduled advances	1st month	July			10,000
	2nd month	August			15,000
	3rd month	September			5,000

12. ALTERNATE COMPUTATION FOR ADVANCES ONLY

a. Estimated Federal cash outlays that will be made during period covered by the advance	$
b. *Less:* Estimated balance of Federal cash on hand as of beginning of advance period	
c. Amount requested (*Line a minus line b*)	$

13. CERTIFICATION

I certify that to the best of my knowledge and belief the data above are correct and that all outlays were made in accordance with the grant conditions or other agreement and that payment is due and has not been previously requested.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL: Aaron Zzyyton

DATE REQUEST SUBMITTED: 8-1-77

TYPED OR PRINTED NAME AND TITLE: Aaron Zzyyton, General Manager

TELEPHONE (AREA CODE, NUMBER, EXTENSION): (312)555-333

This space for agency use

Federal Share broken down as follows:

$ 9,099 - for actual period 1-1-77 - 6-30-77
6,967 - for July
6,967 - for August
6,967 - for September
$30,000 - this requisition

SAMPLE SECTION 5
REQUEST FOR ADVANCE OR REIMBURSEMENT
Figure III-5b

270-102

STANDARD FORM 270 (7-76)
Prescribed by Office of Management and Budget
Cir. No. A-110

INSTRUCTIONS

Please type or print legibly. Items 1, 3, 5, 9, 10, 11c, 11e, 11f, 11g, 11i, 12 and 13 are self-explanatory; specific instructions for other items are as follows:

Item	Entry
2	Indicate whether request is prepared on cash or accrued expenditure basis. All requests for advances shall be prepared on a cash basis.
4	Enter the Federal grant number, or other identifying number assigned by the Federal sponsoring agency. If the advance or reimbursement is for more than one grant or other agreement, insert N/A; then, show the aggregate amounts. On a separate sheet, list each grant or agreement number and the Federal share of outlays made against the grant or agreement.
6	Enter the employer identification number assigned by the U.S. Internal Revenue Service, or the FICE (institution) code if requested by the Federal agency.
7	This space is reserved for an account number or other identifying number that may be assigned by the recipient.
8	Enter the month, day, and year for the beginning and ending of the period covered in this request. If the request is for an advance or for both an advance and reimbursement, show the period that the advance will cover. If the request is for reimbursement, show the period for which the reimbursement is requested.
Note:	The Federal sponsoring agencies have the option of requiring recipients to complete items 11 or 12, but not both. Item 12 should be used when only a minimum amount of information is needed to make an advance and outlay information contained in item 11 can be obtained in a timely manner from other reports.
11	The purpose of the vertical columns (a), (b), and (c), is to provide space for separate cost breakdowns when a project has been planned and budgeted by program, function, or activity. If additional columns are needed, use as many additional forms as needed and indicate page number in space provided in upper right; however, the summary totals of all programs, functions, or activities should be shown in the "total" column on the first page.
11a	Enter in "as of date", the month, day, and year of the ending of the accounting period to which this amount applies. Enter program outlays to date (net of refunds, rebates, and discounts), in the appropriate columns. For requests prepared on a cash basis, outlays are the sum of actual cash disbursements for goods and services, the amount of indirect expenses charged, the value of in-kind contributions applied, and the amount of cash advances and payments made to subcontractors and subrecipients. For requests prepared on an accrued expenditure basis, outlays are the sum of the actual cash disbursements, the amount of indirect expenses incurred, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received and for services performed by employees, contracts, subgrantees and other payees.
11b	Enter the cumulative cash income received to date, if requests are prepared on a cash basis. For requests prepared on an accrued expenditure basis, enter the cumulative income earned to date. Under either basis, enter only the amount applicable to program income that was required to be used for the project or program by the terms of the grant or other agreement.
11d	Only when making requests for advance payments, enter the total estimated amount of cash outlays that will be made during the period covered by the advance.
13	Complete the certification before submitting this request.

Appendix I—Questions and Answers on Cost Allocation Plans

Questions and Answers on Cost Allocation Plans

A. Application of Principles

Q. Is Federal Management Circular 74–4 Mandatory for use by both States and local governments?

A. Yes. Paragraph A–3 of Attachment A to the Circular states that the principles will be applied by all Federal agnecies in determining costs incurred by State and local governments under Federal grants and cost reimbursement type contracts (including subgrants and subcontracts) except those with (a) publicly financed educational institutions subject to FMC 73–8, and (b) publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Federal agencies.

Q. Federal Management Circular 74–4 states that it does not apply to grants and contracts with (a) publicly financed educational institutions subject to Federal Management Circular 73–8 and (b) publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Federal agencies. What is the intent of this statement and how does it affect the reimbursement of costs?

A. Federal cost principles are designed to be compatible with the organizational structure, accounting systems and programs conducted by specific types of organizations which perform Federal grants and contracts. FMC 74–4 was designed to be compatible with the type of operations conducted by State and local government. The organization and operations of colleges and universities and hospitals differ markedly from that of State and local governments and hence, there are special cost principles for them (FMC 73–8 for colleges and universities and the Medicare/Medicaid/HEW research cost principles for hospitals). These principles recognize State and local central service costs and departmental indirect costs allocable under the procedures of FMC 74–4.

Q. Will the indirect costs arrived at by the application of the indirect cost rate percentage be reimbursed to State and local governments?

A. The indirect costs which are determined to be associated with Federal programs in accordance with the procedures in FMC 74–4 will be recognized as part of the total cost of the Federal projects, except where restricted or prohibited by law. The extent to which such costs are reimbursed is a matter for determination between the Federal awarding agency and the recipient State or local unit of government.

B. Federal Cognizance

Q. What Federal agency will be responsible for determining and reassigning negotiation and audit cognizance for State and local agencies under FMC 74–4?

