VOLUME III
THE COMMUNICATIONS ACT OF 1979

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

H.R. 3333

TITLES II, V AND VII

COMMUNICATIONS REGULATORY COMMISSION; ADMINISTRATIVE AND JUDICIAL PROCEDURES; PENALTIES; AND NATIONAL TELECOMMUNICATIONS AGENCY

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THE COMMUNICATIONS ACT OF 1979

TUESDAY, JUNE 12, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2123, Rayburn House Office Building, Hon. Lionel Van Deerlin, chairman, presiding.

Mr. VAN DEERLIN. Good morning. Today will be the first of 2 days of hearings on titles II, V, and VII of H.R. 3333. The subjects covered are FCC reform and executive branch reorganization.

I would like to remind participants that we have a full schedule and the House will be going into session on an important markup bill at 11 o'clock. It would be appreciated if witnesses would honor the time constraints placed upon them for their formal testimony, leaving fuller opportunity for subcommittee questioning.

Our first witnesses, appearing together, are Hon. Henry Geller, Assistant Secretary of Commerce for Communications and Information, and Mr. Stanley I. Cohn, who is the Deputy Associate Administrator for Federal Systems and Spectrum Management in the National Telecommunications and Information Administration.

Welcome back on another of your frequent appearances on this legislation, Mr. Geller.

STATEMENTS OF HENRY GELLER, ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, DEPARTMENT OF COMMERCE, AND STANLEY I. COHN, DEPUTY ASSOCIATE ADMINISTRATOR, FEDERAL SYSTEMS AND SPECTRUM MANAGEMENT

Mr. GELLER. It is a pleasure to be here, Mr. Chairman. We have a fairly lengthy statement which deals with titles II, V, and VII, and if I may, I would like to have it introduced for the record.

I thought that while I would be available to answer questions on the CRC, NTA, ex parte, all of the various aspects dealt with in the statement, that it would be better if we focused, in view of the busy schedule you mentioned, simply on the spectrum allocation aspect. It is by far the most important.

Spectrum is the backbone, the lifeblood of the telecommunications system, and if it is mismanaged, and not used adequately, the results are disastrous. You saw this mismanagement in FCC's mistake in UHF-VHF in the early 1950's. We are still paying the price of that.

What I thought I would do is turn it over to Mr. Cohn, the Deputy Associate Administrator for Federal Systems and Spectrum Management. He is an experienced and skilled professional in this field, and I will let him focus on that one issue. I will be available to answer questions on the other relevant aspects if time permits.

Mr. VAN DEERLIN. Fine. Please proceed, Mr. Cohn.

STATEMENT OF STANLEY I. COHEN

Mr. COHN. Mr. Chairman, the act's most significant provisions with regard to NTA are those intended to improve the management of a vital national resource, the radio spectrum. We would like to commend the subcommittee for recognizing the serious nature of the spectrum problem.

The spectrum is not an unlimited resource. But there are additional potential national benefits over and above those now being obtained which can be realized from its use. Like other resources, it must be managed effectively and efficiently or these benefits will not be forthcoming.

Unlike other resources, it is not consumed by use. However, it can be wasted or not used efficiently, with a resulting denial to new users or for new applications. The nature of spectrum use changes rapidly because of increasing demand, new technology and new applications. Management of the resource must therefore be dynamic and respond to these changes.

Economic considerations and techniques have already been covered on our testimony on part IV, and these will not be repeated but should be considered as critical background. Current law divides spectrum management responsibilities between the President, whose responsibility is delegated to NTIA, for Federal use, and the Federal Communications Commission for non-Federal use.

The division of the spectrum between Federal and non-Federal users and the sharing of certain frequency bands between both groups is accomplished by coordination between NTIA and FCC. This division's responsibility has served the Nation well for half a century. It has proved to be a workable system in times when sufficient spectrum has been available to fill the needs of both Federal and non-Federal users.

In recent years, however, demands for new allocations and assignments have been increasingly difficult to meet. This has happened despite technical advances which have extended the boundaries of the usable portion of the spectrum and expanded the number of stations it is possible to fit into certain frequency bands.

This growing scarcity of spectrum resources, which many believe may lead to a spectrum crisis in the 1980's, has begun to reveal problems in the present system. The idea that a spectrum scarcity or a spectrum crisis would arise to a significant extent because of physical limitations of the spectrum is inaccurate.

The spectrum, if properly conserved through sound management, could accommodate foreseeable future needs. Whatever scarcity might occur in the future would be primarily a reflection of the inadequacy of management techniques for allocation and assignment.

These techniques were suitable for situations of relatively light demand on the spectrum. They employed methods that did not require detailed consideration of geographic factors or other case-by-case engineering evaluations.

Recently, however, due to technical progress and to expanded social, business, and Government needs, demand for spectrum has grown significantly. In the process, our traditional spectrum management techniques have begun to show their limitations.

The problem of spectrum scarcity is, then, largely a management problem and thus subject to management solutions which involve the increased use of engineering techniques. Unless they are applied, the situation will surely grow worse. By their very nature, however, the necessary management remedies in many cases tend to render the distinction between Government and non-Government services artificial. Moreover, the distinction is an impediment to employing these remedies with the full degree of effectiveness that will be needed to meet increasing demands on the spectrum.

Thus, the goal of legislation regarding radio spectrum management should be to improve spectrum management in order to facilitate the sharing of the resource, provide for effective and efficient use of the spectrum, and accommodate present and future demands.

There are two ways of accomplishing this goal. The first would involve combining, in one agency, spectrum management authority for both the Federal and non-Federal sectors, while the second involves improving spectrum management within the present authorities.

If a system which unifies spectrum management by discarding many of the present distinctions between responsibilities for Government and non-Government use is to be adopted, it should be based on four fundamental principles:

One, all spectrum allocation authority, that is, specifying bands for radio services, should be centralized in one executive branch agency.

Two, to insure that the allocation policy is thoroughly adhered to, that agency should also have authority to set sufficiently detailed technical rules by which the assignment process, that of specifying a frequency for a particular radio station, would be governed.

Three, the actual assignment process must be carried out in a unified fashion, that is, with common data bases, common engineering tools, resulting in the most efficient assignments without regard to artificial Government or non-Government division of spectrum.

Four, due to their sensitive nature, non-Government authorizations—selecting particular licensees—should not be the authority of the Executive but should be made by an independent regulatory agency. Similarly, Government authorizations should be made by the executive branch.

The proposed act encompasses principles 1 and 4 but not 2 and 3, and it is somewhat unclear in its provisions on the principles it adopts. We believe that any new plan for spectrum management that does not embody all four principles in a suitable way is seriously defective and should not be enacted.

Our concern about the bill's provisions for spectrum management go beyond issues of clarification. As stated in our principles, we strongly believe that in order for the management process to be

truly effective, the full authority to do the job must be vested in the agency which is given the responsibility.

This would mean at least that this agency would have to have the authority to specify in as great detail as necessary the technical criteria on which assignments would be made in each band allocated. This is our second principle. We believe that unless it is adopted, many of the disadvantages of the present divided authority in allocation would be perpetuated.

Under the arrangement suggested in the bill, NTA could make an allocation based on its understanding of CRC assignment rules and subsequently discover the CRC had a differing interpretation and implementation. And, of course, the reverse situation could also occur. Such a system would greatly reduce the benefits of unified allocation authority and make it difficult to take the unified view of spectrum planning that is required to meet the growing demands for this resource.

Unless NTA or NTIA, as we prefer for reasons given in the written testimony, is also given clear authority to specify the technical rules governing assignments and be able to effect a unified assignment system as in principle 3, little will have been gained by the other changes in spectrum management proposed by the bill. We therefore believe that because the bill creates a division between allocation and assignment, it is defective and should not be enacted.

This second way of improving spectrum management is by enhancement of the analytical activities which serve as a base for spectrum planning. The present Federal/non-Federal division of spectrum management would be retained in this proposal.

In the early 1970's, NTIA's predecessor organizations, OT and OTP, initiated a number of efforts to improve Federal spectrum management. Two of these programs enhanced spectrum management by the use of analysis techniques. The first of these, spectrum resource assessments, involves analyzing present and projected use of various exclusive Government and shared Government/non-Government allocated bands, determining potential compatibility problems and corrective actions to mitigate interference between systems, determining inter- and intra-service sharing opportunities and providing recommendations on improving the efficiency and effectiveness of spectrum use in the bands studied.

The second of these programs is the system review procedure. Under this procedure, proposed Federal systems are examined at the conceptual, experimental, developmental, and preoperational stages. This is done to insure that compatibility with existing and other known proposed systems in the environment will be achieved when the reviewed system becomes operational.

Both of these programs, as well as the results of our other efforts, have proved to be useful in Federal spectrum management and in our planning efforts. In addition to improving the efficiency and effectiveness of Federal spectrum use, considerable cost savings have resulted because incompatible situations have been avoided rather than corrected by field modifications or by scrapping of systems because of incorrectable operational interference problems.

Programs similar to these do not exist for non-Government spectrum management. Our second alternative would, therefore, consist

of establishing and utilizing similar analysis techniques to assess overall national spectrum utilization and to review all conceptual and developmental systems intended to use the spectrum to allow for before-the-fact solution of spectrum problems.

The obvious way to achieve this would be to have the FCC or CRC establish an analysis capability similar to NTIA's. We would be most happy to aid the FCC or CRC in this effort by providing advice and knowledge based on our experience and by providing the analysis techniques which have been developed. In this manner, the total national use of the spectrum would be treated, with the FCC or CRC being responsible for non-Government aspects and the NTIA for Government aspects.

In such a system, a joint FCC–CRC–NTIA report would be issued annually. This report would cover actions taken during the year as well as long-range plans concerning efforts to improve overall national spectrum management. Both public and private use of the spectrum would therefore be considered and both organizations would be concerned with overall accountability for all spectrum.

Moreover, both completed and planned changes and improved procedures for allocations, assignments, and authorizations would be agreed on by the Federal and non-Federal spectrum management entities. Where agreement could not be reached, the differing views would be presented. The joint effort would also, where appropriate, recommend legislative changes believed to be necessary to improve management and use of this resource.

The above-proposed alternative would certainly improve the management and use of the existing exclusive Government and non-Government bands and those existing shared bands. One argument against this alternative is that it would continue the present practice of balancing the interests of opposing entities, Government and non-Government, for use of the spectrum.

If this were the case, then progress in changing the present exclusive bands to Government/non-Government shared bands would be slow.

While there is some substance to this criticism, we believe that on balance, the benefits to be gained warrant adoption of this proposal. Further, we regard this alternative as a waystation to the ultimate solution, a single allocation/assignment agency. In short, we are proposing, as an alternative, an evolutionary process to obtain the goal of unified allocation and assignment.

Should the subcommittee still wish to enact the spectrum management provisions of H.R. 3333, there are a number of points which are covered in the written testimony that should be considered before final legislation is written. I will not go into those in the summary.

Finally, Mr. Chairman, we believe that H.R. 3333 should not be enacted in its present form since it separates the assignment and allocation functions. We would fully support adoption if the bill were modified to provide a unified allocation and assignment authority along the lines which I discussed earlier.

If the subcommittee feels that such a modification is unwarranted at this time, then we would urge retaining the present division along Federal/non-Federal lines with the enhanced analytical and planning capability which I described in the second alternative.

As to unified spectrum management, we note that contrary to our strong recommendation, when testifying on H.R. 13015, that the bill should not be enacted if allocation and assignment are split; H.R. 3333 continues that split. We also note that there has been considerable opposition to this concept of unified spectrum management.

Realistically, therefore, the concept as developed in our four principles, and particularly the fusion of allocation and assignment, may not be enacted in this Congress. If that were to be the case, we would urge that in any event, it not be dropped. It is, we stress again, an idea which merits the most serious consideration of the Congress. We would therefore hope that it would be given that consideration and study in the next Congress. For example, S. 611, title V, the Spectrum Commission, might be a good place to study this.

Mr. Chairman, this concludes my summary.

[Testimony resumes on p. 45.]

[Mr. Cohn's prepared statement and attachment follow:]

STATEMENT OF
STANLEY I. COHN
DEPUTY ASSOCIATE ADMINISTRATOR
FOR FEDERAL SYSTEMS AND SPECTRUM MANAGEMENT
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

Mr. Chairman, I welcome this opportunity to testify before the Subcommittee on Titles II, V, and VII of H.R 3333. Because these Titles cover a diverse range of topics, I will be discussing them in a two-fold manner: First, setting forth background and second, commenting on specific provisions in each Title. I hope that this approach will be beneficial to the Subcommittee, particularly in the area of spectrum allocation and management, where the background principles are most important. I will begin with Title II, which seeks to create a new regulatory authority--the CRC.

The issues here involve important policy decisions, and the Executive Branch has not completed its study of the Bill or coordinated with all interested agencies in order to reach final conclusions. Consequently, NTIA's conclusions presented today represent our views as an expert agency, rather than those of the Administration.

REGULATORY REORGANIZATION

Background

Telecommunications regulation has been divided along two lines: regulation relating to government communications and that pertaining to non-government communications. On the non-government side, strong centralization of authority is present in the Federal Communications Commission (FCC). The Commission allocates spectrum, assigns frequencies, evaluates tariffs and facilities, and--through its rules and adjudications--formulates and implements policies for broadcasting and wire communications. It has expansive, flexible power to act according to a broad standard, the public interest, and this power is combined with wide authority to adopt rules or policies.

But the crucial question is: Has it been effective in the policy area? Many observers, and we gather from H.R. 3333 this includes you,

Mr. Chairman, the answer is no. The case as commonly laid out consists of two major points. First, as this Subcommittee pointed out in a 1975 report, the Commission has not engaged extensively in long-range policy planning. This may be, in part, either because it is caught up in so many daily or short-term operational crises, or because as a body heavily engaged in administration, it tends to resist long-term policy changes that might affect actions currently in progress. In any event, short-term concerns tend to predominate over those of the long-term. The Commission is, of course, seeking to improve its long-range planning capability by strengthening its Office of Plans and Policy, and this development is certainly worthy of note. Nevertheless, the entire record stretching back over the decades justifies a careful examination of this situation by the Subcommittee.

Second, serious questions have been raised about the Commission's performance in many specific policy areas. Many believe, for example, that the FCC has seriously erred in its critical allocation task. Critics contend that it displayed lamentable judgment in intermixing UHF and VHF assignments, with adverse consequences that still plague the nation. Much criticism has also been leveled at its decision concerning allocations to FM broadcasting and land mobile radio, and at its judgment as to block allocations.

In the important area of broadcasting, there are those who believe the Commission has not developed policies to implement the basic public trustee notion. Indeed, this view is shared by many at the Commission. As recently as 1973, after we had four decades of experience with the present Act, the FCC Chairman told an audience of broadcasters:

> If I were to pose the question, what are the FCC's renewal policies controlling guidelines, everyone in this room would be on equal footing. You couldn't tell me. I couldn't tell you--and no one else at the Commission could do any better (least of all the long-suffering renewals staff).[1/]

Furthermore, the FCC's comparative process, both for new applications and for license renewals, has been severely criticized by the courts. In 1971, the Commission acknowledged that the winning applicants in the period of 1952-1965 had regularly "puffed" their programming proposals. On the average, the applicants stated that they would dedicate 31.5 percent of their programming time to local live coverage; but, in fact, they devoted only an average of 11.8 percent of time to this end, and nothing happened to them at renewal.[2/]

As this Subcommittee knows, the FCC's cable policies have also been severely criticized. Among other reasons, this criticism seems to stem from the fact that the Commission, after delaying pay television for years, adopted restrictive rules that the courts found unnecessary and illegal.

I do not wish to be misunderstood. No one says that the Commission has erred in every important policy matter. It has done much good. Nor am I criticizing the present Commission under Chairman Ferris for mistakes that may have been made in the past. But, looking at the overall record of several decades, there have been many failures in important policy areas. Obviously, the thrust of the Bill is that remedial action is desirable.

H.R. 3333: Title II

The Bill, in Title II, proposes to abolish the FCC and in its place create a new commission, the Communications Regulatory Commission (CRC), which would have a more limited jurisdiction over the communications industry. Like the FCC, the CRC would be an independent regulatory agency.

We generally support the provisions regarding the quality and the independence of the Commissioners. Specifically, we support the provision in Section 212(e) that appointees reflect a balance of professional backgrounds pertinent to telecommunications. This requirement would

militate against appointments made primarily because of political considerations, rather than the expertise and judgment that the nominee could bring to the panel.

Several modifications in the provisions in this area could be adopted. We recommend not limiting each Commissioner to one term as proposed in Section 212(c)(2). This provision might result in the loss of the services of an experienced, dedicated public servant. Moreover, it does not square with the provision permitting work in the regulated industry if the full term is served. As the end of his or her term approaches, the Commissioner is, in effect, instructed to be thinking largely about an industry niche, rather than about the possibility of continued service. In this connection, the suggestion that a Commissioner who has served the full term be given an additional 60-day period with pay to find employment--it being understood that he or she will not open any negotiations while with the agency--seems worthy of study.

We also suggest that the term "telecommunications entity" in Section 231(a)(2) not be defined to include every concern "which is subject to regulation by the Commission under this Act." In view of the widespread but incidental use of radio in virtually all businesses, such a definition would preclude a Commissioner or supervisory employee, who left prior to the completion of his or her term, from almost all employment. The phrase, "which is substantially affected by the regulatory activities of the Commission," could have the same drawback, in light of the growing ability of FCC action to impact significantly on a widening variety of industries such as banking, airlines, or the print media. In the "information age," few companies or industries would not be significantly affected by the regulatory policies of the Commission. The legislative history should therefore make clear the importance of the term "substantially"--namely, that the effect, while significant, must fall within a substantial (ample) portion of the firm's activities to come within the ambit of the provisions.

Otherwise, this provision may be too broad and too vague, and could prove detrimental to attracting weli-qualified individuals to government service.

The provision in Section 212(b)(3) provides for a veto, by either House, of the President's designation of the CRC Chairman. We strongly oppose this provision. There is no reason--no past experience--that would warrant a change from the present law, under which the President simply designates the Chairman. Further, as you know, the Administration strongly believes that a one-house veto of this nature is unconstitutional.

We turn now to a second facet of the Bill: those sections meant to assure the Commission's efficiency.

- The provision for a Commission of five members instead of seven, as the FCC is presently organized, would appear to maintain the full advantage of the collegial body, and yet reduce costs and contribute somewhat to more efficient operation. We note that other regulatory agencies such as the CAB and SEC operate effectively with five members.

- We generally support Section 243. We believe that the Chairman should be able to exert strong leadership. We commend the provision in 243(b)(1) that other membes of the Commission should also be able to place items on the agenda.

- Because of the volume of work and the currently limited staffs of the Commissioners, it is often impossible for Commissioners or their assistants independently to research and evaluate the

recommendations of the bureaus or offices. Thus, an expanded staff for Commissioners should conduce to more informed decisionmaking. Accordingly, we would also suggest removal of the limit of five staff members per Commissioner in Section 221(a). Within a reasonable and set budget, each Commissioner should have the flexibility to staff his or her office in a manner most suitable for his or her needs. With regard to staff upgrading, higher pay levels should allow Commissioners to attract the most qualified assistance.

Public Participation

Section 215 of the Bill creates an Office of Consumer Assistance that "would assure that the interests of consumers are presented" to the Commission. While we support the creation of such an office to fulfill the responsibilities specified in Section 215(b), the mere presence of a consumer affairs office is not sufficient to "assure" that consumer interests will indeed be represented fully before the Commission.

We believe that besides having such an office to represent consumers, there is a strong need to encourage the public to participate in FCC proceedings. To accomplish that, it is critical that financial assistance be extended to public interest groups that would not otherwise be adequately represented in Commission proceedings, and whose participation would make a substantial contribution to those proceedings.

Section 244 of the Bill represents a commendable effort to institutionalize public participation funding. As you know, this Administration has strongly backed such efforts in legislation, most recently in S. 755, the Regulation Reform Act of 1979.

We believe, however, that the provision as drafted does not provide broad enough coverage for reimbursement. The provision is limited to rate proceedings involving the dominant carrier and to rulemaking proceedings; Section 244(b)(2) proscribes reimbursement in two important and frequent situations--proceedings to revoke or deny a broadcast license. But a public trustee or public interest scheme clearly calls for facilitating public participation in adjudicatory proceedings. It is the public in various communities which has the greatest interest in broadcast service meeting the Act's standards. Through research and monitoring, public groups can develop data that would be helpful to the Commission's determination of the licensee's status. Yet, because the task of preparing and following through on a petition to revoke or deny is costly, such groups may find the cost of participation in adjudication to be prohibitive. The end result is decreased public participation, and with it a subversion of the Act's scheme. One need only to look to cases like WLBT-TV in Jackson, Mississippi, to establish that public participation in adjudication can markedly serve the public interest.[3/]

We believe, therefore, that the Subcommittee should expand the scope of proceedings that are eligible for reimbursement by the Commission. Naturally, the same criteria for reimbursement should apply both to rulemakings and adjudication proceedings. In this way, competing applicants would not be able to claim reimbursement, since the financial requirements for an application negate a claim of financial inability to participate in the proceeding.

In our view, however, the criteria for reimbursement contained in Section 244 are too restrictive. In order to be eligible for financial assistance, an applicant would have to set forth an interest that is necessary for a fair determination of the issues in a proceeding. Since it would be difficult, if not impossible, for the Commission to make that assessment in advance of a proceeding, we recommend that the Commission be required to ascertain only that representation of the applicant's interest could

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reasonably be expected to contribute substantially to a fair disposition of the proceeding.

We believe that the financial need criterion in Section 244 is too narrow as well; it would require as a condition of eligibility that an applicant be unable to pay the costs of various aspects of participation in a proceeding. There are many small organizations that have total budgets larger than the cost of participating in one proceeding, but that need to spend much of their money on other activities necessary to their maintenance and effectiveness. We suggest that the eligibility of such organizations be clarified by adoption of the test set forth in S. 755, the Administration's regulatory reform bill, which would permit financial assistance to applicants who do not have sufficient resources available to participate effectively in a proceeding in the absence of such assistance.

Ex Parte Provisions

1. **Adjudications**

Principles

Because adjudications involve adversary parties in a trial-type setting, due process requires that these proceedings be governed by a strict prohibition of communications made outside of the formal record. Case law, statutory law, and current FCC rules all adhere to this principle, and it has worked well in practice.

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Section 234(a)(1) seeks to control ex parte communications before a hearing is designated. Another section of the Bill, Section 512(c)(1)(f), proscribes such communications after a case has been designated for a hearing.

The FCC's present rules specify that interested persons are not to make ex parte presentations after a petition to deny or a mutually exclusive application is filed. The rules forbid Commissioners from initiating such contacts; however, they do not affect the staff, which must process the applications and conduct the investigations.

We appreciate the purpose of Section 234(a)(1)--to allow all interested parties[4] to know about communications between the Commission and the parties to an adjudication.

This provision, however, applies both to Commissioners and participating supervisory employees. It seems unnecessary and burdensome, for example, to require the head of the Complaints and Compliance Branch to notify other competing applicants of every contact or communications that is made or received in the course of the Branch's proper investigation. Since we do not know of any criticism of the FCC's present and well-established way of handling this situation, we would not alter its process as proposed in 234(a)(1).

2. Informal Rulemaking

The Communications Act does not now deal with this area. Rather, it comes under the Administrative Procedure Act and case law. We suggest that while clarifying legislation would be desirable, procedures in this area should continue to be uniform, and therefore there should be no special provisions applicable only to the Commission. If, contrary to the above, there is legislation in the CRC area, we would urge that it be along the lines suggested to the Commission in a recent NTIA filing.[5] We have attached as Appendix A a summary of the principles of that position and their application to H.R. 3333.

H.R. 3333: Title V

Completing Rulemaking Actions

Section 511(c) calls for completion of a rulemaking proceeding within one year of issuance of the notice of proposed rulemaking. Section 511(d) calls for action on a petition for rulemaking within 90 days after filing. We appreciate the reason for these provisions. The Commission has taken as long as five years to act in many rulemaking proceedings. Indeed, after the conclusion of the oral or written phase, years have passed with no Commission action of any kind. Action on petitions for rulemaking can take four or more years. While the issues in some proceedings are complex and call for complex economic or other analysis, the delay extends far beyond the time needed for such analysis. There are instances where no action is taken for years after the last comment is filed, with the result that the record becomes stale and there is a need for a new round of comments and oral arguments; see e.g., Docket No. 18891, FCC 79263, par. 3.

Nevertheless, we do not favor the strict time limits proposed in 511(c)(d). In rulemaking particularly, with its heavy emphasis on economic analysis, the time needed varies with the nature of the issue, and the agency should therefore be given discretion. We would suggest that a uniform approach such as in S.755 be followed (i.e., requiring agencies to set deadlines for their actions, which, although not legally binding, would be the subject of annual reports in the event of failure to meet them).

Another alternative would be to require the Commission first, to appoint publicly a Commissioner to be responsible for overseeing the progress of each rulemaking or petition for rulemaking, and second, to submit annual public reports on this subject to the Congress as part of the yearly Congressional oversight proceedings. The Commissioners would then

know that they would have to explain why some proceeding or petition was still pending after a year or more.

Filing Exceptions

There is a need to clarify the requirement in Section 512(b)(1) and (b)(2) that a decision be made on any exception filed to an initial decision. Most agencies, such as the CAB, ICC, and NLRB, rule on such exceptions with a general declaration, stating that those that are granted are reflected in the decision and the rest are denied for several stated reasons--e.g., reasons given in the decision; not supported by the record; having no decisional significance. This manner of ruling has been sustained by several courts and is now well established. The FCC, on the other hand, has been required by the D.C. Court of Appeals to rule on each individual exception. We believe that there should be consistency in treatment, and that the general way of proceeding employed by the CAB and NLRB should be applicable to Commission proceedings. It obviously saves time and resources, and has not been shown to be unfair to the parties over decades of use. Accordingly, either the Bill or the legislative history should reflect this general approach.

Limitations on Actions

Section 534 of H.R. 3333 amends Section 415 of the 1934 Act to apply only to dominant carriers. It continues the two-year statute of limitations presently contained in Section 415. The Commission, in several decisions, has ruled that Section 415 is not applicable to actions brought by the Government. Section 534 should be amended, therefore, to reflect these precedents. The legislative history should specifically indicate a Congressional intent not to alter past FCC rulings on this issue.

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Emergency Powers of the President

The Bill makes no provision to continue the wartime and emergency powers of the President over communications facilities, as currently authorized in Section 606 of the Communications Act of 1934. These powers include ordering priority transmission of national security message traffic; protecting lines of communications from obstruction; closing down wire and radio communications facilities; suspending or amending the rules governing these facilities; and authorizing their use or control by the Government.

The Nation would be highly dependent upon communications facilities in wartime to meet its vital need to transmit security and defense information. As a result, we believe some provisions for dealing with emergency powers of the President along the lines of the present Section 606 should be included in any revised Communications Act. If changes in technology since the Act of 1934 was drafted make it desirable to adopt somewhat different provisions than those of Section 606, we suggest that it be done after consultation with the Office of Science and Technology Policy, the National Security Council, and the Department of Defense.

The Review Board

Section 242(e)(1)(b)(i) allows the continuation of the FCC's Review Board, but Section 513(e) disallows judicial appeals directly from the Board's decisions. Rather, interested parties must first file an application for review with the Commission.

The Review Board has made a marked contribution to the FCC's processes. Its members can thoroughly explore the records and participate intimately in decision-making, and this has led to much better informed

judgments. The Board has also relieved the Commissioners of the need to pass on many complex, formal hearing cases.

Therefore, it does not seem logical to require that a party who wishes to appeal the Review Board's decision to the courts must in every case first file an application for review with the Commission. The losing party, after all, has by that point already enjoyed a full appellate review of its case--probably even a better review than it would obtain from the Commissioners. Only novel and important questions pertaining to law or policy should be brought before the Commission. Under these circumstances, a complaining party should be required to file a succinct application setting forth why its case presents such a question. If the party does not believe its case is of such a nature, and if it wishes to challenge some decision of the Review Board, then it should be allowed to proceed immediately to court.

SPECTRUM ALLOCATION AND MANAGEMENT

Principles

The Act's most significant provisions with regard to the National Telecommunications Agency (NTA) are those intended to improve the management of a vital national resource--the radio spectrum. I would like to commend the Subcommittee for recognizing the serious nature of the spectrum problem. The spectrum is not an unlimited resource but there are additional potential national benefits, over and above those now being obtained, that can be realized from its use. Like other resources, it must be managed effectively and efficiently or these benefits will not be forthcoming. Unlike other resources, it is not consumed by use. However, it can be wasted or not used efficiently, with a resulting denial to new users or for new applications. The nature of spectrum use changes rapidly because of increasing demand, new technology and new applications.

Management of the resource must therefore be dynamic and respond to these changes.

We have already covered in our testimony on Title IV the strong need to use economic considerations and techniques, such as auction and subleasing.[6/] I will not repeat that discussion, other than to stress again its crucial importance to this area of spectrum allocation and management. I turn now to a discussion of spectrum management, with our previous testimony as critical background.

First, I shall explain my use of some basic terms referring to management functions. The term "allocation" refers to the specification of bands for radio services--such as fixed or land mobile--and the establishment of general spectrum policy. The term "assignment" refers to determining what frequency should be assigned to a specific station; e.g., that a television station having certain technical characteristics shall be assigned Channel 9 in a given city. Finally, the term "authorization" refers to the function that involves selecting what entity can operate a specific station; e.g., selecting television licensees. I stress that these definitions are very important for a clear discussion of spectrum management.

Current law divides spectrum management responsibilities between the President and the Federal Communications Commission. Section 305(a) of the Communications Act of 1934 empowers the President to set frequencies for each radio station or "class of stations" owned and operated by the Federal Government, thereby encompassing both assignment and allocation authority. In the Federal case, the authorization and assignment functions are not differentiated but are encompassed in the assignment role. Reorganization Plan No. 1 of 1977 resulted in redelegation of most of the President's spectrum management powers from the Director of OTP to the Secretary of Commerce, effective March 26, 1978. By Department of Commerce internal order, this authority now rests with the Assistant

Secretary for Communications and Information, the Administrator of NTIA. Under the Reorganization Plan, frequency assignment appeals may be taken to the Office of Management and Budget.

The Interdepartment Radio Advisory Committee (IRAC), founded in 1922, advises the Assistant Secretary on Federal spectrum allocations, assignments, policy and management issues. NTIA chairs IRAC, the membership of which comes from the major spectrum-using departments and agencies. The FCC has liaison representation.

Managing the spectrum for non-Federal users--including state and local governments--is the responsibility of the FCC. Section 303(c) of the 1934 Act authorizes the FCC to "assign bands of frequencies to various classes of stations and to assign frequencies for each individual station." The first of these functions is considered to be the Commission's "allocation authority," while the latter serves as a mandate to make specific frequency assignments and authorizations.

The division of the spectrum between Federal and non-Federal users, and the sharing of certain frequency bands between both groups, is accomplished by coordination between NTIA and the FCC.

The division of responsibility has served the nation well for half a century. It has proved to be a workable system in times when sufficient spectrum has been available to fill the needs of both Federal and non-Federal users.

In recent years, however, demands for new allocations and assignments have become increasingly difficult to meet. This has happened despite technical advances that have extended the boundaries of the usable portion of the radio spectrum and expanded the number of stations it is possible to fit into certain frequency bands. This growing scarcity of

spectrum resources, which many believe may lead to a "spectrum crisis" in the 1980's, has begun to reveal problems in the present system of divided authority.

The idea that spectrum scarcity, or a "spectrum crisis" would arise to a significant extent because of physical limitations of the spectrum is inaccurate. The spectrum, if properly conserved through sound management, could largely accommodate foreseeable future needs. While there is definitely a strong need for further research on the relationship between the performance of radio systems and their requirements for spectrum, lack of research information is not the primary limitation on spectrum use. The management techniques generally in use today were suitable for situations of relatively light demand on the spectrum; they employed methods that did not require detailed consideration of geographic factors or other case-by-case engineering evaluations.

Recently, however, due to technical progress and to expanded social, business and government needs, demand for spectrum has grown significantly. In the process, our traditional spectrum management techniques have begun to show their limitations. Fortunately, however, our technical capabilities for spectrum management have improved at the same time. Using computers, for example, we can more quickly evaluate alternative means of providing the needs of a given service in a given area rather than by continued reliance upon older conservative prediction formulas which do not account for the specific characteristics of the systems and area involved. We can also improve spectrum sharing--the flexible allocation of frequency bands to several radio services. In addition, encouraging utilization of higher ranges of the spectrum--above 12 GHz--is of growing significance. And on the horizon are techniques for spectrum conservation, such as "band-width compression" and "spread spectrum."

Finally, much radio equipment now being manufactured is far more efficient in aspects of spectrum use than older equipment. Because the

characteristics of transmitting and receiving equipment have a major influence on the demand for spectrum, taking maximum advantage of this aspect of the "technological revolution" should be an integral part of spectrum management. Existing rules, however, maintain assignments that perpetuate the use of older, spectrum-inefficient equipment.

Several reports concerned with spectrum management have recognized the need for improved management of this resource. "Spectrum Engineering--The Key to Progress" published in 1968 by the Joint Technical Advisory Committee of the IEEE and EIA urged the use of improved engineering techniques in spectrum management. The GAO in two reports, "Information on Management and Use of the Radio Frequency Spectrum--A Little Understood Resource," September 1974, and "Further Opportunities to Improve Radio Spectrum Management in the Federal Sector," October 1975, has pointed out that insufficient effort is being applied to spectrum management. The GAO noted that because of the large investment, "It is essential that this resource be effectively and efficiently managed and used." Many of the recommendations of these reports have been followed to the extent possible within the available funding and personnel resources of NTIA.

Based on these recommendations and those of our own staff and the IRAC, a number of new or improved spectrum management capabilities have been developed. In the early 1970's analysis techniques designed to assess the present and projected Federal use of the resource, determine where intra- and inter-service sharing would be possible, evaluate interference potential and resolve operational interference problems were put into operation. Data bases of equipment characteristics and characteristics of the terrain were developed for use with these analysis techniques. Improvements were made to the automated processing of assignments and various spectrum management data bases to improve efficiency. A mobile Radio Spectrum Measurement System, which uses up-to-date automated

measurement techniques, was put into operation to provide usage and compliance data, validate analysis techniques and obtain data needed for solving operational interference problems. Finally, in order to cope with the shortage of spectrum management personnel and to improve the quality of existing personnel in this field, a Federal Government-wide spectrum management career development program was established.

All of these steps have enhanced our capability to cope with the increasing number and complexity of problems associated with the expanding demand for use of the spectrum.

We have done much to modernize Federal spectrum management, transforming it from a largely administratively-based, overly conservative process to an engineering-based process which allows for more sharing and greater utility of the resource. The future will require even more improvements.

The problem of spectrum scarcity is, then, exacerbated by management problems and thus to some extent subject to management solutions which involve the increased use of engineering techniques. Unless they are applied, the situation will surely worsen. By their very nature, however, the necessary management remedies in many cases tend to render the distinction between government and non-government services artificial. Moreover, the distinction is an impediment to employing these remedies with the full degree of effectiveness that will be needed to meet increasing demands on spectrum.

Spectrum sharing between government and non-government users illustrates this well. This technique requires that we discard the notion that any part of the spectrum be dedicated solely to government or non-government use; it demands only that we find some suitable place for each application, regardless of the user. More than 40 percent of the usable

spectrum is now shared between government and non-government radio services, but the proces of extracting consent from both the IRAC and the FCC for the use of these shared bands can seriously delay service implementation. Also, the belief that once a band is opened to sharing, its dedicated character is lost forever, often results in resistance to change from both the Federal and non-Federal users.

Thus, the goal of legislation regarding radio spectrum management should be to improve spectrum management to facilitate the sharing of the resource, provide for effective and efficient use of the spectrum, and accommodate present and future demands.

To meet the management task ahead, we believe that a system which unifies spectrum management by discarding many of the present distinctions between responsibilities for government and non-government use must eventually be adopted. Such a system should be based on four fundamental principles:

1. All spectrum allocation authority should be centralized in one Executive Branch agency, NTIA. (For reasons stated within, at pp. 31-32, we believe that the agency's scope should encompass information policy matters, and that therefore "NTIA" is by far the preferable term.)

2. To insure that the allocations policy is thoroughly adhered to, that agency should also have authority to set sufficiently detailed technical rules by which the assignment process would be governed.

3. The actual assignment process must be carried out in a unified fashion (i.e., with common data bases, common engineering tools),resulting in the most efficient

assignments, without regard to artificial government or non-government division of spectrum.

4. Due to their sensitive nature, non-government authorizations (selecting particular licensees) should not be the authority of the Executive, but should be made by an independent regulatory agency, the CRC. Similarly, government authorizations should be made by the Executive Branch.

The proposed Act encompasses principles 1 and 4, but not 2 and 3, and it is somewhat unclear in its provisions on the principles it adopts. We believe that any new plan for spectrum management that does not embody all four principles in a suitable way is seriously defective and should not be enacted.

We agree, therefore, with Section 704(4) of the proposed Act which confers total allocation authority on the Executive Branch entity. Only unification of government and non-government authority in this way will meet the demands for effective management in the years to come. This has been recognized by many, at least since the issuance in 1968 of the Report of the Rostow Commission, and we are glad that the Subcommittee has taken the initiative in this direction. In light of our four points, we do, however, have several issues of clarification and a major concern about the system proposed in the Bill.

Section 435(a)(1) provides that radio stations owned and operated by the Federal Government would use frequencies "assigned to each or to each class by the President." It is our understanding that this provision was meant to vest only assignment authority in the President, and the use of

"each class" from Section 305(a) stems from language currently relied upon for Federal Government allocation authority and was inadvertent. Retention of this language would, of course, be inconsistent with the intent of Sections 704(a) and 707 to have a single allocating agency. Futher, Section 704(a) provides for NTA to exercise the allocation function "in accordance with Section 435(a)(1) and Section 707(a)," while Section 707(a)(3) states that the NTA allocation authority "shall be subject to the provisions of Section 435(a)(1)". Accordingly, the phrase "or to each class" should be deleted from 435(a)(1) and reference to Section 435(a)(1) would then be unnecessary.

NTIA's present functions include this Federal assignment authority and Section 711(a)(1) transfers to the new agency, NTA. If this is the case, then Section 435(1)(a), as modified above, should be referenced as an additional function in Section 707(a). It would appear that the intent of the Subcommittee was to include Federal assignments in the new agency's missions.

Section 435(b)(1) of H.R. 3333 modifies the provisions of Section 305(d) of the 1934 Act to conform them to the realities of modern day technology. We endorse this change. Under Section 305(d), there has been an ambiguity concerning the President's power to authorize a foreign government to construct an earth station utilizing satellite technology for its diplomatic communications. Indeed, satellites may not be the only new technology that create interpretive problems under Section 305(d). Laser and/or fiber optic technologies, although presently speculative as to specific utilizations, could raise similar questions about the meaning of the present Section 305(d). The rapid development of diverse telecommunications technologies justifies the modifications embodied in Section 305(d). The rapid development of diverse telecommunications technlogies justifies the modifications embodied in Section 435(b)(1). This provision, unlike the existing one will permit an expansive interpretation consistent with the potential variety of telecommunications means available.

As we read the new section, a satellite earth station would now be permitted to be located in the "environs" of the District of Columbia (e.g., the Blue Ridge Mountains), in addition to within the District of Columbia proper. This will accommodate spectrum interference problems associated with satellites and not previously associated with high frequency radio. The Bill makes clear that the President has authority to allow other radiating technologies in addition to high frequency radio. The section also makes clear that the important limiting factor on the use of these authorizations is that they be used for "diplomatic messages." Thus, the principle of maximum reliance on the private sector carriers for most communications traffic is preserved along with the efficient utilization of new technologies.

Finally, Section 435(b)(2) extends to foreign governments, and by reciprocal agreement to the United States, the ability to protect high level government officials and diplomats on foreign soil through the use of land mobile radio equipment. We interpret the use of the phrase "base and land mobile" to indicate an intention to include only base station communication with mobile units (e.g., aircraft stations would be excluded). The limitation of such mobile stations to operation within 30 miles of the site of the embassy or legation seems reasonable in order to prevent the use of the authorization for purposes other than protecting the ambassador and personnel of the foreign government. It also allows reuse of the spectrum for domestic purposes beyond that limited range. We commend this modification.

The Bill assigns NTA the "principal" responsibility for spectrum allocation. However, the heading of Section 436, "Spectrum Allocation Standards and Management," seems to indicate that the CRC is intended to have some allocation responsibility. The text of that section does not bear this out. If the Subcommittee desired to create fully unified allocation management, we urge that this intent be made clear.

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Our concern about tne Bill's provisions for spectrum management goes beyond issues of clarification, however. As stated, we strongly believe that in order for the management process to be truly effective, NTIA must have the full authority to do the job. This would mean at least that NTIA would have to have the authority to specify in as great detail as necessary the technical criteria on which assignments would be made in each band allocated. This is our second principle. We believe that unless it is adopted, many of the disadvantages of the present divided authority in allocation would be perpetuated. Under the arrangement suggested in the Bill, NTIA could make an allocation based on its understanding of CRC assignment rules and subsequently discover the CRC had a differing interpretation and implementation. And, of course, the reverse situation could also occur. Such a system would greatly reduce the benefits of unified allocation authority and make it difficult to take the unified view of spectrum planning that is required to meet the growing demands for this resource. Unless NTIA is also given clear authority to specify the technical rules governing assignments, little will have been gained by the other changes in spectrum management proposed by the Bill. We, therefore, believe they would be defective and should not be enacted, as formulated.

