

Dated: November 1, 1981.

Carolyn K. Davis,
Administrator, Health Care Financing
Administration.

Approved: November 13, 1981.

Richard S. Schweiker,
Secretary.

(FR Doc. 81-34778 Filed 12-2-81; 8:45 am)
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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 1

[FCC 81-526]

Delegation of Authority to Review Board

AGENCY: Federal Communications
Commission.

ACTION: Final rule.

SUMMARY: The FCC is revising its rules pertaining to the delegation of authority to the Review Board in order to help achieve the Commission's objective of providing speedier service to the public.

Three major changes are being made. First, in addition to its other duties, the Board is authorized to review decisions of Administrative Law Judges in cases involving renewal or revocation of broadcast and common carrier licenses. Second, the Board is given a firm 180-day deadline by which it will have to issue a decision in each case or otherwise any party may request certification to the Commission. Third, the present rule requiring three Board Members to participate in each decision is changed to allow two members to adopt a decision in cases of emergency or necessity where a third member is unavailable.

DATES: Effective: January 1, 1982.

FOR FURTHER INFORMATION CONTACT:
Allan Sacks, Review Board, Federal
Communications Commission. (202) 632-
7180.

SUPPLEMENTARY INFORMATION:

Adopted: November 12, 1981.

Released: November 20, 1981.

By the Commission: Commissioner Fogarty dissenting; Commissioner Jones concurring and issuing a statement; Commissioner Dawson not participating.

1. Section 0.361, 0.365 and 0.367 of the Commission's Rules contain the delegation of authority to the Review Board. These Rules have been reviewed to make those changes necessary to insure that the public receives service in the most efficient and expeditious manner possible. To achieve that objective several changes have been made in the Board's authority, and the

rules have been rewritten in simpler and more direct language. See Appendix to this Order, especially, §§ 0.361 (a) and (c), 0.362(b), and 1.301(c)(6).

2. Authority for the adoption of the foregoing revisions is contained in Section 4(f)(1), 4(i), 4(j), 5(b), 5(d), and 303(r) of the Communications Act of 1934, as amended. 47 U.S.C. 154(f)(1), 154(i), 154(j), 155(b), and 303(r).

3. In view of the fact that the proposed revision involves rules of agency organization, prior publication of a *Notice of Proposed Rule Making* under the provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. 553, is unnecessary. Since the revisions are necessary to prevent undue delay in adjudicatory proceedings, delay in its implementation would be contrary to the public interest.

4. Accordingly, it is ordered, that effective January 1, 1982, Parts 0 and 1 of the Commission's Rules are amended as set forth in the attached Appendix.

(Secs. 4, 303, 307, 48 Stat., as amended, 1066, 1082, 1083; 47 U.S.C. 154, 303, 507)

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix

PART 0—COMMISSION ORGANIZATION

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

1. Section 0.361 is revised to read as follows:

§ 0.361 General authority.

(a) The Review Board is constituted pursuant to section 5(d)(1) of the Communications Act of 1934, as amended, to review decisions of the Administrative Law Judges in all adjudicative proceedings unless at the time of designation, the Commission specifies otherwise. The Board shall also perform those functions set forth in §§ 0.362 through 0.365 of this Part and any additional duties assigned by the Commission not inconsistent with these functions.

(b) The Board is composed of three or more Commission employees. Members of the Board are designated by the Commission, serve indefinitely on a full-time basis, and are responsible only to the Commission. Neither the Commission nor any of its members will discuss the merits of any matter pending before the Board with the Board or any of its members.

(c) Two members of the Board shall constitute a quorum. The Board may sit in panels of two members. Any member

assigned to a case who is not present at oral argument may, after reading the transcript of oral argument, participate in the Board's decision. However, so far as practicable, all of the members of the Board assigned to a case shall hear oral argument. In the case of a tie vote, a member of the Board not recused may review the record and vote; if a third member is not available, the case shall be certified to the Commission for decision.

(d) The member of the Board designated as Chairman by the Commission shall assign panels and cases on a rotational basis to the extent practicable. Each opinion of the Review Board will be signed by one of its members, who shall be responsible for its preparation.

2. A new § 0.362 is added, to read as follows:

§ 0.362 Action on initial decisions.

(a) The Review Board shall decide each matter before it by majority vote in accordance with the Communications Act of 1934, as amended, rules and regulations, case precedent, and established policies of the Commission. In reviewing initial decisions referred to it, the Review Board is authorized to perform all of the review functions which would otherwise have been performed by the Commission under §§ 1.273 through 1.282 of this chapter.

(b) The Board shall adopt a decision within 180 days after the release date of an Initial Decision to which exceptions are taken; provided, however, that where, for good cause shown, extensions of time are requested by the parties and granted, the 180 days shall be extended likewise. If the Board does not adopt a decision before the appropriate date, any party may file a motion with the Commission for certification of the case for decision.

3. A new § 0.363 is added, to read as follows:

§ 0.363 Certification of matters to the Commission.

(a) The Review Board, on its own motion or upon motion to the Board by any party, may in its discretion certify any matter to the Commission with a request that the Commission act upon the matter. The Commission may act upon the matter or remand it to the Board for decision.

(b) Whenever the Commission determines that a matter pending before the Board involves a novel issue of law or policy, it may, on its own motion, direct that the matter before the Board be certified to the Commission for

decision. However, no petition requesting the Commission to take such action will be entertained.

4. Section 0.365 is revised to read as follows:

§ 0.365 Authority delegated.

(a) The Review Board is delegated general authority to take such action as may be necessary to perform those duties specified in §§ 0.361 through 0.363 of this Part.

(b) The Review Board is delegated specific authority in all adjudicative cases to act on exceptions to initial or summary decisions, appeals from other rulings of Administrative Law Judges pursuant to §§ 1.301 and 1.302 of this chapter, and all related pleadings filed in cases or matters which are before the Board.