A. The Office of Management and Budget working in cooperation with the other Federal departments and agencies is responsible for determining and reassigning negotiation and audit cognizance for State and local agencies.

Q. May another Federal agency question the costs included in a central service cost allocation plan submitted to and approved by a cognizant Federal agency?

A. Cognizant Federal agencies will coordinate the approval of central service plans with the other Federal agencies affected. Accordingly, Federal agencies will accept as part of the costs of a particular State or local government agency, those costs represented as central service costs provided they are in accord with the amounts set out in the negotiation agreement signed by representatives of the State or local government and the cognizant Federal agency.

Q. Will an indirect cost rate(s) established for a State or local department by a cognizant Federal agency by accepted by other Federal agencies that have active programs with the same State department?

A. Federal agencies have determined which Federal agency will have negotiation responsibility at State and local departments where more than one Federal agency has active programs. Generally, the Federal agency with the predominant interest in terms of program dollars will be the cognizant Federal agency. This means, for example, that the Department of Health, Education and Welfare will determine indirect cost rates at State and local departments where the Department has the predominant dollar interest. The rates negotiated by the Department will be accepted by all Federal agencies that also have programs at these same State and local departments. In making such determinations the cognizant Federal agency will coordinate its activities with the other Federal agencies affected to the extent deemed necessary prior to reaching an agreement with the State or local department concerned.

Q. Which Federal agency will be responsible for the audit of costs of programs administered by State and local governments under grants from and contracts with the Federal Government?

A. The Department of Health, Education, and Welfare will be responsible for the audit of costs resulting from a State central service cost allocation plan, the results of which will be accepted by other Federal agencies. The Federal agency that has negotiation cognizance for indirect cost proposals at the State or local department level will also be cognizant for audit of these costs. That Federal agency that has the preponderance of dollar activity within a city, county or other subdivision will be cognizant for both audit and negotiation of local central service cost allocation plans. However, changes in cognizance may be required from time to time in Federal agency assignments as material changes in preponderance of Federal dollar activity occur.

Q. Where can State and local governments receive additional information or clarification on the implementation of FMC 74–4?

A. States and local governments should contact the Federal agency that has been assigned cognizance for either central service cost allocation plans or individual government department indirect cost proposals.

C. Definitions

Q. To what does the expression "cost allocation plan" refer?

A. A cost allocation plan refers to a document that identifies, accumulates, and distributes allowable costs to grants and contracts and identifies the procedures used in making such distribution. It refers to both the central service cost allocation plan which is used to allocate the costs of central government services to benefiting government departments, and the indirect cost proposals of those departments or units performing grants and contracts.

Q. What is an indirect cost rate?

A. An indirect cost rate is the ratio of an organization's indirect costs to some element of its direct costs, e.g., direct salaries and wages. Once determined, the rate is used to compute grantee indirect cost entitlement. The entitlement is accomplished by multiplying the indirect cost rate by the direct salaries and wages charged to a grant or contract. An indirect cost rate is the net product of an indirect cost proposal.

D. Preparation and Use of Plans

Q. Who is responsible for the preparation of State and local central service cost allocation plans and indirect cost proposals?

A. It is the responsibility of each State and local government to prepare timely central service plans and indirect cost proposals where indirect cost reimbursement is sought.

Q. Are there any critical areas that State and local governments should give particular emphasis to in the development of a central service cost allocation plan and in the preparation of individual indirect cost proposals?

A. State and local governments must be especially alert to inconsistent costing practices, i.e., the treating of a type of expense such as occupancy or fringe benefits as both a direct and indirect cost. Inconsistent costing invariably results in disallowed claims.

Q. Must the indirect cost proposal or the central service cost allocation plan be prepared centrally for each State or local department performing under Federal grant programs?

A. There is no requirement that an indirect cost proposal be prepared by an designated State or local government organization. Proposals may be prepared by each of the government departments performing under Federal grants or they may be prepared in a central office. However, while the State or local central service cost allocation plan need not be prepared centrally, it must be prepared as a single document.

Q. Must a State or local government prepare a central service cost allocation plan?

A. The preparation of a central service cost allocation plan is only required where a State or local government wishes to recover the costs of central services that benefit Federal programs conducted in or by State or local government departments. A State or local central service cost allocation plan is not required if a State or local government elects not to make a claim for recovery of central service type costs against Federal awards.

Q. How will a central service plan be used?

A. The central service plan is used to distribute allowable central service costs to each of the individual government departments benefited, in order that they might include them in their indirect cost proposal.

Q. How will the State or local government, and other Federal agencies, be notified of cost allocation plans that have been submitted and approved?

A. The cognizant Federal agency will reduce to writing, in the form of a negotiation agreement, the results of the negotiation it has concluded with State or local authorities. The agreement will be signed by representatives of both the cognizant Federal agency and the State or local government and will be distributed to other Federal agencies by the Department of Health, Education, and Welfare. A negotiated agreement will be issued for the fiscal years affected and will include amounts or percentages that have been agreed to as allowable for inclusion in the various State or local departments' indirect cost proposals.

Q. Do small cities or counties with a minimal amount of Federal Government activity have to prepare a central service cost allocation plan?

A. Small cities and counties who feel that the preparation of a central service cost allocation plan under the regular method is burdensome, may elect to establish their costs under a method that combines both the central service cost allocation plan and indirect cost proposals. This method however, results in less cost recovery than would likely result using the regular method, so cities and counties will have to determine whether this approach is suited to their needs. The method is illustrated in Section V, Appendix 1, Exhibit F.

Q. How will the Federal Government assure itself that central service cost allocation plans and indirect cost proposals that have been submitted have been properly prepared?