The question remains of how it is possible to insure that this agency could provide detailed and effective guidance on assignments, and how to effect a unified assignment system (principles 2 and 3). There are several ways of accomplishing this, and we would be glad to discuss the respective merits at a later date. Our major concern here is to urge the Subcommittee to incorporate into its final legislation provisions reflecting our four principles. If there is agreement on principles, the mechanics can, we believe, be satisfactorily resolved.

In making this recommendation, we wish to meet head-on the most commonly-voiced objection to fully unifying spectrum management. It is often argued that if an Executive Branch agency handled all allocations,

and, at the least, executed such a major influence over assignments, it would favor government over non-government users and, in particular, that the Department of Defense, the largest government spectrum user, would be able to encroach on spectrum allocated to the civilian sector. We believe this fear to be unfounded. NTIA, while part of the Executive Branch, would be independent of all agencies and would be responsible for overall efficient spectrum management. Moreover, allocations affecting non-Federal users would constitute rulemakings under the Administrative Procedure Act. Public notice and the opportunity for comment would be required, with both court and Congressional review available.

Indeed, we believe that the private sector would benefit from the new arrangement. It is envisioned that opportunities would develop which would permit greater sharing of government and non-government spectrum. Practically speaking, the two sectors go their separate ways, meeting only at IRAC. With unified management, it is likely that both sides would become much more interested in the overall uses of the spectrum. This would only benefit the nation.

But, most importantly, the present institutional arrangement has an unfortunate side effect: it inspires the view that total spectrum management is a matter of balancing the interests of "opposing" entities--government and non-government. We believe that, in reality, there is an ability to largely accommodate foreseeable government and non-government needs in the spectrum if only the proper management methods are adopted. If the present arrangements are maintained, government and non-government users are more likely to come into serious conflict.

Under the new arrangement, we believe the CRC should retain the authority to make the highly sensitive judgments about which non-government licensees should be authorized to use radio stations on

particular assignments. The present IRAC advisory system should be retained for government authorizations. Authorization is a policy matter incidental to overall spectrum management efficiency, and is best handled by an independent commission for non-government authorizations and the Executive Branch for government authorizations.

Should the Subcommittee be unwilling to reflect in its final legislation the four principles which have just been presented and the establishment of a unified allocation assignment authority, we urge that, rather than creating a division between allocation and assignment, conideration be given to a second alternative. This alternative involves improving spectrum management by enhancement of the analytical activities which serve as a base for spectrum planning. The present Federal/non-Federal division of spectrum management would be retained in this proposal. While not meeting all of the four principles previously stated it would provide a significant step toward their fulfillment.

In the early 1970's NTIA's predecessor organizations, OT and OTP, initiated two programs to enhance spectrum management by the use of analysis techniques. The first of these, Spectrum Resource Assessments, involves analyzing present and projected use of various allocated bands, determining potential compatibility problems and corrective actions to mitigate interference between systems, determining inter- and intra-service sharing opportunities and providing recommendations on improving the efficiency and effectiveness of spectrum use in the bands studies. These resource assessments are performed in exclusive government bands and in shared government/non-government bands, but not in exclusive non-government bands because NTIA's authority is limited to Federal use of the spectrum. Because of the changing nature of use (nearly half of the assignments change in some way each year) it is NTIA's goal, by 1982, to assess the total Federal involvement on a three-year cycle.

The second of these programs is the System Review Procedure. Under this procedure, proposed Federal systems are examined at the conceptual, experimental, developmental and pre-operational stages. This is done to ensure compliance with rules and regulations and to ensure that compatibility with existing and other known proposed systems in the environment will be achieved when the reviewed system becomes operational. At the present time, due to resource limitations, such reviews are performed for systems intended to operate at frequencies above 420 MHz. By conducting these analyses before systems become operational, identified problems can be rectified and solved before the fact rather than after the fact.

Both of these programs have proved to be useful in Federal spectrum management and in our planning efforts. In addition to improving the efficiency and effectiveness of Federal spectrum use, considerable cost savings have resulted because incompatable situations have been avoided rather than corrected by field modifications or by scrapping of systems because of incorrectable operational interference problems.

Programs similar to these do not exist for non-government spectrum management. Our second alternative would, therefore, consist of establishing and utilizing similar analysis techniques to assess overall national spectrum utilization and to review all conceptual and developmental systems intended to use the spectrum to allow for before-the-fact solution of spectrum problems.

The obvious way to achieve this would be to have the FCC or CRC establish an analysis capability similar to NTIA's. Although there would be some changes in procedures, due to differences between the Federal and non-Federal sectors, the same analysis and engineering techniques could be used. We would be most happy to aid the FCC or CRC in this effort by providing advise and knowledge based on our experience and by providing the

analysis techniques which have been developed. In this manner the total national use of the spectrum would be treated, with the FCC being responsible for non-government aspects and the NTIA for government aspects.

In such a system, a joint FCC (CRC)/NTIA report should be issued annually. This report would cover actions taken during the year as well as long-range plans concerning efforts to improve overall national spectrum management. Both public and private use of the spectrum would therefore be considered and both organizations would be concerned with overall accountability for all spectrum. Moreover, changes--both completed and planned--to allocations assignments and authorizations would be agreed on by the Federal and non-Federal spectrum management entities. The same would be true for improvements of procedures for allocations, assignments and authorizations which will enhance overall utility of this resource. Where agreement could not be reached, the differing views would be presented. The joint report would also, where appropriate, recommend legislative changes believed to be necessary to improve management and use of this resource.

The above proposed alternative would certainly improve the management and use of the existing exclusive government and non-government bands and those existing shared bands. One argument against this alternative is that it would continue the present practice of balancing the interests of "opposing" entities--government and non-government--for use of the spectrum. If this were the case, then progress in changing the present exclusive bands to government/non-government shared bands would be slow.

While there is some substance to this criticism, I believe that on balance the benefits to be gained warrant adoption of this proposal. Further, I regard this alternative as a way-station to the ultimate

solution--a single allocation/assignment agency. In short, we are proposing as an alternative, an evolutionary process to obtain the goal of unified allocation and assignment.

Finally, I have a few concluding points. First, I applaud the Bill's requirement that a study be conducted on how to provide more efficient uses of electromagnetic spectrum. This is an important complement to the allocation authority. I am also pleased to see that it requires a study of how radio frequency interferes with consumer electronics equipment. This serious problem requires a great deal more information than is available today, both about the interference susceptibility of electronics equipment and about the radio frequency and electromagnetic spectrum environment generally.

Second, we note that Section 413(a) of the Bill gives the CRC authority to regulate the interference potential of equipment. As previously mentioned, equipment characteristics strongly influence the demand for spectrum and, therefore, the problems faced in the spectrum allocation process. Development of more efficient spectrum use requires consideration of all equipment characteristics, not just interference potential, however. For this reason, the Department of Commerce believes that the Subcommittee should await the results of the study required by Section 707(c) before reaching a decison on (1) the nature of regulatory authority over equipment; and (2) which agency or agencies should exercise the authority.

In summary, Mr. Chairman, I believe that on this important spectrum management issue, H.R. 3333 should not be enacted in its present form since it separates the assignment and allocation functions. I would fully support adoption if the Bill were modified to provide NTIA with a unified allocation and assignment authority along the lines which I discussed earlier. If the Subcommittee feels that such a modification is unwarranted at this

time, then I would urge retaining the present division along Federal/non-Federal lines with the enhanced analytical and planning capability which I described in the second alternative.

THE NATIONAL TELECOMMUNICATIONS AGENCY (NTA)

H.R. 3333: Title VII

The Bill proposes to establish an independent Executive Branch agency, the NTA, to perform some functions now performed by NTIA and several new functions, including several now vested by statute in the FCC. The NTA would:

(i) Have the primary responsibility for developing and implementing national telecommunications policy (Section 704(1)), and in this connection, to conduct, support, and coordinate research (Section 704(13)).

(ii) Exercise principal responsibility for allocating the entire radio frequency spectrum (Section 704(4)).

(iii) With regard to Federal communications, have broad responsibilities, such as serving as the principal advisor to the President on telecommunications issues (Section 704(2)); settling telecommunications disputes among government telecommunications services (Section 704(3)); assisting and coordinating security and emergency matters (Section 704(7)(18)); and establishing policy guidelines for, and overseeing GSA's procurement of, government telecommunications systems (Section 704(11)).

(iv) Develop and administer grant programs for public telecommunications facilities (Section 704(12)), and low interest loans for minorities in broadcasting (Section 704(10)).

(v) Prepare for and manage, in consultation with the State Department, participation in international telecommunications conferences (Sction 704(5)).

Taking into account the overall thrust of the Bill, NTA would clearly be a different entity from NTIA or NTIA's predecessors. The Bill accords NTA a greater role in policymaking, particularly as regards spectrum management. It also assigns to NTA new responsibilities in telecommunications applications and gives NTA a large mandate to oversee government telecommunications activities, a mandate that cuts across the programs of all Executive Branch departments.

Under the Bill, NTA would have the authority to develop a national telecommunications policy. But while it is authorized to "take such action as may be necessary to provide for development and implementation" of this policy (Section 704(1)), it is not at all clear how it would carry out this responsibility. The policy function under the Bill is divided between the CRC and NTA. Thus, NTA could merely make recommendations to the Commission or the Congress.

Aside from the unified spectrum management assignment along the lines of our four principles, the other major responsibilities of the proposed NTA are now covered by Reorganization Plan No. 1 of 1977 and Executive Order 12046. Under these, NTIA has operated effectively for the past year, and thus, on this basis a new independent agency is not necessary and we would strongly oppose its creation.

As to this matter when viewed from the aspect of unified spectrum management, we strongly recommend, when testifying on H.R. 13015, that the Bill should not be enacted if allocation and assignment are split; H.R. 3333 continues that split. We also note that there has been

considerable opposition to this concept of unified spectrum management. Realistically, therefore, the concept, as developed in our four principles and particularly the fusion of allocation and assignment, may not be enacted in this Congress. If that were to be the case, we would urge that in any event, it not be dropped. It is, we stress again, an idea which merits the most serious consideration of the Congress. We would, therefore, hope that it would be given that consideration and study in the next Congress. See, e.g., S. 611, Section 503.

We have a further objection concerning the change from NTIA to NTA. The Bill focuses almost exclusively on the policy issues relating to telecommunications. Generally speaking, it omits any assignment of responsibility in the area that is coming to be called "information policy." There is an exception to this, privacy, dealt with in Section 704(11).

Simply stated, information policy is concerned with those issues that emerge from concentrations or flows of information and that display two charateristics:

- o they are generally, although not necessarily, influenced by developments in technology, especially computers and telecommunications;

- o they may have a significant impact on our institutions or on the complex of social, economic, and political relationships within our society.

It is not a cliche to say that the United States is moving toward an "information society." A recent Commerce Department study suggests that over 50 percent of our national work effort is tied to the production, use, or

dissemination of information. Naturally, any activity of this magnitude is bound to raise important and complex questions of public policy.

Indeed, a host of information-related issues have already been identified by varied Federal commissions, legislators, administrators, information industry spokespersons, civil liberty organizations, and consumer groups. As we move into the 1980's, the manner in which these issues are resolved--or not resolved--will significantly affect the structure of certain important institutions in our society and it may substantially alter the balance of power among these institutions. I am speaking now of institutions in the broadest sense; i.e., government at all levels, industry, the press, and the public.

One section of the Bill--Section 704(13)--could be read to provide for research on information policy issues arising out of the introduction of new communications technologies. However, policymaking authority in this area is not discussed.

Moreover, as the Subcommittee knows, the lines between telecommunications and computers are blurring. The same can be said of the lines between telecommunications policy and policy pertaining to the information carried via telecommunications systems. So, it is unrealistic to limit the Government's policymaking role to those issues relevant merely to telecommunications technology. If this legislation is to be effective for the rest of this century and beyond, it must come to grips with the Government's oversight and policy roles in the broader field of information. Without specific legislative direction, we will surely witness de facto solutions to these information-related problems and possible unnatural fragmentation of policy responsibility. This last night in turn lead to confusion within the Government and in the minds of the general public.

We urge the Subcommittee, then, to consider carefully that the Bill in its present form does not adequately address the concerns of information policy.

That concludes my statement. Again, Mr. Chairman, we commend the sponsors of H.R. 3333 for raising and dealing with these important issues, and stand ready to cooperate fully in perfecting the legislation.

FOOTNOTES

1/ Speech of FCC Chairman Dean Burch, to the International Radio and Television Society, September 14, 1973.

2/ Moline Television Corp., 31 F.C.C. 2d 263, 272 (1971).

3/ Office of Communication of the United Church of Christ v. FCC, 359 F.2d (D.C. Cir. 1969); 465 F.2d 519 (D.C. Cir. 1972).

4/ Because this term is not defined, there is some doubt whether it includes only the competing applicant or petitioner to deny, or informal complaints as well.

5/ Comments of the National Telecommunications and Information Administration in FCC Docket No. 78-167, filed August 16, 1978.

6/ Statement of Paul I. Bortz, Deputy Assistant Secretary, National Telecommunications and Information Administration, on H.R. 3333, Spectrum Fees, Land Mobile and Other Radio Services before the House Subcommittee on Communications, Wednesday, June 6, 1979, pp. 1-8. See also Statement of Henry Geller, Assistant Secretary for Communications and Information, U.S. Department of Commerce, on H.R. 3333 before the Subcommittee on Communications, U.S. House of Representatives, May 1979, pp. 25-26.

7/ Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959); Accord: Action for Children's Television (ACT) v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1977); Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir.), cert. denied 434 U.S. 829 (1977).

8/ See ACT v. FCC, supra note 7, at 474-478.

9/ Speech of the FCC Chairman Richard Wiley, to the Federal Communications Bar Association, April 30, 1974 (FCC Mimeo 21343).

APPENDIX A

Informal Rulemaking

Introduction

The following discussion is premised upon a Congressional determination to legislate in the CRC (FCC) field as to the procedures governing informal rulemaking (see p. 9) for the desirability of a uniform approach under the APA). Presumably such legislation would stem from the consideration that the courts have laid down several holdings, some in conflict, applicable to FCC informal rulemaking proceedings. Compare Home Box Office v. FCC, 567 F. 2d 9 (D.C. Cir.) cert. denied 434 U.S. 829(1977),with Action for Children's Television, 564 F. 2d 458 (D.C. Cir 1977). Further, the discussion is, of course, inapplicable to the issue of the relationship between Executive Branch agencies and the President or his Executive Office in informal rulemaking proceedings.

Principles

NTIA believes that in formulating policies and procedures regarding ex parte communications in informal rulemakings, the objective should be to foster a genuine and fair dialogue between interested parties and the Commission, while creating a record of agency decisions that is suitably framed for judicial review.

Accordingly, interested parties should be provided an adequate opportunity to contribute any data, views, information or arguments with respect to an agency proposal. The Commission, in turn, should be able to preserve the traditional flexibility associated with informal rulemakings and to rely on its own expertise as long as the basis for its decision is spread on the record.

H.R. 3333

The pertinent section of this Bill that deals with ex parte communications in informal rulemaking is Section 234. Subpart (b) covers any Commissioner or participating supervisory employee who initiates or receives any communication from any interested party to an informal rulemaking proceeding. It requires written notice, and a summary of the communication involved, to be furnished to all other participants in the proceeding, if the "communication occurs after the record relating to such proceeding has been closed by the Commission."

Unlike an adjudication, there is no formal record or closing period for the record in an informal rulemaking. Therefore, we assume that this section is meant to cover all communications made after the expiration date for filing all comments. If, however, the intent is to require notification at an earlier period, such as once a notice of proposed rulemaking has been issued, this should be resolved by language that makes clear at what point in the proceeding the provision becomes effective.

As written, we believe the provision accomplishes both too much and too little, depending on the nature of the rulemaking. Some rulemakings are of a technical, often non-controversial nature. In these cases, basic fairness to contending participants is not a matter of concern, so that the Commission should be free to obtain information, from any source at any time, without restrictions. Notification to other interested parties would serve no useful purpose.

On the other hand, other rulemakings involve the "resolution of conflicting private claims to a valuable privilege." Here, the courts have held that basic fairness requires such proceedings to be conducted in the open.[7/] Under present law and FCC policy, ex parte communications in these types of rulemakings are prohibited (although the FCC has adopted a

narrow interpretation as to what kinds of rulemakings are covered by this categorization).

There is a third category of rulemakings that falls somewhere between the others. These involve broad policy areas, such as the fairness doctrine or children's television, where important matters of industry operations are at stake. We believe that here again, whatever the present law,[8] some process must be formulated to control the practice of oral presentations made in the privacy of individual Commissioner and staff offices after written and oral arguments in a rulemaking proceeding have been completed. This practice is contrary to the principle of basic fairness to all participants, and also hinders the process of judicial review. Former Chairman Wiley, in a 1974 speech, accurately described the result of these closed-door meetings, which result in the offering of "compromises, fall-back positions and the so-called 'real facts.'"[9]

Finally, there are proceedings that are not categorized as informal rulemakings, but that, in effect, should be treated no differently than the broad policy rulemakings described above. A particular inquiry proceeding, for example, can involve the same considerations as in rulemaking, with the exception that a policy, rather than a rule, is the end product. The principle of basic fairness should still be followed here, regardless of the form of the proceeding.

The present law is confused (see cases cited note 7) and calls for clarification. We urge that the provision in 234 be revised to specify that unless the Commission makes the explicit finding in the Notice of Proposed Rulemaking that the proceeding is of a technical, non-controversial nature, all ex parte communications going to the merits shall be succinctly summarized (if oral) and placed in the public docket. We believe that this will permit the agency flexibility to receive data in informal conferences and yet will insure basic fairness to all participants and facilitate effective judicial review. It is a combination of sunshine and flexibility appropriate to the nature of the proceeding--rulemaking to formulate substantive policy rather than adjudication of the rights of individuals or parties.

We also believe that the category of those covered by the provision may be too limited to achieve basic fairness. Since non-supervisory personnel, such as key staff members or Commissioners' aides, may be personally and substantially involved in a particular rulemaking proceeding, the provision should be made applicable to all participating employees, regardless of supervisory authority. This can be accomplished by striking the word "supervisory" from Subparts (b) and (c).

The term "interested party" should also be defined in Subpart (d). An "interested party" should include:

(a) Participants in the rulemaking; i.e., those filing or intending to file formal comments. This category should include not only private parties, but also public officials and other governmental agencies participating in Commission proceedings.

(b) Their representatives.

(c) "Interceders" on their behalf. The Administrative Conference has defined an interceder as "any individual outside the agency conducting the proceeding (whether in public or private life), partnership, corporation, association or other agency, other than a party, or an agent of a party, who volunteers a communication which he may be expected to know may advance or adversely affect the interests of a particular party to the proceeding whether or not he acts with the consent of any party or any party's agent."

Finally, a Subpart (e) should be added to afford the Commission flexibility in implementing the provision. It should direct the Commission to extend the applicability of the section to appropriate Notices of Inquiry that share the characteristics of broad policy rulemaking. Moreover, the Commission should be encouraged, either in the legislative language or history, to designate some specific point in each rulemaking after which all ex parte communications would be prohibited. This would insure that the Commission's final deliberations on proposed rules were not influenced by external pressures. The particular point chosen might be after an oral argument, if one were held, or after an opportunity for staff consideration at the end of the comment period.

Mr. VAN DEERLIN. Mr. Cohn, the principal criticism we have heard of the bill's proposal for spectrum management stems from fear that the executive branch might use this enormous power to silence unfavorable critics of the administration. We want to be careful to meet such fears as this and it seems to me that your views do not represent any such paranoia.

After all, if an administration wants to silence its critics by getting them off the air, there are probably more devious ways of doing it than this would entail. Do you think the division of spectrum management responsibility between the executive branch—for the Government sector—and the Commission—for the non-Government sector—can be improved upon?

Mr. COHN. As presently exists, do you mean?

Mr. VAN DEERLIN. As proposed in the bill, with spectrum management functions assigned to the NTA rather than the Commission.

Mr. COHN. I don't feel dividing the allocation and assignment functions is the best way to go. These are intimately related. And I think whoever has allocation authority should have assignment authority.

Mr. VAN DEERLIN. Do you agree with that, Mr. Geller?

Mr. GELLER. Yes, very much so. We strongly believe that if you split the two, you will create a division which will be almost as inimical as the present split between Government and non-Government; and therefore, if you are going to do the job, you ought to do it effectively and put the two together.

As Mr. Cohn said, if the single allocator decides that 100 megahertz are needed for some service, whatever it is, and it does so based upon certain assumptions as to assignment rules, heights, and power, separations and so on, and then having decided that, the CRC chooses to adopt different assignment standards, this would frustrate entirely what the allocator had done.

It is for that reason we think they go hand in hand, like ham and eggs; you have to put the two together.

May I also address and propagandize a bit on the first point you made? We think that, as you have indicated, it is absolutely ludicrous to think that somebody would try to still antiadministration viewpoints by eliminating channel 2 in New York or channel 4 here. That is not the way it would be done. Such an action would stand out like a dead mackerel in the moonlight and wouldn't survive for a moment.

The way it would be done—and this is why I say I am propagandizing—is by using the public interest standard, the one now in the act. It is a vague standard. It allows the FCC or the CRC great leeway in how it wants to act. And as we have seen in the Nixon administration with the tapes Nixon said the Washington Post would have a damned hard time, a damnably hard time at renewal.

Mr. VAN DEERLIN. Getting its television licenses renewed?

Mr. GELLER. Yes, on its television station. He sent Charles Colson out to talk to the networks. Suppose you had an FCC which was in league with the administration and it issued a notice of proposed rulemaking saying the networks could only own one station or two stations instead of the present limit of five. Then you sent Colson

out to talk to the networks about problems of mutual concern, with such a notice over their head.

The public interest standard allows you all of this leeway to act under that, and what I am saying is it is not going to happen in allocations. That is a very difficult area. There would be very much sunshine on it. It will happen in areas where there is great leeway to act under a public interest standard.

Mr. VAN DEERLIN. What is the nature of the spectrum crisis in the 1980's to which you have alluded, Mr. Cohn?

Mr. COHN. For example, Government assignments grow at a rate of about 7 percent per year, and the number of changes we have in assignments are approximately half the total assignments per year. If you project these rates out, you will find that somewhere in the mid-to-late eighties, unless more engineering is applied to spectrum management, we are going to run out.

Mr. VAN DEERLIN. What is the nature of this expanding Government use of the spectrum?

Mr. COHN. More economical ways to do Government business, greater defense requirements, greater safety requirements of the FAA, et cetera.

Mr. VAN DEERLIN. I assume that defense applications constitute a good part of it. What kinds of uses exist today that didn't exist in recent years?

Mr. COHN. Radars are probably the biggest users of the spectrum as a single class of equipment. They probably use about 25 percent of the Government's involvement in spectrum. There are ways, we feel, of fitting these together, fitting more equipment within the same band. But it is going to take some engineering to do this, not just plain conservative administrative assignment rules which have been used in the past.

Mr. VAN DEERLIN. Do you mean that the Government's use of the spectrum is perhaps not the most efficient use which could be made?

Mr. COHN. Nor is the non-Government's.

Mr. VAN DEERLIN. Except that——

Mr. COHN. I think the management techniques have been very conservative using worse case situations, placing assignments so that they absolutely cannot cause any interference. These techniques have essentially used very large areas that are precluded to other assignments. People have used these conservative administrative rules and they are not necessarily reality.

Mr. VAN DEERLIN. Do you mean a wider separation between bands?

Mr. COHN. A wider separation than is necessary, both in the Government and non-Government sides. The spectrum resource assessments and the system review procedures that I have talked about are a step in the direction of trying to reduce these spacings and cram more users into the same spectrum space.

Mr. VAN DEERLIN. Incidentally, as an authority in this field, could you set at rest the technical and engineering questions that have been raised in regard to 9 kilohertz separation on radio rather than 10?

Mr. COHN. I don't know whether I can set them at rest, but there is a very definite need to reduce the spacing. Other parts of the world have done it and I believe we can do it successfully.

Mr. VAN DEERLIN. Can it be done without sacrifice of quality?

Mr. COHN. That is what our studies seem to indicate.

Mr. GELLER. The Commission, I believe, is about to issue a notice and begin a proceeding on this issue. We at NTIA are going to devote major resources to showing, one, it will not cause adjacent channel interference, two, it will not cause inordinate cause even in adjusting the direction rays, and three, it won't affect AM stereo. And finally, we believe it may be necessary because preliminary indications have indicated we may suffer interference from regions 1 and 3 as Mr. Cohn mentioned; that in times of low sunspot activity, this interference will pick up. Therefore, if we do not move to 9 kilohertz, we may find our operations will be adversely affected by this heterodyne interference.

Mr. VAN DEERLIN. There would be unaccountable static?

Mr. GELLER. Yes. It is a whistle.

Mr. COHN. It is a whistle.

Mr. GELLER. We are not sure, but what I am saying to you is that there are indications of this. But as Mr. Cohn has said, our preliminary studies have indicated it will not cause any interference and we don't see why it would. After all, regions 1 and 3 have done so and they are not getting poorer service.

Therefore, we think the change is perfectly feasible. It was proposed to move to 8 kilohertz as a separation, and instead of that, 9 was used as a compromise. All I am saying is we think there will be a proceeding. NTIA will provide the engineering data in that proceeding. We believe we will carry the burden of showing that this is sound in terms of engineering.

Once we carry that burden, Mr. Chairman, it then becomes a matter of using the spectrum efficiently. If it can be used at 9 kilohertz rather than 10, it makes sense to use 9—the more efficient alternative. This ties in not only with providing more spectrum for daytime-only use in this country, but for minority use.

Mr. VAN DEERLIN. Yes. If we are going to deregulate the commercial radio industry, it seems that the corollary is to make possible further competition.

Mr. GELLER. Yes; and that is possible through expanding the AM band at WARC. It is possible through use of directional rays in FM. We have filed a petition with the FCC urging that measure. It does not require international agreement. It is feasible right now if the Commission will move to do so, and it could add scores of other stations in that area.

So that we think that besides the 8,400 radio stations which are now on the air, there can be hundreds and hundreds more, thus allowing quite a choice in the marketplace for different formats for services to the public.

Mr. VAN DEERLIN. Thank you.

Ms. Possner.

Ms. POSSNER. Mr. Cohn, I have a few questions for you. I am not sure whether I was following your oral statement completely, but in your written statement you say that spectrum scarcity is exacerbated by management problems, lack of coordination be-

tween those entities that have management responsibility. I don't have the Executive order creating NTIA in front of me.

Would you summarize for us the extent to which NTIA now has authority to manage and allocate the spectrum?

Mr. COHN. Our authority now concerns Government use of the spectrum.

Ms. POSSNER. Only those frequencies that are federally owned and operated?

Mr. COHN. That is right. Now, in certain bands there are mixed Federal and non-Federal use, and we are involved in those. But we are not involved in the exclusive non-Government bands.

Ms. POSSNER. And to the extent that the FCC has authority over managing the spectrum—the non-Federal portions of the spectrum—you did allude to the fact that in the present regulatory environment there is considerable coordination between the NTIA and the FCC.

Mr. COHN. That is right, particularly in those mixed shared bands, which, by the way, represent about 40 percent of the spectrum.

Ms. POSSNER. Forty percent of the spectrum is shared by Government and non-Government users?

[Mr. Cohn nods affirmatively.]

Ms. POSSNER. In H.R. 3333, principal authority over allocating and managing the spectrum is given to the new agency, the NTA. That is in title VII. And in title IV, section 435, the President is given the authority to assign frequencies for use by stations owned and operated by the Federal Government.

Mr. COHN. Right.

Ms. POSSNER. And the CRC is given the authority to assign frequencies for non-Federal use. In your oral statement you said the bill is defective because of this division between allocation and assignment.

Mr. COHN. That is right. We feel that the allocator and the assigner should be the same agency.

Ms. POSSNER. In all cases?

Mr. COHN. In all cases. We have talked about authorization, that is, who gets the particular license, and we feel a non-Government entity should license non-Government users.

Ms. POSSNER. Then perhaps I am not understanding your definition of the term "assignment."

Mr. COHN. An assignment is a specific frequency to a specific radio station.

Ms. POSSNER. And as proposed, the CRC would grant assignments for non-Federal licensees—non-Federal frequencies?

Mr. COHN. That is right, in the bill.

Ms. POSSNER. In the bill, the President, or the NTA, would do that—grant assignments for Federally owned and operated frequencies?

Mr. COHN. That is right. That is in the bill.

Ms. POSSNER. But title VII grants the NTA specific authority to exercise principal responsibility for allocation of the entire spectrum. So I guess I still don't understand where the defect is. If the NTA has principal authority over allocating and managing the spectrum, and that to some extent eliminates the management

problems we have today because authority is divided among several entities, I simply do not understand what the fatal defect is.

If the NTA has the authority over management and allocation and the NTA has the authority over assignments for Government portions of the spectrum, and CRC over non-Government, where is that defect—in the assignment function?

Mr. COHN. Assignment and allocation——

Ms. POSSNER. Are different.

Mr. COHN. Are different, but they are mixed together, as Mr. Geller pointed out. As Mr. Geller pointed out, the assignments could be based upon a set of rules.

Ms. POSSNER. Such as alluded to in those four points?

Mr. COHN. Yes. The other assignment authority would not necessarily have to follow. They could change the rules and the allocations would be meaningless.

Ms. POSSNER. You also mentioned four principles——

Mr. COHN. Right.

Ms. POSSNER. That are essential to a sensible, efficient spectrum management policy. One, I believe, is that a single agency have responsibility for spectrum management and allocation. Your fourth principle is that the CRC make non-Federal assignments, and numbers 2 and 3 are the ones you said are not in the bill.

Mr. COHN. Number 4 was not on assignments; it was on authorizations.

Ms. POSSNER. Authorizations. Numbers 2 and 3 are technical rules governing assignments and a standardization of the assignment process or a unified assignment system. And because those two principles are not embodied in the bill now, the bill is defective.

Mr. COHN. That is right.

Ms. POSSNER. I have one final question. If the NTA section, title VII, were not enacted in the form in which it appears today, would you support—either Mr. Cohn or Mr. Geller—a shift of spectrum management and allocation authority to the NTIA? What, if anything, would need to be done to the NTIA's authority over spectrum management and allocation to achieve the results we are aiming at in title VII?

Mr. GELLER. We would certainly support it, provided, as Mr. Cohn said, you combine both allocation and assignment. We believe those responsibilities could be given to NTIA. It would have to be given by law. It would require a specific provision. And if it were not in title VII, it would have to be elsewhere in title IV, giving NTIA that authority. We do strongly support the notion of a single allocator assignment.

We would point out, for all of the reasons Mr. Cohn said and others, that by putting them together we bring more sunshine, more focus on the process. The non-Government side would be very much interested in what the Government side is doing, and vice versa, and that is a benefit. The more you have people questioning, looking, examining this from both sides, the more the public benefits.

Mr. VAN DEERLIN. What would be the Commission's authority with respect to licensees who had violated FCC rules?

Mr. GELLER. They would have the same authority they have in H.R. 3333 at the present. They would be the authorizing ones. They would say who would go on channel 9 in New York City and how long they would stay on channel 9. If the licensee did something contrary to the law, rule or policy, it would be the CRC, the Commission, who would move to revoke the license or deny renewal.

What we are talking about here is how to make maximum use of the spectrum because it is such a precious resource and it needs this unified management. We are not talking at all in this morning's session about the policies and rules under which the licensee on channel 9 shall operate. That would be for the non-Government side to do, for the CRC to police. We don't think the Executive branch should be involved in that activity at all.

But as I said to you, I don't see any reason why one entity, NTIA, should not be managing the entire spectrum, all the assignments; we don't think that would endanger anything under the first amendment. I repeat to you, the danger under the first amendment is going to come under the public interest standard and is going to call for oversight by this committee.

Mr. VAN DEERLIN. When you use the term "assignment," then, you are not referring to the licensing of a specific user, are you?

Mr. GELLER. No. As Mr. Cohn says, that is authorization. What you have is an allocation of frequency: 100 megahertz—I'm just making this up—shall go to broadcasting. Now you have to assign within that 100 megahertz and determine how you are going to use it: What are the technical rules, what is the separation, what are the heights and power? And by doing that, you decide that there shall be seven assignments in New York City, channels 2, 4, 5, 7, 9, 11 and 13. That is an assignment.

Now, you still haven't determined who is going to be on them. So you turn to who shall be on them and how late they shall operate, and that is called authorization and that belongs with the non-Government, with the CRC. But if you split the other two functions, then the giving of the 100 megahertz could be frustrated by the assignment agency—a different agency could come along and say we are not going to do what you thought we were going to do with this 100 megaheratz. We are going to use 200-mile separation or 300-mile separation, or we are going to use a heightened power of this or that. And it would make a mess out of the 100 megahertz allocation. It wouldn't work any more.

Ms. POSSNER. Mr. Cohn, did you want to respond to the question I asked Mr. Geller about strengthening NTIA's authority over spectrum management and allocation should title VII not be enacted in the form in which it appears today?

Mr. COHN. I think my answer would be very similar to his.

Ms. POSSNER. Thank you. I have no further questions.

Mr. VAN DEERLIN. Mr. Wunder, minority counsel.

Mr. WUNDER. Thank you, Mr. Chairman.

Mr. Cohn, I would like to shift subjects on you for a minute. Referring to your statement, the public participation provisions which appear starting on page 6. First of all, in your statement you indicate the bill is deficient in that it does not provide for funding for public interest groups or others in adjudicatory proceedings. If

there were any such provision made, would you agree that there needs to be some standard specified in the legislation as to who and what group and under what circumstances they shall be entitled to the money? Mr. Geller?

Mr. GELLER. Yes, we do agree. And we think the administration's bill, S. 755, sets forth what we think are appropriate standards, and that is that the party seeking money must reasonably be expected to contribute substantially to a fair disposition of the proceeding, and that the money is needed because the party has a shown he doesn't have sufficient resources available to participate effectively in the absence of such assistance. We believe those should be the two criteria.

Our reason for stressing this, Mr. Wunder, is that if you keep the public trustee system, it is based, we believe, upon public participation. The public needs lawyers to participate effectively, and the system becomes nugatory, almost, if you don't have such a provision.

Mr. WUNDER. When you think about the existing public participation funding mechanisms of agencies such as the FDA, FTC, CPSC, the proceedings almost uniformly have nationwide applicability. Take the CPSC. If they are setting a standard for small children's toys, that has nationwide ramifications because the product is marketed in every locality. But the FCC proceedings in a broadcast license renewal does not.

If you are using the standard that you have outlined, it says nothing about the group that will be funded having any broad-based type of support in the community. One of the great fears of the broadcasters is that they will be subjected to frivolous proceedings which will be exacerbated by public funding mechanisms.

Mr. GELLER. The point you raise is certainly a good one. There are two types of proceedings. One is the one of general applicability, and the FCC has them, as does the Federal Trade Commission—for children's television and so on.

Mr. WUNDER. Sure.

Mr. GELLER. But there is another aspect I would bring to your attention: The system you the Congress have decided upon is one of local outlets. It is one of responsibility to the local group, to the listener, even to a single listener, who is now given standing. The Congress has required, under section 311, that the public be given notice of renewals and ability to participate in that proceeding.

If you want the public to participate, if you want a system of millions of monitors because you want that grassroot inquiry, then you should follow through on the local level with the funding of local groups.

If the idea is that a station in Roanoke, Va. should be responsible to the Roanoke public and it is to the public that the FCC should look at renewal more than to anyone else, then if the Roanoke public wants to participate, they do need lawyers. We have found that absent the lawyers, the public doesn't know what the rules of the game are and they are more apt to raise frivolous things such as poor taste or issues the FCC can't get into.

It is for that reason that we urge that, if you maintain the system of public trusteeship, then you do need this funding of public interest groups. Without it, the broadcasters will have very

experienced counsel and the public interest groups not, and that will result in very unequal combat.

Mr. WUNDER. In theory that all sounds very nice, but when you are talking about the number of groups potentially that could form in a locality just for the sake of forming, it certainly boggles the mind.

Mr. GELLER. Yes, it does. I think the agency would have to exercise discretion, just as was stated in the leading seminal case, United Church of Christ, when the courts held that listeners have standing. The courts said that if the agency gets overwhelmed, if the floodgates open, it, the agency, can take steps to limit the number of people who may participate. I think that is even clearer with regard to funds.

First of all, there has to be made a showing not only that the public group needs the money to participate but that it will make a substantial contribution to the fair resolution of the proceeding. An agency cannot keep funding group after group. Once one group comes in and proves its relevance, the agency, which has very limited money, would have to say to other groups: I am sorry, we have funded one and we are not going to fund several, three or four.

So far, the floodgates have not really opened. The Commission has not been overwhelmed by people coming forward. But you raise a point that would have to be looked at. If it turned out that there were enormous requests, the Commission would have to adopt rules, such as allowing only one to a customer, or designing a selection process.

Mr. WUNDER. Thank you, Mr. Chairman.

Mr. VAN DEERLIN. Mr. Luken.

Mr. LUKEN. Pursuing that to some extent, I too think it boggles the mind and that the agency would, in effect, be the decider of what public interest groups are going to be recognized and funded. So it is really going to be the agency, not the public interest groups, which will be the instrumentality bringing the charges or making the objections or making the case.

Mr. GELLER. No, I think the groups would be coming——

Mr. LUKEN. This is what happened in the FTC.

Mr. GELLER. I believe the groups will be coming forward. The agency should not foment participation by any local group.

Mr. LUKEN. If I may interrupt.

Mr. GELLER. Yes, sir.

Mr. LUKEN. For you to say the agency shouldn't foment, could be considered a pious statement, or hortatory, at worst. The agency very well might. There have been accusations with some justification that public agencies have done just that, and for us to say that they should not isn't going to prevent their doing it.

Mr. GELLER. It seems to me if you have a Roanoke—again, I use it as an example—TV station, which the agency thinks it is not operating properly, then the agency should act on its own. It has a complaints and compliance section. It should send its people out to investigate; it should designate hearings; and it should carry the burden of moving forward.

If, on the other hand, a public interest group——

Mr. LUKEN. What do you mean by acting properly? The public trustee concept?

Mr. GELLER. Anything. A rigged quiz. Failure to carry out its promises. Failure to serve—there might be 45 percent minorities in the area and the station has virtually zero minority programing. Any number of things.

Mr. VAN DEERLIN. Are you just pulling Roanoke out of the hat?

Mr. GELLER. Yes. If you would like for me to use Pocatello, it is almost always used. But the agency has a complaints and compliance section. It is supposed to get annual figures and get figures at renewal about what has been done in local and informational programming and in a number of other areas. It also can learn through a number of sources about double billing, rigged quizzes, any number of policies. The agency should act on its own then.

But there is another concept in the bill, and that concept is one that the licensee is a public trustee and responsible to his public. That means that the Commission likes to have public participation. I don't mean it should go out and say go participate but what it does is it gives the public notice of renewal. That is required. They have to do it over the air. They have to make announcements: We are coming up for renewal, and if any persons want to participate, they can come forward. That, I think we would all agree, is very desirable. Actually it is a mistake to call them public interest groups by that name. They don't necessarily represent the public interest. What they represent is a group of listeners who feel that the station has not served the public adequately. Everybody would agree they are entitled to come forward and give their story to the Commission.

The system is one of local outlets responsible to local groups, to the local public, and the question then is: If they come forward, how do they do that without attorneys? Because I am sorry to say—it is my own profession—that it has become so complicated it is very difficult to participate in an FCC proceeding without an attorney. The broadcasters have one. Doesn't the public interest group have to have one if they are going to participate effectively?

But it would be up to the agency to make sure the complaint was not frivolous, as Mr. Wunder pointed out; to make sure a given group really needs the money and it really will make a contribution. After too many apply and the money supply is depleted the public interest groups will have to get together and settle on one counsel.

I want to back up on one thing and say that in radio, particularly, NTIA does not favor the continuation of the public trustee concept. We favor scrapping it. We think the regulation of program content has been ineffectual, it has large first amendment costs, and we believe you should go to a different system. But if you keep it——

Mr. LUKEN. Do you think those public interest groups out there agree with you on that?

Mr. GELLER. No, they don't. They disagree totally.

Mr. LUKEN. They sure don't agree, and they are organizing. The drums are——

Mr. GELLER. I know about the drums. They are beating behind me too, sir. But what I am saying is if you keep the public trustee

concept, you should keep pace with it. And it seems to me in doing that you should fund public interest groups because other than that you are keeping the promise to the ear and breaking it to the heart.

It is for that reason that we support extending the provision that is now in the bill only as to rulemaking; we support its extension to licensing proceedings if you decide to keep the public trustee concept.

Mr. LUKEN. I have made statements similar to yours, not with tongue in cheek but not with any great deal of certitude that I was right or that I could carry them out, or help to carry them out, with reference to deregulating radio. But as we get closer to a possible decision and as we hear from more public interest groups and public interest representatives, I would predict that it is going to be very difficult, if not impossible, for this Congress to carry out such deregulation.

Mr. GELLER. I am sorry to hear that.

Mr. LUKEN. Certainly I have made a very provocative statement.