5. Section 0.367 is revised to read as follows:

§ 367 Record of actions taken.

The official record of all actions taken by the Review Board pursuant to §§ 0.361-0.365 is contained in the original docket folder, which is maintained by the Secretary in the Dockets Branch.

PART 1.—PRACTICE AND PROCEDURE

6. Section 1.301(c)(6) is revised to read as follows:

§ 1.301 Appeal from presiding officer's interlocutory ruling; effective date of ruling.

(c) * * *

(6) Appeals are acted on by the Review Board.

November 12, 1981.

Concurring Statement of Commissioner Anne P. Jones

In Re: Amendment to Parts 0 and 1 of the Commission's Rules to revise the Review Board's authority

I concur in these amendments because of the hope they offer of increased expedition in the Commission's adjudicatory processes. I would prefer, however, that the newly established quorum of two Board members be limited to cases of emergency or necessity when a third Board member is unavailable.

It seems to me that in cases considered and decided by only two Board members there may be too much incentive for compromise and consensus. I believe it preferable, where there is no emergency and a third member is available to have three members decide each case, so they will be free to vote strictly on their view of the merits of the case without

any pressure to reach a consensus to avoid a tie vote.

[FR Doc. 81-34968 Filed 12-2-81; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 63

[CC Docket No. 80-767; FCC 81-520]

Elimination of the Telephone Company—Cable Television Cross-Ownership Rules for Rural Areas

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Federal Communications Commission prohibits telephone companies from providing cable television service within their telephone service areas. It allows waivers for those areas where independent cable television service demonstrably cannot exist, or upon other showing of good cause. On January 22, 1981, the FCC adopted a Notice of Proposed Rulemaking to establish an exemption which would allow telephone companies to provide cable television service to rural areas without a waiver. 46 FR 9138 (January 28, 1981). The FCC hoped the exemption would facilitate cable television service to unserved rural areas. This order exempts rural areas from the prohibition. A rural area is any area outside of (a) any place, incorporated or unincorporated, with 2500 or more inhabitants; and (b) any urbanized area. This exemption will allow cable television service in rural areas which might otherwise go unserved.

EFFECTIVE DATE: December 4, 1981.

FOR FURTHER INFORMATION CONTACT: Linda M. Goodman, Common Carrier Bureau, (202) 632-6920.

In the matter of elimination of the Telephone Company—Cable Television Cross-Ownership Rules, §§ 63.54-63.56, for Rural Areas, CC Docket No. 80-767.

Report and Order

Adopted: November 5, 1981.

Released: November 27, 1981.

By the Commission: Commissioner Fogarty concurring and issuing a statement.

1. In a *Notice of Proposed Rulemaking* adopted December 19, 1980,¹ we announced an intention to create an exemption from the telephone company—cable television cross-ownership rules² in rural areas. We

¹ Notice of Proposed Rulemaking in the Elimination of the Telephone Company—Cable Television Cross-Ownership Rules for Rural Areas, 84 FCC 2d 335 (1981) [hereinafter cited as NPRM].

² Sections 63.54-63.56 of the Commission's rules, 47 CFR 63.54-63.56. Previously, the caption in this

found, upon initial analysis, that requiring waivers for rural areas appeared to be imposing costs which exceeded benefits. We proposed several alternative definitions of rural areas and requested interested parties to submit their comments on those definitions, as well as to submit additional proposals.

2. We find herein that our initial analysis was correct. Accordingly, we are supplementing our waiver policy with an exemption for rural areas. We adopt the definition of rural area used by the U.S. Department of Commerce, Bureau of the Census.

I. Background

3. The telephone company—cable television cross-ownership rules generally prohibit telephone common carriers from furnishing directly, or through affiliates, cable television service within their telephone service areas. Provisions exist for waiver of the rules

[i]n those areas where cable television service demonstrably could not exist except through a cable television system owned by, operated by, controlled by, or affiliated with the local telephone common carrier, or upon other showing of good cause * * *.³

4. Since adoption of the cross-ownership rules in 1970,⁴ the Commission has instituted several proceedings designed to ensure that the rules not impose unreasonable barriers to the growth of desired cable services. The Commission has attempted to better define "those areas where cable television service demonstrably could not exist," and to streamline the procedures pursuant to which petitioners might seek waivers of the cross-ownership prohibition. Nevertheless, many rural areas have remained unserved by cable television.

5. A number of rural telephone companies have filed for waivers to provide cable television service in their telephone service areas.⁵ Most petitions have been unopposed and have been

docketed included § 63.57. However, that section is only applicable to certain Section 214 applications in which the telephone company is constructing and leasing the cable system to an independent cable operator. Therefore, the caption of this proceeding has been amended to read "§§ 63.54-63.56."

³ Section 63.56(a) of the Commission's rules, 47 CFR 63.56(a).

⁴ Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 FCC 2d 307 (1970) [hereinafter cited as *Section 214 Certificates*], *recons. in part*, 22 FCC 2d 746 (1970), *aff'd sub nom. General Telephone Company of the Southwest v. U.S.*, 449 F. 2d 846 (5th Cir. 1971).

⁵ NPRM, *supra* note 1, at 338.

granted routinely. However, action on some opposed petitions has taken longer than 18 months. Service has been denied to the public while the matters were being resolved by the Commission.