A. The Federal Government will review each central service cost allocation plan and indirect cost proposal submitted to assure itself that the plans and proposals have been prepared properly. Authorized State or local government representatives will be required to certify to the correctness of the cost allocation plans.

Q. The sample formats illustrate one method of computing a central service cost allocation plan, four methods for computing an indirect cost rate and one method of computing a consolidated local central service cost allocation plan and indirect cost proposal. Are State and local governments restricted to these basic methods?

A. States and local governments should use the cost allocation plans in the sample formats. A format materially different than that shown in the samples may be used only if prior approval is obtained from the cognizant Federal agency. Less detail than that shown in the sample format for the central service plans will not be acceptable. Federal agencies will recognize any of the four sample indirect cost proposal formats as long as the format selected gives effect to statutory requirements of the various Federal programs performed in the proposing department. However, it is recognized that differences in government laws, accounting systems, and policy directives may require deviations from the recommended format in some instances. Deviations will be considered if they conform with generally accepted cost accounting principles, do not conflict with Section C., Attachment A. of FMC 74–4 and are approved by the cognizant government agency. A State for local government need not use the same format for all State or local government departments but may elect the format which in each case is most appropriate to the department.

E. Specific Items of Cost

Q. Attachment B, Section C. of the circular identifies costs that are allowable with approval of the grantor agency. Is approval necessary when the State or local government treats these costs as indirect costs?

A. To the extent that costs in Attachment B, Section C. of the Circular are treated as indirect costs by a State or local government, negotiation of the indirect cost proposal(s) by the responsible Federal agency shall constitute approval of the Section C costs included in the proposal. Where Section C costs are to be treated as direct program costs, necessary approval must be obtained from the Federal department or agency which awarded the grant or contract.

Q. FMC 74–4 states that when the depreciation method of compensation for the use of buildings, capital improvements, and equipment is followed, any method of computing depreciation may be used. How will Federal agencies interpret this?

A. Depreciation is intended to spread the cost of an asset over its useful life. With rare exceptions, the depreciation of assets owned by States and localities occurs at approximately the same rate throughout their life. Thus, the straight line method of depreciation is always used for general purpose buildings and equipment and is used almost exclusively for all other assets.

Q. Are there any exceptions to the general rule that the computation of depreciation or use allowance will be based on acquisition cost?

A. There is one exception to this general rule and it applies only in the special case of donated assets. Depreciation or use charge will be recognized on the fair market value at the time of acquisition of the donated asset.

Q. The circular states that acquisition cost may be based on a reasonable estimate if actual cost records have not been maintained. Are there any guidelines on what will be accepted as a reasonable estimate if actual cost records have not been maintained?

A. There are no definitive guidelines on what will be accepted as a reasonable estimate in lieu of actual cost records. However, if in the opinion of the cognizant Federal agency, depreciation or use charges based on estimated acquisition costs are material in amount, the Federal agency may require that acquisition cost be based on an estimate performed by independent and professional appraisers or by other similar independent valuations. States and local governments should seek assistance from their cognizant Federal agency in developing an alternative method where actual cost records have not been maintained.

Q. May charges to Federal programs be based on such factors as replacement costs, commerical catalog prices or comparable commercial billing rates?

A. No. Charges to Federal programs must be based on costs actually incurred.

Q. Attachment B, section D.8 of FMC 74–4 states that legislative expenses are unallowable. Does this prohibit the recovery of the costs of legislative auditors?

A. To the extent that legislative auditors conduct regularly scheduled cost postaudits of government departments that perform Federal grants and contracts, and the Federal agreements benefit from the incurrence of this cost, then the cost is allowable. Audits conducted for investigative purposes or pursuant to data gathering for appropriation hearings are not allowable.

Q. Some grant programs are awarded to the office of the Governor of a State, to the chief executive of a political subdivision, the county supervisor, city council, school board or other similar type body. Are these grants precluded from recovering indirect costs under the circular?

A. The general expenses required to carry out the overall responsibilities of these offices are unallowable. Attachment B, Section D.6, of the Circular identifies them as a general expense of Government and therefore an unallowable cost. However, if special indentifiable expenses were incurred to satisfy a Federal grant or contract requirement, they would be allowed if they otherwise met the standards of allowability provided in the Circular.

F. Other

Q. How can a grantee distinguish between a direct cost and an indirect cost?

A. There is no universal rule for classifying costs as direct or indirect. Generally speaking, a direct cost is one that is incurred specifically for one activity. Indirect costs are if a more general nature and are incurred for the benefit of several activities. Consequently, some allocation technique must be used to distribute these indirect costs to the several direct functions benefited. Once a grantee makes an election and treats a given cost as direct or indirect it must apply that treatment consistently and may not change during the fiscal year.

Q. Is it permissible to allocate costs (either directly or indirectly) on the basis of revenue or on the basis of funds available under Federal grants or contracts?

A. No. The allocation of costs by either of these methods is unacceptable. Cost must be allocated on the basis of services rendered or goods provided to Federal grants or contracts.

Q. Should a cost allocation plan be submitted with a grant or contract project application?

A. A plan should not be submitted with a grant or contract project application. Space is provided on most applications for the approved indirect cost rate and the identification of the cognizant Federal agency.

Q. Does the circular have any effect on "cost sharing" or on "matching" requirements?

A. The Circular does not change any "Cost Sharing" or "Matching" requirements. It does provide a means of identifying total program costs for use in meeting those requirements.

Q. Program income represents earnings by the grantee realized from the grant-supported activities as a result of the grant. How should State and local units of Government treat program income?

A. State and local units of government should treat program income in accordance with awarding agency regulations implementing FMC 74–7 (formerly OMB Circular A–102).