Mr. VAN DEERLIN. Has it occurred to you, Mr. Geller, as an observer of the communications scene, that what the public interest organizations were telling us last week dovetails almost precisely with what we were hearing from network representatives in regard to the public trustee concept? Can it be possible that their motivation is the same?

Mr. GELLER. Their motivation may be different, but it is extraordinary to hear both sides saying, "a representative of AMST, for example," the act is fine. Both groups may be saying you have to refine it, but it works basically well, but——

Mr. VAN DEERLIN. As sort of backup documentation, the public interest groups cite the dreadful things they see and hear on television today, all of which seem to have occurred under the 1934 act that they ask us so steadfastly to maintain.

Mr. GELLER. What I would urge is deregulation in radio. We all know there will not be any deregulation of television, but you have, as I have said, 8,400 radio stations, 39 in Washington and 59 in Chicago, and more in the offing through these various methods of 9 kilohertz, FM directionals, extension at WARC of the AM band. What I would strongly urge the Congress to do is to try deregulation in AM, try getting rid of the public trustee concept in AM, and at least try the same in the major markets.

There is no need for this regulation. It is out of line with reality to regulate all these 59 stations in Chicago as public trustees. Try it and see that the sky—wrong analogy these days with Skylab—but that the world won't come to an end; that things will go on and it will work. You could then build on that experience. But if you don't take that first step and try deregulation in major markets, you will never get any experience and you will be stuck with the present system, and I think very strongly that that would be a pity.

Mr. LUKEN. If the gentleman would yield back.

[Mr. Van Deerlin nods affirmatively.]

Mr. LUKEN. Mr. Chairman, you are not saying, if I may address that question to you, that the public interest groups and the broadcasters are saying the same thing? The statement that was just made with reference to deregulating the major markets.

Mr. VAN DEERLIN. The broadcasters and the public interest groups are telling us almost the same thing word for word about the public trustee concept.

Mr. LUKEN. The general——

Mr. VAN DEERLIN. If you can find any significant difference in position between Everett Erlick and Ralph Nader on the public trustee concept in testimony before this subcommittee, I will buy your lunch.

Mr. LUKEN. Except the broadcasters do want to deregulate, get rid of fairness and equal time. They want to get rid of it period, as I heard it.

Mr. VAN DEERLIN. They also want to get rid of competition from cable television, satellites and superstations.

Mr. LUKEN. Well, sure.

I am not disagreeing with the chairman at all in his overall comment, but in these particulars I am suggesting there is a difference in some particulars, there is a difference in approach.

Mr. GELLER. I think it is a mistake to call the broadcasters monolithic. There are NRBA, the National——

Mr. LUKEN. They are just taking a tough bargaining position.

Mr. GELLER. Some of them strongly favor deregulation. But there are a number of them who, because of opposition to the spectrum fee and the concept of the spectrum fee, would just as soon keep the 1934 act and not run the danger of a substantial spectrum fee, and therefore they opposed deregulation.

Mr. LUKEN. They will settle for the benign status quo.

Mr. GELLER. That is it. The bottom line is that they would be better off overall, perhaps, with the status quo, they feel, than with moving to a new system. Some of them are locked into the present system the same way public interest groups are locked in to the present.

In making this argument, I want to stress to you we are not talking about total deregulation. We would keep a lot of regulations that were content neutral, such as rigged quizzes and multiple ownership and those regarding the equal opportunity employment. In fact, there could be heightened attention on those. What has been a failure, we think, by the FCC, is looking at overall programing in light of the public trustee concept; it hasn't served the public interest.

Mr. LUKEN. You said what you are not going to deregulate. What are you going to deregulate?

Mr. GELLER. We are going to deregulate the renewal. What we would urge you to do in radio is to have no renewal, to have no public trusteeship concept. We urge you to scrap the licensee's requirement to come in every 3 or 5 years or whatever and show that in overall programing he has served the public interest. For this requirement means that a licensee would have had to ascertain social problems and have a series of programs that meet those problems. Then, the FCC, a Government agency, has to judge whether those programs sufficiently and adequately met the problems. That is a subjective judgment and it has not worked.

Mr. LUKEN. I don't understand, frankly. You say you are going to deregulate the renewal. The renewal is only a process.

Mr. GELLER. Yes; but it is a process based upon a public trustee concept. We would get rid of the public trustee concept. The licensee would no longer be a public trustee.

Mr. LUKEN. My question is what does that mean, public trustee concept? What specific parts of that public trustee concept are you going to adopt?

Mr. GELLER. We would get rid of the entire concept that the licensee has to show every few years at renewal time that his overall programing has served the public interest. That would go. What would happen is that your bill would then specify that the Commission can have regulations in EEO and multiple ownership, and whatever you wanted to keep, you could keep: for example, equal time, at least as to paid time.

Mr. LUKEN. You would keep equal time?

Mr. GELLER. That is up to you. We suggest you do it. It is a concept which is established. You can keep it. But you could get rid of the fairness doctrine.

Mr. LUKEN. We should get rid of the fairness doctrine?

Mr. GELLER. Yes.

Mr. LUKEN. In the major markets?

Mr. GELLER. Yes.

Mr. LUKEN. Of radio?

Mr. GELLER. Yes.

Mr. LUKEN. Not anywhere else?

Mr. GELLER. I think it is not realistic to try to deregulate television. I think you have to build on the experience in radio and turn to TV in 10 years and see how it works.

Mr. LUKEN. What I am saying—and I will "ciss and decease," as someone said recently—luck to you and to us in attempting to do what you are suggesting.

Mr. GELLER. I understand that, but all I urge you, again, is to say that it is right to begin; that you should begin to deregulate in at least some part of the major markets and see what happens. You could get a report in 5 years or 3.

Mr. LUKEN. Thank you, Mr. Chairman.

Thank you, Mr. Geller.

Mr. VAN DEERLIN. While Mr. Gore is warming up, and since this hearing is mainly on title II, the restructuring of the FCC, do you think that the provisions contained in title II of the bill in regard to the restructuring of the Commission would help to alleviate some of the management problems that we are reading and hearing so much about now—such as the rising backlog of renewal hearings and applications for new services?

Mr. GELLER. I think the bill has many commendable provisions in that sense. I think it is desirable to reduce the Commission to five members, to lengthen their term. We do suggest that you allow reappointment. We think it is very desirable to get rid of the comparative hearing. It has been a stultifying, wasteful process criticized by everyone, every judge, every court, everyone who has looked at it.

You have done it by lottery. We suggest a way that is better, we think, and will keep better faith with the minorities who are now coming on-stream and want to get broadcast stations.

But again, we commend you in the bill for seeking to change the commission structure. By doing that, you get rid of a number of backlogs. You allow the Commission to focus better on major policy issues in common carrier, international and other areas that should command its attention. We have pointed out a number of areas where we think it would be a great improvement; a number where we suggest revisions that would better accomplish our purpose. But on the whole, yes, we do support what you are seeking in this bill.

We also support the notion of a new Commission, a CRC, because if the bill passes, it would be a different commission from the FCC. It would have much more limited powers. It would be called upon to move toward deregulation in common carrier, the marketplace solutions, and we think it is good to establish a new mood by calling it a different agency.

Mr. VAN DEERLIN. I realize this may be an unpleasant question to pose to a Government official, but what sort of reductions in staff do you think might be possible at the Commission as a result of such restructuring?

Mr. GELLER. If you get down to five commissioners, you will save some staff and considerable sums of money because the two commissioners are supported, I think, by about $800,000 a piece, something of that nature.

If you get to deregulation, if you carry out other provisions of the bill, you would certainly save staff in that sense. You could get rid of the comparative hearing. You would save both in examiners and staff in the Broadcast Bureau. There are a number of provisions in the bill which would save a great deal of staff resources. We have not calculated it yet, so I am unable to give you any figure of what it would be, but the bill does reduce the agency's size in many significant ways.

Mr. VAN DEERLIN. Mr. Gore.

Mr. GORE. No questions, Mr. Chairman.

Mr. VAN DEERLIN. Ms. Possner.

Ms. POSSNER. Mr. Geller, isn't it true that in some cases restructuring might not result in an overall reduction in staff but might require a shift in staff.

Mr. GELLER. No question.

Ms. POSSNER. In title III, for example, which deals with telecommunications carrier regulations, wouldn't you agree that additional staff would be necessary with respect to the agency's responsibilities in acting on tariffs filed by the dominant carrier?

Mr. GELLER. But even there I think you would have reduction. The Commission now is regulating MCI and SBS and all of these people who do not have the dominant market power your bill refers to. There would be no more need for these people to come before the Commission. And if you look in the Yellow Peril, as it is called, you will see that every week one competitor is petitioning against another competitor. It is true, you are quite right, you would be left with a lot of regulation of A.T. & T. and anyone else who had such dominance, and that is even desirable. There could be better focus on the issues of cross-subsidization.

But I believe overall you would have a reduction of staff even in your title III because you would get rid of all of this present

regulation of resellers. What is the purpose of it? They have no power. There is no need for the Commission to regulate them, yet they do it.

Mr. VAN DEERLIN. Would it be possible to identify the Yellow Peril for the record?

Mr. GELLER. That is "Telecommunications Reports." I am sorry. It is a yellow sheet of this nature [indicating]. I am sure you have seen it.

When I was going to testify on common carrier, I made copies of it although I didn't use it. It showed that without involving A.T. & T., in the particular week I was going to testify, three people assaulted each other: Graphnet was fighting with Western Union and RCA was fighting with somebody else. What they do is fight with their lawyers before the Commission instead of their salesmen in the market. Consequently, you have long delays.

We think that by moving in the direction of your bill, there will be a staff reduction even in title III.

Mr. VAN DEERLIN. Did I understand you to recommend against the nonrenewability of commissioners' terms?

Mr. GELLER. Yes. Certainly that is a close issue and we do understand what motivates doing it. But we would suggest that if you get a good man on, or a good woman—sorry—and he comes up for reappointment, that if you say he can't be reappointed, then his only future may be serving in the industry. But if he has served his full term, the 10-year term or whatever is specified, and wishes to be reappointed and merits it, we wonder why he should not be.

Now, we understand the reasoning on the other side, that he may—it is possible—he may shade what he does in an effort to win favor with the industry as he comes up toward reappointment so that he doesn't have a lot of opposition. In the past, some very fine Commissioners on the Federal Power Commission and the Federal Communications Commission aroused great industry opposition, and when they came up for renewal of their renomination, they sometimes didn't get appointed again.

The purpose of it, I take it, Mr. Chairman, is to say to people your whole future lies in doing a good job in the one term you have.

Mr. VAN DEERLIN. Like a Federal judge.

Mr. GELLER. Yes.

Mr. VAN DEERLIN. Of course, the history of the Federal Communications Commission shows that the average term served is only a little more than 5 years for commissioners and a little more than 3 years for chairmen, and I suppose if you discounted the lifetime longevity of Robert E. Lee, the average for commissioners would be down to around 2 or 3 years.

Mr. GELLER. And Rosel Hyde served for a very long time also.

Mr. VAN DEERLIN. If there are no——

Mr. MOORHEAD. I have a couple of questions.

Mr. VAN DEERLIN. Oh, I am sorry, Mr. Moorhead. I didn't see you come in. Go ahead.

Mr. MOORHEAD. I was concerned with your testimony concerning public participation. I agree with you that the public has to have an input in these matters, but it seems to me when the Government begins to finance these appearances, the so-called public in-

terest groups with a very, very narrow special interest seem to be the ones who get the money, and the public is left out more than they ever have been before.

Most of these special interest groups that call themselves public interest groups represent, in my district, at least, a very tiny segment of the public, who in most instances are against everything they are trying to do. How do you get the money in the right places?

Mr. GELLER. First, I couldn't agree with you more that public interest, as I said earlier, is a misnomer. They shouldn't be called public interest groups because they don't necessarily represent all the public. They are, as you say, special interest groups, and I think that is perfectly permissible designation.

I think if there is a special interest group, a minority or whatever, whose members feel that the station is not adequately serving their needs, those members should have access to a course of action. The act and the whole scheme of the act is to allow public interest groups to say we represent 25 percent of this area and we are not receiving any representation in controversial issues or problems—we are not being allowed to participate in the station's activity.

That is then a matter for the FCC to look over. There should not be any allocation by percentage of minorities in the population. But you cannot, on the other hand, ignore minorities. You cannot put on controversial issues and pay no attention to a particular minority. So they are allowed to enter the process. That is the scheme. That is the reason for the public announcement.

We understand the difficulty in financing these groups, but if you do not finance them and they do not have adequate funds to participate, and they can make a contribution to the fair resolution of the matter, how will they participate? How does your scheme of responsibility to the groups, to the public—even if the groups are specialized—how will that work out if they have no funds to hire lawyers?

Aren't you then saying yes, you can participate, but you as a member of the public cannot do it adequately or efficiently because there is no way you can get counsel to do it?

Mr. MOORHEAD. Usually if there is a strong enough feeling without the public itself or a group within the public, if they feel strongly enough on an issue, they will contribute money for the cause and they will be willing to work at it. If it is just a group who have appointed themselves and want, perhaps, public money to finance their operation, they are defeating the public interest.

Mr. GELLER. Let me point out, though, that, in a number of statutes, you the Congress have set down a system of what might be called private attorney generals. You have said to special interest groups—in the civil rights area, the pollution area, and a number of other areas—you can participate, you can bring the case, and if you prove the case, you can get the costs of your counsel.

Now, what we are asking you is why shouldn't that concept be applicable here so long as you keep the public trustee notion? If you are trying to foster public participation, a system of public monitors at the local level, then shouldn't one who makes an

attempt to participate, shows a fair contribution, shows he doesn't adequately have the funds without public help, shouldn't he be funded? And that is the issue we are raising to you.

What I stress to you is that this concept of private attorney generals does have its roots in a number of laws Congress has passed in the last decade.

Mr. MOORHEAD. Will you contribute the funds to any group that wants to come in, regardless of what position he represents?

Mr. GELLER. No. I think the group in question would have to make a showing that it will contribute substantially to a fair disposition of the matters that are the subject of a hearing. If the group shows that it will assist the Commission and make a substantial contribution, then I think it would be up to the Commission to consider whether it wanted to fund the group.

If the Commission receives requests from too many groups, it would have to tell the groups that they cannot all receive funds. The Commission could tell the groups to get together and decide upon a common counsel. The Commission could state its ability to fund only one counsel and that he or she will have to represent all the groups.

But I do urge you again to consider that the scheme is one of public interest, of being responsible to the public in the area. Even a single listener—who, I agree, may not reflect the overall views of all the people in the area—is entitled to raise matters that are relevant to the public interest standard.

Now, we think that the public interest scheme is out of line with reality in radio, and we would urge you strongly to scrap it. But if you keep it, it seems to us you ought to make it effective.

Mr. MOORHEAD. Isn't it true in these times when public moneys are not easy to come by and there are so many things that are needed, that this is just another area of a drain on the public treasury and it has to be justified as being a higher purpose than some of the other things that cannot be funded?

Mr. GELLER. That is a different matter. I would defer entirely to Congress on that. We think it is a worthwhile endeavor if you keep the public interest standard, but as to how funding public interest groups compares with using the limited money available to finance medical, energy, or other demands, we would defer entirely to the Congress.

Judgments do have to be made. We are not expert on what the competing values are. All I am saying to you is that if you keep the public trustee standard you ought to give serious consideration to the public complaint process. How that cause stacks up against others is not for us to decide—we would not dream of making that evaluation. We don't have the rest of the equation—only you do.

Mr. MOORHEAD. Thank you for appearing this morning.

Mr. VAN DEERLIN. In theory, of course, the regulatory agency itself could be expected to represent the public interest.

Mr. GELLER. Yes; but remember, the regulatory agency cannot go out and find out what is happening in each local community. It would be very difficult for it to do so. And that is why the subcommittee in section 311 and the FCC in its rules have required that the station announce it is coming up for renewal. The station must inform the public that anyone can come and look at its files.

You have a witness coming on later today, Mr. Barry Cole, who is very expert in this area and can, I am sure, supply you with details. But it is quite a structure; it is all based upon getting into the local community, giving the local community notice, and allowing them to participate in the renewal process.

Mr. VAN DEERLIN. Mr. Swift?

Mr. SWIFT. No questions, Mr. Chairman.

Mr. VAN DEERLIN. Thank you, Mr. Geller and Mr. Cohn, for your help this morning.

Our second witness insofar as the principal subject matter of today's hearing is concerned will appear somewhat out of order. He is Mr. Thomas C. Brennan, Commissioner for the Copyright Royalty Tribunal.

Mr. Brennan, we welcome you to the subcommittee. As you know, the legislation has prompted a brisk discourse on the subject of responsibility of cable television operators: Should they be totally deregulated in providing programing and, if so, under what terms. We will be very pleased to hear from you how the present copyright royalty system operates. I guess it is a little less than 2 years old; isn't it?

Mr. BRENNAN. That is correct, Mr. Chairman.

STATEMENT OF THOMAS C. BRENNAN, COMMISSIONER, COPYRIGHT ROYALTY TRIBUNAL

Mr. BRENNAN. I have a prepared statement which I will request be printed in the record.

The statement discusses three issues that I was asked to comment on by members of the subcommittee. I am very conscious of the time pressures on the subcommittee, and perhaps it would expedite the proceedings, rather than to consume time by summarizing the statement, for me at this stage to invite questions from the chairman and the staff, and that, perhaps, might cover more ground in a shorter period of time.

[Testimony resumes on p. 70.]

[Mr. Brennan's prepared statement follows:]

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Testimony of
Commissioner Thomas C. Brennan, Copyright Royalty Tribunal
on H. R. 3333
House of Representatives Subcommittee on Communications
June 12, 1979

I am Thomas C. Brennan, senior Commissioner of the Copyright Royalty Tribunal. Prior to my current position I served as Chief Counsel of the Senate Subcommittee which processed the copyright revision bill, and was actively involved in cable regulatory and copyright issues.

I am appearing at the request of the Subcommittee in my personal capacity. The views expressed are my own and do not represent official positions of the Tribunal. Even in a personal capacity, there are some subjects that I have concluded must be excluded from the scope of my testimony. I do not believe it appropriate for me to discuss issues that will come before the Tribunal in the execution of its quasi-judicial functions.

I have been asked to discuss several specific subjects and to generally comment on the previous testimony concerning the functions of the Tribunal. Before doing that, it may be useful to provide some background as to the circumstances which resulted in the creation of the Tribunal. During the long gestation period of the revision bill, it became apparent that both the House and the Senate intended to utilize compulsory licensing as a means of balancing the competing claims of the owners of copyrighted materials and the users of such works. It then became necessary to devise a mechanism to make these statutory licenses viable, to avoid the Congress having to periodically review the royalty rates, and to resolve various practical problems inherent in the operation of the licenses. For

example, the cable television industry reluctantly accepted the concept of copyright payments but insisted that it must not have any responsibility for the distribution of the royalty fees among the many copyright owners. The Tribunal was thus invented to periodically review, and possibly adjust, royalty rates applying to cable, records, jukeboxes, and public broadcasting. The Tribunal also resolves disputes concerning the distribution of certain royalties, including the cable royalties. Somewhat similar bodies exist in several other major nations.

The first specific subject I have been asked to discuss is the economic justification for the existing fee schedule and the public policy considerations that influenced the Congress in the determination of the cable copyright provisions. The legislative history is clear -- there is absolutely no empirical economic justification for the statutory schedule. None of the Act's sponsors or the Committees which considered the bill have ever suggested that the rates were adopted on the basis of any objective standard. The original Senate Subcommittee schedule would have provided a graduated schedule up to five percent of gross receipts, although it was anticipated that most cable systems would be paying under three percent.

During the processing of the bill, I observed the offering of various amendments to reduce rates and to expand the scope of various exemptions. In my view, the success of many of these amendments was not necessarily induced by the cogent economic arguments of their sponsors. The original Senate approach was to initiate cable into a copyright payments system, to resolve doubts in favor of lower rather than higher rates, and to provide for early and comprehensive review of the fee schedule.

As I shall discuss shortly, this last objective was greatly diluted as the bill ran the legislative gauntlet.

From the perspective of copyright policy, the most significant issue was whether cable operators would be required to negotiate for copyright licenses to carry the programs they pick up as secondary transmissions, or be granted a statutory license. The active consideration of this issue in the Congress extended beyond the House and Senate Subcommittees having jurisdiction in copyright matters. In the Senate, the bill was referred to the Commerce Committee, and this Subcommittee is acquainted with the procedures that were followed in the House of Representatives. I do not recall any congressional dissent from the conclusion expressed in H. R. 94-1476 "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."

I am not aware that any viable alternative has emerged to alter the judgment reached by the Congress only three years ago. Indeed, the Subcommittee is being urged to adopt essentially the same approach previously discarded by both the Congress and the Federal Communications Commission. The inherent limitations of that approach are made manifest by the effort already to qualify it by grandfather clauses, transitional periods, and exemptions, exceptions, etc.

The second subject I have been asked to discuss is the scope of the Tribunal's jurisdiction to review the statutory rates and to respond to certain changes in the FCC rules. To say that the Tribunal may conduct a "complete review" in 1980 of the statutory rates distorts the language of the Copyright Act. It simply is not true that "if program owners believe they are not being

adequately compensated, Congress has already given them a remedy."

The original intent of the sponsor of the copyright revision bill for an early objective review,and possible adjustment,of the cable rates does not survive in the enacted legislation. In all the other statutory licenses, the Tribunal has full jurisdiction to review and possibly adjust the rates based on the record developed during the Tribunal's proceedings. The cable industry successfully pursuaded the Congress that if the Tribunal could review the basic schedule it would result in financial institutions declining to make loans for the development of the cable industry. Since copyright fees will always remain one of the smaller operating costs of a cable system, I found this argument much less pursuasive than the Congress apparently did.

As has been much discussed in the testimony, if the FCC alters the signal carriage or exclusivity rules, the Tribunal is authorized to conduct a special proceeding to assure that the rates are reasonable in light of the altered circumstances. However, the testimony was confused as to whether this is a one-shot review. The Chief Counsel of the Subcommittee at page 190 of the May 14 hearing represented that the Tribunal would have only "one opportunity" to adjust the rates, other than for inflation. I call the counsel's attention to the final sentence of section 804 (b) of Title 17. This provides that in 1980 and at five year intervals, the Tribunal may reconsider any change in rates previously made as a result of changes in the signal carriage or exclusivity rules.

The third subject that I have been asked to discuss are the procedures of the Tribunal concerning the distribution of the deposited royalty fees. The Subcommittee

might find it instructive to direct the staff to compare the assertions of certain of the Subcommittee witnesses with the comments filed on behalf of the same witnesses in the proceedings of the Tribunal.

The Tribunal in its distribution procedures has been governed by the perhaps quaint notion that we should act in accordance with public law and the intent of the Congress, especially when there is general agreement as to the legislative intent. The Copyright Act generally became effective January 1, 1978. The Act provides that claimants to cable royalties must file with the Tribunal in July of each calendar year. Other provisions of the Act control the filing twice a year by cable operators of statements of account reporting the signals and programs which they have transmitted. It is necessary for copyright owners to have access to these cable operator reports in order to properly document their claim.

The first of the cable reports was not available until after the July statutory deadline. The Tribunal therefore proposed that claimants in July 1978 be required to only file a "bare bones" claim to preserve their rights. This proposal of the Tribunal was supported by all the principal copyright claimants. To reduce expenses and paperwork, it was further decided to essentially consolidate the 1978 and 1979 distribution proceedings. Under the Copyright Act, the Tribunal is barred from declaring the existence of a controversy concerning cable distribution until after August 1 of each calendar year.

An important question that had to be resolved by the Tribunal was whether it should propose a distribution formula prior to the filing of the first substantive claims, and prior to any determination under the copyright

Act that a controversy exists. All the major claimants urged the Tribunal at this stage to not propose a distribution formula. The Tribunal, after carefully reviewing this subject, concluded that it would not be desirable for the Tribunal presently to propose a distribution formula.

What were the reasons advanced by the copyright owners in opposition to Tribunal involvement prior to the fall of this year? The overriding argument was that the claimants were negotiating in an effort to reach a complete or partial voluntary agreement and that for the Tribunal to require various justifications from the claimants would result in a considerable expenditure of time and effort that might well prove to be unnecessary.

Let me briefly summarize what some of the claimants were telling the Tribunal. The Commissioner of Baseball Bowie Kuhn in his 1978 comments stated that he "does not believe that the Tribunal should, at this point, specify the type of information which must be included in the July filing." On April 25, 1979 the Commissioner submitted a statement generally supporting the Tribunal's most recent distribution rule. The Motion Picture Association of America testified before the Tribunal on November 9, 1978 that "I think it is best that the parties be given maximum opportunity to collect data on their own." On the same occasion the representative of the National Association of Broadcasters testified "I think we would all like the opportunity, or at least I speak for N.A.B. in this respect, to have an opportunity to negotiate among ourselves before the Tribunal actually steps in." The N.A.B. urged the Tribunal to delay "commencement of any formal proceeding to establish criteria or methodology for the distribution of royalties."

This period to explore the prospects for a voluntary agreement was specifically contemplated by the Congress.

The Congress wrote an antitrust exemption into the Copyright Act so as to permit such discussions among the claimants. To further encourage a voluntary settlement, the Copyright Act provides that the full cost of any Tribunal distribution proceeding must be deducted by the Tribunal prior to the distribution of royalty shares.

The Commissioners of the Copyright Royalty Tribunal have no illusions about the difficulties inherent in the initial distribution proceeding. We anticipate that there will be a controversy, but we are hopeful that determinations and precedents established by the Tribunal in the initial proceeding will facilitate subsequent voluntary distribution agreements. Contrary to some comments made during the hearings, the Tribunal is not looking to the Congress to come to our rescue. We recently appeared before the House Subcommittee which has legislative jurisdiction over this subject matter. We did not suggest any change in our distribution responsibilities and the Tribunal does not believe that any change is necessary.

Mr. Chairman, I fully sympathize with the members of this Subcommittee, having had myself for so many years to wrestle with the cable television question. It is clear that any viable resolution must reflect an integrated communications and copyright solution. It is necessary, furthermore, for the Committees having jurisdiction in copyright matters, and the Congress generally, to consider the interrelationship among various sections of the Copyright Act. The Act, as previously discussed, provides for several compulsory licenses. My personal opinion has been that, other than for cable, compulsory licensing is neither necessary nor desirable. But the Congress has determined otherwise and I see no prospect of this judgment being altered.

If section 453 is enacted in its present form, the Congress would be saying that the jukebox industry, which must obtain licenses from only three societies of copyright owners, has such difficult clearance problems that it requires a compulsory license, but that it is feasible to require thousands of cable operators to obtain program consent from hundreds of copyright owners. Closer to the concerns of this Subcommittee, the Congress would be saying that Public Broadcasting, because of clearance problems, requires a compulsory license for the use of certain categories of copyrighted works in the programs it originates but that it is feasible for cable operators to negotiate for program licenses for the programs they retransmit.

I have reviewed the comments made by members of this Subcommittee, by members of the Senate Communications Subcommittee and by others in the Congress with an active interest in this subject. I seriously doubt that at the present time there is a disposition in the Congress to significantly alter the cable copyright structure so recently implemented. It has been suggested that a possible resolution would be to retain the compulsory license, but amend the Copyright Act to give the Tribunal jurisdiction to conduct a general review, and possible adjustment, of the basic statutory rate schedule. The congress would presumably identify the factors to be considered by the Tribunal, as it has in the other compulsory licenses.

While this approach has a certain attraction, it was successfully resisted in the past by the cable industry. Perhaps a different result could now be achieved as part of a broader general accommodation of regulatory and cable issues.

If it should develop that it is not possible during this session, or even this Congress, to complete action on all issues in the communications rewrite, it might be desirable to provide for a study of the existing rate schedule. The Tribunal could presumably undertake a study of the rates without any amendment of the Copyright Act although there would be no jurisdiction to alter the rates, except as presently provided. It may be that the Tribunal will find it necessary to review the impact of the basic rate schedule in performing its currently mandated cable functions.

Finally, Mr. Chairman, after the Subcommittee has made its policy decisions, I shall be glad to provide, in consultation with the House Judiciary Subcommittee, any necessary technical assistance in terms of the relationship between the Communications and Copyright Acts as they impact on the Tribunal.

Mr. VAN DEERLIN. Thank you, Mr. Brennan. It seems to me that the obvious question in light of the controversy that has raged between the commercial broadcasting industry, the cable television industry and the program distribution industry is how well you believe the Copyright Royalty Tribunal is working in regard to the equation between cable, programers, and broadcasters; whether the compulsory license fee is sufficient to maintain order and equity in a totally deregulated climate.

Mr. BRENNAN. Yes; let me comment on our authority to possibly adjust the fee schedule. As I indicated in my prepared statement, the Congress adopted the existing schedule in the absence of any empirical data. It is simply not true to say, as some have contended, that the Tribunal in 1980 may undertake a complete review of the rates.

It is simply not true, as some have contended, that if copyright owners believe they are not receiving adequate compensation, that Congress has already provided a remedy. That was the intention of the original sponsors of the Copyright Act, but in the process through the two houses, our authority to review the rates has been greatly diluted. We really have no authority to deal with the basic schedule other than the inflation adjustment factor.

As to our jurisdiction to respond to FCC developments, I believe our authority there is somewhat broader than has been recognized in some of the comments made before the subcommittee.

Mr. VAN DEERLIN. The Tribunal is collecting roughly $1 per year for every cable home in the United States, is it not?

Mr. BRENNAN. It is anticipated that the first yearly distribution will be approximately $13 million, which is $4 million to $5 million more than was estimated in the House committee report. If the chairman desires, I could possibly briefly discuss the distribution process.

Mr. VAN DEERLIN. Has there been any distribution?

Mr. BRENNAN. The Copyright Act became effective generally on January 1, 1978. Under the act, claimants are required to file during the month of July of each year. Cable operators are required twice a year to pay the fees and file statements of account in which they report on the signals and programs which they pick up.

Because these latter reports were not available in a timely fashion, the Tribunal, with the support of all the copyright claimants, decided it was not feasible to have a 1978 distribution proceeding. We therefore have essentially consolidated the 1978 and 1979 distribution proceedings, and the next filing will occur during the month of July.

We have no illusions as to the difficult task that we will confront. If the task were simpler, I suspect the Congress would have resolved it either in the act or in the committee report. We are given extensive guidance by the Congress in a number of areas, but when it came to distribution, the House committee report says we will leave this to the good judgment of the Tribunal.

We are hopeful that whatever precedents and determinations are established in the first distribution proceeding will encourage subsequent voluntary agreements, and the intent of the Congress was to have the Tribunal encourage efforts for voluntary agreements.

There are several antitrust exemptions in the act for that purpose. Also another incentive for a voluntary agreement is that the costs of our proceedings are deducted from the royalty fees before they are distributed, so there is an additional incentive for the copyright claimants to undertake to obtain voluntary agreements.

Mr. VAN DEERLIN. I assume the Tribunal has a staff and, I suppose, it has to be paid.

Mr. BRENNAN. Sir, we have no professional or administrative staff. The only employees we have are the secretaries to the commissioners. The intent of the Congress which was clearly set forth in the House committee report was that this was to be a working commission. The Congress intended that the commissioners would basically perform their own professional chores, and the President in selecting the membership was encouraged to choose individuals with skills in various professional disciplines.

So we have two attorneys and one accountant. We do have some authority to hire consultants if a need should arise.

Mr. VAN DEERLIN. Have you hired any consultants yet?

Mr. BRENNAN. We have not.

Mr. VAN DEERLIN. What is the range of claimants? Do they include other than program producers?

Mr. BRENNAN. It is conceivable that there will be some legal disputes as to which entity is entitled to receive a portion of the royalty pot. You may have seen reference in the trade press to a tentative position taken by the NAB, in which they exert a claim to a much larger share than I think other claimants would accept.

Mr. VAN DEERLIN. How surprising.

But the claim would be made on behalf of stations; would it not?

Mr. BRENNAN. Yes; a number of individual radio and television stations have filed claims. When I was the chairman of the Tribunal last year, I made a special effort to encourage the NAB to operate to the extent they can as a common agent for individual stations because it would not be feasible for a local radio or a local television station in most cases to hire local counsel to fight this battle before the Tribunal.

Mr. VAN DEERLIN. In theory, of course, every television station that produces news that is picked up by a cable system would to that extent be a program producer—a copyright holder; would it not?

Mr. BRENNAN. That is correct, and a number of such claims have been filed with us.

Mr. VAN DEERLIN. So, in addition to Hollywood program producers, you have——

Mr. BRENNAN. We have basically broadcasters, movie companies, program syndicators, the sports people, and finally, the performing rights societies, ASCAP, BMI, and SESAC.

Mr. VAN DEERLIN. I have heard the suggestion that by accepting money through the Copyright Tribunal, the sports claimants might feel that they were automatically yielding rights to their programing that they are very jealous of guarding. Do you agree?

Mr. BRENNAN. I would not agree with that conclusion, Mr. Chairman. The Congress has provided for a compulsory license, and their filing a claim with us in no way jeopardizes whatever rights they might have now under the FCC regulations.

Mr. VAN DEERLIN. Mr. Luken.

Mr. LUKEN. I will pass for the moment, Mr. Chairman.

Mr. VAN DEERLIN. Mr. Swift.

Mr. SWIFT. No questions.

Mr. VAN DEERLIN. Mr. Wirth.

Mr. WIRTH. Thank you very much, Mr. Chairman.

Sir, you mentioned in response to the chairman's questioning that the Copyright Tribunal at this point had no professional staff other than two lawyers; is that correct?

Mr. BRENNAN. We have no professional staff.

Mr. VAN DEERLIN. The lawyers he referred to are members of the Commission.

Mr. BRENNAN. Yes, sir.

Mr. WIRTH. So you have no staff. Senator Hollings, in various discussions about the cable producers retransmission consent issue, has, to paraphrase him maybe incorrectly, said that this is essentially a fight between two industries; that the Copyright Tribunal should be brokering; that it is really not a matter of communications policy.

Have you all on the Tribunal discussed this issue, and what is your reaction to that statement that this is not a communications issue but is rather something that should be brokered by you, the Copyright Commission?

Mr. BRENNAN. I think to a great extent Senator Hollings was referring to the matter of the royalty payments, as to whether the existing schedule is adequate, whether we have sufficient jurisdiction to respond to developments at the FCC if certain of the FCC rules should be modified. I would agree with the Senator to the extent that it might involve the question of royalty determinations.

I do not believe it was the intent of Congress for our body to make policy recommendations generally to the Congress.

Mr. WIRTH. Do you feel sufficient jurisdiction to handle this issue?

Mr. BRENNAN. In responding to the chairman's questions, I said that as far as our jurisdiction to react to changes at the FCC, I believe that we do have adequate jurisdiction. But as to the basic fee schedule, the answer is quite clear. We have no jurisdiction other than to make the inflation adjustment.

Mr. WIRTH. Could you expand on that? I am not sure that I understand that.

Mr. BRENNAN. Yes; when the copyright bill was first introduced many years ago and during most of its life, the Copyright Royalty Tribunal would have had jurisdiction periodically to review and possibly adjust the fee schedule which the Congress provided in the act. As part of an industry agreement, that review authority of the Tribunal was greatly diluted, and all that remains is jurisdiction to make certain that the rates keep pace with inflation.

For example, if a cable system did not increase its subscriber charges at the same rate as inflation was increasing, this would result in a loss to the copyright owners, and we have jurisdiction to deal with that but nothing else as far as the basic schedule.

Mr. WIRTH. What you describe as an industry agreement was written into the copyright legislation; is that correct?

Mr. BRENNAN. It was written into the Copyright Act in the House of Representatives following an agreement between the National Cable Television Association and the Motion Picture Association.

Mr. WIRTH. And what was your basic understanding of what that agreement was?

Mr. BRENNAN. It was to preclude the Tribunal from making any adjustment in the basic schedule other than to take account of the inflation factor.

Mr. WIRTH. And do you remember or do you have knowledge of what the rationale was behind that?

Mr. BRENNAN. A major argument of the cable industry was that if there was authorization for independent periodic reviews, it would be difficult to induce bankers to invest in the cable industry. That was a major concern of the cable industry.

Mr. WIRTH. And what was the thrust on the side of the motion picture parties, the other parties to this agreement?

Mr. BRENNAN. In the beginning, the copyright owners were opposed to compulsory licensing. When it became obvious that that was the direction in which the Congress desired to go, the emphasis was then on not having the Congress adopt a fee schedule, or at the very least, to provide some mechanism for review.

Then you get involved with the philosophical questions, Congressman, as to whether it is appropriate for a Government agency to be involved in making such determinations.

Mr. WIRTH. Still, I am not sure I thoroughly understand this. It is very important, as you know, for the whole retransmission consent argument that is now being considered. Who sets the fee schedule?

Mr. BRENNAN. The schedule which is now in force was established by the Congress when it passed the Copyright Act.

Mr. WIRTH. And that schedule was agreed to through what you describe as the industry agreement which was agreed to by both parties?

Mr. BRENNAN. That is correct. And that agreement was then ratified by the Congress as part of the——

Mr. WIRTH. OK. When was that agreement established?

Mr. BRENNAN. This agreement was back in 1976, but the act itself did not become effective generally until January 1, 1978.

Mr. WIRTH. The agreement was formulated by the motion picture industry and the cable television industry in 1976.

Mr. BRENNAN. That is correct.

Mr. WIRTH. Do you remember, at the time of that agreement, whether or not there was any reference to what we are now calling superstations?

Mr. BRENNAN. I am not aware of any such reference, but I was not part of the private discussions.

Mr. WIRTH. So the fee schedule was effectively set up by that agreement between those two industries, and the Copyright Commission only has the ability to increase that by the rate of inflation, is that right?

Mr. BRENNAN. That is correct as far as the basic schedule. As you know, if the FCC should change their rules as to exclusivity or signal carriage, then we have more adequate jurisdiction.

Mr. WIRTH. On page 4 of your testimony, you say that in 1980 and at 5-year intervals, the Tribunal may consider any change in rates previously made as a result of what are referred to as the signal carriage or the exclusivity rules. Do you anticipate making this kind of review in 1980?

Mr. BRENNAN. Because of the FCC developments? The review of the basic schedule——

Mr. LUKEN. Would the gentleman yield at this point?

Mr. WIRTH. Yes.

Mr. LUKEN. I wanted to ask the question: What FCC developments? You have referred to them several times, and I am not sure which you are referring to.

Mr. BRENNAN. Yes, Congressman. Under the Copyright Act and again as part of this industry agreement, if the FCC rules pertaining to distant signal carriage or program exclusivity are modified from the rules in effect in 1976, then the Tribunal with regard to those two issues is given jurisdiction in essence to make the copyright owner whole, to attempt to make up for any financial loss that may result from the modification of the Commission rules.

In those areas we believe our jurisdiction is adequate.

Mr. WIRTH. And that would occasion the kind of review you make reference to on page 4 in your testimony?

Mr. BRENNAN. That is correct, sir.

Mr. WIRTH. Is that a relatively complicated proceeding? Were the distant signal importation rules to be changed by the FCC, would that occasion a significant amount of recrafting of the fee schedule as now set in the legislation?

Mr. BRENNAN. I would anticipate it would be a rather protracted and technical proceeding. There is a provision in the Copyright Act which provides that every proceeding must be completed within 1 year from the date of commencement. So it would not be an ongoing activity.

Mr. WIRTH. Can you do that with the commissioners and secretaries' help?

Mr. BRENNAN. It is quite likely we would see the need to hire one or two consultants. I think our budget comes up on the House floor very shortly, and perhaps I can get a copy of this transcript and use it on that occasion. But seriously, Congressman, we would contemplate hiring consultants. We have been reluctant to do it up to this point because we did not know how things might develop in the Congress, or, for that matter, at the FCC.

Mr. VAN DEERLIN. Will the gentleman yield?

Mr. WIRTH. Yes.

Mr. VAN DEERLIN. What sort of judgments would you seek assistance of consultants in making?

Mr. BRENNAN. It would be, I suppose, to some extent retracking the ground which has been well-plowed over at the FCC in terms of economic studies as to the loss to broadcasters and copyright owners from additional carriage of signals by cable operators. It would be basically economic data.

Mr. WIRTH. As you at the Copyright Commission review the FCC, what do you do? What do you anticipate you would do in the face of some kind of changes? What would you do?

Mr. BRENNAN. We would conduct a rate proceeding which would provide for an increase in the copyright payments being made by cable systems to reflect the additional signals they were authorized to carry, or additional programs, as the case might be.

Mr. WIRTH. What is a rate proceeding?

Mr. BRENNAN. A rate proceeding would be one in which we took testimony from various parties of interest in which they would recommend to us a new fee schedule to be adopted to reflect these developments.

Mr. WIRTH. Would you have funds to hire a recorder so that there is a record of all of this proceeding?

Mr. BRENNAN. Yes. All of our proceedings are transcribed. That is required under the APA.

Mr. WIRTH. And you have the capability for doing that, and you as three commissioners——

Mr. BRENNAN. Five.

Mr. WIRTH. The five commissioners would then huddle and decide what you are going to do?

Mr. BRENNAN. Of course, we would huddle in public under the Sunshine Act, sir.

Mr. WIRTH. I was about to get to that. I am glad you anticipated that, Mr. Brennan.

Mr. VAN DEERLIN. Mr. Luken makes a point that he doesn't think we should miss any of this testimony; therefore, we should all go vote and all come back, even though Mr. Swift is dashing at his 440 pace to come back and take the gavel.