6. This proceeding was undertaken to determine whether the benefits of the cross-ownership rules in rural areas continued to outweigh the costs. We sought comment on whether the policies underlying the rules remained relevant in such areas. Our initial analysis indicated that the restrictions were not working to the public benefit in rural areas, and therefore we proposed to eliminate the requirement of waivers for rural areas. We proposed several definitions of "rural areas" and also invited other proposals. The definitions we proposed for comment were:

a. *Less than 30 Homes per Route Mile, Franchise Area.* This was the level (measured within a franchise area) established in CC Docket No. 78-219. We found that independent cable television systems generally were not viable in franchise areas with populations at this level.⁶

b. *Less than 30 Homes per Route Mile, Service Area.* This standard was broader than the preceding one because a telephone company could determine the density of the entire area it proposed to serve with cable television, regardless of franchise area boundaries. Although we had rejected this approach in the *First Reconsideration in CC 78-219*, *supra* note 6, we believed it appropriate to reevaluate the standard and propose it for comment.

c. *No Community of Greater than 1500 Persons.* The Rural Electrification Administration (REA) administers financing for cable television services and facilities. The REA gives priority consideration to:

low density rural areas, particularly those outside the boundaries of incorporated or unincorporated cities, villages, or boroughs having a population in excess of 1500 inhabitants.⁷

⁶ This franchise area standard was incorporated in the provision for obtaining waiver of the cross-ownership rules. See Section 63.56 of the Commission's rules, 47 CFR 63.56. Memorandum Opinion and Order in Revision of the Processing Policies for Waivers of the Telephone Company—Cable Television "Cross Ownership Rules," 82 FCC 2d 254, 258 (1980) (hereinafter cited as *First Reconsideration in CC 78-219*). However, subsequent to the filing dates for comments in this proceeding, the standard was modified to apply the presumption on a cable television service area basis (proposal b). Memorandum Opinion and Order in the Revision of the Processing Policies for Waivers of the Telephone Company—Cable Television "Cross Ownership Rules," 86 FCC 2d 983 (1981) (hereinafter cited as *Second Reconsideration in CC 78-219*).

⁷ Interim REA Bulletin 328-1, Sec. VI.A.1., page 5, June 26, 1979.

d. *Areas Outside the Top 100 Major Television Markets.* For administrative ease, we proposed using the specified zone and major market concepts found in our cable television rules, 47 CFR 76.5(f), 76.51. Thus, any area more than 35 miles from the center of a city to which stations in the top 100 television markets are licensed would have been considered rural. We speculated that areas outside these 35 mile zones would generally be rural and not prime candidates for independent cable television operations. The standard also would be convenient to administer.

e. *Areas Outside the Top 200 Television Markets.* This standard would exclude the second 100 television markets' 35 mile zones from the definition of rural.

f. *Combined Measure.* We asked comment on any combination of the above. We asked if it would be appropriate to eliminate the rules for those areas outside the specified zones of all major markets where the community size was less than 1500 or where there were fewer than 30 homes per mile.

II. Summary of Pleadings

7. The formal comments filed in this proceeding were received from the cable television industry,⁸ the telephone industry,⁹ government agencies¹⁰ and a

⁸ The cable television group consisted of American Cable Television, Inc.; Arizona Cable Television Association, Cablecom-General, Inc., Coaxial Communications, Inc., Essex Communications Corporation, Horizon Communications Corporation, McCaw Communications Companies, Inc., Mid-America Cable TV Association, New England Cable Television Association, North Carolina CATV Association, Tele-Media Corporation, Vision Cable Communications, Inc., Whitney Communications Corporation, and W.W. Communications, Inc. (filing consolidated comments) (Arizona Group); CATV Service, Inc.; Colonial Cablevision of Revere, Inc.; Community Antenna Television Association, Inc.; National Cable Television Association, Inc. (NCTA); New York State Cable Television Association; Palmer Communications, Inc.; Multimedia Cablevision, Inc., and Nor Cal Cablevision, Inc. (filing consolidated comments); Storer Broadcasting Company; Tele-Communications, Inc.; Teleprompter Corporation; and Times Mirror Cable Television, Inc.

⁹ The telephone company group consisted of Ardmore Telephone Company, Inc. (Ardmore); Continental Telephone Companies (Continental); GTE Service Corporation and its affiliated domestic telephone companies (GTE); Missouri Telephone Company, North-West Telephone Company, and Platteville Telephone Company (filing consolidated comments) (Missouri Group); National REA Telephone Association (NREATA); National Telephone Cooperative Association (NCTA); Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO); Telephone and Data Systems, Inc. (TDS); United States Independent Telephone Association (USITA); and United Telephone Systems, Inc. (UTS).

¹⁰ This group was made up of the New York Public Service Commission (NYPSC), the Rural

not-for-profit organization unaffiliated with either industry (the National Citizens Committee for Broadcasting (NCCB)).

8. The cable television group, except for CATV Service, Inc., unanimously rejected the proposed exemption from the telephone company-cable television cross-ownership rules. Their arguments consisted for the most part of a reiteration of the policies underlying the adoption of the cross-ownership rules. For example, they claimed that concerns about control over the media and anticompetitive abuses are still warranted, and that cable is a potential alternative to the telephone local distribution monopoly. Furthermore, they asserted that the waiver procedure has sufficiently reduced the administrative burden caused by the rules, and that the Commission's burden is now "more ministerial than substantive." They argued that the relatively few opposed petitions demonstrate that the independent cable industry is as interested as the telephone industry in getting service to rural areas. They also stated that furtherance of the Commission's national communications policies is sufficient reason to overrule local franchising authorities who might prefer the local telephone company to an independent operator, and that the Commission need not worry about frustrating REA policies, because REA's budget has been reduced severely. The comments made little distinction between the application of the rules in rural and nonrural areas. Furthermore, they offered but few suggestions or comments concerning an appropriate definition of "rural area" for purposes of the exemption.

9. Times Mirror Cable Television, Inc., while rejecting the proposed exemption, included an alternative position in its comments. In lieu of the exemption, it proposed that unopposed waiver petitions be granted automatically. However, if an exemption were to be adopted, it suggested that the exemption apply only to areas more than 35 miles from any community which has a licensed television station, so long as the area has a population of less than 1500 or a density of less than 30 households per route mile measured on a franchise area basis. It argued that its alternative to an exemption—the automatic grant of unopposed petitions—would expedite the waiver process and the commencement of cable

Electrification Administration (REA), and the United States Department of Justice (Department of Justice).

television service. Its proposal for a rural definition allegedly reflects the built-up nature of television markets and the threshold levels at which independent cable television service is presumptively unattractive.