Appendix II—Sample Cost Allocation Plans

A. Central Service Cost Allocation Plan Description

This is a sample illustration of a central service cost allocation plan. It consists of:

Exhibit A-Summary of Allocated Central Service Costs. This exhibit shows each central service, and the attendant costs, which benefit Federal grants and contracts and for which a State or local government wishes to make a claim. This exhibit must be supported by detailed schedules comparable to A.1–A.3 for each included central service.

Schedule A–1-Allocation of Costs, Personnel Department. The personnel department has been selected as an illustrative central service. This schedule shows those State organizations to which the personnel department provides services and the allocation of its costs to those organizations. This schedule is supported by Schedules A–2 and A–3.

Schedule A–2-Costs to be Allocated, Personnel Department. This schedule shows the composition of the costs of the personnel department as contained in official financial or budget statements and a reconciliation of those costs with the amount allocated in Schedule A–1.

Schedule A–3-Statement of Function and Benefit, Personnel Department. This schedule is a narrative description of the activities conducted by the personnel department, their necessity (benefits) to the successful performance of federally supported programs, a description of the base(s) selected to distribute the costs of those activities to the organizations to which services are rendered and the rationale or the base(s) selected.

Exhibit A–1—Summary of Central Services Billed. It is common practice for central service departments to bill those organizations to which they render services for the cost of those services. This Exhibit illustrates the services billed to organizations conducting Federal grants and contracts, the costs included in the billing, the methodology for computing the billing rate, etc.

Amounts allocated to the operating departments from the central service cost allocation plan in Exhibits A and A–1, are carried forward to Exhibits B, C, D, and E, which illustrate various sample formats for an indirect cost rate proposal.

Only a few of the many possible central services have been shown in Exhibit A and only one central service department is shown in the accompanying Schedules A–1 through A–3. A central service cost allocation plan may include any other services and their attendant costs which are allowable under FMC 74–4 and for which documentation can be provided. Each type of cost claimed should be supported by appropriate schedules and other documentation sufficient to provide a reasonable basis for evaluation and acceptance.

BILLING CODE 4910-57-M

EXHIBIT A

SAMPLE FORMAT

CENTRAL SERVICE COST ALLOCATION PLAN*
SUMMARY OF ALLOCATED CENTRAL SERVICE COSTS
FOR THE FISCAL YEAR ENDED JUNE 30, 19--

Department/Operating Unit	Central Service Organizations				Total Allocated Costs(b)
	Personnel(a)	Accounting	Purchasing	Audit	
Health	$ 9,945	$ 20,145	$ 3,412	$ 1,675	$ 35,177
Environmental Services	8,907	21,622	2,221	1,221	33,971
Social Services	3,187	7,984	896	645	12,712
Highway	15,132	42,855	6,751	6,227	70,965
Police	29,848	51,960	9,475	11,421	102,704
Fire	24,873	49,743	9,997	14,526	99,139
Other Departments	57,048	187,608	21,431	18,645	284,741
TOTALS	$148,940	$381,917	$54,183	$54,369	$639,409

(a) Allocated amounts shown are from Schedule A-1, In an actual plan, the remaining service departments would similarly need to be supported by separate schedules showing the computation of the allocated amounts.

(b) These amounts are includable in the indirect cost propsals of the individual operating Departments/units. See Exhibits B, C, C, and E.

*This is a sample only and hence, is brief and simple. In practice, a State of local government may wish to claim more or less activities as charges to Federally supported programs and this Exhibit and its supporting schedules would need to be modified accordingly.

BILLING CODE 4910-57-C

Appendix II—Sample Cost Allocation Plans

Exhibit A–1

Sample Format*

Central Service Cost Allocation Plan, Summary of Central Services Billed to User Organizations

Motor Pool.—The (State or local government) operates a central motor pool which makes cars, trucks, and buses available to user departments. User-departments are billed for each mile driven: cars—15 cents per mile, trucks—25 cents per mile, and buses—30 cents per mile. The basis for the charge is the most recent study of cost per mile driven, performed by the internal audit staff. Any over or under recovery is applied to the next year's expected expenditures and is included in that year's billing rate. The costs included are salaries and wages and fringe benefits of motor pool personnel, their travel, supplies and parts and use charges for equipment and buildings and vehicles determined in accordance with FMC 74–4.

Data Processing.—The State (or local government) operates a central computer center consisting of an IBM System 370/115, and Control Data 3100 and Cyber 70 series configuration. The center provides both regular continuing and special job computer support to most operating and staff departments. Billings for services are made to user organizations based on a standard price schedule. The price schedule is related to and designed to recover the costs of various types of jobs on each system. It is revised quarterly and audited annually by the internal audit department. Profits or losses are carried forward and used to adjust price schedules of ensuing quarterly billing rates. Costs consist of salaries and wages and fringe benefits of center personnel, supplies, maintenance and utilities, and straight line depreciation of equipment based on a fifteen-year life.

Long Distance.—All long distance telephone calls are placed through a central switchboard telephone and are billed to the organizations making the call.

Notes.—If a direct billing mechanism is used by the government, then all users must be billed. Billing of selected departments and allocation of residual amounts through the cost allocation plan to remaining departments results in inequitable costing and is not acceptable. However, if all users are billed, residual amounts may be allocated through the allocation plan provided they are not material and the allocation base is equitable.

A detailed breakdown of costs is not normally required as part of this exhibit. However, the submitting State or local government must have and make available to the Federal cognizant agency such cost and revenue breakdowns, utilization records and other information as is necessary to permit a reasonable assessment of the costs incurred and charges made.

* This is a sample only, and hence, is brief and simple. In practice, the number and types of services billed may be greater than shown here and may require more extensive description and explanation.