Mr. WIRTH. Can Mr. Brennan stay with us?

Mr. BRENNAN. I shall, sir.

Mr. VAN DEERLIN. Yes, he will stay.

[Brief recess.]

Mr. VAN DEERLIN. Did you have further questions, Mr. Wirth?

Mr. WIRTH. Mr. Chairman, Mr. Luken and I have a whole series of questions, but maybe other members of the panel might want to jump in at this point and we could come back to it.

Mr. LUKEN. Mr. Chairman.

Mr. Brennan, would you say at the present time—do you have a comment that the baseball or sports, the broadcasters and the motion pictures who have been reserved about making claims, that they are being dilatory in this process?

Mr. BRENNAN. No; to the contrary, Congressman. All the claimants that you enumerated have taken part in the proceedings of the Tribunal. They had better do so because the statute tolls. They are required to file their claims in a certain month of each year, and if they allow that opportunity to pass by, their claim is permanently barred.

I am not aware of any major copyright owner who has not filed a claim.

Mr. LUKEN. Well, didn't you say—and I am sorry I have not had a chance to study your testimony—but didn't you indicate that they were urging or who was urging that the commencement of any formal proceedings to establish criteria or methodology should be delayed?

Mr. BRENNAN. Those comments, Congressman, are focused on the actual distribution proceeding. The Copyright Act requires that

the claims be filed in the month of July. In July of 1978 we decided, since the copyright owners did not have timely access to the reports filed by the cable operators, that equity would best be served by a bare bones filing whereby the copyright owners preserved their rights.

Mr. LUKEN. Well, the effect of delaying is to delay the distribution and therefore to delay the carrying out of the purposes of the Copyright Act, is it not?

Mr. BRENNAN. The delay, to the extent there was a delay, had the active support of all the copyright owners.

Mr. LUKEN. That is exactly what I asked you.

Mr. BRENNAN. Yes.

Mr. LUKEN. The active support of the delay by all the copyright owners. Doesn't that signal that the copyright owners do not, in effect, want a settlement under the terms of this legislation and under your present guidelines and procedures? What other conclusion would you come to?

Mr. BRENNAN. The conclusion which they advanced in our proceedings, namely, that they are seeking to achieve a voluntary agreement as to how the copyright royalties shall be divided.

Mr. LUKEN. I asked you for your opinion, if you have one; not just theirs.

Mr. BRENNAN. It is my opinion and one which is shared by all of the commissioners that there has up to this time been a good faith effort by the claimants to explore the prospects for a voluntary agreement as was contemplated by the Congress.

Mr. LUKEN. Well, you are certainly aware of the testimony of all of these participants before this committee, which was very strongly critical of this legislation and these procedures at this time, and urging radical change.

Mr. BRENNAN. As far as any comments about the procedures of the CRT, I suggested in my prepared statement that it might be instructive for this subcommittee to compare what was said by witnesses here with what they were saying in our proceedings.

Mr. LUKEN. Would you help us in doing that since you are aware of both?

Mr. BRENNAN. I should be glad to assist the counsel in doing that.

Mr. LUKEN. Thank you. Could you give us some insight right now?

Mr. BRENNAN. If you would turn, Congressman, to one page of my prepared statement, I think we can give you a——

Mr. LUKEN. I might say in general, Mr. Brennan, at this point in time that I know there are several of us on this panel who are simply fascinated by everything you have to say because we are so interested in the subject and because you are in a position to shed light on the subject which we have discussed with others for so long, and I mean ad nauseum we have discussed this. And we are just intensely interested in everything that you have to say.

But when you came in and didn't read your testimony and we haven't had a chance to read it, we are sort of fumbling around for the questions. So don't hesitate to volunteer anything.

Mr. BRENNAN. In response to your question, Congressman, I call your attention to page 6 of the prepared statement, which summa-

rizes some of the recommendations made to us by the major claimants.

Mr. LUKEN. That part I had read. That is what prompts my question.

Mr. BRENNAN. And the motivation? I have no reason to question their good faith. The motivation was a desire to act as the Congress contemplated, to explore the prospects for a voluntary agreement. And while that exercise was still in progress, the claimants recommended to us that it would not be useful for us to require much in the way of justification because this could involve a lot of unnecessary work.

Mr. VAN DEERLIN. A lot of what?

Mr. BRENNAN. Unnecessary work. Assuming that there was a voluntary agreement, you would have a lot of time and effort that was consumed that would not really serve any practical purpose.

Mr. LUKEN. Well, you refer on page 7—you use the language "to further encourage a voluntary settlement." What do you mean, "settlement"?

Mr. BRENNAN. Under the Copyright Act, after the claims have been filed with the Tribunal there is a period of time in which the claimants may negotiate in an effort to reach a voluntary agreement as to how the fees should be distributed. And to make that——

Mr. LUKEN. Does distribution in that case mean apportionment?

Mr. BRENNAN. Yes.

Mr. LUKEN. So there is no longer an argument as to the amount of the fund. There is no longer an argument at this point in the settlement procedure as to whether the proper amount has been paid.

Mr. BRENNAN. Right.

Mr. LUKEN. It is only a question of the distribution amongst the potential claimants, is that correct?

Mr. BRENNAN. That is correct. Actual claimants. Because this would follow the filing of the claims.

Mr. LUKEN. All right, actual claimants. So then that is the settlement to which we are referring.

Mr. BRENNAN. That is correct.

Mr. LUKEN. The controversy here as to the legislation is not so much, would you agree, as to the distribution among actual claimants but as to the amount that is to be paid in.

Mr. BRENNAN. It is more the question of the amount, but I believe Mr. Norman Lear and some others testified as to what they conceived to be problems with the fair distribution process.

Mr. LUKEN. Well, sir, I am not sure that I follow from your testimony what you mean by your suggesting that we compare the testimony. If we compared the testimony, what would be the general outlines of that comparison as you see it? Would there be a contrast?

Mr. BRENNAN. That comment was addressed to the concerns that were advanced here about the difficulties inherent in the distribution process, and the point of my comment was to call the subcommittee's attention to the fact that the major claimants in our proceedings have supported at every step of the process what has been done or what has not been done, and the overriding concern

was to not take hasty actions which would require things being done which perhaps need not be done in the event of a voluntary agreement.

Mr. LUKEN. So the comparison might suggest that in their positions before your Tribunal, they seem to be satisfied with the proceedings; whereas, in their testimony here, they are, to say the least, dissatisfied.

Mr. BRENNAN. That color was left, yes, sir.

Mr. VAN DEERLIN. Otherwise known as a "forked tongue."

Mr. LUKEN. Now, Mr. Wirth referred to the superstations, and we have heard a great deal about the superstations changing the entire picture. Would you have any comments or would you please comment—I think you answered the very limited question, the rather narrow question Mr. Wirth propounded on this subject. But has the advent of the superstations and the prospect of more superstations in the future changed the picture, the whole environment, so that we would look at a change in overall policy and legislation? Would you comment on that? That is a change from 1976.

Mr. BRENNAN. The Congress in enacting the Copyright Act obviously contemplated that there would be changes in communications technology. I do not recall any specific attention to the question of the superstation.

Mr. LUKEN. But that is what I am asking you about now.

Mr. BRENNAN. Yes.

Mr. LUKEN. You did refer to the changes in FCC regulations about bringing in more stations, and of course that is brought about, that opportunity, by changes in technology, isn't it?

Mr. BRENNAN. That is correct.

Mr. LUKEN. Go ahead. I am sorry. On the superstation issue.

Mr. BRENNAN. We are getting to the point where I must enter a mild caveat, in that, as I indicated in my prepared statement, there are certain issues which will come before us under existing law in a quasi-judicial proceeding, and I have to be careful as to how far I can go in saying what may be done and what may not be done.

All I can say in response to your question is obviously the Congress anticipated that there would be changes in technology, not only in the cable section but in other sections of the act. It sought to use language, terminology that would be sufficiently flexible to adjust to these developments. This objective was not fully implemented in all sections of the act.

As I indicated to you before, this particular section of the act was negotiated between major competing forces, and the Congress ratified that determination. I do not believe it is the Tribunal's function to give the Congress advice as to the superstation problem.

Mr. LUKEN. Someone has got to give us advice. We are not going to be left to our own little resources. Well, I guess I am talking about the fairness. If the superstations are sending signals out, distant signals, and programing of a certain kind, and developing certain programing which was not anticipated prior to the advent of the superstations, it would not be anticipated that there would be that kind of competition in local markets around the country.

Do they have a point that it wasn't anticipated; that there really isn't any way to compensate because whereas it may be a detri-

ment to competition in those local markets they are going into, at the same time there is no particular benefit to the sender of the signal, so everybody loses. That is a sort of argument that is made, is it not?

Mr. BRENNAN. I understand the argument and it is made, certainly. Unfortunately, the final version of the act does not permit the measure of flexibility here that some of us would have preferred. But I did not have a vote.

Mr. LUKEN. Do you have a comment on the rate schedules? Would you explain a little bit about the rate schedules?

Mr. BRENNAN. Yes. I indicate in the prepared statement that the basic schedule in the act was not adopted by the Congress on the basis of any exhaustive economic study or the collection of empirical data. The original objective on the Senate side was to initiate cable television into a copyright payments system, to resolve doubts, perhaps, on the side of lower rates rather than higher rates, and to provide for an early objective review of the rates after a period of practical experience.

This latter objective fell by the wayside as a result of the industry agreement.

Mr. LUKEN. The industry agreement?

Mr. BRENNAN. Yes.

Mr. LUKEN. The industry agreement preceded the legislation.

Mr. BRENNAN. The agreement between NCTA and the Motion Picture Association eliminated any jurisdiction for the Tribunal to review the basic fee schedule other than to deal with the inflation adjustment problem.

Mr. LUKEN. That occurred subsequent to the legislation?

Mr. BRENNAN. No. The first portion of my answer to your question was in terms of the proceedings in the Senate.

Mr. LUKEN. Oh.

Mr. BRENNAN. In the Senate, the review authority existed. It was deleted as a result of the industry agreement.

Mr. LUKEN. Well, didn't you say that if the FCC changes its rules you can look at the basic rate structure?

Mr. BRENNAN. Yes, Congressman, but that is an entirely different section. Again, both the Congress and the parties contemplated that there might well be changes in these FCC rules, and therefore, if that occurs there is a trigger mechanism whereby we can conduct proceedings in that area. That is separate from the basic fee schedule.

The basic schedule we can only adjust in terms of the inflation factor.

Mr. LUKEN. Mr. Chairman, I have no further questions at this time.

Mr. VAN DEERLIN. Ms. Possner.

Ms. POSSNER. Mr. Brennan, I am sorry you did not take the opportunity to summarize your statement because I found it very interesting and very informative.

First, let me say that you are obviously an expert on the subject. You state in the very first paragraph of your prepared statement that prior to serving as commissioner on the Tribunal, you were chief counsel to the Senate subcommittee which processed the copy-

right revision bill and were actively involved in cable regulatory and copyright issues.

I think you are being very modest. You had a great deal to do with crafting this legislation and the Tribunal, and we are fortunate to have you as a witness.

Mr. VAN DEERLIN. You understand that staffers always speak well of one another.

Ms. POSSNER. Even though it is Senate staff.

I would like to ask a few question based upon your prepared statement, and I will try to keep them as short as possible. In drafting H.R. 3333, and more recently in preparing for our hearings on the bill, we attempted to do some research that would help us learn more about the Tribunal, its authority under the current law and its ability to deal with a changing regulatory environment. And frankly, there was very, very little material we could turn to. That is one reason why a statement like yours is so valuable because it does help us out.

In the law itself and both in the Senate and House reports, there does not appear to be a great deal of descriptive information about the Tribunal nor is their any guidance given with respect to its authority and scope of its responsibility.

Mr. BRENNAN. I would somewhat disagree, counsel, at least in terms of the concerns of this subcommittee. I believe the Congress, in fact, was very explicit as to the extent of our jurisdiction in cable television issues in contrast to other areas. And the reason for this having occurred, again, goes back to the industry agreement.

The parties made this deal and they were very careful to make certain that both in the language in the act and the House committee report, it reflected the terms of their understanding. So I think as far as cable is concerned, we have a pretty good understanding as to what the Congress contemplated.

Mr. WIRTH [presiding]. Mr. Brennan, can you tell us what kind of consultation you had with the subcommittee and staff in drafting the rewrite of the Communications Act?

Mr. BRENNAN. I think, Congressman, that question could be answered better if I had served on the House side. I had contact from time to time with the counsel to the Senate Communications Subcommittee.

Mr. WIRTH. How long have you been a member of the Tribunal?

Mr. BRENNAN. I have been a member of the Tribunal since late 1977. I assume that on the House side there was similar consultation between Chairman Kastenmeier and the chairman of this subcommittee, and I assume at staff level you had similar consultation.

Mr. WIRTH. But you have no staff.

Mr. BRENNAN. I have no personal knowledge.

Mr. WIRTH. There is no staff for the Tribunal, so you wouldn't have had staff contact. Supposedly you as a member of the Tribunal would have been contacted as to whether retransmission would work.

Mr. BRENNAN. I can flatly state there was no contact with the Tribunal.

Mr. WIRTH. I am curious about that, particularly given the statement you make at, I think, the end of your testimony, but in any case, about the unworkable nature of retransmission consent. If I can paraphrase your comments at the top of page 8 on section 453, in which you refer to the *Juke Box* decision and the fact that that was awfully cumbersome, and you were dealing with three providers at that point, is that correct?

Mr. BRENNAN. That is correct, sir.

Mr. WIRTH. And how many are we dealing with on this?

Mr. BRENNAN. Several hundred at the least, with various interlocking corporate relationships.

Mr. WIRTH. So your perspective, or your counsel, would have been that the retransmission consent number doesn't work, is that right?

Mr. BRENNAN. I read the proceedings of this hearing. I did not discover in that transcript any new elements or new factors that would alter the judgment which the Congress reached so recently.

Mr. WIRTH. You were never contacted about an area in which there has been so much discussion about the Copyright Tribunal, and the fact that it does not work or that it only meets once and so on.

Mr. BRENNAN. That is correct.

Mr. WIRTH. Could you tell me how royalty payments currently are set? Is it by law? Is that right? Is it set by agreement between the various parties?

Mr. BRENNAN. The parties made their agreement. The House of Representatives ratified that agreement in the cable section of the Copyright Act. The Senate managers in conference yielded to the House, so that the current act is essentially the House version of the bill.

Mr. WIRTH. OK. So it was set by that agreement.

Mr. BRENNAN. It was set by the agreement of the National Cable Television Association and the Motion Picture——

Mr. WIRTH. So that is the basis from which you are now operating?

Mr. BRENNAN. That is the basis and we cannot deviate from that standard other than for the inflation adjustment.

Mr. WIRTH. Unless there is a significant change at the FCC, or presumably by the Congress.

Mr. BRENNAN. Yes, but that was contemplated as a separate question distinct from the basic rate schedule. But you are correct that if there are these developments at the FCC——

Mr. WIRTH. You can meet again and reset the royalty payment schedule, is that right?

Mr. BRENNAN. That is correct, except we can only do it in terms of the additional signals or the additional programs. We can never tinker with the basic schedule other than for the inflation factor.

Mr. WIRTH. The basic schedule meaning what? What is the difference between the basic schedule and others?

Mr. BRENNAN. The basic schedule is the one that applies to the number of signals that were carried by a cable system back in 1976 when the bill was passed.

Mr. WIRTH. Again, can you flesh out what that means? What does that mean to Norman Lear?

Mr. BRENNAN. It means to Norman Lear that if the FCC should dilute the exclusivity protection, he may well sustain a financial loss because he would perhaps be receiving less money for programs in syndication. The Congress contemplated this possibility; therefore, it gave us the jurisdiction to then conduct a proceeding to, in essence, attempt to make the Norman Lears of this world whole, to restore to them whatever financial loss they may sustain as a result of the dilution.

Mr. WIRTH. So you cannot change it beyond the original fee schedule.

Mr. BRENNAN. We are shifting gears again, Congressman, in that when I say we cannot change other than for inflation, I am talking about the fees paid by cable television for the number of signals that they were authorized to carry back in 1976 and under the currently existing FCC rules.

However, if the FCC should modify the rules and allow additional signal carriage, additional program carriage, then we have full jurisdiction to conduct a proceeding to establish what payments should be for those purposes.

Mr. WIRTH. In other words, if there is a change from what existed in terms of the rules in 1976, you are then free to make whatever changes you think appropriate, is that correct?

Mr. BRENNAN. I would say it is not a question of only being free, there would be an obligation. There was clearly a mandate.

Mr. WIRTH. You are required to, so therefore you can change them. The statement has been made—and I think Mr. Luken earlier referred to this—that there was a rigid structure that couldn't be changed. That is not correct if there is a change in the FCC regulations or the congressional legislation, is that right?

Mr. BRENNAN. Yes. I think part of the problem with the testimony was that people tend to pick the parts of the statute that support their particular case.

Mr. WIRTH. There is an old saying that what you see depends upon where you sit, right?

Mr. BRENNAN. Yes.

Mr. WIRTH. Has there been a change at the FCC since 1976, a change occasioned by the Copyright Tribunal?

Mr. BRENNAN. No copyright owner has filed a petition with us in response to any such developments.

Mr. WIRTH. Do you anticipate a change that would then occasion petitions from copyright owners?

Mr. BRENNAN. I have not the slightest doubt but that if the FCC should proceed in the direction they appear to be going, that at the proper time under our statute, we would have a proceeding to deal with this question. And that would not require any further action by the Congress.

Mr. WIRTH. In 1978, how much did you collect in terms of royalty payments?

Mr. BRENNAN. It is estimated the copyright payments for the first full year by cable will be approximately $13 million. This is about $4 or 5 million more than was projected in the House committee report. However, you have to take into account certain factors, such as inflation and growth.

Mr. WIRTH. We are talking about, say, $13 million. Where is that money now?

Mr. BRENNAN. The money physically is in a Treasury account which is accruing interest, and it remains there until the distribution proceeding is completed.

Mr. WIRTH. Where is that distribution proceeding?

Mr. BRENNAN. The status is that under the Copyright Act we can only conduct a proceeding in the fall of each calendar year following the filing of claims during the month of July.

Mr. WIRTH. So by law, you cannot distribute the 1978 revenue until the fall of 1979.

Mr. BRENNAN. The reason for that result was a practical one having to do with the——

Mr. WIRTH. That is in the law? Go ahead and finish. I am sorry.

Mr. BRENNAN. Having to do with the practical problem that on the first round in July of 1978, there was not adequate time for copyright claimants——

Mr. WIRTH. Were there revenues collected into this fund in 1977?

Mr. BRENNAN. No. The act became effective generally——

Mr. WIRTH. People who have been complaining that the Copyright Tribunal has been delinquent, and has not distributed any of these revenues are, in fact, not telling us the whole truth; is that correct?

Mr. BRENNAN. Let me rephrase your question and attempt to answer it. I have not been as upset, perhaps, as some of my colleagues when they read or heard some of the comments made in this subcommittee concerning the distribution procedures. I have been around Washington long enough to know how the game is played. I made the comment earlier—and I think Congressman Luken took me up on this—that it might be useful for the staff, at least, to review the filings which these claimants made in our proceedings, and you will discover that at every step of the process we did what they recommended for the reasons I previously described.

Mr. WIRTH. It is not fair for some to say that the Copyright Tribunal system has not been working. As I remember a number of witnesses saying, none of that money has been distributed. They don't know what they are doing. That is not fair. You were precluded from doing that until this fall; is that correct?

Mr. BRENNAN. If that testimony was heard by one of America's most beloved figures, it might be described as the testimony of a meathead.

Mr. WIRTH. We have part of the meathead syndrome going here.

Mr. LUKEN. How voluminous would those records be that you have now twice suggested that we look at, those applications of those claimants?

Mr. BRENNAN. I was not suggesting, sir, that you look at the claims. I was suggesting that at least the staff might want to review the comments filed by major claimants.

Mr. LUKEN. How voluminous would those comments be?

Mr. BRENNAN. They were concise. They could be——

Mr. LUKEN. How many pages, 20, 100?

Mr. BRENNAN. I would say between 50 and 75.

Mr. LUKEN. Mr. Chairman, I would ask unanimous consent that the record be held open and that Mr. Brennan be requested to furnish the committee for the record copies of those 50 to 75 pages of comments he has described.

Mr. WIRTH. Without objection we will leave the record open for the appropriate parts of that, and it will certainly be made available for the committee.

[The material referred to was received by the subcommittee and may be found in its files.]

Mr. LUKEN. Thank you, Mr. Brennan.

Mr. BRENNAN. Thank you.

Mr. WIRTH. Where are you in the process of designing the distribution system? Maybe you have been through this and I have missed it. It is something a number of us have been interested in.

Mr. BRENNAN. No; you are the first to ask that particular question. We had a public proceeding in which we received testimony from the major claimants concerning whether it would be helpful to the claimants if the Tribunal plunged in at this stage, or going back now about 6 months in time, and put forth our view of a distribution formula and then requested claimants to document their claims on the basis of that distribution formula.

All the major claimants were opposed to the Tribunal coming forth at this posture with its own distribution formula.

Mr. WIRTH. Were you required by law to set up a distribution formula, or is that an open issue?

Mr. BRENNAN. It is an open issue.

Mr. WIRTH. What does the law say about that?

Mr. BRENNAN. The law provides that after we have determined that there is a controversy, we shall conduct a proceeding.

Mr. WIRTH. Have you determined there is a controversy?

Mr. BRENNAN. We have not, for the reason that the claims are filed in July 1979, and therefore we have not reached——

Mr. WIRTH. Fine.

Mr. BRENNAN. I have no illusions about our decisions.

Mr. WIRTH. Do you think there probably will be a finding there is a controversy over the distribution of this payment pool?

Mr. BRENNAN. It is a very likely result. I indicated earlier in my testimony, however, that we would hope that whatever precedents and determinations are made in the first distribution proceeding would facilitate voluntary agreements subsequently.

Mr. WIRTH. Go ahead and sketch out what you do between now and the fall. Would you do that?

Mr. BRENNAN. I would be glad to. In July the copyright owners will file their claims. For the first time we now are requiring them to justify their claim. Last year in the July 1978 filing it was a bare bones filing because they lacked timely access to the reports filed by the cable operators.

Mr. WIRTH. Is this a claim for a piece of that $13 million, that they say we should get such and such a share? Or do they say that overall we deserve to get *x* amount?

Mr. BRENNAN. At this stage, for the first time we are asking them to precisely state what share of the pie they are requesting.

Mr. WIRTH. A percentage share?

Mr. BRENNAN. It could be expressed either in a percentage or in a dollar figure.

Mr. WIRTH. They will make that claim with you in July. How many people do you anticipate will come in with a claim for that?

Mr. BRENNAN. In terms of the number of separate filings, it would probably be between 300 and 350, but many of these claims involve common agents who are filing on behalf of a number of separate corporate entities.

Mr. WIRTH. What would be your best estimate of what the aggregate claim would be from those 300 to 350 claimants? Is it going to be $100 million that they claim they should have? What is your sense of that?

Mr. BRENNAN. We, of course, don't——

Mr. WIRTH. Will it be more than $13 million?

Mr. BRENNAN. Oh, yes; there is no question of that.

Mr. WIRTH. In what magnitude would you guess?

Mr. BRENNAN. I would have no basis to make an——

Mr. WIRTH. You said "Oh, yes" to $13 million. You don't know if it would be as high as $100 million or as low as $20 million? I am trying to get a sense for what we are dealing with; how big is this greased pig we are trying to get a handle on.

Mr. BRENNAN. The National Association of Broadcasters, according to trade press accounts, in the private discussions has asserted certain legal positions which, if mantained, would involve their claiming a much larger share than other claimants had anticipated.

Mr. WIRTH. So you are anticipating that by sometime this fall, October——

Mr. BRENNAN. Yes, sir.

Mr. WIRTH. You will have worked out a distribution system; is that correct?

Mr. BRENNAN. We are anticipating there will be a controversy; that we will commence a proceeding to resolve the controversy and distribute the $13 million. Under the Copyright Act, that proceeding must terminate within 1 year from the date of commencement.

Mr. WIRTH. Is it your impression that the resolution that you will come to this fall, and in the following year, is going to be fair to the parties involved?

Mr. BRENNAN. I would certainly hope that we would——

Mr. WIRTH. I am not talking about the proceeding itself, but the result of the proceeding in terms of who receives what from the royalty payments pool.

Mr. BRENNAN. Yes: and that is one of the reasons we have been reluctant to get involved at an early stage in imposing a distribution formula. By following the method we have pursued, we will allow the claimants their full day in court to advance whatever theories they deem most appropriate.

Mr. WIRTH. Is it your sense that the Tribunal concept, as established in law, is working?

Mr. BRENNAN. The jury is still out. It would be presumptuous to reach a conclusion one way or the other. The act became effective in 1978, and we are just now getting to the period in time where the Tribunal activities become more important.

Mr. WIRTH. But, the jury is out only because of the age of the Tribunal rather than because of inadequacies in the legislation.

Mr. BRENNAN. Right. It is out because of the age and also because of the timetable which the Congress has established as to when certain proceedings shall be commenced.

Mr. WIRTH. Let me shift, and ask you a question that involves the testimony we had related to the amount of money the cable industry pays a producer for a product, compared to the amount of money that, say, a broadcaster pays. Do you have any knowledge, on a per viewer basis, of how royalty payments paid by cable television compare to those paid by over-the-air broadcasting?

Mr. BRENNAN. No, I do not.

Mr. WIRTH. Will you have that kind of information at the Tribunal?

Mr. BRENNAN. Yes; this would certainly be a relevant factor in our rate proceedings when we get to that stage.

Mr. WIRTH. How will you tease out that information? There are only five of you with a secretarial staff.

Mr. BRENNAN. That is correct. As I said earlier, the Congress contemplated that we would hire consultants when and if the need arose, and we anticipate doing that in regard to the 1980 royalty proceedings.

Mr. WIRTH. How soon will you have available at least some indications of the comparative data between what is paid by cable and what is paid by over-the-air broadcasters?

Mr. BRENNAN. Unfortunately, Congressman, not at all in time to be of assistance to the Congress in its current deliberations.

Mr. WIRTH. We are looking for all of the help we can get, as you know, Mr. Brennan.

Mr. BRENNAN. Yes.

Mr. WIRTH. Who has that kind of information? Who is an objective third party which has that kind of data? Is there an objective third party that has that kind of data?

Mr. BRENNAN. As the subcommittee is, I am sure, aware, there have been exhaustive studies at the FCC as to the economic impact of various regulations on broadcasters and copyright owners, and I am sure the various parties have commissioned their studies.

Mr. WIRTH. Let me ask you a question about your statement in the middle of page 3 that says, "I do not recall any congressional dissent from the conclusion expressed in H.R. 94-1476 '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.' "

Do you think that language is appropriate legislative history—something that wouldn't be altered by the Tribunal?

Mr. BRENNAN. The statement is addressed to whether or not there was dissent or minority opinions within the Congress on the judgment reached in both bodies that it would not be feasible for cable operators to negotiate individually in the marketplace with copyright owners. Anyone who wanted to document that conclusion could simply read the history of the bill in the House and the Senate, and you will not find dissenting points of view, which is not too surprising.

Mr. Valenti testified before the House subcommittee in 1975 and said that in all honesty he had to admit that the mechanism just did not exist whereby cable television could negotiate for licenses with copyright owners.

Mr. WIRTH. Is there enough change in the development of, say—again referring to the superstation concept—is there enough change in the way in which signals are carried to occasion a change in the way the Tribunal deals with the copyright royalty——

Mr. BRENNAN. I will give you the same evasive answer I gave Congressman Luken when he asked me that question earlier. We don't think it is the function of the Tribunal to become involved in these communication policy issues. The purpose of my appearance is to respond to more technical questions.

Mr. WIRTH. Going back to what we were talking about before—about what forces you to change the way royalty payments are set—there has not been any kind of a change so far which would occasion your resetting those rates.

Mr. BRENNAN. That is correct. And there is no special trigger mechanism for the superstations.

Mr. WIRTH. There is no special trigger mechanism for the superstations? Do you think there should be?

Mr. BRENNAN. I think the Congress made a mistake when it curtailed our rate review jurisdiction in cable. This is in contrast to all of the other compulsory licenses where the Tribunal periodically has jurisdiction to review and possibly adjust the basic schedule. We do not have that authority with regard to the cable fees. And I think it was a mistake to deny us that authority.

I understand the reason it was done.

Mr. WIRTH. Good healthy politics.

Mr. BRENNAN. Yes, sir.

Mr. WUNDER. When Mr. Luken asked the question about superstations, which was just alluded to, and your response was: "The Act does not permit the measure of flexibility that some would have preferred," I take it you are one of those who would have preferred it?

Mr. BRENNAN. Yes.

Mr. WUNDER. Your point is that the act, section 801, describes the trigger as being a "change in the number of distant signals that can be imported, or alternatively, a change in the sports programs or syndicated exclusivity rules?"

Mr. BRENNAN. That is correct.

Mr. WUNDER. So other than that you cannot have a broad scale review of the rates?

Mr. BRENNAN. That is correct, Counsel.

Mr. WUNDER. Now, also in response to Mr. Luken, you said you were not privy to private statements with respect to the superstations. Were you aware of any public statements?

Mr. BRENNAN. No.

Mr. WUNDER. There were no public statements during any of the discourse on this legislation that alluded to the prospect of a superstation or superstations coming in?

Mr. BRENNAN. That was not surprising, Counsel, because as I testified several times this morning, the final version of the act is

the House language. So, therefore, it is not surprising I was not a party to that.

Mr. WUNDER. Sure. You made numerous references to the industry agreement. That agreement was brought—a large blown-up copy of what purported to be that agreement was brought into the hearing room and on display. It appeared that the signatories to that agreement were NCTA and MPAA by Mr. Valenti.

Mr. BRENNAN. That is correct. The broadcasters were not a party to that agreement.

Mr. WUNDER. Your testimony today has been there would be 350 claimants in July of this year; is that right?

Mr. BRENNAN. Yes.

Mr. WUNDER. So, Mr. Valenti represents eight companies?

Mr. BRENNAN. Yes.

Mr. WUNDER. All the rest were not a party to the agreement then?

Mr. BRENNAN. Yes; by far the largest single category of claimants are local television and radio stations. They were not parties to that agreement.

Mr. WUNDER. Was the NBA?

Mr. BRENNAN. No.

Mr. WUNDER. Was the NHL?

Mr. BRENNAN. No.

Mr. WUNDER. Was major league baseball?

Mr. BRENNAN. No.

Mr. WUNDER. Nor the NFL nor the NCAA?

Mr. BRENNAN. That is correct.

Mr. WUNDER. So, it was not an industry agreement; it was an agreement between two parties, albeit principal parties?

Mr. BRENNAN. I said it was an agreement between the two parties, which I identified.

Mr. WUNDER. OK. I was wondering, if you were called upon to set a new rate on the basis of changes in the distant signal importation rule or the syndicated exclusivity rule, the repeal of those rules; how could you establish a new rate that would be equitable and fair when what we know about what the rate is charged is for an era in which those rules were in existence?

So, do we really have the kind of data that would put you in the position of establishing a fair rate, which is one of the charges of the Copyright Tribunal, "to afford the copyright owner a fair return for his creative work and the copyright user a fair income under the existing economic conditions." Do we have that? Does it exist?

Mr. BRENNAN. It may exist but there is no reason for it to come to the attention now of the Tribunal because we are barred under the statute from conducting any proceedings in that area until such time the Commission has acted and we have petitions filed with us.

At that time I predict to you that if the Copyright Act remains unchanged, that some of those who now say they could not possibly conceive of how they could justify a proposed increase will testify at great length before the Tribunal setting forth voluminous economic data.

Mr. WUNDER. Well, there is one question that you address in your statement and that was with respect to the one-time change. The argument runs: If the rules are eliminated at point in time "A," Mr. Brennan, that triggers your review, the Copyright Tribunal's review, and then you establish a rate based upon that change?

Mr. BRENNAN. That is correct.

Mr. WUNDER. If the rate that you make at some later point in time is found to be inequitable, an inequitable rate, your testimony is that you have a mechanism in the 5-year review for making that rate into an equitable rate?

Mr. BRENNAN. That is correct, to consider whatever new evidence may be presented.

Mr. WUNDER. Maybe it is not new evidence. Does it have to be on the basis of new evidence?

Mr. BRENNAN. No, but if there is no new evidence, it is unlikely there would be a change in the rate.

Mr. WUNDER. So, what we have, again, is another Government-established rate.

Mr. BRENNAN. If the FCC acts to modify the rules and we have a proceeding in 1981 to adjust rates to take into account these developments, we have authority under the act to reconsider that rate in 1985 and at intervals thereafter.

Mr. WUNDER. That is section 804(b)?

Mr. BRENNAN. That is correct.

Mr. WUNDER. Thank you, Mr. Chairman. I have no further questions.

Mr. VAN DEERLIN. Mr. Moir.

Mr. MOIR. Thank you, Mr. Chairman. I have one quick question.

In your dialog with Congressman Wirth, he cited the report language, which you mentioned in your testimony on page 3, about its relevance as legislative history. You went into a long discussion on the fact that you viewed it as legislative history.

Do you view then that concept, which is cited in the report and which appears—at least in my reading—negative toward the concept of retransmission consent, Mr. Brennan, as being legislative history on the Tribunal in either of the two mechanisms we have discussed: either the 5-year review, which is initiated in 1980; or on the other aspect, which you have mentioned in your testimony and you have discussed here, where there are significant changes at the FCC and if a case has been brought to you, you may then hear it.

Do you find this is binding legislative history in either situation and then something only left up to the jurisdiction of the Congress to alter?

Mr. BRENNAN. We need not really be concerned with the language in the committee report in terms of your question because we deal directly with the statute. The Copyright Act gives cable television a compulsory license to carry such signals as are authorized by the FCC, so you are not confronted, in the context of your question, sir, with that analysis.

Mr. MOIR. OK. Thank you, Mr. Chairman.

Mr. VAN DEERLIN. Wrap-up questioning by Ms. Possner.

Ms. POSSNER. Just to follow up on Mr. Moir's question, we were talking earlier about changes that may occur in the next few

months at the FCC with respect to signal carriage regulations and exclusivity rules. You also alluded to this in your prepared statement.

According to Chairman Ferris, the FCC could eliminate its signal carriage rules and its syndicated exclusivity rules by December 31, 1979, and the Tribunal is scheduled to conduct its first review of royalty payments January 1, 1980, and then every 5 years thereafter.

Now, adjustments in royalties paid by the cable industry would be based on rule changes at the FCC and/or changes in national monetary inflation; is that correct?

Mr. BRENNAN. That is correct. The process is triggered by a copyright owner who believes he or she has been damaged by the FCC action filing a petition with us. We review the petition to establish if the petitioner has a significant interest. If the petitioner does, we then start the rate review.

Ms. POSSNER. You comment in your prepared statement on an exchange or several exchanges that took place at our May 14 hearing with respect to changes in FCC cable rules that take place in 1979: "Not only could the Tribunal make rate adjustments during the 1980 examination, but it could indeed make rate adjustments based on those 1979 rule changes in 1985, in 1990, in 1995, in the year 2000," and on and on and on.

This puzzles me because we have had several witnesses testify that there will only be one bite at the apple. They have said that, although the statute gives the Tribunal the authority to make rate adjustments based on changes in FCC rules, the statute does not appear to have anticipated elimination of the FCC rules or elimination of the FCC's authority to regulate cable television.

Can you comment on that one-bite-at-the-apple argument we have heard from several witnesses?

Mr. BRENNAN. Yes; I think there was some confusion in the testimony on this question, and I believe the minority counsel in his question referred to the same subject. Let us assume that the change in the FCC rules becomes effective in 1981. We commence a proceeding to decide what additional compensation should be given to copyright owners as the result of those changes.

Ms. POSSNER. In 1981 at the request of a copyright——

Mr. BRENNAN. At the request of a petitioner. We complete that proceeding at the outside within 1 year. So that at some point in 1982 you have an adjustment of the rates applying to the additional distant signals. Come 1985 under the sentence, which the minority counsel read into the record a few minutes ago, we have authority to reconsider that 1982 determination.

Ms. POSSNER. Does your authority to reconsider that 1982 determination extend to 1990 when you come up again for your next 5-year review?

Mr. BRENNAN. Yes, that would carry forward every time.

Ms. POSSNER. So, in your opinion there would not be just one bite at the apple?

Mr. BRENNAN. That is correct.

Ms. POSSNER. In your written statement you refer to a "bifurcation of responsibility between the Tribunal and the Copyright Office." I want to pursue that for a moment, but I would like to

digress briefly. Earlier, Mr. Wirth asked if the subcommittee staff had been in touch with you or anyone at the Tribunal during the preparation of H.R. 3333. The record should reflect the fact that the staff has been in constant touch with the Copyright Office throughout the preparation of the bill. This leads me back to your question concerning bifurcation of responsibility between the Tribunal and the Copyright office.

Isn't it true that the Copyright Office has statutory responsibility for doing all work in preparation for distribution of royalty fee payments?

Mr. BRENNAN. It depends on which side of the question you are dealing with. In terms of the reporting requirements——

Ms. POSSNER.They are set by the Copyright Office.

Mr. BRENNAN [continuing]. Of cable television owners, those reports go to the Office.

Ms. POSSNER. Go to the office? The Copyright Office?

Mr. BRENNAN. Go to the Office. When you become involved with the rights of the copyright owners and the filing of the claims, then it is the Tribunal, not the Office.

Ms. POSSNER. Does the Tribunal deal with copyright infringement?

Mr. BRENNAN. Neither the Tribunal nor the Office.

Ms. POSSNER. So, its authority is limited to dealing with claims.

Mr. BRENNAN. That is correct.

Ms. POSSNER. So, we have the Office collecting data and specifying what information is filed with respect to signals carried and programing distributed.

Mr. BRENNAN. In consultation with the Tribunal.

Ms. POSSNER. But the Tribunal acts only in an advisory capacity?

Mr. BRENNAN. That is correct.

Ms. POSSNER. And the Office in fact collects the fees from cable operators.

Mr. BRENNAN. That is correct.

Ms. POSSNER. So, the principal function of the Tribunal is distributing the moneys?

Mr. BRENNAN. Distributing the moneys and also, of course, the royalty adjustments.

Ms. POSSNER. That raises another question. You mentioned earlier that according to the statute, claimants were authorized or were required to make their first statement of claim in July of 1978, the act having gone into effect in January.

But the cable industry was not required to make its first payment until August. That seems backwards. Forgive me for being so confused, but on what information did the claimants base their claims if nothing had been filed by the cable industry?

Mr. BRENNAN. Well, that was undoubtedly due to deficiencies in the operation of the House of Representatives because——

Ms. POSSNER. Thank you for bringing it to our attention.

Mr. BRENNAN. Because that is the reason we had to forego any distribution in 1978.

Ms. POSSNER.Who decided to forego distribution that first year? The Tribunal itself or the Tribunal in consultation with the Copyright Office?

Mr. BRENNAN. The Office was not involved in that determination.

Ms. POSSNER. So it was just the Tribunal deciding not to distribute moneys that first year?

Mr. BRENNAN. The Tribunal published a notice in the Register inviting claimants to comment on the various options that were open to us. Because of the technical problem that you have enumerated, we decided that it would be extremely unfair to copyright owners to expect them to document their claim when under the act they did not have access to the reports filed by cable television operators.

Consequently, all that was required was for them to file a piece of paper which preserved their rights.

Ms. POSSNER. So, the Tribunal made the decision to postpone distribution?

Mr. BRENNAN. We made the decision in consultation with the claimants.

Ms. POSSNER. All of the claimants?

Mr. BRENNAN. We had a public notice in the Register and we had written comments in response to that notice from all of the major claimants.

Ms. POSSNER. How many major claimants are there?

Mr. BRENNAN. I would describe the major claimants as the Motion Picture Association——

Ms. POSSNER. The number is sufficient. You do not have to name them.

Mr. BRENNAN. Five or six.

Ms. POSSNER. In an earlier discussion with the chairman of the Tribunal, I was told approximately 200 to 300 claims have been filed. A few minutes ago you said there probably had been about 350.

Mr. BRENNAN. No, we were talking, I think, in terms of predictions as to the number of claims——

Ms. POSSNER. How many claims have been filed so far?

Mr. BRENNAN. It is under 300.

Ms. POSSNER. Close to 300?

Mr. BRENNAN. 260.

Ms. POSSNER. So as a result of discussions with about five or six major claimants the Tribunal decided to put off distribution of the funds the first year because it would have been unfair to require claimants——

Mr. BRENNAN. Yes, and one of the parties to that determination was the NAB, which to some extent reflected the interests of many individual broadcaster claimants.

Ms. POSSNER. In fact, several witnesses testified on the 14th that in no way has the Tribunal been derelict in distributing the royalty fees, but has delayed distribution at the request of claimants.

Mr. BRENNAN. That is correct.

Ms. POSSNER. We have heard repeatedly that our program consent provision would require every cable operator in the United States—and there are now over 4,000—to negotiate directly with every program owner and/or broadcaster in order to obtain program consent.

That is not what the bill says, and I am not even sure that that would be a ncecessary result of the provision. What does concern me is the prospect of almost 300 individual claimants, of which there are five or six dominant ones, coming together and agreeing on a method of distribution that all perceive to be fair.