10. CATV Service, Inc., limited its comments to whether a waiver should be required for a telephone company to compete with an existing cable television operator at franchise renewal time. It argued in favor of such a waiver requirement. It stated that to permit telephone companies to serve areas where there are operating cable systems would undermine the rationale on which the present cross-ownership restrictions are based.

11. The comments received from the telephone interests were more diverse. GTE, NREATA, Ardmore, and UTS were joined by NYPSC in arguing that the cross-ownership rules should be eliminated for all areas. They reiterated the reasoning in the *NPRM*, *supra* note 1, and professed that it could be applied generally. GTE and UTS did not propose any definition of rural area to be used in the event that the Commission decided against their broader proposal. Ardmore and NREATA suggested exemption of proposed cable television systems with less than 10,000 actual subscribers or 20,000 potential subscribers measured on a headend basis. They claimed that the use of that measure would ensure the provision of cable television service by telephone companies only in areas of insubstantial population.

12. Continental and TDS proposed that rural areas be defined as those areas having less than 30 households per cable route mile measured on a cable television service area basis. This definition was one of those proposed for comments in the *NPRM*, *supra* note 1. They pointed out that this was the density level below which independent cable television operation generally is not viable.

13. Two parties proposed that telephone companies be allowed several alternative definitions under which to claim an exemption. The Missouri Group proposed the following alternatives: (i) Areas having less than 30 households per route mile measured on a service area basis; (ii) areas containing no municipality with a population greater than 10,000; or (iii) areas outside the municipal boundaries of the nation's 100 largest cities. NTCA's alternatives included (i) and (ii) above, and added an exemption for cooperatively-owned telephone companies and an exemption for areas outside of the cities of license of the top 100 television markets. The Missouri Group argued that (ii) is found in the only federal law which authorizes

loans for cable television service, and that it includes most towns and small cities in the telephone service areas of independent telephone companies. It further argued that (iii) was more appropriate than using the top 100 television markets, because those markets bear no relationship to the problems of encouraging cable television service, to the concept of "rural," or to the availability of other cable entertainment and services. NTCA argued for exempting areas outside of the cities of license of the top 100 television markets for the same reason, *i.e.*, that the entire "markets" exclude too large an area.

14. OPASTCO suggested that the entire United States be defined as rural except the cities of license of the top 100 television markets, and adjacent cities with populations exceeding 10,000. It argued that this standard would be easy to administer and would exclude those cities containing licensed full-service television stations.

15. USITA, along with REA, argued for an exemption for all areas that do not include a municipality with a population of over 10,000. Its reasons were similar to those of other parties espousing the same viewpoint. USITA would also exempt areas containing less than 40 households per route mile measured on a service area basis. It proposed this standard based on "current economic conditions and the prospects for the future," stating that a density of 30 households per route mile is no longer realistic.

16. NCCB proposed that an exemption be created for cooperatively-owned telephone companies. It, along with NTCA, argued that cooperative ownership of the media is in the public interest.

17. The Department of Justice noted that in franchise areas containing less than thirty households per cable route mile, independent cable television service is presumably infeasible.¹¹ It requested that the rural exemption apply only to places where independent cable television service is unquestionably infeasible. Although it made no concrete suggestion, the Department of Justice proposed that the definition of rural area be narrower than the 30 households per route mile standard.

18. Reply comments were filed by the Arizona Group, the Missouri Group, NCTA, NTCA, the New England Cable Television Association (filing separately from the Arizona group), OPASTCO, TDS, USITA, UTS, and Teleprompter Corporation. The reply comments

largely reiterated the positions taken in the initial comments.

19. Reply comments also were received from two parties who had not participated in the initial round of filings. Cascade Utilities, Inc., voiced general support for the adoption of a rural exemption. The New York State Commission on Cable Television expressed general disapproval of the creation of a rural exemption. It expressed particular concern that any federal deregulation in the cross-ownership area not preempt the states' right to retain cross-ownership prohibitions.

20. We also received a number of informal comments. Most of these expressed views similar to those expressed in various formal comments. A few, however, suggested an exemption for all independent telephone companies. One suggested an exemption for any telephone company proposing to serve its entire telephone service area, so long as the overall density was less than 10 or 12 households per route mile. These informal comments were brief and usually contained little hard evidence to justify the proposals.

21. Many of the parties also responded to the questions we raised in paragraph 21 of the *NPRM*.¹² The first question asked whether a waiver should be required for a telephone company to compete with an existing independent cable company at franchise renewal time. Cable interests stated that such waivers should be required, while telephone interests, joined by REA and NYPSC, argued against such waivers. Similar responses by those groups were submitted as to whether waivers should be required for telephone company acquisitions of existing independent systems.

22. All parties agreed that divestiture should not be required of a telephone company when a formerly exempt area grows to be nonrural. The cable interests did suggest a requirement that leaseback arrangements be offered. All parties also agreed that cooperatively-owned telephone companies make up only a small number of the independent telephone companies interested in serving rural areas. Furthermore, all parties agreed that cable television service offered by telephone companies should be treated the same as independent cable television service with respect to rules concerning access to the cable, channel capacity, etc.

23. The cable interests feared that the provision of cable services by telephone companies might retard the provision of

¹¹ See note 6, *supra*.

¹² *NPRM*, *supra* note 1, at 342.

nonvoice, nonvideo communications services in rural areas. Conversely, the telephone interests, along with REA and NYPSC, felt that cross-ownership would enhance the possibilities of such services.

24. Finally, the cable interests proffered that REA policies afford the telephone companies a competitive advantage in providing cable television service in rural areas. The telephone interests, REA and NYPSC claimed that REA policies treat everyone equally.