Schedule A–2; Sample Format [1]

[Central service cost allocation plan costs to be allocated, personnel department for the fiscal year ended September 30, 19—]

Salaries and wages		$140,000
Fringe benefits		16,000
Supplies		8,000
Travel		7,012
Maintenance and janitorial services		7,928
Capital outlay		7,561
		186,501
Less: Unallowable costs, capital outlay	$7,561	
Costs chargeable to Federal grant [2]	30,000	37,561
Total costs to be allocated on schedule A–1		[3] 148,940

[1] This is a sample only and hence, is brief and simple. In practice, this schedule should be sufficiently detailed to show the costs of major activities, branches, etc. of the personnel departments in a manner permitting a reasonable assessment of the costs claimed against Federal programs.

[2] Represents charges to a Federal grant awarded to assist the State or local government to improve its personnel system. If a supporting agency received an award from the Federal Government, all costs incurred in connection with the award (including any costs that are required for matching or cost sharing) must be eliminated prior to the distribution of the supporting agency's costs to the user departments or agencies.

[3] The costs allocated must be reconciled to appropriate financial documents, either financial statements, budgets or a combination of both. In this example the government's base data was cost incurred for its most recent fiscal year.

Schedule A–3.—Sample Format [4]

Central Service Cost Allocation Plan Statement of Functional and Benefit, Personnel Department for the Fiscal Year Ended September 30, 19—

The personnel department is responsible for overall administration of the Civil Service program. This includes recruiting, interviewing, testing and referring potential candidates for the more then 2,000 municipal jobs.

The personnel department administers the classifications and salary programs and is responsible for recommending personnel policies and procedures to the Civil Service Commission for approval.

The department is involved in the design of the various employee benefit programs. After installation, the department reviews and maintains the records on these programs.

Active and inactive personnel records are maintained on all municipal employees.

The personnel department is responsible for maintaining the safety program (including workmen's compensation and injury level) and the city training programs.

Sample Cost Allocation Plans

B. Consolidated Cost Allocation Plan Description

This illustrates the consolidated cost allocation plan. The plan may be used only by local governments. This method is used in lieu of the central service cost allocation plan and department/agency indirect cost proposals. The advantage of this method to local governments is that it is simple and does not require the use of complex cost schedules to support cost allocations. However, the use of this method entails the acceptance of certain conditions which may result in less total recovery of indirect type costs to a local government. If the following conditions are recognized and accepted, a local government may opt to use the method:

a. Only indirect costs of certain central services will be accepted for allocation. The only central services includable under this method are those that demonstrably benefit Federally supported programs and which would have been allocated to Federal awards had the regular methods illustrated in Exhibits A and B through E (in OASC–10) been used.

b. Central service costs which do not qualify under a. above must be added to the base used to develop the indirect cost rate.

c. All costs of all local departments and agencies (excluding the costs in a. above) must be included in the base used to develop the indirect cost rate except for unallowable items such as interest expense and items that tend to distort the rate computation, such as major subcontracts and items of capital equipment. Indirect type costs incurred at the local department or agency level, including divisional indirect costs, cannot be proposed as indirect costs but must be treated as a base cost in developing the indirect cost rate.

d. Indirect type costs incurred at any level of government may not be charged to a Federally supported program as a direct cost; e.g., accounting, purchasing, personnel. However, direct charges such as motor pool, reproduction, communications, etc. will be allowed if (1) they are so identified on the consolidated central service plan, and (2) the grantee's system normally provides for directly assessing its departments and agencies for the use of these services using pricing or fee schedules designed to recover the actual costs of services used.

(1) Expenditures not allowable consist of capital expenditures, contracted construction and flow-through monies, etc. These items are excluded from the computation because their inclusion would distort the assessment of indirect costs.

(2) In this illustration, the Treasurer's and Comptroller's office each conduct both direct and indirect activities. For example, the taxing function is contained in both offices (assessing, billing, collecting, etc.).

(3) Costs of the Mayor's Office and the City Council are stipulated in FMC–74–4 as costs of general government and hence, are unallowable as indirect costs; however, these functions benefit from those costs classified as allowable indirect costs and must be included in the base used to calculate the indirect cost rate.

(4) The indirect cost base consists of the costs of all the functions and activities of local governments except (i) central services benefiting Federal programs and (ii) expenditures not allowable. Thus, in this method, costs such as the salaries of department and division heads, secretaries, administrative supplies, etc. which could be treated as indirect cost under other methods, must be treated as direct costs and may not be charged to Federal programs as either indirect or direct costs.

Suggested Bases for Cost Distribution

Following are suggested bases for distributing joint costs of central-type

[4] This is a sample only and hence, is brief and simple. In practice, this schedule should be sufficiently detailed to provide narrative explanations of the functions and benefits associated with the costs being allocated.

services to local government departments or agencies and to projects and programs utilizing these services. The suggested bases are not mandatory for use if they are not suitable for the particular services involved. Any method of distribution can be used which will produce an equitable distribution of cost. In selecting one method over another, consideration should be given to the additional effort required to achieve a greater degree of accuracy. Consideration should also be given to UMTA-specific requirements.

Type of service	Suggested bases for allocation
Accounting	Number of transactions processed.
Auditing	Direct audit hours.
Budgeting	Direct hours of identifiable services of employees of central budget.
Buildings lease management	Number of leases.
Data processing	System usage.
Disbursing service	Number of checks or warrants issued.
Employees retirement system administration.	Number of employees contributing.
Insurance management service.	Dollar value of insurance premiums.
Legal services	Direct hours.
Mail and messenger service	Number of documents handled or employees served.
Motor pool costs including automotive management.	Miles driven and/or days used.
Office machines and equipment maintenance repairs.	Direct hours.
Office space use and related costs (heat, light, janitor services, etc.).	Sq. ft. of space occupied.
Organization and management services.	Direct hours.
Payroll services	Number of employees.
Personnel administration	Number of employees.
Printing and reproduction	Direct hours, job basis, pages printed, etc.
Procurement service	Number of transactions processed.
Local telephone	Number of telephone instruments.
Health services	Number of employees.
Fidelity bonding program	Employees subject to bond or penalty amounts.