I raise this issue because you have said that the Tribunal has not made any preparations for distribution in the hope that the claimants will voluntarily adopt a scheme of their own design. You have suggested that if a voluntary scheme were adopted, any work done by the Tribunal would have been in effect, wasted work.

But you also said you anticipate, as of August, that the claimants will not have been able to reach agreement and that you will have to state, as the statute requires, that a controversy exists. My question is—if the Tribunal has not done any work to finalize or even to formulate a distribution scheme, and you have a statutory cap of 1 year on how long the proceeding can take, then we have moneys collected in 1978 and 1979, no voluntary distribution agreement, and no distribution plan at the Tribunal.

What happens in August? Does the Tribunal hire consultants with economic expertise and ask them to design a distribution mechanism?

Mr. BRENNAN. The new rule which governs the July 1979 filing for the first time requires claimants to justify their claim either by a percentage of the total pot or by a dollar amount. And we anticipate that claimants will attempt to justify their price tag by citing various formulas which we should consider in the distribution controversy.

The Commissioners obviously are aware of what the options are. There aren't that many alternatives in terms of distribution formulas. But we determined that we did not wish, prior to the July filing, to commit ourselves to a particular distribution formula.

Ms. POSSNER. Are one or two of the Tribunal members economists? I believe you have an accountant.

Mr. BRENNAN. We do not have an economist. We have two attorneys; we have one accountant; we have one Commissioner with a background in broadcasting, and we have a Commissioner with a background in free lance writing.

Ms. POSSNER. An eclectic group.

The moneys are collected, deposited in the Treasury and are invested in interest bearing Government securities. I understand that the cost of any proceeding resulting from a controvery comes out of that fund. Is that true?

Mr. BRENNAN. That is another incentive to the parties.

Ms. POSSNER. Not only is that an incentive to reach agreement voluntarily, it is a disincentive to find fault with such an agreement. Isn't the fund further diminished by the Copyright Office which is permitted to recover costs from the fund before the fees are deposited in the Treasury?

Mr. BRENNAN. Under other provisions of the act, the Office is required to deduct the cost of its services in filing these reports from cable television operators.

Ms. POSSNER. As one of the craftsmen of the legislation, could you tell us why the Copyright Office is permitted to recover its costs before the fund is deposited.

If the principal is diminished initially by the Copyright Office, there is less——

Mr. BRENNAN. I would imagine the practical answer would be that the funds were to be passed out of the hands of the Copyright Office. They had performed their function under the act. Their duties were now completed. So, before depositing the funds in the Treasury, they deduct the costs of their services. And then they are no longer involved with the distribution.

Ms. POSSNER. Thank you, Mr. Brennan.

Mr. VAN DEERLIN. We have five more witnesses. We are obviously going to run into some people's lunch hour. Mr. Cole, would you rather proceed now or come back?

Mr. COLE. Whatever you wish.

Mr. VAN DEERLIN. I am as wide open as they come. What is your preference? Do you want to come back after lunch?

Mr. COLE. Fine.

Mr. VAN DEERLIN. All right, in that case, we will resume at 1:30 p.m.

[Whereupon at 12:40 p.m., the subcommittee was recessed until 1:30 p.m. the same day.]

AFTER RECESS

[The subcommittee resumed at 1:30 p.m., Hon. Lionel Van Deerlin, chairman, presiding.]

Mr. VAN DEERLIN. The hearing will resume. Dr. Cole has graciously agreed to wait longer in the interest of permitting Professor Warren and Mr. Nunn from the University of Delaware, College of Urban Affairs, to testify and catch a train at 3 o'clock.

All of this is in the interest of Amtrak really. Welcome to the subcommittee.

STATEMENT OF ROBERT WARREN AND SAM NUNN, COLLEGE OF URBAN AFFAIRS AND PUBLIC POLICY, UNIVERSITY OF DELAWARE

Mr. WARREN. We appreciate the opportunity to appear here and we thank very much Professor Cole and others who have let us go ahead of the schedule. My colleague, Sam Nunn, and I have been conducting research concerning the television allocation policies that have been enacted and are indicated under the rewrite and while the statement we have, I think, overlaps titles II and IV, I think there is a relevant concern with the mandate of the Communications Regulatory Commission.

And for the remainder of the presentation, Sam Nunn will present the comments.

STATEMENT OF SAM NUNN

Mr. NUNN. Thank you. Since we did not get the comments to you until this morning, I think it appropriate we go ahead and read them. It shouldn't take too long. We will read the comments so you have a chance to look over them as I go through them.

Broadcasting and communications policy in the United States is approaching a crucial juncture. Decisions made on various aspects of the proposed Communications Act of 1979 will affect the future

structure of the broadcasting industry, the various means by which broadcasting services can be delivered, and the spatial scale at which these services will be provided.

Technologies currently exist that are capable of pushing the television broadcast system in several directions. Communications satellites have opened the way for the development of regional superstations, while cable technology, translators, and improvements in low-power broadcasting provide a means of establishing decentralized, small-scale television broadcast systems.

Existing Federal policy has specifically fostered local television services. Frequencies have been allocated to many local communities across the United States, along with regulatory mandates to provide service oriented toward citizens within the local community.

Behind this policy of localism resides a belief in the benefits of broadcast services generated by local outlets and at least an implicit commitment to a decentralized system of urban communities. Emphasis placed on local service requirements suggested a fear that, without such a mandate, little or no local orientation would be forthcoming.

Relevant sections of the Communications Act of 1979 suggest that the concern for television broadcast service spatially tied to distinct local communities has been eroded and that the existing policy of local frequency assignments and local service obligations to specific cities will be reversed.

The desire to expose television broadcasting to an unregulated market implies a belief that if market forces do not elicit a system of local broadcast outlets committed to local service, but rather a system of regional or national stations, the public interest is best served. Or, if the market dictates that certain cities presently without television frequencies remain without allocations then, again, it must be believed such behavior is in the best interests of the public.

The absence of any explicit requirement that particular cities receive at least the potential to possess local television outlets seriously constrains the opportunity to enhance local capacity to produce community programing.

Certainly, cities without television allocations suffer costs in the form of benefits foregone due to the lack of a local broadcast outlet: Local news, forums for public issues, coverage of local election campaigns, and advertising opportunities for local businesses with rates scaled to the appropriate marketing area may all be more difficult or costly to obtain without a local television outlet.

And it is interesting to note that a recent poll by Yankelovich, Skelly, & White indicated that the majority of those interviewed considered local news to be of most interest. Cities without local television programing are simply at a serious disadvantage in their information environments in terms of both equity and competitive position with cities that do have local television outlets.

Within the 1979 act, the final arbiters of which cities, States, and regions can serve as local broadcast outlets will be the National Telecommunications Agency, NTA, and the Communications Regulatory Commission, CRC. The NTA shall be responsible for assigning the amount and location of spectrum available for television

broadcasting, while the CRC will assign frequencies for individual stations, determine their time and power of operation, and select the station's location.

However, the NTA's evaluation of the spatial distribution of electromagnetic radiation will not be completed for 4 years and a similar study of major television market areas proposed for the CRC will not be completed for at least 9 years. This suggests that if the broadcast provisions of the 1979 act are adopted and its policies accepted, the existing pattern of television frequency allocations will be accepted as the de facto starting point for a new Communications Act.

The present spatial distribution of allocations would be essentially locked in for a period following passage of present legislation, without any explicit mandate to reevaluate it.

It is this issue with which our early research efforts have been concerned. Given the existing policy's emphasis on local television outlets and now the possibility that such concerns may in part be eliminated by the 1979 rewrite, it seemed odd that, with few exceptions, little or no information was available that evaluated the existing spatial distribution of television allocations from the perspective of cities that had or did not have assigned frequencies.

Believing that there are benefits generated by local television outlets that might be lost with a change in policy, we felt that serious questions of equity would be raised if a significant subset of cities of various sizes had not been granted television frequencies. With this in mind, we have recently undertaken an examination of the distribution of television frequency allocations in the United States.

Despite the early stage at which our examinations currently stand, certain preliminary findings can be presented that may be of some interest to the committee. Using 1975 and 1976 population estimates and the 1976 Table of Assignments, certain trends in the data have emerged which suggest that the populations of a significant number of cities across the United States have been denied access to the benefits of local broadcast outlets.

A new Communications Act, by blanketing in the existing pattern and changing the criteria by which licenses are awarded, could seriously increase the incidence of such inequities.

Our data has indicated that from the perspective of urban areas, the most serious discrepancies in the distribution of total allocations exist for cities within the size range of 25,000 to 100,000 population. More than one-half of all cities in this size category are without a single television allocation.

And if only those allocations which are currently operating are considered, less than 25 percent of the cities in this size category are presently receiving the benefits of local origination. In addition, there are a number of cities in the United States, 30, with populations over 100,000 that are without even one television allocation.

Thus, if we look at the distribution of allocations for only the larger cities of the Nation—those with at least 50,000 population, the requirement for a central city as defined by the Bureau of the Census—we find that as many as 149 cities are without a local television outlet.

Similar findings have emerged from an early examination of major market areas. For example, in the top five television markets, only 26 percent of the 96 cities between 50,000 and 250,000 have television allocations. Twelve cities between 100,000 and 250,000 in these five major market areas have not been allocated a single television frequency.

A primary reason for the exclusion of these cities is likely to be their suburban status relative to the largest central city in the market. Most allocations to the market may be concentrated in the central city, with the surrounding suburbs therefore excluded from possession of an allocation even though this is in violation of stated FCC policy dating from 1952.

While the data is in the earliest phase of analysis, it is nonetheless clear that certain inequities exist in the extent to which all cities share equally the benefits of local broadcasting outlets. Regretfully, there appears to be little concern within the 1979 bill for this issue, its magnitude or how its effects can be lessened or eliminated.

It is therefore our view that the language within the 1979 rewrite be altered to reflect the policy conclusions which flow from some of our early findings. There should be first, and above all, an explicit reaffirmation of the commitment to maximize the number of local broadcast outlets; at a minimum, this means section 413(a)(1) should include some reference to local television outlets.

Further, section 413(a)(2) could include language mandating a maximum number of local television stations, rather than the "at least one commercial VHF per state" requirement.

Second, consideration should be given to the intrametropolitan redistribution of television frequency assignments. The concentration of allocations in larger central cities precludes local origination capacity for many large suburban communities; language contained within sections 461(c)(1) and 707(b)(1) should recommend an examination of the feasibility of redistributing allocations on a metropolitan basis in order to satisfy the broadcast needs of growing suburban communities.

Finally, language should be included that explicitly promotes the development of technologies and policies which will expand the number of broadcasting outlets, such as low-power television stations and translators for smaller urban communities presently without allocations and underserved rural areas.

Such language could be contained within sections dealing with the promotion of new technologies, for example, section 707(a)(1)(B) or 707(a)(2)(B).

An additional recommendation concerns cable television. Since cable may be the only way to provide the local origination capacity for community programing in cities without local television allocations, some provisions must be made to assure cable systems provide opportunities to broadcast locally-oriented programing.

Section 453(b) should therefore contain language which allows local governments to require cable systems to provide local programing and origination capacity under certain circumstances, for example, when the community does not otherwise possess a local television outlet.

Finally, language contained within section 461 concerning the transition to indefinite license periods should be eliminated, and the 5-year license period retained. The opportunity to periodically and predictably challenge the renewal of a license is a critical aspect of assuring licensees remain responsive to local broadcast needs.

For this reason, an indefinite license period would be unsatisfactory from the standpoint of providing citizen input into the broadcast renewal process.

I think initially there were data which we did not present, which did indicate that even within the group of cities that do have allocations, and within a group of cities of any given size or class, there are significant differences in the number and type of allocations they receive.

For example, cities in the 250,000 to 500,000 size, category, might have as few as one single allocation and as many as 10. So there are differences in terms of equal treatment of equal cities from this perspective.

Mr. VAN DEERLIN. Yes; perfect equality, of course, would be difficult to achieve, but you would think there could be minimum standards, even to the point of requiring reassignment, if necessary?

Mr. NUNN. It is hard to visualize every city in the United States defined as such, as having a television allocation.

If you go back to 1952, the development of television, when the FCC initially established their localism policy, I think one of their policy goals was specifically to provide that as many communities as possible receive a television outlet. Their first goal, I think, was that each community receive at least a television service. But following that, in priority, was as many cities as possible to receive a local outlet. Following that through, I think the FCC has tended to uphold that policy with the suburban doctrine dealing with radio services, where the FCC has been unwilling to grant licenses to suburban communities where, to the best of the FCC's knowledge, it could be determined that service was really going to be oriented to the larger central city; first, local service.

So I think one of the primary recommendations could be that there be some thought given to the possibility of redistributing allocations, especially in metropolitan areas, to account for the tremendous suburban growth that has occurred since 1952 and since the initial distribution of city sizes the Commission was concerned with at that time.

Mr. VAN DEERLIN. What is the population of Wilmington?

Mr. NUNN. Essentially, 75,000, and it has a couple of allocations.

Mr. VAN DEERLIN. It is the biggest city in Delaware, isn't it?

Mr. NUNN. Yes.

Mr. VAN DEERLIN. You can see how it happened, even though it shouldn't have.

Mr. WARREN. I think another aspect that is a matter of concern is that it clearly is not possible to provide over-the-air service to every city and even cities beyond a certain point; but we simply do not have an adequate understanding of the existing pattern, and who does, and who does not, and why. No one has an understanding of these things.

In many cases I am sure it is for technical reasons that some cities do and some cities don't; but at least in our analysis up to this point that can't be the sole explanation.

Mr. VAN DEERLIN. Well, no, I should think it far more likely the economic reasons, isn't it?

Mr. WARREN. That may be true. This is something we have been concerned with because a fairly common explanation is, if a city has an allocation and it is not operating, it may be for economic reasons. It may also be because the central city in the area has six allocations; and it simply is unfeasible, not because there is not a market, Mr. Chairman. The market does not exist because the concentration of allocations prevents it from operating.

And in other cases we are not sure why cities which do not have allocations have not been the site for efforts on the part of various entrepreneurs to acquire the location there.

It seems to me the reasons why can't be attributed to the failure of a market response. I think we need better facts as to why, because entry into the market is not that open.

Mr. VAN DEERLIN. Miss Possner?

Ms. POSSNER. Mr. Nunn, you were discussing the sixth report and order adopted by the Commission in 1952. At that time, when the table of allocations was designed, what research did the Commission do with respect to the minimum audience base necessary for the survival of a television station? Was there some minimum population density that had to be present in order for an allocation to be made?

Mr. NUNN. To my knowledge, no, there was not.

Ms. POSSNER. Was not?

Mr. NUNN. No. It seems to me that the major kinds of reasoning they were using were that the larger cities, of course, at that time should be granted the largest number of allocations; and they did, I think, break into some census data that indicated what the city size distributions were at that time.

Ms. POSSNER. One of the flaws in the table of allocations that is mentioned repeatedly is that the population base on which the Commission designed its table was too optimistic, resulting in fewer local television outlets than the Commission had hoped would be created. In your opinion, was the table of allocations too optimistic?

Mr. NUNN. Well, no, I see what you are saying. But going back to the 1952 report and order, I am not sure of the exact number at that time, but the number of cities that were finally granted allocations at that time was over 1,000.

Now the research we have done so far——

Ms. POSSNER. And far fewer now?

Mr. NUNN. Yes, Presently only 800 cities have allocations.

Now, there are cities with populations as small as 750 that have television allocation. Specifically, one I am thinking about is one in Alabama and, obviously, it is an educational UHF allocation. But there are a significant number of cities under 5,000 that have received allocations.

I used the term "de facto" earlier. The de facto criteria might have been in 1952 that the city that was the smallest to receive an allocation. I think in our research efforts that is what we arrived at.

But to get back to your original question, from what I read of the report and order, there was no specific reference to "market thresholds" and "support capacities" that would mandate the allocation of a frequency.

Ms. POSSNER. I am going to assume there is some relationship between the subject you have chosen to study and the fact you study at the University of Delaware. Obviously, Delaware presents a unique situation in this area. The State of Delaware does have a number of UHF allocations, is that true?

Mr. NUNN. Yes.

Ms. POSSNER. How many of them are operating?

Mr. WARREN. There is one which two broadcasters are competing for at the present time.

Ms. POSSNER. Seaford, channel 38.

Mr. WARREN. And also, I believe there are two companies also seeking the UHF allocation in Wilmington now.

Ms. POSSNER. I have one last question: You testified that one way to rectify such a situation is to restructure the table of allocations and you are concerned that H.R. 3333 does not go far enough in that direction.

I am concerned and wonder if you share my concern, that when you get down to a city that is small, or a suburb of a city, or whatever, the medium of broadcasting may not be the most appropriate or technologically efficient way to distribute information to a community. Perhaps residents in such an area should turn to either low-power broadcast stations or translators or cable television to distribute information. The bill recognizes that by deregulating some technologies, perhaps gaps in television coverage today might be taken up by other technologies that might be more appropriate for service to those areas.

Would you care to comment?

Mr. WARREN. Perhaps. Let me comment first, I think there is no question that a variety of technologies and technology mixes could be utilized, but I think the absence of some mandate or indication that this should be a matter of concern is going to make it much less likely to happen. And I would also indicate that the size of cities—that we are not talking be necessarily all small cities. For example, one of the original reasons for my concern for this was coming out of the Los Angeles area, where you have 20 cities over 50,000 in Los Angeles County, in the immediate area, that do not have television allocations. So you have the City of Long Beach, with 340,000 or 350,000 people, without an allocation; you have Pasadena; you have Glendale and several other cities of well over 100,000.

Ms. POSSNER. Do you think each of those communities should have a VHF outlet? Do you think that would be the best way to meet the needs and interests of those communities?

Mr. WARREN. Well, a VHF outlet, not necessarily; but I think if they get cable systems with local generating capacity, or if there are low-power stations which require some reallocation, these would be possible options.

But it would seem to me this would have to be indicated as a matter of policy and national concern, to give some impetus to move in this direction.

Ms. POSSNER. Some people have suggested that the State of Delaware should have at least one VHF allocation to call its own.

Would you care to comment on the prospects for UHF development in the State of Delaware if there were a VHF station serving a sizeable portion of the State?

What would happen, for example, to channel 38 in Seaford and other UHF stations that might be activated in the future?

Mr. WARREN. I think other things being equal, they would be put at a competitive disadvantage. But part of the situation would depend on the degree of cable penetration, which is very high in New Castle County, particularly, and I think that would certainly aid the UHF channels.

Ms. POSSNER. One last and very brief question:

You were saying that in areas where over-the-air television broadcasting is unavailable, cable television operators should be required to provide local programing.

I can understand regulating broadcasters because they use the spectrum, which is a scarce and valuable resource, but on what would you base the requirement that the cable television industry provide local programing and local origination opportunities?

If the only "resource" cable television operators use are local streets and rights-of-way, and a franchise has been granted for such use, on what foundation can such a requirement be based?

Mr. WARREN. Well, I think, as the law stands at the present time, there is a clear basis; they are regulated as utilities by State and local governments.

Ms. POSSNER. Rather than as multichannel broadcasters?

Mr. WARREN. Yes; and I think that is clearly one, and the other is, I think, in the Supreme Court decision, which struck down the FCC requirement for public access on cable systems; it was based primarily on the lack of FCC authority.

So it seems to me it could be a matter of national policy to enhance the information generating capacity at the local level; and this would be one of the few means by which it could be done in the absence of over-the-air transmission.

Ms. POSSNER. Just a followup: Do you think the decision to regulate cable television systems should be made on the local, State, or Federal level?

Mr. WARREN. I think it is a very difficult problem. It seems to me that the States have been very uneven and localities have been very uneven, and the FCC has been very uneven in its response; and ideally there should be national standards or guidelines, perhaps with some triggering capacity at the local level for regulation if it is chosen.

Mr. VAN DEERLIN. Thank you, to both of you, for sharing this time with us.

Our next witness is Dr. Barry Cole, late of the FCC, and noted author.

STATEMENT OF BARRY COLE, ANNENBERG SCHOOL OF COMMUNICATIONS, UNIVERSITY OF PENNSYLVANIA

Mr. COLE. Thank you, Mr. Chairman. I appreciate the invitation to again discuss H.R. 3333, this time the title II provisions regarding reform of and restructuring what is now the FCC.

During last year's hearings I submitted a lengthy statement with specific suggestions about the provisions in title II of the 1978 bill, some of which were incorporated into this year's version. I understand that these hearings are designed to discuss the differences between the two bills, rather than to resubmit and reargue previous suggestions.

Given that mandate, and your reminder regarding time constraints, I will limit my remarks to one of the changes that appears in H.R. 3333—the provisions in section 244 relating to reimbursement.

Last year I endorsed inclusion of explicit statutory language enabling the Commission—whether it be called FCC or CRC—to compensate members of the public for costs of participation in Commission proceedings.

I am happy that this year's bill includes language to permit reimbursement for participation in general rulemakings.

Although the bill permits reimbursement in ratemaking and rulemaking proceedings, section 244(b)(2) states that the reimbursement provisions "shall not be construed to apply to any hearing relating to the revocation of a license * * * or to any hearing relating to a petition to deny."

Fewer than 6 out of every 100 petitions to deny license renewals and fewer than 3 out of every 100 stations challenged by such petitions have been designated for renewal hearing. Yet the bill as now written explicitly precludes reimbursement only in the few hearings relating to petitions to deny.

The section-by-section analysis of H.R. 3333 states, "The Commission * * * is explicitly precluded from providing reimbursement for participation in license renewal and license revocation challenges."

In the following discussion of the reimbursement provision in section 244 I am assuming that the statement in the analysis correctly interprets the true intention of the bill, and that what is really being proposed is to make it impossible for the Commission to ever reimburse a petitioner for expenses incurred relating to a petition to deny or a petition to revoke—regardless of whether that petition results in an FCC hearing or even in a decision by the Commission that the licensee should lose his license.

Public monitoring of local station operations is needed because, as Warren Burger wrote in the 1966 landmark WLBT decision which granted standing to citizen groups, "unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the legitimate interests of listeners can be made a part of the record which the Commission evaluates."

In "Reluctant Regulators: The FCC and the Broadcast Audience" we documented that after the WLBT decision citizens have become very active in monitoring the performance of broadcasters and often have had more influence on licensee behavior at renewal time than the Commission.

Some citizens who become involved in the renewal process act in a manner referred to by Chief Justice Burger as "legitimate listener representatives fulfilling the role of private attorneys general." Unfortunately, Commissioner James Quello has correctly charac-

terized others as people "who use legal processes to promulgate their own private, self-serving versions of the public interest."

Some petitions are frivolous; others raise significant public interest questions.

Given these realities, it would obviously be a mistake to take one extreme and allow the Commission to reimburse expenses incurred by all those filing petitions to deny or petitions to revoke licenses.

But I believe it would also be a mistake to take the other extreme, as has been done in the bill, and preclude the Commission from ever reimbursing members of the public for costs related to such petitions.

Is there a rational middle position between the two extremes that will further the public interest? I would argue that it would be appropriate and extremely beneficial to enable the Commission to consider reimbursing expenses of petitioners when a petition leads to a hearing—that is, when the Commission has found that the petitioner has performed a valuable public service as a "private attorney general" and has raised a "substantial and material question" affecting whether the station should retain its license.

I think the change would help alleviate two concerns of mine which were echoed by several key FCC officials in recent off-the-record conversations: First, in some instances renewal hearings that should take place—in order to enable the Commission to make sure the licensee should be renewed—don't take place because the petitioner withdraws, of necessity.

The public interest lawyers' resources are spread very thin without the additional expenditures of time and money for renewal hearings. There is presently no way for the petitioners or their attorneys to get reimbursed by the Commission, and the Commission lacks the legal authority to require that the licensee provide reimbursement.

The only way such reimbursement will take place is if the licensee agrees to provide it voluntarily, and the only way a licensee will do that is if the petitioner agrees to withdraw from the scene. Such withdrawals are not uncommon and have occurred even in cases when both the petitioner and the broadcaster think the petitioner's case is strong and a hearing is likely or at least quite possible.

I would readily admit and willingly cite examples of how in some cases everyone benefits from agreements between the parties that avoid a renewal hearing; however, sometimes the public interest can better be served by holding a hearing; and sometimes, even though the FCC's broadcast bureau may be anxious to proceed with the case, the petitioners pull out, not because they want to, but because they feel they must.

The petitioners' decision to withdraw cannot be faulted. A public interest law firm must decide whether or not to attempt to stop one renewal in the face of expenditure of resources which could threaten the firm's existence. For the petitioners, the issue can be one of perhaps winning the battle but losing their war for more responsible broadcasting in the process.

The second concern is that when the petitioners do not withdraw their petition and the renewal or revocation hearing takes place, their contribution and their case suffer because the Commission

lacks the authority to compensate them for costs incurred relating to the hearing.

There are currently Commission policies to help reduce this financial burden. The law judge has the power to allow the petitioners to file fewer copies of relevant pleadings and to obtain less costly access to transcripts. The hearing division can subpoena witnesses who support the petitioners' views and pay those witnesses the standard Government witness fee.

But the remaining expenses of the petitioner cannot be reimbursed by the Commission. The law firm cannot get money to hire any more people to help in handling its increased workload.

Yet, the firm and the citizen groups—who may have spent years just trying to get the case to hearing—often end up in the hearing taking the lead from the FCC's hearing division in the presenting of certain issues to the law judge.

The need for active participation by petitioners and their counsel in a license hearing, to work alongside the broadcast bureau, will be even greater if H.R. 3333 becomes law, when petitions to revoke will be the only means of getting a licensee into a hearing.

To the extent those petitions are successful, whenever a revocation hearing is held, all of the burdens of proof and evidence—unlike a renewal hearing—would be on the petitioner and the FCC's hearing division.

For these reasons, Mr. Chairman, I would urge that section 244(a)(1) had been met. Section 244(d)(2) of the bill should also be burse costs accrued by members of the public in the filing and pursuing of a petition to deny or petition to revoke if the Commission has designated that petition for hearing, and if the Commission deems the reimbursement to be appropriate.

Before making this decision, the Commission would have to be certain that the general conditions for compensation in section 244)a)(1) had been met. Section 244(d)(2) of the bill should also be amended to require the Commission to report to Congress specifying the instances in which such compensation has been granted.

One final thought: I share what must be your disappointment that neither of the bills now under discussion in the Senate regarding the changes in the Communications Act have an equivalent for title II. No FCC reform is being proposed in the Senate, let alone creation of a new Communications Regulatory Commission.

I hope that the many valuable proposals relating to Commission reform—whether the Commission in question be the FCC or the CRC—will someday become realities, and that section II becomes law.

But I would point out that some of the provisions in section II—and some related provisions in section V of the bill—could be implemented without new legislation. For example, section 511(c) requires the Commission to complete any rulemaking within 1 year from the notice of proposed rulemaking.

If the Commission fails to meet that deadline, the rulemaking must be terminated, and under section 241(g)(2) a report must be made to Congress as to why the deadline was not met.

This procedure should and could be implemented immediately through order and effective oversight of this committee, regardless of the fate of H.R. 3333.

Similarly, Chairman Ferris has indicated that he plans to include a line item in the next FCC budget for funds for reimbursement of citizen participation in rulemakings. The Chairman told a conference of researchers last year that he would consider approval of the line item sufficient official go-ahead from the Congress to have the FCC begin reimbursement under stated conditions.

Through support of the line-item request which Chairman Ferris apparently intends to make, this committee can help effectuate the reimbursement outlined in section 244, even if that section has not yet been enacted.

Mr. Chairman, I thank you for again inviting me back. I wish you well in your efforts to reform the Commission. It is a noble task indeed.

[Testimony resumes on p. 114.]

[Mr. Cole's prepared statement follows:]

STATEMENT OF BARRY COLE

PROFESSOR AT ANNENBERG SCHOOL OF COMMUNICATIONS

UNIVERSITY OF PENNSYLVANIA

I appreciate the invitation to again discuss H.R. 3333 -- this time the Title II provisions regarding reform of and restructuring what is now the FCC. During last year's hearings I submitted a lengthy statement with specific suggestions about the provisions in Title II of the 1978 bill, some of which were incorporated into this year's version. I understand that these hearings are designed to discuss the differences between the two bills rather than to re-submit and re-argue previous suggestions. Given that mandate and the official time constraints, I will limit my remarks to one of the changes that appears in H.R. 3333 -- the provisions in Section 244 relating to reimbursement.

Last year I endorsed inclusion of explicit statutory language enabling the Commission (whether it be called FCC or CRC) to compensate members of the public for costs of participation in Commission proceedings.

I am happy that this year's bill includes language to permit reimbursement for participation in general rulemaking. In Reluctant Regulators: The FCC and the Broadcast Audience, we discussed how constructive input from members of the public can be decisive to the outcome of a Commission rulemaking. One example concerned the public availability of the program logs of television stations. In a special oral argument on the proposal, broadcasters and their Washington attorneys told the Commissioners that making the logs public would be an undue burden of little value to the public. Citizens -- all of them paying their own travel expenses to Washington, some coming from as far away as California -- argued the opposite. Because of their persuasive arguments, the Commission unanimously decided to revise its previous rather limited proposed rule and make the logs readily available for public inspection. (It later did the same thing with radio logs.) Under H.R. 3333, the public

participants in the oral argument could have been reimbursed for at least their travel expenses.

Although the bill permits reimbursement in ratemaking and rulemaking proceedings, Section 244 (b) (2) states that the reimbursement provisions "shall not be construed to apply to any hearing relating to the revocation of a license. . . or to any hearing relating to a petition to deny any television broadcast station license application. . . ."

Fewer than 6 out of every 100 petitions to deny license renewals and fewer than 3 out of every 100 stations challenged by such petitions have been designated for renewal hearing. Yet the bill as now written explicitly precludes reimbursement only in the few hearings relating to petitions to deny and does not explicitly preclude reimbursement in the 94 percent plus instances in which the Commission has decided the petitioner has not made its case for a renewal hearing. Also, the bill does not limit the Commission's authority to reimburse costs associated with petitions to deny radio broadcast applications filed during the one renewal period all radio licensees must face under H.R. 3333 before getting their indefinite licenses.

The Section-By-Section Analysis of H.R. 3333 states, "The Commission. . . is explicitly precluded from providing reimbursement for participation in license renewal and license revocation challenges." In the following discussion of the reimbursement provision in Section 244, I am assuming that the statement in the Analysis correctly interprets the real intention of the bill and that what is really being proposed is to make it impossible for the Commission to ever reimburse a petitioner for expenses incurred relating to a petition to deny or a petition to revoke -- regardless of whether that petition results in an FCC hearing or even in a decision by the Commission that the licensee should lose his license.

Public monitoring of local station operations is needed because, as Warren Burger wrote in the 1966 landmark WLBT decision which granted standing to citizen groups, "unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the legitimate interests of listeners can be made a part of the record which the Commission evaluates." Burger had earlier indicated that the interests of listeners were legitimate because it is the listeners "who are most directly concerned with and intimately affected by the performance of a licensee."

Reluctant Regulators documented that after the WLBT decision, citizens have become very active in monitoring the performance of broadcasters and often have had more influence on licensee behavior at renewal time than the Commission. The FCC has encouraged such participation, at least officially: "Establishing and maintaining quality broadcasting services in a community is. . . a matter in which members of the community have a vital concern and in which they can and should play a prominent role."

Some citizens who become involved in the renewal process act in a manner referred to by Burger as "legitimate listener representatives fulfilling the role of private attorneys general. Unfortunately, Commissioner James Quello has correctly characterized others as people "who use legal processes to promulgate their own private, self-serving versions of the public interest. " Some petitions are frivolous. Others raise significant public interest questions.

Given these realities, it would obviously be a mistake to take one extreme and allow the Commission to reimburse expenses incurred by all those filing

petitions to deny or petitions to revoke licenses. (The latter petition is very uncommon now, but would become much more prominent as the current license renewal process is discarded.)

It would also be a mistake to take the other extreme and preclude the Commission from ever reimbursing members of the public for costs related to such petitions.

Is there a rational middle position between the two extremes that will further the public interest? I would argue that it would be appropriate and extremely beneficial to enable the Commission to consider reimbursing expenses of petitioners when a petition leads to a hearing -- that is, when the Commission has found that the petitioner has performed a valuable service as a "private attorney general" and has raised a "substantial and material question" affecting whether the station should retain its license.

That has not happened very often. The reasons fewer than only 3 out of every 100 stations challenged by petitions to deny renewals must face a renewal hearing are discussed in our book. Some of these reasons relate to the Commission's "mind-set." The FCC has traditionally acted as a neutral judge trying to decide whether the petitioner has proved its case, rather than, in the words of former Commissioner Benjamin Hooks (now Executive Director of the NAACP), acting as "the principal monitors of broadcast performance who have the obligation to look behind the scenes...through means of formal or informal investigations... and determine whether there is some basis in fact for the petition's allegation." Most Commissioners have agreed with their Chief of the Renewal and Transfer Division of the Broadcast Bureau that a renewal hearing is "a last resort" - something which takes place "when there is just nothing else to do." The

Commission has not gone to this "last resort" unless the petitioners have made a very powerful case which cannot be ignored.

Once the petitioners have overcome the hurdles created by this mindset -- once the Commission has been convinced that their petition raises problems and questions that bear directly on the public interest and have not been satisfactorily answered by the broadcaster, then it would seem the petitioners have demonstrated that they do in fact represent what Burger refers to as "the legitimate interests of listeners" and not the people Quello accuses as just wanting to "promulgate their own private, self-serving versions of the public interest." Once this happens, I think the Commission should have the flexibility to reimburse some of the expenses incurred by those petitioners in their role as private attorneys general during and, when appropriate, even before the renewal hearing.

I think the change would help alleviate two concerns expressed by several key FCC officials in recent off-the-record conversations.

(1) Renewal hearings that should take place (in order to enable the Commission to make sure the licensee should be renewed) don't take place because the petitioner withdraws.

In Reluctant Regulators there is reference to constant jokes within the public interest law community about how the Commission could quickly put them out of business by holding some hearings. The public-interest lawyers' resources are spread very thin without the additional expenditures of time and money for these hearings. (A six-day week, 70 hours plus, work schedule for these lawyers is not uncommon.) There is presently no way for the petitioners or their attorneys to get reimbursed by the Commission and the Commission lacks the legal authority to require that the licensee provide

reimbursement. The only way such reimbursement will take place is if the licensee agrees to provide it voluntarily, and the only way a licensee will do that is if the petitioner agrees to withdraw from the scene. Such withdrawals have become fairly common, even in cases when both the petitioner and the broadcaster think the petitioner's case is strong and a hearing is likely or at least quite possible.

I would readily admit and willingly cite examples of how in some cases everyone benefits from agreements between the parties that avoid a renewal hearing. However, sometimes the public interest can better be served by holding a hearing; and sometimes, even though the FCC's Broadcast Bureau may be anxious to proceed with the case, the petitioner pulls out not because he wants to but because he feels he must. The petitioner's decision to pull out cannot be faulted. A public-interest law firm must decide whether or not to attempt to stop one renewal in the face of expenditure of resources which could threaten the firm's existence. For the petitioners, the issue can be one of perhaps winning the battle, but losing their war for more responsible broadcasting in the process.

(2) When the petitioners do not withdraw their petition and the renewal or revocation hearing takes place, their contribution and their case suffers because the Commission lacks the authority to compensate them for costs incurred during the hearing.

There are current Commission policies to help reduce this financial burden. The law judge has the power to allow the petitioners to file fewer copies of relevant pleadings and to obtain less costly access to transcripts. The Hearing Division can subpoena witnesses who support the petitioner's

views and pay those witnesses the standard government witness fee. (I assume these powers would not change under H.R. 3333 -- although there may be some conflict between Section 242 (b) of the bill and the staff analysis of Section 244 (b).) But the remaining expenses of the petitioner cannot be reimbursed by the Commission. The law firm cannot get money to hire any more people to help in handling its increased work load. Also, the firm and the citizen group (s) -- who often have spent years just trying to get the case to hearing -- often end up taking the lead from the FCC's Hearing Division in the presenting of certain issues to the Law Judge during the hearing.

Warren Burger noted in his WLBT decision thirteen years ago that: "The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation [of those interests] is no longer a valid assumption which stands up under the realities of actual experience. . . ." The need for active participation by petitioners with council in a license hearing, to work alongside the Broadcast Bureau, will be even greater if H.R. 3333 becomes law. If the renewal process is eliminated, petitions to deny renewal will become a thing of the past and petitions to revoke will be the only means of getting a licensee into a hearing. To the extent those petitions are successful, whenever a revocation hearing is held, all of the burdens of proof and evidence (unlike a renewal hearing) would be on the petitioner and the FCC's Hearing Division.

For all these reasons, Mr. Chairman, I would urge that Section 244 (b) (2) be re-drafted to give the Commission the ability to reimburse costs accrued by members of the public in the filing and pursuing of a petition to deny or petition to revoke if the Commission has designated that petition for hearing and if the Commission deems the reimbursement to be appropriate. Before

making this decision, the Commission would have to be certain that the general conditions for compensation in Section 224 (a) (1) had been met. Section 244 (d) (2) of the bill should also be amended to require the Commission to report to Congress specifying the instances in which such compensation has been granted.

One final thought. I share what must be your disappointment that neither of the bills now under discussion in the Senate regarding the changes in the Communications Act have an equivalent for Title II. No FCC reform is being proposed in the Senate, let alone creation of a new Communications Regulatory Commission. And there is talk of separating out those portions of your bill dealing with common carrier and delaying Congressional consideration of the other portions of the bill.

I hope that the many valuable proposals relating to Commission reform -- whether the Commission in question be the FCC or CRC -- will someday become realities. I hope that Section II will not be forgotten. But I would point out that some of the provisions in Section II (and some related provisions in Section V of the bill) could be implemented without new legislation. For example, Section 511 (c) requires the Commission to complete rulemaking within one year from the notice of proposed rulemaking. If the Commission fails to meet that deadline, the rulemaking must be terminated, and under Section 241 (g) (2) a report must be made to Congress as to why the deadline was not met. This procedure should and could be implemented immediately through order and effective oversight of this committee, regardless of the fate of H.R. 3333.

Similarly, Chairman Ferris has indicated that he plans to include a line item in the next FCC budget for funds for reimbursement of citizen participation in rulemakings. The Chairman told a conference of researchers last year that he would consider approval of the line item sufficient official go-ahead from the Congress to have the FCC begin reimbursement under stated conditions. Through support of the line item request which Chairman Ferris apparently intends to make, this Committee can help effectuate the reimbursement outlined in Section 244, even if that Section has not yet become law.

Mr. Chairman, I thank you for again inviting me back. I wish you well in your efforts to reform the Commission. It is a noble task indeed.

Mr. VAN DEERLIN. Thank you, Dr. Cole.

Ms. Possner?

Ms. POSSNER. Dr. Cole, you mentioned at the end of your statement that Chairman Ferris intends to include a line item in the Commission's proposed budget relating to intervenor funding and that he would consider approval tantamount to a grant of authority. Do you know if that is a change in Commission policy in this area? At some point did either Chairman Ferris or the previous chairman, Chairman Wiley, or the Commission claim that explicit statutory authority was necessary to proceed with intervenor funding?

Mr. COLE. As you know, in the past there has been a difference of opinion within the Government as to whether the FCC has that statutory authority.

The Commission has issued a notice of inquiry about reimbursement. One of the questions is, does the FCC have the authority under existing law.

Chairman Ferris indicated at a conference last year that one way, of testing the will of Congress on the matter is to put a line item in the budget; and if Congress tells the FCC reimbursement exceeds the Commission's legal authority and/or should not be implemented, the Commission will not go ahead with a reimbusement program.

But if the Congress does not prevent that line item from going into effect, Ferris would consider that sufficient go-ahead for reimbursement.

This would not be done in a sneaky fashion without anybody knowing about it. I am sure Mr. Ferris will point out to the Appropriations Subcommittee, "Look, we are planning to do this; do you have any reactions?"

Ms. POSSNER. I raised this because in response to a question about whether the Commission has the authority to proceed with such a program, Chairman Ferris, in an earlier hearing, said that he would feel more comfortable with an explicit statutory mandate.

Mr. COLE. I am sure he would; but, the statement to which I refer was also made publicly. He was asked, "Do you think you have the authority?" and he said, "I am not sure." He was then asked "Do you think you should test that authority?" and he said, "I think it would be useful in the next Appropriations Committee hearings, to put a line item for reimbursement in the budget."

Ferris was later asked, "If Congress OK'd that line item, would you go ahead and in fact start appropriating some of that money?" and he said, "Yes, I would."

Of course he was representing only himself in this, and there is a question whether or not he has the support of a majority of the Commission. But the Commission's budget, as you know, Ms. Possner, is traditionally drawn up in the Chairman's office.

Ms. POSSNER. One final question: You propose extending the Commission's authority to grant intervenor funding in broadcast license challenges to those petitions designated for hearing.

If the possibility exists that meritorious petitions could be funded, do you believe this would encourage the filing of petitions—both meritorious and frivolous?

Mr. COLE. I honestly do not think it would have a noticeable effect, because I think most petitioners realize the odds of success are slim. And if the bill were enacted leaving only petitions to revoke in the law, all the burdens would be on the petitioners and the odds would be even slimmer.

I think the difference would not be so much in the numbers of petitions filed, but rather that some of the licensee-petitioner agreements now being reached would no longer be reached. In some instances the public interest law firms would say: "We think we have a strong case here and we may get a renewal hearing. And if it does go to hearing, there may not be an additional burden on us, because we can get compensated."