III. Discussion

A. General Considerations and Conclusions

25. Before discussing the merits of the alternatives before us, we believe it would be helpful to outline the reasons that led us to propose an exemption from the cross-ownership rules. The Commission has long been concerned that its rules not deprive rural Americans of cable television service.¹³ Indeed, the waiver mechanism was created for those situations in which the local telephone company or its affiliate might be the only feasible provider of cable television service.¹⁴

26. We revisited the waiver question in a proceeding initiated in 1978.¹⁵ Ultimately, we refined the waiver process¹⁶ to reduce the impediments to the development of rural cable television service caused by the cross-ownership prohibition.¹⁷ In promulgating that refinement,¹⁸ we acknowledged that our waiver procedures may have discouraged the initiation of new rural cable television service by needlessly requiring complicated and expensive presentations by rural telephone

¹³From the inception of the cross-ownership rules, the Commission has sought to ensure that no substantial segment of the public would be without the opportunity of having cable television service. See Notice of Proposed Rulemaking and Notice of Inquiry in the Applications of Telephone Companies for Section 214 Certificates For Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 34 FR 6290, 6292 (1969).

¹⁴Section 214 Certificates, *supra* note 4, at 326.

¹⁵Clarification and Notice of Proposed Rulemaking in Revision of the Processing Policies for Waivers of the Telephone Company—Cable Television "Cross Ownership Rules," 89 FCC 2d 1097 (1978) (hereinafter cited as *NPRM in CC 78-219*).

¹⁶The refinement was the adoption of the rebuttable presumption that independent cable operation is not economically feasible in areas having a density of fewer than thirty households per cable route mile. See § 63.56(b) of the Commission's rules, 47 CFR 63.56(b).

¹⁷Report and Order in Revision of the Processing Policies for Waiver of the Telephone Company—Cable Television "Cross Ownership Rules," 82 FCC 2d 233 (1979) (hereinafter cited as *Report and Order in CC 78-219*).

¹⁸Second Reconsideration in *CC 78-219*, *supra* note 6.

companies.¹⁹ As a result of the easing of the impediments, there has been a marked increase in the number of waiver petitions filed.²⁰ It is our hope that even more service to rural areas will follow the elimination of the rules for those areas.

27. The cost of applying these rules to rural areas has been high. The majority of the waiver petitions we have received for rural areas have been unopposed. In such cases, when it appeared that service would not otherwise be provided, waivers were usually granted. Yet, the filing of these petitions has placed a considerable burden upon both the rural telephone companies and the Commission. Furthermore, service to communities has been delayed, and that is especially unfortunate in the many cases in which a franchise was obtained prior to the filing of the waiver petition.

28. The major benefit supporting the cross-ownership prohibition in 1970 was the preservation of an environment for the unhindered development of wideband services. Eleven years later, the benefit to be gained from continuation of the prohibition in rural areas is, at best, illusory. Our concerns must seem ironic to residents of rural areas without any wideband service.

29. Nor have the general comments submitted by the cable interests demonstrated that the analysis proffered in the *NPRM* was incorrect. While we are aware of the problems that can arise from telephone company provision of cable television service, we find that an exemption for rural areas is important to ensure that such areas have an opportunity to enjoy the same benefits associated with broadband services which urban areas are already experiencing or are more likely to experience sooner. Many small telephone companies, not familiar with our waiver procedures, may be discouraged from implementing broadband services in rural areas by the mere presence of the Commission's prohibition. Furthermore, the expense of acquiring legal, engineering and other assistance to obtain a waiver may be an additional impediment. In a rural area where the profitability of providing broadband services may be slim, these considerations may be real barriers to initiation of new cable service. Moreover, since we have not observed rapid or significant penetration into rural areas by independent cable operators even under the prohibition, we

¹⁹*NPRM in CC 78-219*, *supra* note 15, 1113-14.

²⁰*NPRM*, *supra* note 1, at 338.

believe that its costs to the rural public have far exceeded its benefits.²¹

30. Accordingly, we reject the proposals made by the cable television interests that the rules remain intact. We see the more immediate availability of cable television service to rural areas, that an exemption should bring to fruition, as outweighing our earlier expressed concerns supporting the prohibition. Therefore, we will exempt "rural areas" from the telephone company—cable television cross-ownership rules.

31. We similarly believe that proposals to eliminate the cross-ownership rules entirely, or to eliminate their applicability to independent or cooperatively-owned telephone companies, are inappropriate in this proceeding. In the *NPRM*, *supra* note 1, we stated that "the policies our rules are designed to promote no longer outweigh the burdens imposed on rural areas."²² We are not rejecting the policies underlying the cross-ownership rules. We merely find them to be overly costly in rural areas. Complete elimination of the cross-ownership rules is beyond the contemplation of this proceeding.²³ We also reject a blanket exemption for independent or cooperative telephone companies. No evidence has been presented to show that the rationale behind the cross-ownership rules is any less applicable to cooperative telephone companies, or that independents or cooperatives operate only in rural areas. We now turn to the question of what is a rural area.

B. Proposals Based on the Number of Households per Route Mile

32. Although two of the standards we proposed for identifying rural areas were based on population density (the number of households per route mile), further reflection and the comments convince us that such a definition is too difficult to implement. Under an exemption, a telephone company that

²¹The cable interests also argue that the process is not administratively burdensome to the Commission. However, we anticipate that elimination of the rules in rural areas will permit the reallocation of at least two workyears time annually. Such a reallocation, given the Commission's current budgetary constraints, is not insignificant.

²²*NPRM*, *supra* note 1, at 341.