Appendix III—Allowable Costs

Allowable Costs

The following four sections describe allowable costs for Capital Grant and Loan projects, Section 5 Operating Assistance projects, Section 8 Technical Study projects, Interstate Substitution projects, FAUS projects, and section 175 projects. Failure to mention a particular item of cost is not intended to imply that it is either allowable or unallowable. Determination of allowability in each case should be based on treatment of standards provided for similar or related items of cost. For other projects, refer to the appropriate Federal Management or OMB Circulars. If any problems arise, contact the appropriate UMTA regional or headquarters office.

1. *Capital Grant and Loan Projects.*

a. *Allowable Costs.*

(1) *Accounting.* The cost of maintaining accounting and other information systems required for management of the project is allowable. This includes costs incurred by central service agencies for these purposes and for personal services provided by recipient employees. The cost of maintaining central accounting records required for overall State or local government purposes, such as appropriation and fund accounts by the Treasurer, Comptroller, or similar officials, is considered to be a general expense of government and is not allowable.

(2) *Advertising.* Advertising media may include newspapers, magazines, radio and television programs, direct mail, and trade papers. The advertising costs allowable are those which are solely for:

(a) Recruitment of personnel required for the project;

(b) Solicitation of bids for procurement of goods and services required for the project;

(c) Disposal of scrap or surplus materials acquired in the performance of the grant agreement or replaced under provisions of the grant agreement; or

(d) Other purposes specifically provided for in the grant agreement and approved project budget.

(3) *Audit Service.* The cost of audits necessary for administration and management of functions related to UMTA projects is allowable and may include the cost of third-party audit surveillance and proposal evaluation.

(4) *Bonding.* Costs of premiums on bonds covering grantee employees who have responsibility for project funds and who would not otherwise be bonded or whose bond coverage had to be increased are allowable.

(5) *Budgeting.* Costs incurred for execution and revisions of approved project budgets are allowable. Costs for services of a central budget office are generally not allowable since these are costs of general government administration. However, where employees of the central budget office actively participate in the project budget process, the cost of identifiable services is allowable.

(6) *Building Lease Management.* The administrative cost for lease management for project property which includes review of lease proposals, maintenance of a list of available property for lease, and related activities is allowable.

(7) *Central Stores.* The cost of maintaining and operating a central stores organization for supplies, equipment, and materials used either directly or indirectly for UMTA projects is allowable.

(8) *Communications.* Costs incurred for local telephone centers, postage, messenger service, and similar services for employees whose time is charged to an UMTA project may be allocated in the same ratio as the amount of time each employee devotes to the project. The basis for allocation must be included in the recipient's cost allocation plan. Long distance telephone service, telegraph, teletype service, wide-area telephones service (WATS), and telpak (tie lines) are allowable if supported by logs showing party contacted and purpose or in accordance with a predetermined cost allocation plan.

(9) *Compensation For Personal Services.*

(a) *General.* Compensation for personal services includes all remuneration, paid currently or accrued, for services rendered during the period of performance under the grant agreement, including but not necessarily limited to wages, salaries, and supplementary compensation and benefits (see paragraph 1a(11)). The costs of such compensation are allowable to the extent that total compensation for individual recipient employees: (1) is reasonable for the services rendered, (2) follows an appointment made in accordance with State or local government laws and rules and which meets Federal merit system or other requirements where applicable, and (3) is determined and supported as provided in paragraph 1a(9)(b). Compensation for employees engaged in Federally assisted activities will be considered reasonable if it is consistent with pay for similar work in other activities of the State or local government. In cases where the kinds of employees required for the UMTA assisted activities are not found in other activities of the State or local government, compensation will be considered reasonable if it is comparable to pay for similar work in the labor market in which the grantee competes for the type of employees involved. Compensation surveys providing data representative of the labor market involved will be an acceptable basis for evaluating reasonableness. Recipients' files must reflect this information.

(b) *Payroll and Distribution of Time.* Amounts charged to grant programs for personal services, regardless of whether treated as direct or indirect costs, must be based on payrolls documented and approved in accordance with generally accepted practices of State or local agencies. Payroll costs charged to the project must be supported by time and attendance or equivalent records for individual employees. (See sample time sheet format, Appendix 3A. Any recipient may use this time sheet, but it should be used by Section 8 recipients.) These records must be certified by the employees' supervisors. Failure to properly document payroll charges will result in cost being unallowable. Salaries and wages of employees chargeable to more than one project or other cost objective will be supported by appropriate time distribution records. The method used should produce an equitable distribution of time and effort.

(10) *Disbursing Service.* Cost of disbursing project funds by the Treasurer or other designated officer is allowable. Disbursing services cover processing of checks or warrants from preparation to redemption, including necessary records of accountability and reconciliation of records with related cash amounts.

(11) *Employee Fringe Benefits.* Costs identified under (a) and (b) below are allowable to the extent that total compensation for employees is reasonable as defined in paragraph 1a(9)(b).

(a) Employee benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as annual leave, court leave, and military leave, if they are: (1) provided pursuant to an approved leave system, and (2) the cost is equitably allocated to all related activities, including the project.

(b) Employee benefits which may include employer's contribution or expenses for social security, employees' life and health insurance plans, unemployment insurance

coverage, worker's compensation insurance, pension plans, and severance pay, provided the benefits are granted under approved plans and are distributed equitably to the project(s) and other activities.