Ms. POSSNER. So, in your opinion, public interest groups would take a chance and file a petition, rather than rely on citizen-broadcaster agreements?

Mr. COLE. In some cases only. Much of this, as Henry Geller mentioned earlier this morning, has to do with the public interest law firms. You need a lawyer, an experienced lawyer, to be successful in a renewal hearing. There is a hearing in which a nonlawyer, with the help of the broadcaster bureau's hearing division, is trying to prosecute a case. But in general you need a lawyer.

As you know, there are only a few public interest law firms which deal on a continuing basis in the area of petitions to deny. They include Citizens Communications Center and Media Access Project.

A shortage of resources at these law firms has existed from the very beginning. For example, Citizens Communications Center worked with local citizens in Sandersville, Ga., on a petition to deny. The petition led to the Commission designating the station's renewal application for hearing. The action surprised Citizens Communications Center for this was the first petition to deny since WLBT that led to a hearing order. I think what CCC director Albert Kramer and most people expected was that, like every other petition to deny, the Sandersville petition would be denied, and Kramer could take his case to court. A court appeal would have been an easier process than a long renewal hearing.

When the petition was designated for hearing, the petitioners got together with the licensee. Both wanted to avoid a hearing, and an agreement was reached. Because of the agreement, the FCC agreed to cancel the hearing.

What I am saying is, in certain cases this is fine; but in other cases it is to the general public's benefit to have a renewal hearing. Just because the petitioners are able to reach an agreement to avoid a hearing does not necessarily mean the licensee is capable of being a responsible public trustee.

The major change would not necessarily be in the number of petitions that were filed. Your odds of success, in getting the FCC to decide to order a renewal hearing would be no better. But at present, if you are a public interest law firm—even with a good chance of getting a hearing—you want to avoid that hearing because that hearing is liable to completely finish you.

With the possibility of reimbursement, I think in some cases where the law firm now tells the petitioners: "Look, if we went to hearing, we might win; but we can't afford to go to hearing," they

would say, "We think we can get a hearing; let's have the Commission rule on this." I think you would start getting a few more petitions, not a great number, but a few more petitions, going to hearing.

Ms. POSSNER. You mention public interest law firms as well as citizen reform groups.

Would you comment on what advantages or disadvantages there might be to putting a cap on the amount of intervenor funding any one petitioner can receive in 1 year? Do you think that a cap would restrict the activities of those public interest law firms that are in the forefront of license challenges—or any other group for that matter?

Mr. COLE. I would not put a cap on until experience suggested the imbalance of reimbursement warranted a cap. For this reason—suppose all of us in the room here today were black, and were in a city in which half the city was black. We file a petition to deny against licensee "X." The petition is filed on behalf of all blacks, the 50 percent of blacks in the community. It claims we blacks are not being served by the licensee.

Once the Commission has made the judgment that our petition raises material, substantial question of fact and the licensee's responses to our allegations are not satisfactory and a renewal hearing is necessary, then I feel our group and our attorney should have the possibility of being reimbursed.

Now, it is true that our attorney may be the same attorney used by many other petitioners. But if we have successfully made our case with his help, and 25 other groups around the country have successfully made their case with his help, I can't see putting a cap on how much that attorney and his firm can be reimbursed for work relating to those 26 renewal hearings.

Ms. POSSNER. Thank you very much, Mr. Chairman.

Mr. VAN DEERLIN. Mr. Wunder?

Mr. WUNDER. Thank you, Mr. Chairman.

I take it that you would also not want to see standards written into the legislation as to who should receive funding, intervenor funding?

Mr. COLE. I would go along——

Mr. WUNDER. Anybody that the Commission chooses?

Mr. COLE. No, not at all. I would go along with the standards you have in section 244(a)(1) of the bill. But what has happened now is, you have said, "Here are standards qualifying people for reimbursement. But in any challenge regarding petitions to deny or petitions to revoke, these standards do not apply, nothing applies. You cannot reimburse at all."

I would apply the same standards you have for reimbursement in general rule makings to petitions to deny or revoke, if the petition is designated for hearing. Some of the questions raised earlier today with Mr. Geller are legitimate questions of how do you know a particular person is really representing the people, et cetera.

My feeling is, once a petition results in a renewal hearing, the petitioner—whether a single citizen, or leader of a group of 100,000 people—has demonstrated he has raised legitimate concerns requiring Commission investigation. He has demonstrated he has an ability to discover and articulate those concerns. And then you can

apply the same conditions in section 244 you do for reimbursement in other proceedings.

Mr. WUNDER. So yours would always be predicated to some initial determination by the Commission that the petitioner seeking to intervene has raised a question that ought to be considered?

Mr. COLE. Correct.

Mr. WUNDER. This is your way of dealing with the frivolous petition issue?

Mr. COLE. Yes; I think that is a reasonable compromise. I think you would have problems, as discussed earlier, if you simply said, "OK, let's permit the Commission to have a pot and start giving money to citizen groups; and if you have given money to one citizen's group in a community, you had better give money to any other." That is a never, never land and the Commission would have terrible trouble administering such a reimbursement approach.

Mr. WUNDER. How do you deal with the argument Senator Danforth raised recently, that the people who seem to be getting the money at the FTC are the people who tend to support that which the FTC is attempting to do?

Mr. COLE. The Commission's mind set—and I think that we document this in our book—has traditionally been that of a judge. If any petitioner indicates that you, the licensee, has not been doing your job——

Mr. WUNDER. Let me stop you right there, because the mind set at the FTC may have been different when Cal Collier was Chairman than when Mike Perchuck is Chairman.

Mr. COLE. Well, the FCC mind set has never really changed. There have been only about 25 petitions to deny which led to a hearing in the history of the agency. I think the interesting thing is, if you started going down a list of why the 25 led to a hearing, you soon recognize the FCC really had no other alternative. The licensee had refused to fill out the form properly, or there was a specific allegation that was almost totally proven to be true, and the Commission had no other choice but to move ahead to a formal renewal hearing.

I could cite a number of examples to demonstrate a consistent FCC mind set. The Commission has never taken a license away in its history since 1934 for a lack of local programing, for a lack of public service or informational programing, et cetera.

The Commission's track record on this, regardless of whether there was a Republican or Democrat majority, has been terribly consistent.

Under existing law at renewal time, in theory, the burden is upon the licensee to demonstrate it is in the public interest to have his license renewed for 3 years.

What I am saying is, in the history of the agency the Commission has never said, "You haven't proved your burden regarding local and public service programing."

So, in effect, the burden has been on the petitioner to come in and say, "There is a material and substantial question of fact here." That burden has only been met with respect to three out of every 100 stations that have been challenged.

The petition to deny process only came about because the courts forced it to come about. Since that time the Commission has consistently sat back as a judge and agreed with its chief of renewal and transfer and Chief of the broadcast bureau: "Hearings are a last resort. You don't do them unless there is nothing else to do."

In effect, the Commissioners have consistently said unless the petitioner has proven his case we are not going to set the renewal for hearing.

So there is a tremendous burden upon the petitioner. But once that burden has been met, then I think the Commission has made a determination that the petitioner represents more than just himself—whatever he calls himself, whatever may be his official title or the number of people in his organization.

Mr. WUNDER. That is an interesting question. You see, you have posed the threshold at such a level that the Commission can say, "Yes, you have raised a significant issue." Even if that were raised to a level of finding and that decision was appealable the determination to be made by the court on appeal would be that the Commission's determination was arbitrary and capricious.

So you set a fairly low threshold; and what I want to get to is the standing, which you were about to raise. Do you believe as a matter of public policy that a single individual, as you alluded to just now, should be granted standing to intervene?

Mr. COLE. I think the only thing that is relevant is the issue raised in the petition. I don't care if that person represents himself or that person represents a million people, the important point is the issue raised. Even under the new bill, there are certain things you can revoke a license for, a licensee must do certain things, and if one person can come to the Commission—and, again, the odds of him doing that have been very, very slim——

Mr. WUNDER. You see that is not really relevant, the odds and past track record.

Mr. COLE. Well, I am setting an exceedingly high threshold. What I am saying is the petitioner has two hurdles: First, his petition must be one of the very few that lead to a hearing; second, he must meet the standards set in section 244(a)(1).

Mr. VAN DEERLIN. Would you yield?

Isn't it likely that limitations on agency staff would provide the limitation on the number of cases that could be set for hearing?

Mr. COLE. Yes, I think in reality that is the case; and I can't see that my amendment would increase the number of hearings significantly.

Mr. WUNDER. Thank you.

Mr. VAN DEERLIN. On one other subject, since your authority is much wider than the matter of reimbursement fees, you have heard the testimony this morning from the NTIA witnesses about their recommendation for the nonrenewability of Commission terms of appointment. What was your feeling, or what is your feeling, on that?

Mr. COLE. I agree with Henry Geller, that you shouldn't ban reappointment, because I can think of cases where reappointment would have been salutary.

What concerns me, Mr. Chairman, is that in this year's bill you have gone even further in the opposite direction. Under last year's

bill, you could be reappointed to the CRC if you had served less than 5 years. Now you can only be reappointed if you served less than 2 years.

I think you should at least move back to a middle ground, if you are not going to permit indefinite reappointments, which I would opt for.

I would think the most effective way to handle reappointment would be to indicate in the committee report that you are not banning additional reappointments, because there may be a case which really merits it; but that before someone is reappointed, the President should think very carefully and make sure this is the best person for the job, et cetera.

But if you are not going to do that, I would like at least to see you permit someone who has served less than 5 years to be reappointed.

To limit reappointment to those who have served less than 24 months defeats the rationale for a 10-year term included in the staff analysis of H.R. 3333. As the analysis suggests, it does take a few years to get familiar with the job.

Mr. VAN DEERLIN. Miss Possner is hankering to ask one more question. Should we let her do it?

Ms. POSSNER. You agree that it takes 2 to 3 years to become familiar with the issues and be able to make a significant contribution to the Commission. And you think that reappointment should not be ruled out. What is your feeling about Mr. Geller's comment this morning, that a commissioner might "shade" his or her behavior because the promise or threat of reappointment exists? What you have then is a 2- to 3-year learning period at the beginning of the appointment and possibly a 1- or 2- or 3-year period toward the end of a term when reappointment is a possibility. What are you left with, 4 or 5 years?

Mr. COLE. I think the key is good people. I think that historically some of the best commissioners have been those that only served for 3 or 4 years; and maybe that is unfortunate. Maybe the system makes them tired and they burn themselves out. I am afraid you cannot legislate an appointment process that will guarantee you good people.

My answer in theory to your question, Ms. Possner, would be that if the quality of the appointment were high, the problems you raise would not really be problems. In actual fact, there may be problems and the bill may alleviate some of them. But the other half of the coin is, the bill prevents you from getting, say, a Ken Cox reappointed. Cox was an excellent commissioner and wanted reappointment, but could not because a Republican President came in. The balance of Commissioners was four to three Democratic, and the end of Cox's term was the Republicans' chance to get a Republican majority.

Under the existing law there would have been a chance for Cox, if Humphrey was elected in 1968.

Under the new law, Cox wouldn't have had a chance of reappointment, even if Humphrey had come into office and had said, "Here is a great Commissioner and he has done an excellent job."

So I think whenever you start legislating the appointment process you lose something and gain something. The key is still good people.

I wish you could legislate a process which would guarantee the appointment of good people.

Mr. VAN DEERLIN. And Congress sometimes is reluctant to think in terms of limitations on terms anyhow.

Mr. COLE. Mr. Chairman, if I could make one other point quickly——

I think in addition to importance of good people for improving things, is the importance of effective oversight by the Congress.

Having worked in the FCC's chairman's office, I know what can happen at the Commission when a couple of good questions are raised by Members of Congress, or a good oversight hearing is about to take place. This has certainly happened more frequently under your regime, but I think a number of the problems which have occurred historically at the Commission could have been remedied by effective, consistent oversight.

At the time I was there we did not even always have oversight every year. Once a year is not enough. You need congressional monitoring on a continuous basis.

As a closing comment, I would suggest that if you want to improve the agency, there are certain things you can do in the law—but a lot will depend on whether you have good people down there, whether you call it the CRC or the FCC, and whether you have seven Commissioners or five Commissioners. And a lot will depend on the effectiveness of the oversight by Congress.

Mr. VAN DEERLIN. On that note, I thank you.

We will step down long enough to go over and vote.

[Brief recess.]

Mr. VAN DEERLIN. Our next witnesses are Mr. Howard J. Symons and Ms. Nancy Drabble representing Congress Watch.

STATEMENT OF HOWARD J. SYMONS, AND NANCY DRABBLE, PUBLIC CITIZEN'S CONGRESS WATCH

Mr. SYMONS. Thank you, Mr. Chairman.

Nancy will speak on the public participation aspect. She has been working on that generally for the last couple of years.

Ms. DRABBLE. I will summarize our statement briefly since other witnesses have gone over the public participation points pretty well. This isn't a new issue to Public Citizen. We have been working with Congress and the administrative agencies for the last several years to try to encourage them to start up public participation programs.

As you know, public participation really is critical to a fair and balanced decisionmaking process. It is not enough to have standing to participate. The FCC proceedings in particular are so technical and complex that it is nearly impossible to participate unless you have the engineers, the lawyers, the economists that you need in order to make an effective case. Citizen's groups and small businesses just can't afford to hire those people.

This was recognized in the landmark WLBT case in which Chief Justice Burger, then Circuit Judge Burger, dismissed the argument that the FCC could represent the public interest and somehow

discern exactly what the public interest was. He wrote that it was "no longer a valid assumption" that the FCC could perform that function without help from the public. Instead, he found that the FCC needs to get people in from all points of view and get as much information as possible in order to make an intelligent decision about a particular issue.

Mr. VAN DEERLIN. While simultaneously monitoring nearly 10,000 licensees?

Ms. DRABBLE. Yes. We all know that the FCC is not omniscient. There is a clear need to hear from outside parties. The documentation of the need for public participation has also been growing over the last several years. The most systematic study was one by the Senate Governmental Affairs Committee, completed in 1977.

In that study, which surveyed several independent agencies, they found that in half the proceedings there wasn't "any public participation at all." I think that is a critical statistic and it is really a disgrace that we don't get the public in to half those proceedings. The regulators are sitting as judges. The regulated industry is one party. They have their lawyers. But there is an empty chair on the other side. In particular, there are some striking statistics at the FCC.

In 1975, for example, A.T. & T. reported to the FCC that they spent more than $2.25 million on Commission proceedings. In adjudications the Governmental Affairs Committee asked the FCC which had been their most significant adjudications, and the FCC sent back a list of 30. And of those 30 adjudications there had been public participation in only 3 of them.

In the two dockets in which the A.T. & T. was requesting an increase in its rate of return, the A.T. & T. spent $800,000. Obviously these were questions of great concern to consumers. But there was no public participation in either one of those proceedings.

Mr. VAN DEERLIN. What about public utility commissions?

Ms. DRABBLE. Actually I am not sure whether they did participate. These were private groups they were counting up. I don't think the governmental entities would have been included in their list of public participants.

Mr. SYMONS. And, as we testified last month, there is a problem even in the State commissions. The public is underrepresented there, too. A.T. & T. is able to send lawyers and economists before the public utility commissions, and oftentimes those commissions will only hear the industry side. Recently a number of States established ombudsmen or public counsel but——

Mr. VAN DEERLIN. I sometimes wonder if the word "public" shouldn't be deleted.

Mr. SYMONS. From the name "public service commission." Yes.

Ms. DRABBLE. Also, there was the Moss report that came out of this committeee a couple of years ago which also recommended the institution of public participation funding across the board in the Government. And as you may know, there is a public participation funding provision included in a few of the regulatory reform bills that are pending in the Judiciary Committee. The FCC itself has acknowledged the need to look into the question of public participation funding in its notice of inquiry last summer.

Also, there are several precedents of public participation funding in other agencies. As the minority counsel mentioned earlier, there is a program at the FTC. It is the oldest one. It has been in existence since the Magnuson-Moss Act of 1975. That program has the same standards as the one proposed in this bill. It provides a model for the other programs that have gone into effect.

I think it important at this point to point out what the standards are for public participation funding programs: The eligibility standards are the crux of any public participation funding program. In order to even be considered for public participation funding the applicant has to show three things.

First, he must prove he is making a contribution to the proceeding that is necessary to a fair determination of the outcome. That is quite a high standard. We would suggest that the requirement that the contribution be necessary be amended to a requirement that the contribution be a substantial one. An unsympathetic agency could find that no one's contribution is necessary to a proceeding, whereas a substantial contribution standard is strict but fair.

The second eligibility criteria is that that contribution is not being made by someone else, including the Commission staff, other industry participants, or other consumer participants.

The third standard is that the applicant must have insufficient resources to participate without an award.

The financial means test is also a critical part.

In many of the questions that are raised in opposition to public participation funding, I think that if you refer to the standards, you will find that the answers are right there. The eligibility standards are tough and they eliminate applications that should not be granted.

I would like to offer a brief summary of the FTC program. In the last 3 years they have funded 68 groups, 50 of whom had never participated in FTC proceedings before. So they have gotten new people into their rulemakings. Also, 27 percent of the groups that have been funded have been small businesses.

It is sometimes suggested that consumer groups are the only ones who are getting this money. It has not been the case with the other public participation programs and I suspect it would not be the case at the FCC.

The previous witness discussed the need to extend the public participation funding proposal to adjudications. We would just echo that suggestion. We think that important policy is made in adjudications. We think that it is important to also have the ability to fund citizen intervenors in license challenges. The WLBT case, the landmark case in the area of citizen participation, was an adjudication. Under your bill the citizen intervenors in that proceeding would not even have been able to apply for funds. We think that at least the FCC should have the authority to consider applications in adjudications. Maybe they will choose to give most of the money to participants in rulemakings, but at least they should have the opportunity in appropriate cases to use funds for license challenges.

Thank you.

[Testimony resumes on p. 139.]

[Mr. Symons' and Ms. Drabble's prepared statement and attachment follows:]

STATEMENT OF HOWARD SYMONS AND NANCY DRABBLE
PUBLIC CITIZEN'S CONGRESS WATCH

Before the

SUBCOMMITTEE ON COMMUNICATIONS,
HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

On

HR 3333 (Communications Act of 1979)

June 12, 1979

Mr. Chairman, Members of the Subcommittee:

We appreciate the opportunity to testify this morning on the administrative provisions in HR 3333. We are particularly interested in Sec. 244, "Compensation for Cost of Participation in Certain Proceedings."[1/]

Public Citizen has been working for several years to encourage agencies and Congress to adopt public participation funding programs. Thus we were very pleased to see a funding provision included in the Communications Act of 1979. Citizen participation in agency proceedings is crucial to a fair and balanced decision-making process. But as you are well aware, the right of citizens to participate is often insufficient by itself. FCC proceedings are so highly complex that it is nearly impossible to participate effectively without engineers and economists -- which small citizen groups and small businesses simply cannot afford to hire. The Commission itself recognized this problem in its recent Notice of Inquiry on public participation reimbursement:

> Because of lack of resources, the public has often been limited to participating in FCC proceedings through legal arguments only, rather than being able to provide us with the necessary underlying economic, statistical and other data and analysis that would be most helpful.[2/]

1/In passing, a number of other sections stand out: Sec. 212--We question the constitutionality of giving either House of Congress the power to veto the President's choice for chair of the Communications Regulatory Commission. Sec. 215--We support the upgrading of the Office of Consumer Affairs as one means of recognizing that the consumer viewpoint is essential to telecommunications policymaking.

2/43 Fed. Reg. 30834, 30835 (July 18, 1978).

But while we generally support Sec. 244, we are disappointed that you have chosen to limit public participation funding to tariff hearings and rulemakings. The public impact of adjudications can be just as great as the effect of rulemakings, and citizen intervention in an adjudicatory proceeding may provide the agency with information that the interested firm either cannot or will not supply to the regulators. Particularly at the FCC, intervenors in license renewal proceedings can alert the commissioners to shortcomings in public affairs programming and EEO compliance. A reimbursement program limited to rulemakings is insufficient.

The Need for Public Participation Funding at the FCC

In administrative proceedings in general and in FCC proceedings particularly, there is a dramatic imbalance between the resources of regulated industries on one hand and those of citizens and citizen groups on the other. The most systematic study to date of industry and consumer representation before federal agencies was completed in July 1977 by the Senate Committee on Governmental Affairs.[3/]

The Committee found that industry participation dramatically overshadowed citizen participation:

> In agency after agency, participation by regulated industry predominates--often overwhelmingly. Organized public interest representation accounts for a very small percentage of participation before Federal regulatory agencies. In more than half of the proceedings, there is no such participation whatsoever. In those proceedings where participation by public groups does take place, typically, it is a small fraction of the participation by the regulated industry. One-tenth is not uncommon; sometimes it is even less than that.[4/]

Financial resources devoted to agency proceedings were similarly imbalanced:

3/Senate Committee on Governmental Affairs, 95th Congress, 1st Session, Study on Federal Regulation, Vol. III (Comm. Print 1977).

4/Senate study, supra, at 16.

> Comparing public interest group costs to industry costs is like comparing David to Goliath. Time after time, industry is able to spend 10, or 50, or 100 times as much money on participation as public interest groups.5/

With the growing awareness of the gross imbalance of representation in agency proceedings has come an increased recognition of the value of greater public participation. This recognition is based on a realistic perception of the limits of an agency's ability to discern the "public interest," particularly where the regulators are not exposed to all sides on an issue. In a landmark case involving the FCC itself, Office of Communications of United Church of Christ v. FCC, 359 F. 2d 994 (D.C. Cir. 1966), Chief Justice (then Chief Circuit Judge) Warren Burger dismissed the theory that the regulatory agency can always effectively represent the citizens affected by regulations. That theory, wrote Burger, is "no longer a valid assumption."6/ If it does not hear consumer viewpoints, the agency cannot be expected to reflect them -- no matter how diligently the agency's statute mandates that the regulators promote the "public interest."

FCC proceedings illustrate the striking disparity between citizen and industry participation. According to the Senate study, for instance, "for the year ending December 31, 1975, A.T.&.T. reported over $2,255,000 in FCC expenses. Of this total, $1,800,000 was incurred in just three dockets."7/ The study found citizen participation in the three rulemakings cited by the FCC as significant, but noted ratios of industry to public interest groups of

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5/Id., at 22.

6/359 F.2d 994, 1003.

7/Senate Study, supra, at 21.

64 to 14, 33 to 4, and 3 to 4.[8/] The Committee could not secure cost figures for the industry, but the Media Access Project estimated that its participation in the Fairness Doctrine rulemaking cost $16,000--and this was only for attorneys fees and out-of-pocket expenses.

The Senate's findings on FCC proceedings other than rulemakings were even more striking. For example, public participants were involved in only three of the 30 most recent broadcast application proceedings.[9/] This is a dismal record. In two other proceedings, AT&T requested increases in its rate of return. The FCC eventually garnted the requests. AT&T spent $800,000 on this docket--with its obvious and important impact on consumers--but there was a total absence of public interest representation.[10/] Citizen groups simply cannot afford the gigantic legal costs involved in such a proceeding and their views go unheard. Public participation funding is the only realistic answer to the present insurmountable financial barriers at the FCC.

Successful Public Participation Funding Precedents

There are seven successful public participation funding programs already in operation. Although procedural details vary, the central focus of each is the funding of in-depth presentations by individuals, small businesses, and citizen groups whose participation will contribute to full consideration of important public issues.

The oldest public participation funding program is at the FTC. It was established under the Magnuson-Moss Act of 1975 to reimburse eligible participants in rulemaking proceedings. The Act authorized the FTC to

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8/Senate Study, supra, at 14.

9/Id., at 16.

10/Id., at 21.

disburse up to $1 million per year to persons who meet strict standards. With Congressional appropriations of $500,000 to $750,000 yearly, the program has worked well since its inception. FTC hearings have included crucial testimony from small businesses, senior citizens, consumer groups, and others who would have been closed out of the decisionmaking process were it not for funding.

Congress has also specifically authorized public participation support in Toxic Substance and State Department proceedings. Last summer, House and Senate conferees agreed to fund programs at the National Highway Traffic Safety Administration (NHTSA) and the Civil Aeronautics Board (CAB). Spurred on by the favorable results of existing programs, several other agencies have announced that they are considering establishment of similar public participation reimbursement efforts.[11/]

Complementary to these agency efforts is Congressional consideration of legislation that would standardize existing programs and establish funding for other agencies. The Carter Administration is actively supporting a $20 million public participation funding provision in its regulatory reform bill covering all regulatory agencies.[12/]

Scope of the Funding Program in HR 3333

Reimbursement must be available to intervenors in adjudications as well as to participants in rulemakings and tariff hearings. Historically, the general public's interest in FCC affairs has not varied with the form of the proceeding. The seminal case on public participation, after all, arose from an adjudicatory proceeding involving the renewal of the license of WLBT, Jackson,

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11/Food and Drug Administration, the Department of Transportation, the Mine Safety Administration, the Department of the Interior, the Department of Agriculture, and the Department of Energy are considering reimbursing citizen and small business participants. Attached to our statement is a summary of all current and pending public participation programs and their general requirements.

12/See S. 755, S. 262, H.R. 3263, and H.R. 2596.

Mississippi.[13/] Adjudications as much as rulemakings result in the formulation of agency policy that will guide decisionmakers in future cases. The FCC's Notice of Inquiry on reimbursement acknowledges that public participation in both rulemakings and adjudications may bring the benefits of a fuller administrative record and diversity of views before the Commission. In considering the scope of HR 3333's reimbursement program, this subcommittee should consider the experience of agencies that already have such programs. The National Oceanic and Atmospheric Administration (NOAA), for instance, has recognized adjudication as an appropriate type of proceeding in which to provide reimbursement. And NHTSA has recommended that its program be extended to cover all types of administrative proceedings.

In particular, reimbursement is necessary and appropriate when citizen groups challenge broadcasting licensees. Citizen intervenors in license challenges are generally not competing with the incumbent licensee for a frequency. Rather, the intervenors (like the United Church of Christ in the WLBT case) are providing information on licensee shortcomings that are evident to the community, unknown to the Commission, and essential to a full and fair resolution of the challenge. The United Church of Christ's information eventually persuaded the Court of Appeals to deny WLBT's application for renewal. Other citizen groups should be given the wherewithal to provide the Commission and the courts with the case studies of licensee performance so necessary in the event of petitions to deny or revoke.

Thank you.

13/Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

Summary of Public Participation Funding Programs at Federal Agencies

In the last few years, several federal agencies have begun public participation funding programs, some with specific Congressional authorization and others on their own initiative. This memo describes what has occurred in twenty agencies that have considered the question of public participation funding. In sum, seven agencies have operating programs, three have announced that they will definitely start programs, six are still considering the question, one has rejected the idea, and three have been prohibited from operating programs.

1. Department of Agriculture

Status. On January 29, 1978 Secretary Bergland directed that a Public Participation Plan be established by a new Special Assistant for Citizen Participation within 120 days. Secretary's Memorandum No. 1931, Establishment of Departmental Focus for Citizen Participation. In February, 1978 the Public Participation Steering Committee submitted a report, "A Public Participation Program in the Department of Agriculture," which described a comprehensive program, including the option of reimbursement of certain participants. On September 18, 1978 the Conference Report on Appropriations for Agriculture, Rural Development, and Related Agency Programs appropriated $220,000 to staff a Departmental Office of Public Participation and directed the Department to report to the Committee within 90 days of enactment of the Act with various details about any proposed funding program. The report and a proposed rule is expected in the Federal Register in the early part of next year. It also stated that no program could be begun until regulations were promulgated and that no expert witness could receive compensation unless he was a resident of the locality to be affected and only if he sought to represent an interest which was not already represented.

Eligibility Test. Under the Appropriations bill, the Department's eligibility test must comply with the Comptroller General's requirements. Thus, a person may be eligible if (1) he does not represent an interest which is already adequately represented, and (2) his representation will substantially contribute to a fair determination of the proceedings, and (3) he lacks sufficient resources to participate effectively in the proceeding absent funding.

Administration. The Department has set up a central Public Participation Office which will provide direction to public participation officers in each of the agencies and will make final decisions on all grants.

2. Civil Aeronautics Board

Status. The final rule allowing compensation of public participants was effective November 28, 1978.

Eligibility Test.

(1) The applicant represents an interest whose representation can reasonably be expected to contribute substantially to a full and fair determination of the proceeding, in light of the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interests;

(2) Participation by the applicant is reasonably necessary to represent that interest adequately;

(3) It is reasonably probable that the applicant can competently represent the interests it espouses within the time available for the proceeding;

(4) The applicant does not have available, and cannot reasonably obtain in other ways, enough money to participate effectively in the proceeding without compensation under this part; and

(5) The applicant's economic interest in the outcome of the proceeding is small in comparison with the burden of effective participation, except that if the applicant is a group or organization, the Committee need only find that the economic interest of a substantial majority of its individual members is small in comparison with the burden of effective participation.

(b) In determining whether an applicant would be unable to participate effectively without compensation, the Committee will require the applicant to demonstrate that its current assets (cash, accounts receivable, and marketable securities that are not in reserves, budgeted for other use, or otherwise restricted for withdrawal) less current liabilities, adjusted by any anticipated operating loss or profit over the relevant year, are less than the amount needed for participation. Salaries paid to employees of an applicant in excess of salaries paid to Board employees for comparable services will be disallowed in this computation.

(c) The committee may waive the "small economic interest" requirement of paragraph (a) (5) of this section if it finds that the applicant's participation in the proceeding would be exceptionally important.

Administration. Applications are considered by a Public Participation Evaluation Committee, which will be composed of the Managing Director, the Director of the Office of Economic Analysis, and the General Counsel. The Evaluation Committee may only communicate with Board staff involved in the proceeding to determine whether the presentation of an applicant is likely to duplicate the presentation of the staff. Any person can submit an answer to a compensation application. A person whose application has been disapproved in whole or in part may petition the Board for review of the Committee's decision within 10 days. Compensation is limited to costs reasonably incurred and in no case can be greater than the amounts normally paid by the Board for comparable goods and services.

3. Consumer Product Safety Commission

Status. An interim regulation allowing compensation in informal rulemakings and related proceedings went into effect on May 31, 1978. 43 F.R. 22560. The Commission plans to issue a regulation that will apply to its formal rulemakings and adjudications, and until that time, will consider on an ad hoc basis requests for compensation in those proceedings.

The new CPSC authorization allows public participation funding in the development of a safety standard when the Commission chooses not to use the offeror process. The offeror process is a system under which outside parties develop safety standards. Now the Commission has the ability to defray the costs of persons participating in the offeror process or in Commission-developed standards if (1) the person's contribution is likely to result in a more satisfactory standard, and (2) the person is financially responsible.

Eligibility Test. The Commission may authorize financial compensation only for participants who meet all of the following criteria:

(1) The participant represents a particular interest or point of view that can reasonably be expected to contribute substantially to a full and fair determination of the issues involved in the proceeding.

(2) The economic interest of the participant in any Commission determination related to the proceeding is small in comparison to the participant's costs of effective participation in the proceeding. If the participant consists of more than one individual or group, the economic interest of each of the individuals or groups comprising the participant shall also be considered, if practicable and appropriate.

Administration. The Office of Public Participation processes and evaluates the applications, but final decisions are made by the Commission. Participants are compensated for reasonable costs, with market rates and rates normally paid by the Commission for comparable goods and services used as a guideline.

4. Department of Energy

Status. DOE announced that it was developing regulations for a department-wide public participation funding program. DOE Release Oct. 11, 1978, Advance Notice of Proposed Rule-making should appear in the Federal Register by early next year according to the attorney drafting the regulation.

Eligibility Test. Because this program will be developed under the Department's inherent authority the eligibility test must comply with the Comptroller General's ruling.

5. Economic Regulatory Administration

Status. The House appropriations bill prohibited expenditures for public participation funding. The Senate deleted the prohibitory language, but receded to the House in Conference. Committee Report No. 95-1251, H.R. 12932.

Prior to this prohibition, ERA had issued guidelines for paid public participation in its home heating oil proceedings. The guidelines specifically provided for payment of participation costs to non-profit organizations "whose principal function involves the furtherance of consumer interests." Economic Regulatory Administration, DOE, Notice of Adoption of Monitoring System, 43. F.R. 2917 (Jan. 1978).

6. Environmental Protection Agency

Status. A funding program is in operation for proceedings under the Toxic Substances Control Act, 15 U.S.C. 2605 (c) (A). An Advance Notice of Proposed Rulemaking is pending for an agency-wide program, 42 F.R. 1492, Jan. 7, 1977. The Clean Water and Clear Air Offices expect to begin funding programs using contracting authority around the beginning of the year.

Eligibility Test in Toxic Substances Program. Compensation may be provided to any person:

(1) Who represents an interest which would substantially contribute to a fair determination of the issues to be resolved in the proceeding, and

(2) if: (a) The economic interest of such person is small in comparison to the costs of effective participation in the proceeding by such person, or

(b) Such person demonstrates to the satisfaction of the Administrator that such person does not have sufficient resources adequately to participate in the proceeding without compensation under this subparagraph.

Administration. The Assistant Administrator for Toxic Substances rules on applications, but the EPA Administrator has the final authority. Up to 25% of the public participation funds can go to regulated interests.

7. Federal Communications Commission

Status. The FCC began a Notice of Inquiry on July 10, 1978, 43F.R. 95545, to consider the question of public participation funding. All comments and replies have now been received. There is a good possibility that a public participation funding provision will be included in the House bill which will be introduced in the 96th Congress to re-write the Communications Act of 1934.

8. Food and Drug Administration

Status. An Advance Notice of Proposed Rulemaking was published in 41 F.R. 35844. Like the USDA, the FDA was instructed by the Appropriations Committee to report the details of any funding program within 90 days of enactment of the Act. The Committee report stated that no program could be started until regulations were promulgated and that no expert witness could receive compensation unless he was a resident of the locality affected.

Eligibility Test. According to the Appropriation Committee, the FDA must follow the Comptroller General's standards in writing its eligibility test.

9. Federal Energy Regulatory Commission

Status. The appropriation bill for this agency of DOE prohibited the agency from spending money on public participation funding. Prior to this, under an informal program with no written guidelines, the agency had reimbursed two consumer groups that had submitted petitions for compensation. Consumers

Union of the United States, Inc., Washington, D.C., 5 FEA ¶87,014 (March 3, 1977). Consumer Federation of America, Washington, D.D., FEA ¶87,040 (May 5, 1977),.later amended in 5 FEA ¶87,051 (June 10, 1977). See also letter dated February 17, 1978, from John O'Leary, Deputy Secretary, to Tersh Boasberg, Esq. and Case No. DSG-0014 (March 10, 1978).

10. Federal Trade Commission

Status. The FTC public participation program has been in operation for more than three years and has served as a successful model for other programs.

The Magnuson-Moss Warranty FTC Improvements Act of 1975 expressly allows funding for costs of participation in rule-making proceedings. §202(h) authorizes the Commission to spend up to $1 million per fiscal year for persons who meet statutory requirements. Under this authority, Congress has appropriated $750,000 for compensation funds for the 1979 fiscal year.

Eligibility Test. Applicants can only receive funds if they could not participate in the proceeding because they can't afford to pay their costs and they have a presentation to make which is necessary to a fair determination of the proceeding. Their contribution must not be duplicative of other participants. A detailed application must be filed, proving how the applicant fulfills the statutory requirements, stating why representation of the applicant's interest is necessary to a fair proceeding, including a list of expenses to be incurred and a statement of the group's organizational and financial status.

Administration. Compensation funds can be authorized for reasonable expenses of participation; for example, funds could be awarded for the costs of conducting a survey, investigation or other research, hiring an expert witness to testify, or reimbursing a staff attorney for reasonable fees.

As of June 1, 1978, the FTC had obligated $1,199,746.79 for public participant compensation. 60 groups have participated in this program in 16 different proceedings; awards have ranged from $173 to an Iowa consumer group leader to pay his fare to an FTC hearing to $91,000 to the National Consumer Law Center for its participation in the investigation of unfair credit practices. The program has been particularly helpful to small, grassroots groups who could never afford to come to Washington without a program like this. Individual citizens and small businesses have also been compensated for their contributions.

11. Department of Housing and Urban Development

Status. A petition by the Center for Auto Safety to start a funding program in mobile home proceedings was denied on June 1, 1977. In the denial letter, Secretary Harris said that the Department would consider development of a consumer participation funding proposal for fiscal year 1979 or 1980.

12. Department of Interior

Upon petition of the Council of Southern Mountains, the Department published a request for comments on the establishment of a public participation funding program. 43 F.R.12339, Mar. 24, 1978. It is likely that the Secretary will soon announce a decision on the petition, though any program will probably be an experimental one limited to surface mining proceedings.

Eligibility Test. Because the Department would be acting under its inherent statutory authority, it would have to follow the Comptroller General's eligibility standards.

13. Internal Revenue Service

Status. Tax Analysts and Advocates petitioned the IRS to establish a funding program in its rule-making proceedings on June 24, 1977. The petition was recently referred to the Tax Legislative Division for a recommendation, but has not been acted upon.

14. Interstate Commerce Commission

Status. The ICC denied a request by the Institute for Public Interest Representation to establish a funding program. It does have the Office of Rail Public Counsel, which provides an independent advocate for consumer, user, and community interests in rail matters.

15. National Highway Traffic Safety Administration

Status. NHTSA's one-year demonstration program was extended indefinitely. 42 F.R. 2864, Jan. 13, 1977. It has a fiscal year 1979 appropriation of $150,000.

Eligibility Test. The evaluation board may approve an application, in whole or in part, if it finds that:

(1) The applicant represents an interest whose representation contributes or can reasonably be expected to contribute

substantially to a full and fair determination of the issues involved in the proceeding, taking into consideration the number, complexity, and potential significance of the issues affected by the proceeding, and the novelty, significance and complexity of the ideas advanced by the applicant

(2) Participation by the applicant is reasonably necessary to represent that interest adequately;

(3) It is reasonably probable that the applicant can competently represent the interests it espouses, when assessed under the criteria of this regulation; and

(4) The applicant does not have available, and cannot reasonably obtain in other ways, sufficient resources to participate effectively in the proceeding in the absence of funding under this program.

In determining whether an applicant would be unable to participate effectively, the evaluation board examines the applicant's proposed expenditures for preparing its presentation in the proceeding, decides whether these projected costs are reasonable and compares them to the applicant's income and expenditures, including anticipated future income and expenditures, for the current fiscal year.

Administration. In its first year, NHTSA funded 21 applicants in 6 proceedings. 56% of the applications were approved, including submissions in proceedings on fuel economy standards, occupant crash protection, electric vehicles safety standards and bumper standards. The average award was $3,993.99.

The program covers all types of proceedings. Applications are processed by an Evaluation Committee, which has two NHTSA representatives and one from the Secretary's Consumer Office.

16. National Oceanic and Atmospheric Administration (Department of Commerce)

Status. A funding program went into effect April 26, 1978, 43 F.R. 17806, covering all agency proceedings.

Eligibility Test.

(1) The person represents an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding, taking into account:

(a) Whether the person represents an interest which is not adequately represented by a participant other than the agency itself;

(b) The number and complexity of the issues presented;

(c) The importance of public participation;

(d) The need to encourage participation by segments of the public who, as individuals, may have little economic incentive to participate;

(e) The need for representation of a fair balance of interests, and

(2) The person demonstrates to the satisfaction of the Administrator that such person does not have sufficient resources available to participate effectively in the proceedings in the absence of compensation.

Administration. The Administrator decides on applications. Compensation is based on reasonable market rates, but no compensation is higher than rates paid by NOAA for comparable services. Limited awards have been made to date.

17. Nuclear Regulatory Commission

Status. The appropriations bill for fiscal year 1979 prohibits the NRC from reimbursing public participants.

18. State Department

Status. Public participation funding is authorized up to a $250,000 limit in §113 of P.L. 95-105 for all Departmental proceedings.

Eligibility Test. To be eligible for financial assistance to participate in a Department of State proceeding, advisory committee, or delegation, a determination must be made that the organization or person:

(1) Is representing an interest which would otherwise not be adequately represented and whose participation is necessary for fair determination of the issues taken as a whole; and

(2) Would otherwise be unable to participate because such organization or person cannot afford to pay the costs of such participation.

Administration. A few awards have been made to consumer groups participating in international aviation negotiations.

19. Department of Transportation

Status. A Notice of Proposed Rulemaking for a Department-wide program is expected in a few weeks. ANPRM, 42 F.R. 1492.

Eligibility Test. Because this program will be under the Department's inherent statutory authority, it must adhere to the Comptroller General's decisions on eligibility.

20. Toxic Substances

Status. See discussion under EPA.

December 5, 1978

Mr. VAN DEERLIN. Thank you.

Do you have anything to add to that, Mr. Symons?

Mr. SYMONS. No, I don't, Mr. Chairman.

Mr. VAN DEERLIN. Ms. Possner.

Ms. POSSNER. One very brief question.

Mr. Symons, you mentioned that public participation is not terribly evident on the State level. Do either you or Ms. Drabble believe that it would be advisable for us to provide for intervenor funding on the State level through State commissions? And if so, would you be able to provide us with some guidance with respect to any precedent for intervenor funding at the State level?

Mr. SYMONS. Yes, I think it would be advisable to fund public participants on the State level. In our common carrier testimony a number of weeks ago we talked about the creation of telecommunications consumer action groups in each State. These groups would facilitate citizen involvement with the State regulatory agencies. In addition, there is a precedent for federally mandating public participation funding on the State level: Last year's Public Utility Regulatory Policy Act. PURPA established a number of Federal guidelines for electric utilities, ordered the States to consider those guidelines, and established the consumer's right to participate in those State deliberations.