²³The Commission's staff has completed a study of all cable television cross-ownership rules. We invite all interested parties to comment on whether the reasons for the telephone company—cable television cross-ownership rules have continued viability or whether other valid reasons exist for the continuation of the prohibition. See Staff Report on FCC Policy on Cable Ownership, released November 17, 1981 (hereinafter cited as *Staff Report*).

decides to provide cable television service to an area defined as rural does so with no need to come before the Commission for a waiver. Therefore, the status of the area as rural must be readily apparent. Unfortunately, household density is not apparent. It requires engineering studies and surveying techniques. Even then, the results are not irrefutable. In our experience with waiver petitions, we have seen a number of disputes as to actual household density. Such uncertainty renders any household density standard administratively impractical, since the exemption must be based on a definition of rural area that is easily identifiable and verifiable.

C. Proposals To Exempt Areas Outside Certain Television Markets

33. Unlike the household density proposals, an exemption granted to areas outside certain television markets would be easy to administer. However, the number and signal strength of the television outlets in an area are not necessarily determinative of whether the area is urban or rural. Those facts may be indicative of other aspects of the area, e.g., size, proximity to major urban centers, and growth trends, which might be relevant to a classification of the area as urban or rural. But many areas not well served by television are not rural areas, and have proved very attractive to independent cable operators. We believe that the standard discussed below gives a more accurate definition of rural—one which is related to size and population density of an area.

D. Proposals To Exempt Areas Which Do Not Contain a Sizeable Community

34. An exemption standard based upon the population in the area has the benefit of being precise and easily enforceable. If we establish that an exemption is warranted for those areas that do not include population centers exceeding a specific size, we could use publicly available census data to determine eligibility. Some commenters suggested that an area should not be considered rural if it contains a community with a population in excess of 1500. We had proposed that figure for comment, since it was utilized by REA. However, several parties pointed out that even truly rural areas can contain towns much larger than 1500.

35. REA argued against making 1500 the standard. It urged the adoption of a community population of 10,000 persons. Although several good reasons were given for adopting that standard, most of the commenters admitted that at populations close to 10,000, independent

cable television service often becomes feasible. We also recognize the Department of Justice's concerns that our exemption only be applicable in areas where independent cable television service is truly infeasible. Therefore, it is our belief that a population figure of 10,000 is too high.

36. We believe the most appropriate and administratively manageable definition of "rural area" is that used by the U.S. Department of Commerce, Bureau of the Census. The Census Bureau began utilizing a rural/urban dichotomy over one hundred years ago.²⁴ It has been refining its definitions ever since.²⁵ The definition of rural is related to the population density and overall size of an area. Our experience shows that this definition adequately describes those areas in which cable operators have been reluctant to initiate service. We, therefore, are adopting an exemption for areas which are defined as rural by the Census Bureau.

37. The Census Bureau defines as rural all areas outside of:

- (a) Places of 2500 inhabitants or more, incorporated or unincorporated;²⁶ and
- (b) Other territory, incorporated or unincorporated, included in urbanized areas.

We want to emphasize that the telephone company's entire cable television service area must be rural in order to qualify for the exemption. The exemption will be inapplicable if the area includes even a portion of a place defined as nonrural in subparagraph (a) or (b) above.²⁷

38. The most easily identifiable determinant leading to classification of an area as "nonrural" is whether it contains any incorporated places having 2500 inhabitants or more. However, a definition of urban territory restricted to such places would exclude a number of large and densely settled places merely because they are not incorporated.

²⁴ See, Statistical Atlas of the United States, 1874.

²⁵ U.S. Department of Commerce, Bureau of the Census, Series P-23, No. 1, The Development of the Urban-Rural Classification in the United States: 1874-1949, Aug. 5, 1949.

²⁶ The first publication in which the population of places having 2500 inhabitants or more was officially designated as urban was the Supplementary Analysis of the Twelfth Census (1900), published in 1906. *Id.* Since that time, the Census Bureau has used this definition with minor modifications. See U.S. Department of Commerce, Bureau of the Census, Number of Inhabitants, 1970, Series PC(1)-A (hereinafter cited as *Number of Inhabitants, 1970*).

²⁷ The Census Bureau has defined some incorporated places of 2500 inhabitants or more as "extended cities." Such cities consist of a rural part and an urban part. The rural part of such "extended cities" will qualify for the exemption from the telephone company—cable television cross-ownership rules.

Therefore, in 1950, the Census Bureau adopted the urbanized area concept and delineated boundaries for unincorporated places.²⁸

39. For purposes of the 1980 census, an urbanized area is composed of an incorporated place and surrounding densely settled areas that together have a combined population of at least 50,000. There is no minimum size for the incorporated place that forms the central city of the area. Areas surrounding the central city are included in the urbanized area only if they are sufficiently densely populated. This population density factor is used so that the physical extent of a city or cities can be clearly delineated.²⁹

40. According to the 1980 census, 26.3 percent of the U.S. population live in rural areas. State population census volumes for 1980 will list the number of inhabitants of each incorporated or unincorporated place and will contain maps and other information relating to each urbanized area. The Census Bureau will release each volume as it is published. In the meantime, such information is available from the Census Bureau by telephone.

41. We expect that only the most recent U.S. Census Bureau statistics will be used in qualifying for the rural exemption. We realize there will be times when all available Census Bureau statistics seem out of date. However, we cannot involve ourselves in determinations as to the accuracy of conflicting statistics. If we were to get involved in these determinations, we would be thwarting one of the reasons for eliminating these areas from the prohibition—elimination of unnecessary delay caused by resolution of issues by this Commission. Therefore, administrative finality requires that statistics from other sources be rejected.