(12) *Employee Morale, Health, and Welfare Costs.* The costs of health or first-aid clinics and/or infirmaries, recreational facilities, employees' counseling services, employee information publications, and pay-related expenses incurred in accordance with general State or local policy are allowable. These costs are considered supporting services costs. Income generated from these activities will be offset against expenses.

(13) *Equal Employment Opportunity.* Equal Employment Opportunity costs resulting from meeting the requirements of UMTA 1155.1, "UMTA Interim Equal Employment Opportunity Policy and Requirements for Grant Recipients," are allowable project expenses.

(14) *Minority Business Enterprise (MBE).* MBE costs resulting from meeting the requirements of UMTA C 1165.1, "UMTA Interim Minority Business Enterprise Policy and Grant Requirements for Grant Recipients," are eligible project expenses.

(15) *Legal Expenses.* The cost of legal expenses required for administering a project is allowable. Legal services furnished by the chief legal officer of a State or local government, or his staff, solely for the purpose of discharging his general responsibilities as legal officer are unallowable. Legal expenses for prosecution of claims against the Federal Government are unallowable.

(16) *Materials and Supplies.* The cost of office materials and supplies necessary to carry out projects is allowable. Purchases made specifically for the project should be charged at actual prices after deducting all cash discounts, trade discounts, rebates, and allowances received by the recipient. Withdrawals from general stores or stockrooms should be charged at cost under any recognized method of pricing consistently applied. Incoming transportation charges are an allowable part of material cost.

(17) *Payroll Preparation.* The cost of preparing payrolls and maintaining necessary related wage records for employees assigned to the project(s) is allowable.

(18) *Printing and Reproduction.* The cost of printing and reproduction services necessary for project administration, including but not limited to, forms, reports, manuals, and informational literature, is allowable. Publication costs of reports or other media relating to project accomplishments or results are allowable when provided for in the grant agreement.

(19) *Procurement Service.* Cost of procurement services, including solicitation of bids, preparation, and award of contracts, and all phases of contract administration in providing goods, facilities, and services for the project are allowable.

(20) *Taxes.* In general, project-related taxes, or payments made instead of taxes, which the recipient is legally required to pay are allowable.

(21) *Transportation.* Project-related costs incurred for freight, cartage, express, postage, and other transportation costs relating either to goods purchased, delivered, or moved from one location to another are allowable.

(22) *Travel.* Travel costs are allowable for transportaton, lodging, subsistence, and related items incurred by employees who are in travel status on official business incident to a grant project. Costs may be charged on an actual basis, or a per diem or mileage basis instead of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip, and results in charges consistent with those normally allowed in like circumstances in nonfederally sponsored activities. The difference in cost between first-class air accommodation and less-than-first-class air accommodations is unallowable except when less-than-first-class air accommodations are not reasonably available. All foreign and out-of-state travel, except for travel between states in a multi-state urbanized area, must be specifically approved by UMTA in advance. This also includes travel to conferences. Travel expenditures must be supported by evidence showing that travel costs were properly authorized. Travel approval requests should include person(s) name and title, purpose, duration, and estimated cost of travel.

b. *Costs Allowable With Prior UMTA Approval.*

(1) *Advisory Councils.* Costs incurred by State advisory councils or committees established pursuant to UMTA requirements to carry out grant projects are allowable. Costs incurred by similar organizations are allowable when provided for in the grant agreement. Currently, UMTA does not require that advisory councils be established to carry out *capital grant projects.*

(2) *Automatic Data Processing.* The cost of data processing services is allowable. This cost may include rental of equipment. Acquisition of automatic data processing equipment or software by purchase, rental-purchase agreement or other method of purchase, is allowable only upon prior approval by UMTA.

(3) *Building Space and Related Facilities.* The cost of space in privately or publicly-owned buildings used to benefit the project is allowable subject to conditions stated below. The total cost of space, whether in a privately or publicly owned building, may not exceed the rental cost of comparable space and facilities in a privately owned building in the same locality. The cost of space procured for project usage may not be charged to the project for periods of non-occupancy, without UMTA authorization. Space procurement costs must be substantiated by a rental or lease agreement which includes the following items:

- Description of space to be leased
- Purpose for which it is to be used
- Period of lease (limited to grant period)
- Options to renew lease
- Utilities, insurance, and other services to be furnished to lessee
- Rate of rental
- Method and time of payment
- Other conditions required of lessor or lessee (recipient)
- Signatures of both parties and witnesses.

(a) *Rental Cost.* The rental cost of space in a publicly or privately-owned building is allowable.

(b) *Maintenance and Operation.* The cost of utilities, insurance, security, janitorial services, elevator service, upkeep of grounds, and normal repairs and alterations is allowable if it is not included in rental or other charges for space.

(c) *Rearrangements and Alterations.* Costs incurred for rearrangement and alteration of facilities required specifically for a UMTA project or those that materially increase the value of the useful life of the facilities, are allowable when specifically approved by UMTA.

(d) *Occupancy of Space Under Rental-Purchase or a Lease With Option to Purchase Agreement.* The cost of space procured under such arrangements is allowable if specifically approved by UMTA.

(4) *Consultants and Contract Services.* The cost of approved consultants and experts rendering professional and technical services is allowable. This includes accounting, legal assistance, and services rendered by other qualified individuals or organizations.

(5) *Insurance and Indemnification.* A description of insurance coverage and indemnification must be included in the recipient's cost allocation plan. Insurance for capital grant projects is usually the responsibility of third party contractors. The following insurance costs are allowable:

(a) Costs of insurance required or approved and maintained pursuant to the grant agreement are allowable.

(b) Costs of other insurance in connection with the general conduct of project activities are allowable subject to the following limitations:

1. Types and extent and cost of coverage will be in accordance with general State or local government policy and sound business practice.