PURPA went on to provide that either:

First. The utility pay the cost of citizen participation in the deliberations; or

Second. The state mandate some other means of funding public participation, in which case the utility need not pay the cost of public participation.

Ms. POSSNER. Were you recommending Telecags, as I think you referred to them, as substitutes for intervenor funding?

Mr. SYMONS. As an alternative. We assumed that a successful Telecag would have sufficient funding and wouldn't need public participation funding.

Ms. POSSNER. To the extent Telecags do not receive such funding, intervenor funding on the State level——

Mr. SYMONS. Should be provided.

Ms. POSSNER. We would appreciate whatever assistance you can provide in this area.

Mr. SYMONS. I would be happy to supply them.

[The following information was subsequently received for the record:]

FEDERALLY MANDATED INTERVENOR FUNDING AT THE STATE LEVEL: THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978

With the enactment of the Public Utility Regulatory Policies Act of 1978 (P.L. 95-617, November 9, 1978), the Federal government required the States under certain circumstances to reimburse consumers who appeared at State utility commission hearings. This memo will discuss PURPA and its applicability to the Communications Act of 1979.

The Public Utility Regulatory Policies Act (PURPA)

PURPA Sec. 111(d) establishes a number of Federal standards for electric utility rates, including cost of service, declining block rates, and time-of-day rates. Section 111(a) imposes on each State regulatory authority the obligation to "consider each standard established by subsection (d)...." Similarly, PURPA Sec. 113(b) establishes five Federal standards for the operation of electric utilities. According to Sec. 113(a), each State regulatory authority must within two years "conduct a hearing respecting the standards established by subsection (b) and... adopt the standards" if the State authority determines that adoption will encourage equitable rates to electric consumers.

Section 121(a) grants consumers a broad right to intervene and participate in the hearings at which the State authorities consider the standards of Secs. 111 and 113. Section 122 makes the right to intervene meaningful by mandating compensation to consumers who participate at the hearings. Either the State must guarantee a "means for providing adequate compensation" to persons who meet criteria almost identical to the criteria set forth in HR 3333's Sec. 244(a)--or the electric utility

itself must compensate consumers who participate before the State regulatory authority.[1/]

The Communications Act of 1979

The analogy between PURPA and the Communications Act of 1979 is clear. HR 3333 establishes fundamentals of common carrier service--reasonable rates, reliable service (both in Sec. 311), and intraexchange access charges (Sec. 324)--which will in part be the responsibility of the State regulatory commissions.[2/] State commissions, in short, will play a crucial role in implementing our national telecommunications policy--just as they do in implementing our national energy policy. Congress recognized the importance of State commissions to energy policy, and passed PURPA. Now Congress must take the same step in telecommunications. It must ensure the broadest possible participation in national telecommunications policymaking--even when State bodies are making the policy. Intervenor funding at both the State and Federal levels will guarantee that telecommunications policy reflects the interests of a wide range of citizens and small businesses, and not just the interests of a few communications giants.

1/ Section 122(b) states:

Compensation shall not be required /from the electric utility/ if the State...has provided an alternate means for providing adequate compensation to persons--

(1) who have, or represent, an interest--

(A) which would not otherwise be adequately represented in the proceeding, and

(B) representation of which is necessary for a fair determination in the proceeding, and

(2) who are...unable to effectively participate or intervene in the proceeding because such persons cannot afford...reasonable costs of preparing for, and participating or intervening in, such proceeding....

2/ HR 3333 should include additional fundamentals of a national common carrier policy--such as a renewed commitment to universal service, and a recognition that consumer needs in an information society extend beyond basic voice-grade telephone service. Of course, State commission determinations of rates and access charges will affect the speed with which this broad notion of universal service becomes a reality.

Ms. DRABBLE. One thing I didn't mention earlier is that we have attached to our testimony a summary of the public participation funding programs in the seven agencies that have programs. [See p. 130.]

Mr. SYMONS. May I add one thing? There has been a lot of talk in Congress during the last few months of making agencies more responsible to the public. We believe that enabling the public to participate in agency determinations would probably be the most fundamental way of insuring that agency rulemakings and adjudications are responsive to public concerns.

Mr. VAN DEERLIN. Mr. Wunder.

Mr. WUNDER. Mr. Symons, you keep using the term "the public." You are not talking about the public. You are talking about special interest groups like your group?

Mr. SYMONS. We are talking about groups that have no direct financial stake in an agency proceeding. I think for convenience sake they have been labeled "public groups." I don't think it necessary to argue about the semantics.

Mr. WUNDER. Well, who you purport to represent is a significant thing. I mean, you are not a public group. You don't represent the public interest. You represent special interests. And I don't know what your membership is now——

Mr. SYMONS. Public Citizen last year had about 75,000 contributors.

Mr. WUNDER. What percentage of the U.S. population is 75,000?

Mr. DRABBLE. I think that in discussing the question of public participation the critical query should be not how many people belong to the group but what kind of information and what kind of contribution they are offering. There may be just a small group in a community except they may have something very important to say about how the local television station has been performing.

On the other hand, there may be a group that has a membership of 1 million people. But the question is, are they bringing arguments and are they offering evidence that is really going to make a difference to the proceeding?

I don't think we would want to choose public participants or the recipients of public participation funding by counting up how many members they have.

This kind of public participation funding program should not be a financial aid program for impoverished groups that have the most members. Instead, it is a program to try to get the information to the agency so it can make the best decision.

There has been an historical debate about what a public interest group is. I think a public interest group is most easily defined by looking at what it isn't. It isn't a group that has an economic stake in the decision. That is the crucial point. People who do not have an economic stake in the decision——

Mr. WUNDER. But they do, haven't they?

Ms. DRABBLE. It will be either nonexistent or small, and therefore hard to identify. Take the example of someone who might want to participate in an ICC proceeding. The rates that truckers can charge for moving goods eventually affects consumers economically in how much they pay for a can of tuna. But because that stake is hard to identify, consumers don't have much of an incen-

tive to organize themselves together to participate in ICC proceedings. The same kind of argument applies at the FCC. That is the traditional reason why consumer groups and groups with noneconomic interest have had difficulty obtaining money, because people don't have that economic incentive.

Economists call it the free rider effect. Somebody else is doing it so you don't have to contribute to that group because you are depending on them to represent issues that don't affect you in your pocketbook in a substantial way.

Mr. WUNDER. Let me ask this question. Let's assume that group "X" petitions the FCC for funding under an intervenor funding program and they allege certain things in their petition and the FCC grants them funding and grants them standing, and then they privately get in touch with a broadcaster and say: "If you will do the following six things, we will withdraw this petition." And the broadcaster unwilling to go to the expense of continuing this proceeding, especially against a group that is now being subsidized by the Federal Government, says: "Yes, I will agree to five of those six."

Five of those six may not even be in the public interest. And this is in the shadow of night and they are agreeing to this simply because they don't want to be strung out in a lengthy proceeding before the FCC. And if this group withdraws its petition, they will be home free. How do we protect against that kind of a situation?

Ms. DRABBLE. Well, I don't think there is any direct way you can ever protect against those kinds of negotiations——

Mr. WUNDER. But to encourage it by providing funding for the——

Ms. DRABBLE. I don't think it would be that much of an encouragement. At least in looking at the seven other agencies with public participation funding, there have been many allegations about public participation funding, but the one you make is new to me in the 3 years I have been working on this.

Mr. WUNDER. It is not applicable to the FTC or the others. I mean, we are dealing with a unique thing when you are talking about a braodcast license renewal. That is the point I was making to Mr. Geller this morning. It is not the same as rulemaking before the FTC or adjudication before the FTC.

Ms. DRABBLE. Well, as part of the question you posit the notion that five or six of the points on which they might have made their application would not be in the public interest. But I think the point is that the FCC would have made a decision that this group has a substantial contribution to make and they were offering something important——

Mr. WUNDER. They contend they are.

Ms. DRABBLE. But the FCC would have had to make that finding in order to decide to fund them; that their contribution was necessary to the proceeding. So they would have to be offering something important to that proceeding.

Mr. WUNDER. Thank you very much.

Mr. VAN DEERLIN. In your statement that you prepared and submitted I presume you also address the question of whether this assistance should extend to license renewal actions and petitions to deny rather than just to rulemakings?

Mr. SYMONS. Right. Ms. Drabble alluded to that very briefly. We think the scope of the public participation funding ought to be extended. I think the other witnesses who have addressed themselves to that agree with it.

Mr. VAN DEERLIN. As you can judge, not only from Mr. Wunder's questioning but also from questioning you heard from Congressman Moorhead this morning—and I don't mean to say it is all on that side, there is much on our side, too—this is one of the difficult and controversial parts of the bill and you have provided some eminently good testimony on it. I thank you for being here.

Our final witness for today's hearing will be Mr. Vincent Connery, national president of the National Treasury Employees Union, which represents, I understand, many employees of the FCC.

STATEMENT OF JOSEPH W. MIHUC, SECRETARY, FCC CHAPTER 209, NATIONAL TREASURY EMPLOYEES UNION, ACCOMPANIED BY SUSAN McKENZIE, LEGISLATIVE LIAISON

Mr. MIHUC. Mr. Chairman, I have a statement of the National Treasury Employees Union by Vincent L. Connery, president, which I would like to enter into the record.

Mr. VAN DEERLIN. Maybe you had better identify yourselves for the record.

Mr. MIHUC. I am Joseph W. Mihuc, secretary of the FCC chapter 209 of the National Treasury Employees Union. This is Susan McKenzie of the NTEU headquarters.

NTEU is the exclusive representative of nearly 115,000 Federal workers, including all the employees of the FCC.

Mr. VAN DEERLIN. Does your jurisdiction extend to the FCC as a result of a vote by the employees?

Mr. MIHUC. Yes. We are deeply concerned with the effect this legislation may have on telecommunications in this country. If enacted in its present form, we believe it can cause substantial deterioration of service to the public as well as seriously and adversely affecting employees of the FCC.

In effect, H.R. 3333 would replace the existing structure of the FCC with two new agencies, the Communications Regulatory Commission (CRC) which would possess general authority to administer and enforce the provisions of the act, and the National Telecommunications Agency (NTA) which would assume telecommunications policymaking and planning functions.

The roles of both of these agencies, however, would be substantially different than that of the present FCC. H.R. 3333 would abolish many of the regulatory provisions under current law relating to telecommunications in favor of competition. The bill states as a general principle that regulatory powers are to be used only to the extent marketplace forces are deficient. If this proposal were to be implemented, much of the technical expertise and legal precedents developed by the FCC over the last 45 years would be lost.

In reality, the idea of competition in the telecommunications field is nothing new. Such competition existed for years among telegraph and telephone companies in the late 19th and early 20th centuries. Because of the fragmented, inconsistent rate system that developed beween 1866 and 1933 the Federal Government was

forced to take an increasingly larger role in monitoring interstate communication.

The Federal Communications Commission was established in 1934. The Commission was charged with regulating interstate and international communications in order to provide the public with a rapid, efficient system that guaranteed adequate facilities and service at a reasonable rate. This is still our mandate.

Despite the criticisms that have been leveled at the FCC from time to time, we believe that the Commission and its employees have carried out their regulatory responsibilities admirably since 1934.

Telecommunications technology has evolved dramatically during this period and the FCC has adapted its functions to meet and encourage these developments. Through its various decisions and past policy, the FCC has made certain that the public benefitted from technological advances in such areas as telecommunications, television, AM-FM radio broadcasting, cable television, underseas cables, coaxial cables, microwave, wave guides, laser, and electronic exchanges.

An example of the benefits of regulation to the public can be found in a recent rate case involving the Communications Satellite Corporation (COMSAT). In its decision, the FCC found that a substantial reduction in COMSAT rates was appropriate and the result was a refund of $100 million to COMSAT's customers. Without regulation, we doubt that this rebate would have taken place.

Furthermore, under the present regulatory system, competition has not been thwarted. In point of fact, many of the changes advocated in H.R. 3333 have been accomplished under the present system without the disruptive effects of a total reorganization or abolishment of the Commission. Over the past 20 years numerous FCC decisions have been issued which have promoted innovation in the communications field.

Though the idea of unrestricted competition in the communications field may have a certain surface appeal to some, we are convinced that the basic flaw of H.R. 3333 is that it places too great a reliance on "marketplace forces" with little protection of the public interest. Unlike the Communications Act of 1934, H. R. 3333 contains no statutory mandate that the public interest be protected by either the CRC or NTA. We find it deplorable that the bill does not emphasize the public interest.

We are not alone in our misgivings over the lack of public interest statement in H.R. 3333. This issue was also raised last year in the testimony of the present FCC Commissioners, a panel of former FCC Chairmen, and the National Association of Regulatory Utility Commissioners, among others. Each group urged that the protection of the public interest be specifically delineated in H.R. 3333 and that the bill's objective of increased competition in the telecommunications field be further clarified.

Chairman Charles D. Ferris, for example, stated that "Competition is a valid tool to achieve the public interest," but added that it is only one tool and should not be relied on to replace regulation as the general practice. Commissioner Tyrone Brown also expessed his concern with the fact that H.R. 3333 would "completely abandon the public interest standard."

We are also very concerned with title VII of the bill which would create the National Telecommunications Agency within the executive branch. This agency will be charged with formulating national telecommunications policy as well as serving as the President's principal adviser on telecommunications matters.

In addition, NTA would exercise primary responsibility for allocation of the electromagnetic frequency spectrum, arbitrate differences in telecommunications matters between Government agencies, and perform a variety of administrative functions dealing with international, governmental and public communications, procurement and research. Presently, most of these functions are performed by the FCC.

We have serious reservations about the advisability of placing telecommunications policy and planning responsibilities in an agency so directly responsible to the President. Obviously, this would greatly increase the possibility of political pressure from the White House improperly influencing policy decisions in this very important area. At present, the existence of the independent FCC helps insure a much greater degree of insulation from the political process in the development and administration of telecommunications policy.

The present structure also requires that telecommunications policymaking and implementation of that policy are vested in one independent body. In this manner, communication between those who formulate policy and those who carry it out is facilitated and the expertise developed over the years by FCC employees who work in this area is put to the maximum advantage.

We believe splitting these functions could be very detrimental to the productive system that now exists. It could create needless problems in coordination and cooperation between the two agencies with a concomitant waste of time, money and employee expertise. As former FCC Chairman Dean Burch warned in his testimony, problems between the CRC and NTA would be "inevitable and inherent." We, therefore, urge the committee to strike the provisions creating the NTA and restore telecommunication policymaking authority to an independent commission.

Finally, we are also deeply concerned over the effects H.R. 3333 would have on the employees of the FCC. The sponsors of the Communications Act of 1979 have estimated that the bill would reduce the staff of the FCC by as much as 25 percent. If this number of employees are affected by transfers, reassignments, or even dismissals, the cost to the Government could be exceedingly high, not only in human terms, but also in the loss of continuity of operation and service to the public.

In addition, we are disappointed that title VIII of H.R. 3333 contains a provision that could do further injustice to the employees affected by the reorganization. Section 801(a) provides that the "transfer of personnel under this subsection shall be without reduction in classification or compensation for 1 year after such transfer, except that the chairman of the Commission shall have full authority to assign personnel during such 1-year period in order to efficiently carry out functions transferred to the Commission under this section."

We believe that this provision is in clear conflict with existing law. The Civil Service Reform Act of 1978 (Public Law 95-454) provides that Federal employees who suffer the adverse impact of a reorganization or restructuring of their agencies shall retain their pay and grade for 2 years, not the 1-year period called for in H.R. 3333. Since Congress has already worked its will in mandating that Federal employees be given this 2-year protection, we urge the subcommittee to amend H.R. 3333 to conform with existing statute.

In conclusion, we believe that much of H.R. 3333 is not in the best interest of the public, the Government, or the FCC employees. Though the principle of additional competition in the telecommunications field may be valid, we believe that any steps to implement such action should be phased in slowly and carefully as part of the present FCC regulatory system. To do less would be a gross disservice to the American public that has benefited from the current system of regulatory oversight and supervision. We urge you to reconsider the provisions in H.R. 3333 which affect FCC employees adversely.

Mr. VAN DEERLIN. Thank you.

I assure you on the 1 year versus 2 years, whatever is already in effect will supersede. And we can certainly make that change. I represent a good many Federal workers, as you may know, in San Diego. And I make it a point and always find it possible to support their usually legitimate aspirations.

I must say that on the first side of Mr. Connery's testimony he puts his finger right on the purpose of the legislation that is under consideration and that is "to do away with many of the legal precedents developed by the FCC over the last 45 years."

We think that this is very much in order precisely because of the factors that are referred to in this testimony. And especially toward the end of page 2 where it says: "The FCC has adapted its functions to meet and encourage technological developments."

I should think if there is one reference that would have been omitted from the testimony it would have been the development of FM, which almost solely because of the regulatory restraints imposed by the FCC, was the better part of two decades in being certificated and licensed. We could have doubled the number of radio stations immediately before World War II had it not been for the refusal of the FCC to do so under the 1934 act.

There is a reference in that same line to cable television. It was no agency other than the FCC for which you speak, which imposed a temporary freeze which lasted 5½ years, all the way from 1967 to 1972.

So I must say on that portion of the testimony which refers to "other than the direct interest of the employees," in which I join your commitment, I must say that the testimony raises a great many more questions than it answers.

At the top of page 3 "competition has not been thwarted." Obviously, this was written without any mental reservations regarding the small Earth station decision which finally was brought about because of the intervention of the small cable association, CATA, which persuaded the FCC, after many, many, many months, that to require massive Earth stations, that were costing hundreds of thousands of dollars, as some sort of public protection was simply

to ignore the opportunity for small cable systems to construct such Earth stations and to greatly vary and expand the programing they were able to offer in local communities.

The record of the Commission, however, cannot be hung upon the shoulders of the employees, who have done what they are supposed to do, I am sure, under the 1934 act.

Does your represent employees of the Civil Aeronautics Board?

Ms. McKENZIE. No, Mr. Chairman, we don't.

Mr. VAN DEERLIN. The deregulation there, as you know, has been very close to total since the 1978 legislation which practically gets the Government out of scheduling and rate regulation of airlines. And whereas the employees of that agency in the year that the legislation was passed numbered 802, the reduction for 1979 has been to 799, which is only a reduction of 3. And the amended request for 1980 still holds at 743. The anticipated savings for 1979 and 1980 reach only $2.7 million.

So I guess deregulation hasn't been too hard on the employees there. And I would judge that any estimates of 25 percent reductions at the FCC as the result of this legislation may be rather sanguine.

Mr. MIHUC. We are glad to hear that, Mr. Chairman.

Mr. VAN DEERLIN. Well, I have always felt that we should protect the individual but not the job slot. If we decide that firemen are really not needed on diesel locomotives, we should protect the job future of the fireman who is presently employed, but not protect the slot of a fireman on a diesel or locomotive.

Mr. MIHUC. We are not against innovation and changes in administration of any law that is proposed for the Commission. But the drastic nature of abolishing the Commission leaves some questions to be answered for the employees that haven't been answered. That was our problem.

Mr. VAN DEERLIN. But as a fellow unionist, you would also recognize—if we really open up technology and competition—the possible generation of jobs is so much greater in the total communications picture than the myoptic consideration of a handful of jobs down at a regulatory commission. Shouldn't we bear this in mind, too?

Mr. MIHUC. Yes. And we are looking after the public interest in that respect. We feel if the economy can be expanded by innovations in telecommunications, we are not against it. But we believe a lot of the segments of the telecommunications market represents a public utility and since that there is only one major supplier, Mr. Chairman, that there should be some oversight of those public utility operations.

Mr. VAN DEERLIN. Well, you will be happy to know that we provide that continued oversight of the dominant carrier in telecommunications, A.T. & T., for not less than 10 years unless the Commission comes in before that time to tell the Congress that it is no longer necessary.

I understand what you were attempting to convey in your testimony and I appreciate getting it. I just couldn't let those few references pass because the larger picture—what we are trying to accomplish—is really much greater than job maintenance in one Federal agency.

Does staff have questions?

Miss Possner?

Ms. POSSNER. Very briefly, and if you don't have the information with you, perhaps you could supply it for the record at a later date. Could you tell us how many employees at the Commission you represent?

Mr. MIHUC. We represent the bargaining unit employees. That would exclude management and supervisory employees. And that is approximately 1,500. Now, not all of those are union members, of course, but according to the law, they are automatically represented—but we are the exclusive bargaining agent for the Commission.

Ms. POSSNER. So out of the total employee population at the Commission, how many do you represent?

Mr. MIHUC. Well, there are roughly 2,200 in the Commission. We represent about 1,500.

Mr. VAN DEERLIN. Excuse me, do you mean there are only 1,500 within the jurisdiction as a bargaining unit or are there 1,500 members?

Mr. MIHUC. There are 1,500 bargaining members, not all of whom are union members.

Mr. VAN DEERLIN. Has there been a notable increase in union membership in the last 2 years?

Mr. MIHUC. Since we are a relatively new union—we only started last year—we are increasing union membership every day.

Ms. POSSNER. Can you tell us how many FCC employees either retire annually or leave the Commission and go on to other jobs? Obviously what I am getting at is if this bill were enacted resulting in a 25-percent reduction in the work force, how much of that 25 percent might be taken up with normal attrition?

Mr. MIHUC. Well, that is hard to answer, but currently we are having reorganizations within the Commission. And some of these are major reorganizations. And one of the problems that has cropped up during those reorgnaizations is early retirement. There is a question whether people are eligible for early retirement. And a number of people would like to have that, but there is some administrative problem in getting early retirement under the types of reorganizations that we have at the present time.

[The following information was received for the record:]

Fiscal year	Total employees	Left FCC	Retired
1976	2,093	246	52
1977	2,100	199	40
1978	2,116	246	36

Ms. POSSNER. For example, it is our understanding that the cable television bureau is either going to be eliminated in the not too distant future or melded with the common carrier bureau or the broadcast bureau. Would your union take part in this reorganization? I think approximately 80 employees would be involved.

Mr. MIHUC. Well, we would represent them as far as the reorganization is concerned. As it impacts employees, if they have a

grievance and their jobs are abolished, then we can represent those employees whether they are union members or not.

Ms. POSSNER. In the case of the cable television bureau either the Chairman or the former Chief of the Bureau has stated that every attempt would be made to find slots within the Commission for those employees whose jobs were eliminated as a result of reorganization of the cable television bureau.

Mr. MIHUC. Well, that is part of the problem in that as they abolish bureaus there is the problem of finding jobs in other bureaus for those employees. And employees are being somewhat dispossessed of maybe other jobs within those old bureaus.

So there is a limited number of slots that are available unless there are other statutory provisions to be regulated.

Ms. POSSNER. Finally, as the Chairman mentioned earlier, this bill would increase substantially regulatory surveillance over the dominant carrier resulting in an increase in the number of common carrier bureau employees. The bill also would create a consumer assistance office. That is something that doesn't exist in the statute today. So new employment opportunities at the Commission would probably result if this bill were enacted.

Mr. MIHUC. We hope that is true, but like anything that is new, there is the matter of development. And information getting to the employees at the present time they are not quite sure what is going to happen. And since we are having reorganizations at the present time, there is a lot of uncertainty within the Commission itself as to what will happen in the future.

Ms. POSSNER. Thank you.

Mr. VAN DEERLIN. Was there a union at the Commission before last year?

Mr. MIHUC. No, this is a landmark within the Commission. This is the first union that they have had. We are currently negotiating our first labor contract.

Mr. VAN DEERLIN. Was there some reason? How did this come about last year?

Ms. MCKENZIE. Well, it came about as it does in any kind of representation situation. We go to an agency and distribute showing of interest forms. When we get a showing of interest of 30 percent of the eligible employees, then we can hold an election under the auspices of the Labor Department.

Mr. VAN DEERLIN. Had the union made an earlier try at the FCC?

Mr. MIHUC. We had not. I think there was one earlier try several years ago by AFGE. And at that time they were unsuccessful.

Mr. VAN DEERLIN. What percentage of response did you get or is that not public information?

Ms. MCKENZIE. I could find that information for you. Would you like to know the vote count also, in the representation election?

Mr. VAN DEERLIN. Yes.

[The following information was received for the record:]

Out of a bargaining unit of 1,720, 523 FCC employees signed a petition stating that they wanted a chance to vote on union representation. That is slightly over 30 percent, which is 517. However, the number of signatures on the petition is not particularly significant, since we stop gathering signatures after we reach the required 30 percent.

Of more significance is the turnout of voters, which was 68 percent of those eligible. Of the 1,720 in the unit, 729 chose representation by NTEU while 449 voted for no union representation.

Mr. VAN DEERLIN. I sure thank you both for being with us. I am sorry you had to wait so long in order to testify.

Mr. MIHUC. Thank you.

Mr. VAN DEERLIN. The hearing will resume tomorrow at 9:30 a.m. in 2167, Rayburn House Office Building.

[Whereupon, at 3:30 p.m., the hearing adjourned, to reconvene at 9:30 a.m., Wednesday, June 13, 1979.]

THE COMMUNICATIONS ACT OF 1979

WEDNESDAY, JUNE 13, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The committee met, pursuant to notice, at 9:35 a.m., in room 2167, Rayburn House Office Building, the Hon. Lionel Van Deerlin, chairman, presiding.

Mr. VAN DEERLIN. Good morning. The subcommittee hearing will resume.

Yesterday we heard a good deal of testimony on proposals for a public participation or reimbursement program for the Federal Communications Commission. Today we shall hear how a similar program has been working in another Government agency, the Federal Trade Commission.

We are privileged to hear from, as opening witnesses, Mr. William J. Baer, Assistant General Counsel for Legislation at the FTC, and Ms. Bonnie Naradzay. Is that right?

Ms. NARADZAY. Yes.

Mr. VAN DEERLIN. Also from the Commission. We welcome you both here this morning and appreciate your testimony. You may proceed.

STATEMENT OF WILLIAM J. BAER, ASSISTANT GENERAL COUNSEL FOR LEGISLATION, FEDERAL TRADE COMMISSION, ACCOMPANIED BY BONNIE NARADZAY, SPECIAL ASSISTANT FOR PUBLIC PARTICIPATION

Mr. BAER. Thank you, Mr. Chairman.

We are pleased to be here to talk a little about our experience with public participation over the last 4 or 5 years. I should note at the outset that Bonnie and I are staff members and our views do not necessarily reflect those of the Commission or its individual members.

Mr. Chairman, we propose briefly to outline our experience, discuss its effectiveness, and we believe the program has been of great assistance to the Commission, and then make ourselves available for any questions you or your colleagues may have.

The FTC's public participation program was created in 1975 with the passage of the Magnuson-Moss Act. That statute gave the Commission rulemaking powers to define unfair and deceptive acts or practices.

The new Magnuson-Moss Act also established that FTC's public participation program. The statutory provisions of that program

are almost identical to those contained in H.R. 3333. The Commission under its statutory authority may compensate individuals or groups who participate in our rulemakings if they represent an interest that otherwise would not be represented and representation of that interest is determined to be necessary if the Commission is to make a fair determination on the issues, and finally, if the individual or group cannot afford to participate without some compensation from our agency.

Since the program began operation in mid-1975, we have compensated over 65 different groups and individuals who participated in 18 different FTC rulemaking proceedings. Over 55 of the recipients—and that is slightly in excess of 84 percent of those groups funded—had never participated before in FTC rulemakings, and we think this is particularly significant. We have been able to use these funds to get advice, counsel and factual expertise into our agency from groups and individuals who previously had not been appearing before the agency.

The range and types of groups, the form of their presentation and participation has varied widely. They range from an award to the National Consumer Law Center, a Boston-based group who prepared information in conjunction with our credit practices rule concerning local community credit practice experiences to a $200 grant to a retiree who participated in our standards and certifications rulemaking proceeding. He was given $200 to cover copying and travel costs to come to San Francisco and explain how his attempt to market an adjustable golf club had in his mind been thwarted by unreasonably restrictive standards established by the PGA and the USGA.

A sizable amount of the funds we have distributed have gone to small business groups, and we think that that is an important element of our program. Over $150,000 has been awarded to 16 groups, individuals and associations who were representing small business interests.

I suppose the most important question and the one we have been asked frequently in other Hill hearings is has this program made a difference; has it helped the agency make a better determination on questions before it in rulemaking proposals; have those groups offered us information, ideas, points of view we otherwise would not have received?

The answer at the Commission, we believe, is a resounding yes, they have made a substantial contribution. In recent testimony, the Chairman of the Commission called public participation the centerpiece of regulatory reform, and we think our experience bears that out.

I would like, if I may, to take a few minutes to review a couple of examples of how the program has helped. A couple of years back I was a staff attorney working on a rulemaking proceeding involving hearing aids. We proposed a rule that would require hearing aid retailers to give elderly purchasers of hearing aids 30 days to try out the aid. The grounds for the rule proposal were that elderly hearing-impaired people really did not know whether an aid would suit them or not without a chance to try out the hearing aid in their home and office environment.

While obviously that proposal has a critical impact on elderly hearing-impaired people, it also has a potentially serious impact on the small businessmen, the retailers of hearing aids who would have to bear the cost of providing that 30-day free home trial. We funded two groups in that proceeding.

The first was the National Council of Senior Citizens, which represents over 3.5 million elderly Americans. We approved their request for funds to survey their members and determine what experiences they had had with purchases of hearing aids, what sorts of difficulties they had had adjusting to hearing aids. As staff persons, we were just not able ourselves to get at that information, to get out in the grass roots to find people who had had those sorts of experiences.

The National Council of Senior Citizens quite successfully was able to get out and survey its local membership, and they produced over 100 affidavits detailing individual experiences with the purchase of and adjustment to hearing aids. They also brought in some economists to talk about the economic impact and some gerontologists to talk about the particular problems of hearing-impaired Americans.

They also used their funds to compensate their counsel who cross-examined other witnesses and helped to forcefully make known to the Commission and the other interests in that proceeding the points of view of elderly hearing-impaired citizens.

At the same time, we funded the National Hearing Aid Society with a comparable amount of money. That group represents the 3,600 or so hearing aid retailers, the people who would really have to shell out whatever costs this rule would impose on them.

They participated in one-half of that rulemaking proceeding through contributions of their members and nearly went bankrupt because of the cost of presenting an effective case. They came to us to ask for compensation, and we provided them with approximately $50,000. They were able to use those funds to obtain extraordinarily competent counsel, to prepare final comments to the Commission on what they thought the record showed and what they thought ought to go into the rulemaking.

Mr. VAN DEERLIN. Did you tell us how much you had given the senior citizens?

Mr. BAER. Roughly the same. Roughly $50,000, Mr. Chairman.

A second example, which I will go through a little more briefly, involves our eyeglass advertising rule, the first trade regulation rule adopted by the Commission. That rule essentially freed up ophthalmologists and optometrists to advertise if they wanted to.

A number of States, approximately 40, had previously banned advertising by these professionals. In that proceeding we funded a San Francisco-based group that did a study of the cost of eyeglasses in States which had restrictions on advertising and compared it to the cost of eyeglasses in States which did not, and they showed a price differential of up to 43 percent, information which was essential to the Commission if it was to make an informed judgment as to whether or not we should really go to all of the trouble of promulgating this rule.

The factual information they presented showed it could make a significant difference in States which currently banned advertising if ophthalmologists and opticians were freed up to advertise.

A procedure which has evolved at the Commission since getting into rulemaking allows all participants at the end of the proceeding to come in, sit around the Commission table with the five Commissioners, and make their views known, to summarize their views as to what the final rule ought to look like.

We have had four of these oral presentations at the end of proceedings: In our eyeglasses rule, our vocational schools rule, our insulation rule, and our funeral proceedings rule. In all of the cases, the publicly funded groups played an important role in summarizing evidence, in helping to assist the Commission before it went into markup on the final rule proposal.

They criticized the staff proposals for both going too far and not far enough. They criticized other groups for factual or logical insufficiencies in their presentations. They really helped highlight and focus for the Commission what the final rule ought to look like.

It is important, we believe at the Commission, if we are going to administer a program like this, that we have adequate safeguards established to make sure that funds are only awarded to groups who meet the statutory criteria, and that once awarded those funds, the groups spend them only for the approved purposes.

This is a novel proposition for the Government, and we believe we have a special responsibility to show that the funds are used only for approved purposes and provided only to groups authorized by the statute.

We have developed some procedures which I would like to review briefly that show how we have tried to maintain the integrity of the program. The location of the program is in our general counsel's office. Bonnie Naradzay is our special administrator for the program. We have separated the decisionmaking on applications for funding from the Bureau of Consumer Protection, which is the bureau responsible for proposing and developing FTC rules, to make sure there is no influence by the staff or undue influence on who those funds go to or how the funds are distributed.

We think that ensuring independence yet locating the funding authority within the agency is important so that the general counsel might be in a position to make informed judgments on who ought to get the money and what additional information is necessary for a fully informed factual record.

We have developed outreach efforts to make sure this program does not become a bonanza for Washington-based groups which otherwise might be participating in our proceedings. Bonnie has developed a series of booklets that explain in detail how the program works and how people can make application, and we include sample forms and descriptions of what information we need to make a judgment.

We have sponsored conferences in outlying areas to inform small business and consumer groups of the existence of the program, the rules pending at the agency, and how groups might apply if they believe they have an interest which otherwise would not be represented.

Each time we propose a rule, the staff comes up with a list of contacts they have made of groups that would likely be eligible so we can send out information on the rule, and its impact and on availability of the program.

When applications come in—and we do get a number of applications—we often are forced to send them back to require more information so the Commission has enough to make a solid, informed judgment that this group really does have something to offer.

We require detailed information on the financial status of the organization, the nature of the group, its membership, and why it believes it represents an interest which otherwise would not be adequately represented. We then go to the presiding officer, the individual who chairs our rulemaking proceedings, and ask him to review the application to determine whether or not this group is really offering something not already covered by another group.

He makes a report under our rules to the general counsel describing in what ways he thinks this group may or may not make a difference. We then have a compensation committee that consists of Bonnie as its staff person, representatives from the General Counsel's Office, the Executive Director's Office, Bureau of Consumer Protection, and survey experts from our Office of Policy Planning, and elsewhere who review, critique, and evaluate the applications, again, often sending the applications back for more information so that we are sure we know what we are doing when we make our decision.

Finally, the General Counsel gets the recommendations of that committee and determines whether or not to provide funds. If we decide to provide funds, we send a letter specifying in detail what funds have been approved and for what purposes. In about half the cases, we deny parts or substantially all of the application because we do not think those funds are really necessary to assist us in making the decision, but some small aspect of the proposal might be. That is spelled out in a letter. We include a detailed line item budget so the group knows how much it has for each element of its participation.

We give them written guidelines of how the funds are to be expended, what records must be kept, and we give them a notice that at the end of the proceeding we are going to come in with our auditors and do a field audit on their books.

To date we have audited approximately 30 percent of some 65 groups that have received funds, and we expect to audit 100 percent of the groups by the end of the next fiscal year.

Finally, when a group has expended money for a particular project, we require them to submit a voucher detailing what the expenditure is for and including receipts that indicate that the money has been spent only for an approved purpose. And we have developed a procedure so that the next time a group wants to participate in a different rulemaking, we seek the input of the presiding officer and the staff to make sure this group has done a competent job the first time around. And if they have not, that weighs against any subsequent application for additional funds.

That concludes my prepared remarks. To summarize, I would simply like to say that although it takes a lot of care and diligence

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on the Commission's part, I think I do speak for all of the commissioners in saying that this program has proved invaluable to us in making some very tough determinations on some very difficult rulemaking issues, and we would strongly support the inclusion of a similar program in H.R. 3333.

Thank you, Mr. Chairman.

Mr. VAN DEERLIN. Thank you.

Has the program at FTC stayed within the financial restraints placed upon it at the outset?

Mr. BAER. Yes, it has, Mr. Chairman. We have been funded $500,000 through the first 3 years of the program. In the current fiscal year we are receiving $750,000 and we are requesting the same amount, $750,000, during the next fiscal year. The authorized level for the program is $1 million.

Mr. VAN DEERLIN. One element that is a little different, when we consider the FCC, is that here is a body which performs a licensing function which, I assume, in no sense applies to the FTC.

Mr. BAER. We hope not, sir.

Mr. VAN DEERLIN. And in the legislation we drew a line between public participation at public expense in rulemaking matters and in licensing procedures to meet the fear that such assistance could be used to help finance so-called fishing expeditions against licenses.

Have you given any thought to whether this separation is wise or whether you think that we should go whole hog and fund participation in license challenges as well?

Mr. BAER. Mr. Chairman, I have given it some thought, but I should confess to not being very knowledgeable about the different procedures at the FCC. And to the extent I have views, I suspect they are not very informed. My sense is that if there is a danger of some sort of fishing expedition in renewal applications or the like, that perhaps a threshold test might be established whereby if a group wanted to challenge or in some other fashion involve itself with the more adjudicative licensing-type function, that if an application were filed or some sort of filing made which on its face seemed to be meritorious, or to pass some sort of threshold, that perhaps funds could be made available.

That is the most I think I ought to offer on that subject. I just do not know.

Mr. VAN DEERLIN. Thank you.

Are there staff questions for Mr. Baer or Ms. Naradzay?

Ms. POSSNER. For either Mr. Baer or Ms. Naradzay: Returning for a moment to the question the chairman just asked about providing reimbursement for adjudicative matters as well as for rulemaking matters, your so-called uniformed opinion meshes pretty well with an expert opinion we received yesterday from another witness, Dr. Barry Cole. He suggested as a middle ground—that we not statutorily bar the FCC from making awards in licensing matters but instead leave the door open, and if a petition to deny or petition to revoke is deemed meritorious by the Commission—and the test of that would be that it had been designated for hearing—then the petitioner would be eligible for reimbursement.

Is that the sort of threshold test you were just referring to?

Mr. BAER. Yes. That seems to me one possible way to deal with the problem.

Ms. POSSNER. You mentioned in your testimony that since the FTC's program was inaugurated, 65 different groups have received funding in 18 rulemaking proceedings, and over 55 of those 65—84 percent—had never participated before in FTC rulemaking matters. Do certain groups make application regularly? Do you see the same Washington-based groups again and again, or are the 65 representative of groups from all over the United States?

Mr. BAER. There is a wide range. We have tried to count them, and either directly through an application coming from a State or through membership located in States, basically, every State is represented in those funding grants we have made.

There are some Washington-based groups who have some special expertise to offer or some groups from other areas that have done a very competent job in a particular area and they have gotten more than one grant, and we believe that is appropriate. The key thing is to make sure that the statutory test is met—that the group really does have something to offer and their offering cannot be made through their own funds.

Ms. POSSNER. Does your statute place a cap on the amount of funding that parties with a financial interest in the outcome of a rulemaking may receive in any one year?

Mr. BAER. Yes. The wording is similar to H.R. 3333, and the percentage, that is, 25 percent, to groups who would be affected by the rule or regulated by the rule.

Ms. POSSNER. In Magnuson-Moss or in your own rules, is there a cap on the amount any one group can receive in a fiscal year?

Mr. BAER. There is not at present, Ms. Possner, but the House Interstate and Foreign Commerce Committee 3 weeks ago reported out our authorization for fiscal years 1980, 1981, and 1982. Contained in that version of the authorization is a $75,000 cap on the amount any one group can receive in any 1 year, and a $75,000 cap on the amount any one group can receive during the course of any one proceeding.

Ms. POSSNER. What is the average amount of awards you have made so far?

Mr. BAER. I think it is roughly $25,000.

[Ms. Naradzay nods affirmatively.]

Ms. POSSNER. What is the largest single award you have ever made?

Mr. BAER. About $120,000, I think, for the National Consumer Law Center for the study I mentioned of local credit practices. Maybe I should have Bonnie answer.

Ms. NARADZAY. The National Consumer Law Center is based in Boston, Mass., and it services the legal aid societies throughout the country. For our credit practices rulemaking proceeding, at which the banks and other financial institutions were well represented, the National Consumer Law Center was designated by the presiding officer to be the representative during hearings for cross-examination purposes of the consumer group, because the presiding officer does group the interests participating in the proceeding.

Therefore, in addition to producing quite a few statistical studies which were very important evidence for the proceeding, the Na-

tional Consumer Law Center involved its member legal aid services around the country in the six different hearings that were held around the country.

Those legal aid attorneys and their clients participated in the hearings and did a very good job of explaining what they had learned from representing over 100,000 clients who were low income and had credit problems. Those are some of the ways in which the money has been used.

I may add that that figure includes participating throughout the proceeding. It includes production of a great deal of evidence and cross-examination during the hearings, sponsoring witnesses, producing rebuttal comments and posthearing comments.

Ms. POSSNER. One final question. Mr. Baer, you mentioned that in deciding whether to grant an application for funding, part of the responsibility for making that decision resides in the General Counsel's office and part of the responsibility resides with the presiding officer in charge of rulemaking. You also said that the presiding officer would review the applications to determine whether they represented an interest which would otherwise not be adequately represented, and he or she does this by comparing them to comments already filed as part of the rulemaking.

I am not very familiar with how the FTC operates so perhaps I do not understand. My question is: If filings have already been made in the rulemaking to the extent that the presiding officer can determine whether a point of view has or has not yet been adequately represented, isn't there a time problem? The proceeding is underway and interested parties have already filed. If the presiding officer decides to make an award, isn't this group coming in at the 11th hour?