E. Requirement of Waiver for Acquisitions and for Oppositions to Franchise Renewals

42. In rural areas, we have determined that the costs of imposing the cross-ownership rules outweigh their benefits. Those costs include foreclosure or delay of cable television service to rural residents and wasted administrative resources at the Commission. Neither of these costs is substantial in the case of acquisitions, or oppositions to franchise

²⁸ The introduction of the concept of "extended cities" in 1970 has had very little impact on the numbers of areas classified as either urban or rural. *Number of Inhabitants, 1970, supra note 26.*

²⁹ U.S. Department of Commerce, Bureau of the Census, Release No. 81-125, Large Increase in Number of Urbanized Areas Shown by Census Figures, July 27, 1981.

renewals. In these instances, an independent cable operator continues to provide service to the community. Furthermore, such waiver petitions have been few. We therefore find that a continuation of the waiver requirement in these situations is not overly burdensome to either the rural areas or the Commission. We will continue to require waivers of telephone companies who propose cable television service in any area where a competing cable television system is under construction or in existence.

F. Other Matters

43. In order to distinguish those telephone company applications which propose cable television service in exempted areas from those which do not, we will require telephone companies to state in their applications for authority under Section 214 of the Act that they are relying upon the rural exemption. We are therefore adding to our rules a new § 63.01(r) that will describe this requirement.

44. We wish to make it clear that any party filing an opposition to a Section 214 application to which the exemption may apply must confine its arguments to issues relevant to whether the "public convenience and necessity" will be served by the applicant's proposal. For example, an opposition may contain current Census Bureau figures showing that an exemption claimed pursuant to § 63.01(r) is inapplicable. However, considering the years that many rural areas have gone without cable service while we have precluded telephone company involvement, we believe it would be inappropriate and counterproductive for us to continue to take into account naked assertions that independent cable television service is feasible in these areas.

45. Telephone companies will still need waivers to provide cable television service within their telephone service areas if any part of the area to be served is not rural. We are retaining our present waiver standards for this purpose. A telephone company must show, pursuant to § 63.56, that service otherwise would not exist or, alternatively, that other good cause warrants waiver. Telephone companies will continue to enjoy a rebuttable evidentiary presumption that service would not otherwise exist where the proposed cable television service area has fewer than 30 households per cable route mile. This standard is based on our findings in the *Report and Order in CC 78-219*, *supra* note 17, that cable television systems generally are not profitable when density is below that level. Unaffiliated cable television

systems may, of course, rebut the presumption by demonstrating an intent to offer essentially the same service as proposed by the telephone company within the same time frame.

46. The exemption will relieve petitioners, the Commission and the public of the costs and burdens associated with the waiver process where the benefits of the process are least apparent—in rural areas. Permitting telephone companies located outside these areas to continue to seek waiver under our present standards will provide a means by which to evaluate the public interest aspects of individual situations on a case-by-case basis. Moreover, comments on the *Staff Report*, *supra* note 23, may indicate that further refinements in our telephone company-cable television cross-ownership rules and policies are necessary. Until that record is compiled, we believe continuing our present policies, with the exemption for rural areas adopted today, is the most administratively sound way of proceeding.

47. It is not our intention to preempt the rights of the states to adopt cross-ownership prohibitions as they see fit. In this proceeding, we do not reject the policies underlying the cross-ownership rules. We merely wish to eliminate any barriers to rural cable television service stemming from our rules. Therefore, state and local officials may continue to assess the effects of cross-ownership within their jurisdictions, and may make any rules or judgments that seem appropriate to them. Thus, our action in no way affects local requirements that the telephone company first obtain a cable television franchise.

48. We want to assure any telephone companies contemplating service to rural areas that divestiture will not be required solely because an area becomes nonrural at some future time. Also, any telephone company providing cable television service must comply with the same Commission rules with which independent cable television operators must comply. See Parts 76 and 78 of the Commission's rules, 47 CFR Parts 76 and 78.

49. Finally, a number of petitions for waiver are pending. Review of several of these petitions reveals that in many situations waivers will no longer be necessary. On or before the effective date of this order, the staff will notify parties to those waiver petitions of the determination that the telephone company's proposed cable television service area is rural. Those parties will then have 10 working days from the effective date of this order to rebut that

determination with recent census data that shows the area is not rural. Absent that showing, those waiver petitions will be dismissed and the requirement of the new § 63.01(r) will be waived to facilitate processing of the corresponding Section 214 applications.

50. In light of the above, any delay in the effectiveness of this order would be contrary to the public interest. Accordingly, pursuant to Section 553(d)(1) and (3) of the Administrative Procedure Act, 5 U.S.C. 553 (d)(1) and (3), the new rules will be effective December 3, 1981.

Ordering Clauses

51. Accordingly, it is ordered that, pursuant to Sections 2, 3, 4 (i) and (j), 205, 214, 303, 307, 308, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 152, 153, 154(i) and (j), 205, 214, 303, 307, 308, 309, and 403, Part 63 of the Commission's rules is amended as set forth in the attached Appendix below, effective December 3, 1981.

52. It is further ordered that, parties who receive the notification outlined in paragraph 49 above, may file, within 10 working days after the effective date of this order, any response thereto.

(Sec. 2, 3, 4, 5, 301, 303, 307, 308, 309, 315, 317, 48 Stat., as amended, 1064, 1066, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089; (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317))

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix

PART 63—EXTENSION OF LINES AND DISCONTINUANCE OF SERVICE BY CARRIERS

Part 63 of Chapter I of Title 47 of the Code of Federal Regulations is amended as set forth below.

1. By adding a new paragraph (r) to § 63.01 to read as follows:

§ 63.01 Contents of applications.

(r) A statement as to whether the applicant is relying upon the exemption found in § 63.58, if the proposed facilities are to be used to provide a communication service prohibited by § 63.54.

2. By adding a new § 63.58 to Part 63 to read as follows:

§ 63.58 Exemption.

(a) A telephone common carrier shall be exempt from the provisions of §§ 63.54-63.56 if no cable television system is under construction or in

existence within the proposed cable television service area, and that area contains none of the following:

(1) Any incorporated place of 2,500 inhabitants or more, or any part thereof;

(2) Any unincorporated place of 2,500 inhabitants or more, or any part thereof; or

(3) Any other territory, incorporated or unincorporated, included in an urbanized area.