2. Costs of insurance or of contributions to any reserve covering the risk of loss of, or damage to, Federal Government property are unallowable except to the extent that UMTA has specifically required or approved such costs.

3. Costs insuring project purchased equipment are unallowable for *capital* grants, but may be allowable for other projects.

(c) Contributions to a reserve for a self-insurance program approved by UMTA are allowable to the extent that the type of coverage, extent of coverage, and the rates and premiums would have been allowed had insurance been purchased to cover the risks.

(d) Actual losses which could have been covered by permissible insurance (through an approved self insurance program or otherwise) are unallowable unless expressly provided for in the grant agreement. However, costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound management practice, and minor losses not covered by insurance, such as spoilage, breakage, and disappearance of small hand tools which occur in the ordinary course of operations, are allowable.

(e) *Indemnification* includes securing the grantee against liabilities to third persons and other losses not compensated by insurance or otherwise. The Government is obligated to indemnify the recipient only to the extent expressly provided for in the grant agreement, except as provided in (d) above.

(6) *Maintenance and Repair.* Costs incurred for necessary maintenance, repair, or upkeep of property which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are allowable under the following two conditions:

(a) The property is necessary to accomplish the purpose of an UMTA project, and

(b) The costs are occasioned by usage of the property to accomplish an UMTA project or a portion thereof.

(7) *Motor Pools.* The costs of a service organization which provide automobiles to the grantee at a mileage or fixed rate and/or provide vehicle maintenance, inspection, and repair services are allowable. The purchase cost of vehicles is unallowable as a factor in determining motor pool cost.

(8) *Personnel Administration.* Costs for the recruitment, examination, certification, classification, training, establishment of pay standards, and related activities for UMTA projects are allowable.

(9) *Training and Education.* The cost of in-service training, customarily provided for grantee employee development which directly or indirectly benefits the UMTA project(s) is allowable, if specifically approved by UMTA. Out-of-service training involving extended periods of time is allowable only when specifically approved by UMTA. To be allowable, the costs must be included in the estimated costs of acquiring the capital assets.

c. *Unallowable Costs.*

(1) *Bad Debts.* Losses arising from uncollectable accounts and other claims, and related costs, are unallowable. Bad debt costs may offset an applicable credit if the claim had been previously considered as an applicable credit reducing net project cost.

(2) *Contingencies.* Contributions to a contingency reserve or any similar provision for unforeseen events are unallowable unless specifically allowed by UMTA.

(3) *Contributions and Donations.* Unallowable.

(4) *Depreciation and Use Allowances.* Unallowable.

(5) *Entertainment.* Costs of amusements, social activities, and incidental costs such as meals, beverages, lodgings, rentals, transportation, and gratuities, are unallowable.

(6) *Fines and Penalties.* Costs resulting from violations of, or failure to comply with, Federal, State, and local laws and regulations are unallowable.

(7) *Governor's Expenses.* Salaries and expenses of the Governor of a State or the chief executive of a political subdivision are considered a cost of general State or local government and are unallowable. The salary of the recipient's general manager or executive director is also unallowable.

(8) *Interest and Other Financial Costs.* Interest on borrowings (however represented), bond discounts, cost of financing and refinancing operations, and legal and professional fees paid in their connection are unallowable.

(9) *Legislative Expenses.* Salaries and other expenses of the State legislature or similar local governmental bodies such as county supervisors, city councils, school boards, etc., whether incurred for purposes of legislation or executive direction, are unallowable.

(10) *Management Studies.* Unallowable under capital grant projects.

(11) *Memberships, Subscriptions, and Professional Activities.* Unallowable under capital grant projects.

(12) *Preapproval Costs.* Costs incurred prior to the effective date of project approval are not allowable unless specifically approved by UMTA through a "Letter of No Prejudice."

(13) *Proposal Costs.* Costs of preparing proposals on potential Federal Government grant agreements are unallowable.

(14) *Underrecovery of Costs Under Grant Agreements.* Any excess of cost over the Federal contribution under one grant agreement is unallowable under other grant agreements.

2. *Operating Assistance Grants.* Information on allowable costs for Section 5 Operating Assistance Grants can be found in UMTA C 9050.1, "Application Instructions for Section 5 Operating Assistance Projects."

3. *Section 8—Technical Grants.*

a. Recipients shall follow the principles of FMC 74-4 in determining allowable costs under Section 8 Technical Study grants with the following qualifications:

(1) *Travel*—Costs for travel are allowable if the travel specifically relates to an approved project activity included in the grant contract. Recipients' must obtain approval from UMTA for all foreign travel, to conferences, and all out-of-state-travel except that in a multi-state urbanized area.

(2) *Equipment*—Recipients must obtain prior approval from UMTA before purchasing equipment.

4. *Section 10—Training Grants*

Under Section 10 training grants, UMTA will allow costs incurred by grantees in the following categories:

a. Salary and benefits actually paid by recipients to employees engaged in training activities.

b. Transportation and moving expenses directly related to training paid by recipients.

c. Training and educational expenses paid by recipients, including tuition, fees, and books.

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NAME _____

TITLE _____

TIME REPORT FOR MONTH OF _____

HOURLY RATE $_____

RECAP

PROJECT NUMBER & SPONSOR	TASK # OR DESCRIPTION	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	TOTAL HOURS	SPONSOR	DIRECT HOURS	HOURLY RATE	TOTAL COST
																																	UMTA				
																																	HUD				
																																	County				
																																	Local				
																																	State				
																																	EPA				

(49 U.S.C. 1601; 23 U.S.C. 103 and 142; 42 U.S.C. 7505; 49 CFR 1.51; OMB Circular A-102; Treasury Circular 1075; DOT Order 4600.9B)

Dated: August 21, 1980.

Theodore C. Lutz,

Administrator.

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