(b) All population statistics and definitions used in qualifying for this exemption shall be the most recent available from the U.S. Department of Commerce, Bureau of the Census. In no event shall any statistics resulting from censuses prior to 1980 be used.

Note.—The Census Bureau has defined some incorporated places of 2,500 inhabitants or more as "extended cities." Such cities consist of an urban part and a rural part. If the proposed cable television service area includes a rural part of an extended city, but otherwise includes no territory described in paragraphs (a) (1), (2), or (3) of this section, the exemption shall apply.

Concurring Statement of Commissioner Joseph R. Fogarty

In Re: Elimination of the Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54-63.56, for Rural Areas.

I have repeatedly called for a complete exemption from the cable/telco cross-ownership prohibition for rural areas of the United States,¹ and I am therefore pleased to have this *Report and Order* approved by the Commission. Cable service that could have been provided to rural America by telephone companies has been too long denied in favor of protecting a vague future possibility of service from independent operators. As this decision so correctly emphasizes:

(C) Considering the years that many rural areas have gone without cable service while we have precluded telephone company involvement, we believe it would be inappropriate and counterproductive for us to continue to take into account naked assertions that independent cable television service is feasible in these areas.

I do question, however, the assertion in this *Report and Order* that there is no

¹ *Revision of Processing Policies for Waivers of Telephone Company-Cable Television "Cross-Ownership Rules," On Reconsideration*. Separate Statement of Commissioner Joseph R. Fogarty, 82 FCC 2d 296 (1980); *Sugar Land Telephone Company*. Concurring Statement of Commissioner Joseph R. Fogarty, 76 FCC 2d 237 (1980); *Elimination of the Telephone Company-Cable Television Cross-Ownership Rules for Rural Areas, Notice of Proposed Rule Making*. Separate Statement of Commissioner Joseph R. Fogarty, 84 FCC 2d 344 (1980); *Concord Telephone Exchange, Inc.*, Concurring Statement of Commissioner Joseph R. Fogarty, 78 FCC 2d 863 (1980).

evidence indicating that the rationale of the cross-ownership prohibition is any less applicable to telephone cooperatives. The existing cross-ownership prohibition is heavily predicated on the spectre of cross-subsidization between basic telephone service and cable television service. In the context of a telephone cooperative—where the subscribers are also the owners—it is either ludicrously mindless or diabolically paternalistic to worry about any "danger" of cross-subsidy. I note that the Commission will soon have the opportunity to address this matter, as well as the issue of whether the cable/telco cross-ownership prohibition should be completely rescinded, in considering the Office of Plans & Policy Staff Report on cable television ownership issues and public comment thereon.

[FR Doc. 81-34702 Filed 12-1-81; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[BC Docket No. 81-154; RM-3692]

FM Broadcast Station in Ansley, Alabama; Changes Made in Table of Assignments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: Action taken herein denies a petition to assign FM Channel 261A to Ansley, Alabama, in response to a petition from Reid Spann. Petitioner failed to establish community status for Ansley.

DATES: Effective: Non-Applicable.

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

FOR FURTHER INFORMATION CONTACT: Nancy V. Joyner, Broadcast Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION:

Report and Order

(Proceeding Terminated)

Adopted: November 16, 1981.

Released: November 20, 1981.

By the Acting Chief, Policy and Rules Division:

In the Matter of amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations. (Ansley, Alabama) BC Docket No. 81-154 RM-3692.

1. The Commission has before it for consideration a *Notice of Proposed Rule Making*, 46 Fed. Reg. 17809, published March 20, 1981, proposing the assignment of FM Channel 261A to Ansley, Alabama, as its first FM

allocation, in response to a petition filed by Reid Spann ("petitioner"). Comments in opposition were filed by Talton Broadcasting Company ("TBC"), licensee of FM broadcast Station WTUN, Selma, Alabama, to which the petitioner responded.

2. The *Notice* indicated that the Commission was prepared to consider assigning Channel 216A to Ansley, Alabama, as its first FM assignment, contingent upon the petitioner's submission of economic and demographic information to demonstrate that Ansley is a community for assignment purposes. His petition asserted that Ansley's population consists of approximately 600 persons, 30% of which are Black, and that the nucleus of its social and entertainment activities is provided by the nearby communities of Troy and Montgomery. Further, petitioner stated that Ansley is in need of a station that will relate to its needs, although it is dependent on the support of larger cities. Petitioner was therefore requested to submit a recent population estimate for Ansley, and furnish additional data to demonstrate the need for the proposed FM assignment. Additionally petitioner was requested to make a showing of his present intent to apply for the channel, if assigned.

3. Ansley (not listed in the U.S. Census), is located approximately 56 kilometers (35 miles) south of Montgomery, Alabama. It currently has no local aural broadcast service.

4. In its opposition, TBC challenges petitioner's showing of Ansley as a community for assignment purposes. It cites such factors as petitioner's admission of dependence on the nearby urban areas of Troy and Montgomery as the focal points of Ansley's employment and social activities, as precluding a finding of an independent and distinct community, citing *Musical Heights*, 19 RR 49, 50 (1959). Further, it disputes petitioner's allegation that Ansley has a population of approximately 600 persons. TBC states that not only is Ansley not listed in the U.S. Census Reports, but neither is it attributed any population by state or local sources. It adds that Ansley does not appear on the 1980 Alabama road map, and has no identifiable boundaries. Further, it claims that according to Rand-McNally 1980 (p. 564), Ansley has a population of 50 persons. It also points out the total absence of a business district, as precluding the attainment of community status, citing *Musical Heights, supra*, and *Risner Broadcasting, Inc.*, 20 FCC 2d 790 at 791 (1969). Also, TBC alleges that it was unable to locate any social