I don't understand the time factor there or perhaps I've misunderstood the sequence. How do you determine if a point of view has not been adequately represented if a rulemaking is not already underway?

Mr. BAER. Under the Magnuson-Moss procedures, there is an initial notice of rulemaking which sets out the substance of the rule and poses some questions the Commission thinks particularly merit discussion. There is an extensive period between publication of that initial notice and the start of the hearings, during which comments begin to come in, during which applications for public participation funds also come in.

In addition, we have a staff report which sets out the evidence as the staff sees it, and you basically have a sense for where the staff is at. That is the first position the presiding officer can compare an application to. In addition, he has contact with the interested parties who plan to participate. They have begun to make their initial submissions, and he is in a position to make an informed judgment, we believe, on just how valuable and how unique this contribution is going to be.

There tends to be a bit of a time crunch for the public participation groups. They don't have an easy time of it. In the first place, in order to make an application, they have to lay out exactly what it is they are going to do in the rulemaking proceeding, and they complain somewhat fiercely about that because that puts them at a disadvantage with respect to other participants in the proceeding

who do not have to spell out until the last minute exactly what they are going to do.

But we think that is a necessary condition of our making informed judgments on whether or not those funds should be provided. We also think it is really more in the nature of a rulemaking proceeding that groups should not be trying to hide the ball but rather should have their factual positions identified and their evidence there to be submitted to the record and examined by the Commission before it makes a decision.

Ms. POSSNER. And by requiring them to spell out their position in advance of being funded.

Mr. BAER. Right.

Ms. POSSNER. If they are successful with their application, a great deal of the work has already been done, so that time crunch is somewhat——

Mr. BAER. That at least helps. They have outlined, at least, something they want to achieve. We do not—and this might be of interest to the subcommittee—compensate for funds or costs incurred prior to submission of the application, and we think that is important. We don't want people going out spending a lot of money on perhaps the faulty assumption we are going to give them public participation funds, so they spend their own funds getting the application together in the detail we think it is necessary to make a judgment.

Only then will we give them funds, and the funds are only to be used prospectively and only for approved purposes.

Ms. POSSNER. Thank you.

Mr. WUNDER. When I hear you discuss your program down there, it sounds all very good. But then when you look at some of the groups who have received money under your program, it doesn't look as good. For instance, the Americans for Democratic Action, a group which, I understand, rates politicians on the basis of their ideological views, have been funded 34 times, for a ballpark figure—I have just rounded it out—of about $150,000.

Now, what particular expertise do the Americans for Democratic Action bring on the area where they appear to be most expert, which is in the area of health spas?

Mr. BAER. I am glad you asked that question, Mr. Wunder, because it is one we get wherever we go. The answer to the question is, first, we did not fund the National Americans for Democratic Action. We have had the misfortune of having it appear that way by the way we have listed our groups.

There is a small consumer affairs committee located in Washington, D.C., which is affiliated with but substantially distinct from the local chapter of the Americans for Democratic Action. For the last 10 or 15 years, they have been very active in the local community doing consumer-oriented work. They have done price surveys. They have been actively involved in trying to get generic drugs available in local drug stores. They have done the kind of nuts and bolts consumer work that gives them some expertise.

Mr. WUNDER. Have they done a lot of work on health spas, too?

Mr. BAER. They have done some work involving possible sales abuses with health spas. The most unfortunate thing is they are sufficiently independent that I suspect they could have organized

under a different name. They do not take their direction from the national chapter. They are in no way affiliated with the sort of rating partisan activity that the ADA does, and if they were, we would not fund them.

Mr. WUNDER. So the Americans for Constitutional Action, or the Republican National Committee, for that matter, could set up this arm's length affiliate not involved in the activities of the RNC or the ACA and qualify for funding under your program?

Mr. BAER. It would depend upon the funding arrangement for the group, the constituents they represented, and their expertise.

Ms. NARADZAY. May I add something, Mr. Wunder?

Mr. WUNDER. Yes.

Ms. NARADZAY. Mr. Wunder, the Consumer Affairs Committee that is affiliated with the local ADA chapter here gets a total of $2,000 a year to pay for part-time secretarial services. I don't think $2,000 buys very much these days. I think that when you get an application, you have to look not only at the finances of a group; you also have to look at the point of view that it proposes to represent and whether or not that point of view is already being adequately represented by any of the other interests in the rulemaking proceeding.

Mr. WUNDER. Another point you make is about the small businesses which receive funding. When I look at it, I look at the funeral rulemaking and it appears that the business groups which received the money there were primarily crematoriums, which stood to benefit from a rulemaking which was restrictive with respect to funeral parlors. Do you have any reaction to that?

Mr. BAER. I do. We don't look, necessarily, to whether a group favors or opposes a rule. We look to whether or not they represent an interest that otherwise wasn't going to be adequately represented, whether that interest really is important, whether it will really make a difference if it is there, and whether they have the funds. And that group satisfied the criteria. Most of the small business groups we have funded have tended to be opposed, either all or in part, to FTC rules. In our standards and certification proceeding, which is ongoing, we have funded some 11 small business groups. That is a rule that uniquely affects small businessmen because many small innovators have some difficulty in getting access to private standard setting organizations.

They have trouble challenging what they believe may or may not be an unfairly restrictive standard. That rule will affect them, both for good and for bad. We want their views. And over 11 of those who have applied have received funds.

Mr. WUNDER. Thank you, Mr. Chairman.

Mr. VAN DEERLIN. Thanks to both of you for your help on this really difficult and innovative part of our legislation.

Mr. BAER. Thank you, Mr. Chairman.

Mr. VAN DEERLIN. We will take a very short break now to answer the bells, and we will resume in 8 or 10 minutes.

[Brief recess.]

Mr. VAN DEERLIN. Our next witness will address another controversial subject—program consent. Mr. Kevin O'Sullivan, president of Worldvision Enterprises, Inc., accompanied by——

Ms. RENOUF. Katrina Renouf.

STATEMENT OF KEVIN O'SULLIVAN, ON BEHALF OF NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS, ACCOMPANIED BY KATRINA RENOUF, COUNSEL

Mr. O'SULLIVAN. Ms. Renouf is counsel for the National Association of Independent Television Producers and Distributors, and actually I am appearing on their behalf today.

I think you had, or this subcommittee has had, an enormous amount of speechifying and comment about the matter of program retransmission.

Mr. VAN DEERLIN. You noticed?

Mr. O'SULLIVAN. It is not my intention to come here and give a formal statement in that regard. I think you have a surfeit of that information. Maybe it has been talked to death to a certain extent. But I think there are certain technical aspects of this matter which should be taken into consideration.

I have taken the liberty of bringing down a couple dozen copies of our license agreements, Worldvision Enterprises license agreements. These license agreements are fairly standard to the industry. These are agreements that we use when we license programs to stations across the country. Indeed, even the CATV systems.

The license specifies the market area in which the licensee can broadcast the program. There are thousands, literally thousands, perhaps tens of thousands of these licenses in effect in the United States today. And what is happening now with this prolific and, if you will, promiscuous retransmission of programing across the country is that these licenses are, in effect, abrogated in terms of the exclusivity aspect. We don't know what to do about this.

The licensee signs the agreement. We sign the agreement. It states that you have the exclusive license to the program in your market, whether it be Birmingham, Chicago, or whatever. But indeed he does not, because the program can be imported by satellite 1,000 miles away into a cable system maybe in two or three instances, and we are now faced with this constant mirroring of the same programs very possibly coming into the same market through three or four different sources. So these license agreements really mean nothing. We find it very disturbing.

I brought two dozen with me because I thought it might interest you to read them over, and if I may, I would like to leave them with you.

Mr. VAN DEERLIN. We would be pleased to accept them.

Mr. O'SULLIVAN. We also came across a document that is really interesting to look at, and perhaps you may have seen it. This is a very slick brochure produced by a company called United Video, Inc., located in Tulsa, Okla. It is a brochure promoting the marketing of WGN-TV as a superstation. In fact, the brochure refers to WGN as the No. 1 satellite independent superstation. This is a whole marketing technique.

It refers to the programing that is on WGN, the sports programs, the entertainment programs, in quite some detail, and it even has an order blank, if you will, by which the cable system can order WGN-TV from United Video, Inc., and in fact, the gentleman who is the head of United Video, Inc., has even already signed the order form indicating that all you have to do to become a licensee of this

company, to get WGN-TV on your cable system, is just fill in this form and sign it, because he has already approved it, which is a very unusual way of going about licensing.

But why should he care? He doesn't have to worry about his licensee's financial standing because if the man can't pay the bill, it doesn't make any difference because he is delivering this thing to him for nothing. On the back of the order form are the terms, the conditions, the costs, et cetera, and there it is and it comes with the brochure.

If you want WGN-TV on your cable system, wherever you are, you just have to send this in and Mr. Roy Bliss will deliver it to you.

Mr. VAN DEERLIN. And this is an offering with which the licensee, the management, and ownership of WGN has no part?

Mr. O'SULLIVAN. Absolutely. None whatsoever. Nor do the people who supply the programs. Obviously, this Mr. Bliss of United Video was offering WGN not for their test pattern but for the programs they have on the air.

I think that this is an interesting document, and I would like to leave that also, if I may.

There are also different things if you notice as you go around the country. I was down in Palm Beach the other day and I took a few things out of the newspaper. I noted that WTCG Atlanta in the Palm Beach Post is carried in the actual TV listings along with the local stations. This is the Palm Beach Post, Friday, June 8.

Here is its TV section [indicating], and it lists in the TV section all of the Miami stations, all of the West Palm Beach stations, the stations that are actually on the air. And actually in the TV listing it lists channel 17 out of Atlanta just as if it were actually in the market actually broadcasting on the air in the market. I find that to be quite an interesting thing.

Another thing it does not do is it does not list channel 17 of Miami, the educational station, because this could possibly confuse the viewer. So here it lists channel 17 from—oh, gosh, how far away is Atlanta from West Palm Beach? It must be 500 miles, maybe 400 or 500 miles. But it does not list the local educational station which also happens to be channel 17. I think that that is kind of an interesting thing to note.

Mr. VAN DEERLIN. Isn't that more a judgment on the newspaper management than it is on the question of program consent, however?

Mr. O'SULLIVAN. Well, sir, I don't know if it is accidental, because it also appears in the Palm Beach Times.

Mr. VAN DEERLIN. My question stands.

Mr. O'SULLIVAN. I think it is a valid question. Yes; it could be judgmental.

Mr. VAN DEERLIN. The fact that the local public television station was omitted seems to me subject to great criticism, but if a signal is available in a market, it seems to me the readers of the newspapers would be entitled to know that, whether the NAB approves it or not.

Mr. O'SULLIVAN. I am not speaking for the NAB.

Mr. VAN DEERLIN. I understand that. I simply pulled that out of the air.

Mr. O'SULLIVAN. I understand what you are saying, sir, and that is a valid point. But wouldn't you think it would be listed in the cable chart, which is another section?

Mr. VAN DEERLIN. Again, it seems to me it reflects on the judgment of the newspaper.

Mr. O'SULLIVAN. Well, may I leave these? Would you like to see this?

Mr. VAN DEERLIN. Sure.

Mr. O'SULLIVAN. Without rehashing what has been gone through many times before this subcommittee, we just don't know what to do about this matter of exclusivity and the fact that we are issuing licenses that state that the licensee has an exclusive right to the program in his market, and now that no longer exists.

We really feel that we need legislative relief in this area. There is no way that we can handle it otherwise. One might say, well, if you want to protect your licensee in Oklahoma City and protect his exclusivity, then don't sell any of your programs to WGN-TV in Chicago because then the fellow in Oklahoma City doesn't have to worry about your show being imported in by satellite out of WGN-TV.

But how can we not sell WGN-TV in Chicago? Because Chicago is a very important market as far as programs are concerned. So it is a mess.

Mr. VAN DEERLIN. Do you therefore support the program consent proposal that appears in H.R. 3333?

Mr. O'SULLIVAN. Yes, sir, very definitely. I think it is the only way to bring order out of what is now chaos and is going to become even more chaotic.

Mr. VAN DEERLIN. Mr. Collins.

Mr. COLLINS. I want to come to this last question, which is the basic question people keep asking me. They say on this transmission consent when they talk about these key superstations, WGN in Chicago and Turner's station in Atlanta, why is it you sell those superstations if you know you are getting ready to blanket the country and you have the right as an independent producer selling to whomever you please? Why do you sell to them?

Mr. O'SULLIVAN. That is a very good question. Because we cannot afford not to.

Mr. COLLINS. In Chicago there are bound to be more than just one station. WGN is not the only station in Chicago.

Mr. O'SULLIVAN. Probably as time goes on all of those stations in Chicago will be upped onto satellites at one point or another.

Mr. COLLINS. They will all go broke. You know, there is just so much that the market——

Mr. O'SULLIVAN. In New York, sir, WPIX is up on satellite and WOR-TV has just been approved up on satellite, and those are two independent stations. Channel 5, the other major independent, will probably go up on satellite. Most syndicated programs are sold to independent stations.

So if we said, OK, the only way to stop it is not to sell to these stations, we would be out of business very quickly.

Mr. COLLINS. But on your own free conscience, though, you are agreeing to sell to them knowing what the ultimate result will be under the present law. Why, under the present law, are you doing

it? You keep saying because it is the only thing to do, but you have only named two or three stations in America who in turn with the benefit of the satellite can blanket the whole country.

Mr. O'SULLIVAN. Well, you have KTTV in Los Angeles, and KTLA in Los Angeles will probably be put up on satellite eventually. You have two out of three of the independents in New York up there, and you start eliminating WGN in Chicago, the leading independent station in the country. If you begin eliminating those stations and saying OK, we won't sell to them, you will be quickly out of business.

The other point is we do not know when we sell a program whether they are going to become a superstation or not. We may sell them a program today, and tomorrow they may become a superstation. There is no way of telling that. If it goes on as it goes on now, anyone and everyone can become a superstation and it will become like a house of mirrors, a mirroring of the same programs back and forth all over the country.

Mr. COLLINS. I understand your problems in duplication and I understand your marketing problems, too, when you go to Houston or Oklahoma City and the guy buys a package and someone else is laying it down on what you have got. But aren't you allowed to put in a provision that if your station goes to satellite, we can have a revocation of the contract?

Mr. O'SULLIVAN. We did that when we heard—the first superstation, of course, was WTCG in Atlanta, and about 1 year or more before it actually got into the satellite, possibly 2 years, these rumblings were going around. So I said to our counsel: Put in a clause there that would say that whether or not, with or without your permission—I am not phrasing this properly from a legal standpoint, but we put in a clause saying that should our program by means of satellite be taken off your station, with or without your permission, we would have the right to rescind the contract or the contract would become null and void.

They signed that agreement. When Mr. Turner announced that he was putting two of our properties that we had under the license on the air to go up on the satellite, we exercised that prerogative and we terminated the agreement with him.

Now we have discussed this with certain stations that are going up on satellite, and they are saying we won't sign an agreement like that because we don't have any control over whether it goes up on the satellite or not, and if you put that in the agreement now, we will strike it out; we will not sign it and we will not buy your show.

So it is a mess.

Mr. COLLINS. Do you think it is sound business to take that calculated risk and sell with the satellite-duplicated coverage going over the Nation? What are you advising?

Mr. O'SULLIVAN. I think we are going to get to a point where stations, particularly in smaller markets, are going to look to see what is on the satellites and what is not on the satellites. We operate out of four offices in this country, and as our men in the field call across the country into stations and talk to them about programs—for example, we are at the moment in what we call the presell phase of the "Little House on the Prairie," which will be

coming off network in September 1981, and we are talking to stations about ordering that program for off-network rebroadcast.

Our fellows are running into the question in these small markets of "Have you sold it yet to WGN or WPIX? We would like to know that." Well, as of today we have not sold it, but we probably will sell it to them. People are very concerned about it.

Mr. COLLINS. Let me go into one other side on economics. They tell us cable is just now beginning to make a situation where they are showing in the black but they are not really in the profitable area television is in as an industry, and we are talking about this thing 3 or 4 years, possibly, too soon; that it ought to be deferred a while and come up later.

Why do you think it ought to be brought up right now instead of being brought up 4 or 5 years from now when cable is in a stronger financial position?

Mr. O'SULLIVAN. Well, because I think you can destroy a lot of good program property. I don't agree with cable's position that they are having financial difficulties. They are all doing quite well, it seems to me. A gentleman testified here a couple of weeks ago who is very active in our aspect of the industry and is also very active in the operation of cable systems, and he is very supportive of his cable operation and less supportive of his program distribution operation.

I think the handwriting is on the wall. He sees where the action is going. I think the time to do it is now. It is not going to be very often that Congess is going to rewrite an important piece of legislation like this, and it may be too late later on.

[Mr. Collins nods affirmatively.]

Mr. VAN DEERLIN. Ms. Possner.

Ms. POSSNER. Mr. O'Sullivan, I would like to ask you a few questions about the company that you represent, Worldvision Enterprises?

Mr. O'SULLIVAN. Yes, ma'am.

Ms. POSSNER. Worldvision Enterprises syndicates programing?

Mr. O'SULLIVAN. Yes. We sell programs, syndication on a market-by-market basis, but we also sell programs to networks, too, and we sell them overseas, too.

Ms. POSSNER. In the syndication business, are you a relatively large firm, a small firm?

Mr. O'SULLIVAN. We are the largest privately held program distribution company in the world.

Ms. POSSNER. In the world?

Mr. O'SULLIAN. In the world, yes, ma'am. It sounds like an overstatement but it is a fact. We were originally part of ABC. As CBS begat Viacom, ABC begat Worldvision, excepting that in the case of Viacom, when it had to spin out as a result of the FCC regulations that put the networks out of the program distribution activity, Viacom went out as a public company. In the case of Worldvision coming out of ABC, the officers of the company purchased that subsidiary from ABC about 6½ years ago.

Ms. POSSNER. When you referred earlier to distribution and sale of "Little House on the Prairie," was that a Worldvision enterprise?

Mr. O'SULLIVAN. Production?

Ms. POSSNER. Not production. Is that something Worldvision Enterprises, Inc. is doing? Do you have the off-network rights to that series?

Mr. O'SULLIVAN. Yes, ma'am. We have the worldwide rights. We have done it overseas and now we are preparing it for the off-network marketplace.

Ms. POSSNER. I am interested in pursuing the question that Mr. Collins raised about selling to a superstation knowing that nationwide distribution via cable will result.

When you sell "Little House on the Prairie" to a broadcast station and the licensee asks if you have sold it to WGN or to WTCG, and you say no, I have not, you then, I suppose, negotiate a price based on what market that station is in and how large an audience it commands in its market. Is that correct?

Mr. O'SULLIVAN. That is correct, yes.

Ms. POSSNER. Just for purposes of discussion, let's say over the next year or so you are successful in selling "Little House on the Prairie" to 100 television stations across the country, and your 101st license is with Mr. Turner's station in Atlanta, channel 17. When you sell it to Mr. Turner, what kind of audience figures do you take into consideration? His share of the Atlanta market or an extended market?

Mr. O'SULLIVAN. I really don't know. You see, the other problem is, to go back to the first part of your question, when the small market station manager asks us have you sold it to WGN or WPIX because he is obviously concerned about whether he is going to have to compete with it coming in by satellite——

Ms. POSSNER. WPIX is not on the satellite, is it?

Mr. O'SULLIVAN. It is going up. So is WOR. There are a whole bunch of them going up.

Ms. POSSNER. But so far its signal is distributed by microwave.

Mr. O'SULLIVAN. I think WPIX is up on the satellite now. I think so but I am not sure. And when that small market station manager asks that question, we know why he is asking the question. And if we say to him no, it is not sold to WPIX and WGN at the moment and he goes ahead and buys the program, he has no assurance it will not be sold to WGN and/or WPIX by the time he goes on the air with it.

So these rumblings, these questions coming out of the small markets indicate the concern of those broadcasters, and it also goes to the heart of these license agreements which say—there is a section in it here which says Worldvision, the licensor, grants, and the licensee named and scheduled accepts, a limited license under the copyright of the pictures to be telecast, programs specified, over the television facilities of the station indicated in said schedule. And it indicates it is exclusive.

Ms. POSSNER. Let me ask the question another way. Is Ted Turner going to pay more for "Little House on the Prairie" because his audience is bigger than just channel 17's share of the Atlanta market? Have you sold to Ted Turner? I note that you have canceled some agreements with him. Have you in the past sold to Ted Turner's station?

Mr. O'SULLIVAN. We sold him the "Casper" cartoon package and a series called "Discovery," and when he put it up on the satellite, we canceled the contract.

Ms. POSSNER. When you negotiated that contract with him for either of those two products—without revealing the price, obviously—did he pay more for those products because he was up on a satellite, or did he pay a price based upon the share of the Atlanta market he reaches?

Mr. O'Sullivan. He paid an Atlanta price, and at the time he bought them, he was not on the satellite.

Mr. VAN DEERLIN. I take it you would be willing to negotiate with him for the full price that would be represented by his full coverage.

Mr. O'SULLIVAN. I really don't know, sir. I really don't know how to answer that question. Really, today when I came down here I said to myself, I want to stay out of the economic arena, the money arena. I think that there are other things here which are maybe—and this may sound Pollyannaish but I don't mean it that way. I don't see in asking Ted Turner to pay whatever we could figure out it was worth that he should pay to be able to put it up onto the satellite, whether that is really the issue here.

What happens to the stations down the line? What happens to the little stations that are buying it from us also? Do we give it to them free?

Mr. VAN DEERLIN. We have been talking about marketplace determinations. If people in the production end sit before us and say that they would make moral judgments rather than marketplace judgments, it kind of throws our argument out of whack.

Mr. O'SULLIVAN. I really don't know how to deal with that. It is not a matter of pushing the whole exclusivity thing aside.

Mr. VAN DEERLIN. It is being pushed aside very quickly.

Mr. O'SULLIVAN. Maybe my mind is not moving ahead fast enough with the developments in the technology.

Mr. VAN DEERLIN. Just for the sake of making a record here that is going to stand up, you don't seriously mean to tell us that you would have any other than economic considerations, do you, in distributing this entertainment?

Mr. O'SULLIVAN. No. Definitely we are in business to make money. There is no doubt about that.

Mr. VAN DEERLIN. OK. So if Ted Turner will pay a price that accurately reflects his total audience, which is the whole basis of program consent, you will do business with him.

Mr. O'SULLIVAN. I would expect so in the final analysis, yes.

Ms. POSSNER. And you expect that the arrangement you make with him will compensate you for the stations you might lose as a result of that program already being carried extensively on the satellite?

Mr. O'SULLIVAN. It would have to.

Ms. POSSNER. One final question. Worldvision is the largest independent syndication company——

Mr. O'SULLIVAN. At the moment. We are in a process of merging right now which is not quite final.

Ms. POSSNER [continuing]. In the world?

Mr. O'SULLIVAN. Yes.

Ms. POSSNER. Have you had any contact with the Copyright Royalty Tribunal?

Mr. O'SULLIVAN. No, not directly. I think Katrina mentioned to me at the NAPTE Convention in March that we had a lot of money coming to us, like $34,000, for the usage of our programs. I think that was the figure, wasn't it?

Ms. RENOUF. Yes.

Ms. POSSNER. Could you tell us whether Worldvision has filed a claim with the Tribunal?

Ms. RENOUF. No, I cannot tell you that. I served as counsel for the National Association of Independent Television Producers and Distributors, of which Kevin's company is a member, and Worldvision's own counsel presumably makes the Copyright Tribunal filings if they have made them.

I do know there are a number of our members, Worldvision being one of the biggest, some of them being one-man companies, who have never even made the filings because they didn't know how or what they were supposed to do. There are not many of them exactly major corporations. They are just small, ignorant operations and they didn't even know about it.

Mr. O'SULLIVAN. I don't think we have. I am not sure.

Ms. POSSNER. Mr. O'Sullivan, would you consult with your counsel and let the subcommittee know whether your company has filed?

Mr. O'SULLIVAN. Do you want us to call that down to you?

Ms. POSSNER. A letter will do.

Mr. O'SULLIVAN. Sure.

Ms. POSSNER. Would you also consult with your counsel and ask whether your corporation, the largest of its kind in the world, has taken part in any of the negotiations or discussions the Tribunal has held with respect to distribution of the royalty fees that have been collected. We would be interested in that information as well.

Mr. O'SULLIVAN. Yes.

Ms. POSSNER. Thank you very much.

Mr. O'SULLIVAN. Thank you.

Mr. VAN DEERLIN. Mr. Wunder.

Mr. WUNDER. The question I have is: You expressed a concern for the smaller market people who, in effect, will be competing with a signal brought in from the superstation. Let's go back a minute. In that market that broadcaster pays a price for that product based upon the fact that he is going to have exclusive rights to that product in that market.

Now, why couldn't, as the chairman suggested and Mr. Collins also alluded to, as a matter of contract, you charge the superstation more on the basis of this expanded audience and then charge the broadcaster in the smaller market who no longer can get exclusivity a smaller amount? Wouldn't you have effectively a wash?

Mr. O'SULLIVAN. I suppose you could do that, excepting you might sell the smaller market the program first and you may not have sold it to the——

Mr. WUNDER. You could adjust for that, couldn't you? You could put a provision in the contract that in the event this same product comes into that market, you would renegotiate at some predeter-

mined rate? And alternatively with a bigger station, if you sell on the basis of a given size audience and the audience increases in certain increments, that the price would be——

Mr. O'SULLIVAN. Theoretically that could be done, Mr. Wunder, but I really don't think the so-called superstations—maybe Mr. Turner would be willing to pay more money for the product, but I don't know if WGN in Chicago and WPIX and the others that are going up on satellites would be willing to pay a lot more money for the programs because they are going up on satellites.

The attitude they are taking is we are reluctant about this; we don't like being up there, but gosh, what can we do about it? You know, I really don't know what the answer is there.

Mr. WUNDER. What you are saying is it would work for Turner because he wants to be there?

Mr. O'SULLIVAN. Well, he has an ax to grind. He is determined he wants to do this thing. And I think he has indicated to some sources of program supply that he would be willing to pay additional moneys for programs. But I don't think they all would.

Mr. VAN DEERLIN. He has testified that the program consent provision of this bill would put him out of business.

Mr. O'SULLIVAN. Put the satellite out of business, or his station?

Mr. VAN DEERLIN. His superstation.

Mr. O'SULLIVAN. I don't think that that is so.

Mr. VAN DEERLIN. Well, neither do I, but that is what he testified.

Mr. O'SULLIVAN. I think that is very untrue. He would probably do better if he gave up his obsession with this superstation thing and operated WTCG as a responsible television station within Atlanta.

Mr. VAN DEERLIN. Well, now, just a minute. Every American boy has a right to dream and to spend his money in pursuit of that dream. I don't think you have any more right to require him to remain a fourth-rated station in the Atlanta market than he has to dream impossible dreams.

Mr. O'SULLIVAN. I accept your chastisement, sir.

Mr. VAN DEERLIN. It was not intended as that.

Thank you very much.

Mr. O'SULLIVAN. Thank you, sir.

May I leave this material here?

Mr. VAN DEERLIN. I hope you will, sir.

[The following letter was received for the record:]

WORLDVISION
ENTERPRISES INC.

660 Madison Avenue, New York, N.Y. 10021 (212) 832-3838 Cable Address WORLVISION

Neil M. Delman
Executive Vice President

August 6, 1979

Ms. Karen Possner-Wiggins
Subcommittee on Communications
House of Representatives
B-333 Rayburn House Office Bldg.
Washington, D.C. 20515

Dear Ms. Possner-Wiggins:

I am writing to you on behalf of Worldvision's President, Kevin O'Sullivan, who is out of town for several days. We wanted to get a response to you without further delay.

Following up Mr. O'Sullivan's testimony to the Communications Subcommittee on June 13, and his promise to bring you up to date on Worldvision's contacts with the Copyright Royalty Tribunal, this is to advise you that on July 30, 1979 Worldvision files its claim for cable royalty fees from secondary transmissions by CATV systems during the second half of 1978. On the same date Worldvision filed a claim for fees from such transmissions during the first half of 1978, requesting a waiver of the Tribunal's rules if necessary for its acceptance.

Until recently, Worldvision was not part of any preliminary negotiations or discussions with the Tribunal concerning the distribution of royalty fees. However, we have been in touch with representatives of the Motion Picture Association of America and plan to pursue our claims as part of the group of which the MPAA is a part.

If we can be of any further assistance, please let me know. Mr. O'Sullivan certainly appreciated the attentiveness of the Subcommittee and its staff and hope we can continue our dialogue as Congress moves toward badly needed legislation in this field.

Yours sincerely,

Neil M. Delman

NMD/ib

cc: Mr. Kevin O'Sullivan
E. William Henry, Esq.
Katrina Renouf, Esq.

Mr. VAN DEERLIN. Our next witness, in still another subject area of the legislation, will be Mr. J. Edward Day, special counsel to the consumer electronics group of the Electronic Industries Association, a highly distinguished former Postmaster General of these United States.

STATEMENT OF J. EDWARD DAY, SPECIAL COUNSEL, CONSUMER ELECTRONICS GROUP, ELECTRONIC INDUSTRIES ASSOCIATION

Mr. DAY. Thank you, Mr. Chairman. My name is J. Edward Day. I am a lawyer in general practice that has for a number of years represented the consumer electronics group of the Electronic Industries Association.

We are different than nearly all the other witnesses here in that we represent the equipment manufacturers, and particularly the television equipment manufacturers. Our association includes not only substantially all the television manufacturers for the U.S. market; we include the principal Japanese-controlled manufacturers as well in our trade association.

So we pretty much represent the market. We also represent the other types of consumer electronics products that are mainly in the entertainment area. Our concern principally is with the provision in section 413, subsection 12, which is on page 86, which would give to the new regulatory commission the power to regulate the performance characteristics of television receivers.

This is a very big change from what the existing law is. We think it is unnecessary. We think it is not justified by any failures on our part or by any need to have the Government bring about things that are not already being done pursuant to the strong economic pressures our members are under to improve the product constantly in order to meet the competition.

Because we are television, people sometimes are inclined to get us mixed up with the broadcasters and think that we are in the same ball park as far as profit margins are concerned. But although our industry is an enormous success from the standpoint of volume of sales and from the standpoint of public acceptance, it is actually a distressed industry financially.

Very few of the companies in this manufacturing business are making any money at all. The trade press reports that overall last year, which was a tremendous year volumewise, the industry as a whole ran in the red. When television got started in the earlier days, there were over 100 companies in the business of manufacturing television receivers in the United States. Today that figure is down to about 15.

A couple of those are having a hard time surviving, and we are going to have the same situation if we are not careful that happened with the automobile manufacturing industry where they started out with large numbers of manufacturers and ended up with only a handful.

As you have observed, just in recent years leading companies have dropped out of the business: Packard Bell out in your part of the country, Admiral just a few months ago, Philco Ford, Warwick, Motorola, and there are going to be more.

Now, the significance of this profit squeeze and financial squeeze is we try to balance every change that we make in our technological improvements with cost-benefit, and we don't want to have forced upon us costs which we feel don't really achieve anything significant for the buyer of the product but which increase the squeeze and increase the problem of the companies surviving.

Another thing that is really unique in our business is that we are the only leading product where the price has stayed stable for 20 years. While it is a well-known figure that the cost of living, CPI, has gone up over 100 percent since 1967, our prices have stayed level. In fact, in 1978 they even went down a little bit, and that has been a terrific boon for the consumer because he is getting a better product all the time at a price which, in relation to other products and the Consumer Price Index, is constantly lower.

So the combination of these two factors make us very conscious of the necessity to pinch pennies in the way we go about our production.

Now, the present law gives the Federal Communications Commission some regulation over our performance, as you know, and that has to do with the comparability between UHF and VHF. But this provision which I am concentrating on here would give a general authority over all performance characteristics. And it is important to realize that it is not a health and safety type problem. It is not like giving more power to EPA or OSHA or one or another to improve the atmosphere or to improve people's health.

This is purely a matter of giving a Government agency a right to substitute their particular preferences as to how a product should be designed and engineered for those that result from long years of highly competitive activity.

Mr. VAN DEERLIN. Would you see it, Mr. Day, as adoption of a consumer standard which has no bearing on the interference potential of a product. Obviously, I am out of my depth already, but I am referring to the performance characteristics of a TV set which would determine whether it emits interference which would impair the reception of a neighbor's set?

Mr. DAY. Interference is a subject that is being and has been for a long period of time pursued intensely by the industry, and tremendous strides have been made. There are certain types of interference which cannot, by any expenditure of money or any means that could possibly be devised, be cured by something that you do to the receiver.

Certain types of interference are caused by transmissions that are improperly controlled, maybe excessive power, maybe illegal, one thing or another. If that comes in on the same channel you are trying to tune in on as harmonic interference, if you build something into the set to get rid of that, you get rid of the program you are trying to see.

So there are certain rather major parts of the interference problems which can only be solved at the transmitter, and the Federal Communications Commission does, through action of your committee and the Congress, have increased enforcement powers to prevent certain illegal transmissions which have been the source of much of the interference.

We feel the interference problem is gradually tapering off and is not as serious as it was. The companies all report that the public communications on this subject are going down, but a lot is being done on it. On the new color sets, there is additional componentry being put in there which greatly reduces the susceptibility to interference to the extent that it can be done in the receiver.

If you have an unusual case of some next door neighbor—say you had Senator Goldwater living next to you in an apartment with his ham radio equipment and it was causing some interference. Usually the ham radio operator is an expert and he will be able to take care of it by you pointing it out to him, but if not, the company will furnish a special type of filter that may help the situation somewhat.

Mr. VAN DEERLIN. Then there would be no tool left except to impose a spectrum fee on the Senator, right?

Mr. DAY. I suppose so.

But that interference is an example of the type of performance characteristic regulation that we hope will not be included in the bill. There is a separate subsection of 413 that does relate to interference. We cannot tell from reading it whether it relates to preventing the emission of interference, which we certainly favor, or whether it relates to—it may relate to susceptibility of interference.

There is also a provision under your new agency relating to the spectrum which would allow them to study the interference problem. We think it would be highly undesirable for anything to be said by Congress that would indicate to the public that there is some shortcut easy solution to the interference problem, all types of interference, that can be achieved by passing a law or adopting a regulation.

Thank you, sir.

Mr. VAN DEERLIN. And do you know anything, Mr. Day, about performance characteristics in other countries, say Japan?

Mr. DAY. On interference?

Mr. VAN DEERLIN. On performance characteristics in general. I am just seeking information.

Mr. DAY. Well, I don't have anything significant. As you know, in most of those other countries the transmission facilities for broadcasting are run or controlled by the government, and you may have fewer stations that are operating in an area. I think Japan goes pretty much on the basis of nationwide programing.

Mr. VAN DEERLIN. I was wondering if there was any supervision of standards for receiving sets.

Mr. DAY. I don't know the answer to that. Do you know, Eb?

This is Mr. Tingley, the staff engineer of the consumer electronics group.[1] Sit down here.

Mr. VAN DEERLIN. Do you know anything about that, Mr. Tingley?

Mr. TINGLEY. Yes, sir. Mostly they are under the national administration, just like the FCC in our country. There are certain recommendations that are made internationally by what they call the CISPR that deals with interference that products may cause to communication services. We don't get involved too much in that.

[1] Mr. Tingley was in the audience and was called upon for questioning.

I am aware, though, in the case of FM, I believe the international recommendation was not as strict as that placed on FM receivers, so they are having some problems now with interference between FM receivers and certain air-ground services. But I don't think there are any performance requirements that get into the type Mr. Day was discussing dealing with interference susceptibility of the television receiver. I still think that is largely determined by the marketplace.

Mr. VAN DEERLIN. Thank you, Mr. Tingley.

Ms. Possner.

Ms. POSSNER. Mr. Day, when you talk about regulating performance characteristics of television receivers, does this refer to picture clarity and the quality of the sound?

Mr. DAY. All of those things, yes. The Federal Communications Commission at the present time has outstanding three notices of inquiry which are bringing forth volumes of papers in attempting to comment on them, and those include 33 different subjects of new regulation for us, which gets into every kind of detail of that kind almost that you can think of.

We feel that the FCC has no special magic by which they can improve on the intensely competitive efforts of the companies to improve the quality of the picture and the quality of the sound and other performance features of the set, because this is a survival industry. If one set turns out to be deficient, it is soon going to drop by the wayside because people shop these things.

We were rather interested to see that Consumers Union, which is hardly a fan of most industries of this kind, said in a recent issue that the consumer today when he buys a television set of any make can count on getting good performance.

Ms. POSSNER. I raise this because—and this is in the nature of a followup to the question the chairman raised—I was wondering if other nations regulate performance characteristics of receivers with respect to picture quality and sound. I am not suggesting that it is another area the FCC need necessarily get into, but I was just wondering if that occurs—if perhaps in Japan or in other countries the government requires manufacturers to adhere to standards of performance.

Mr. DAY. Well, I think rather than surmising, it would be better if I submitted for the record such information as we can glean as to what is done by other countries on video sound, for example. That has for some time been a very active subject of concern and development by the industry on a private basis in this country, to work toward having the quality of sound in the audio portion of your television receiver that you have in a sophisticated audio product, a hi-fi or something of that kind.

How that will be achieved, we can't say yet, but we certainly don't need any Government agency to tell us that is something we are working toward. And you can bet that the first company that comes up with it is going to have a terrific competitive advantage and the others are going to have it very fast.

Ms. POSSNER. Thank you.

Mr. VAN DEERLIN. Mr. Wunder.

[Mr. Wunder nods affirmatively.]

Mr. VAN DEERLIN. Thank you very much, Mr. Day, for your testimony.

[Testimony resumes on p. 189.]

[The following letter was received for the record:]

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AVENUE LOUISE, 165-BOX 15
1050 BRUSSELS, BELGIUM

June 22, 1979

Honorable Lionel Van Deerlin
Chairman
House Subcommittee on Communications
B333 Rayburn House Office Building
Washington, D.C. 20515

Dear Van:

When I testified last week on H.R. 3333 in opposition to regulation of performance characteristics of television receivers, you asked whether other countries had such regulations.

I have checked with people who are in a position to know, and they tell me no such regulations are imposed by government authorities in Japan or in Western Europe.

I am attaching a bulletin entitled "Television Receiver Requirements" and dated November 7, 1978, from the Department of Communications in Canada. These Canadian requirements are roughly parallel to those of the Federal Communications Commission in the United States for UHF broadcast receivers. There are additional technical requirements in Canada for receivers or converters intended for operation with CATV systems; however, they apply to the narrow area necessary for compatibility so there is not unfavorable interaction between the cable system and the television receiver.

Best wishes,

Sincerely,

J. Edward Day

J. Edward Day:hm

Enclosure

Government of Canada
Department of Communications

Gouvernement du Canada
Ministère des Communications

Your file Votre référence

Our file Notre référence
6203-0
6203-14 (DBC-P)

300 Slater Street
Ottawa, Ontario
K1A 0C8

November 7, 1978

RE: Television Receiver Requirements.

Dear Sir:

Enclosed is a copy of the amendment to the General Radio Regulations Part I and General Regulations Part II pertaining to television receiver regulations which was published in Part II of the Canada Gazette on October 25, 1978.

The above regulations, as now promulgated, were finalized following comments received by the Department in response to Notice No. DGTR-012-77 published October 8. 1977 in the Canada Gazette Part I. We wish to thank all those who have assisted the Department in this matter.

Yours truly,

W.E. Wright
Head
Broadcast Standards
Broadcasting Regulation Branch
Telecommunication Regulatory Service

Encl.

#31040 11/15/78
R-4,a

Registration
SOR/78-768 6 October, 1978

RADIO ACT

General Radio Regulations, Part II, amendment

The Minister of Communications, pursuant to paragraph 7(1)(*h*) of the Radio Act, is pleased to amend the General Radio Regulations, Part II, made by order of 6th August, 1963[1], as amended[2], in accordance with the schedule hereto.

Dated at Ottawa, this 5th day of October, 1978

JEANNE SAUVÉ
Minister of Communications

SCHEDULE

1. The heading preceding section 133 and sections 133 and 134 of the *General Radio Regulations, Part II* are revoked and the following substituted therefor:

"DIVISION VIII

RADIO APPARATUS CAPABLE OF RECEIVING BROADCASTING

Interpretation

133. In this Division,

"conversion gain" means the gain obtainable when an RF signal of one frequency is converted to an RF signal of another frequency, and is expressed in decibels as the ratio of the output signal level to the input signal level; (*gain de conversion*)

"manual selection" means the adjustment of a radio apparatus to obtain reception of a channel by use of an easily accessible and continuously variable control or a device that can be adjusted without the aid of a tool; (*sélection manuelle*)

"noise figure" means the ratio, expressed in decibels, of

(*a*) the total noise power delivered to the output termination of a radio apparatus when the noise temperature of its termination is 290 degrees Kelvin, to

(*b*) the portion thereof engendered by the input termination;

(*facteur de bruit*)

"preset selection" means the adjustment of a radio apparatus to obtain, automatically, reception of a channel by use of discrete positions, digital systems or other mechanical or electronic devices; (*sélection préréglée*)

"signal level" means the RMS voltage over an RF cycle during the transmission of the synchronizing pulse of a television signal expressed

[1] SOR/63-297, *Canada Gazette* Part II, Vol. 97, No. 16, August 28, 1963
[2] SOR/78-739, *Canada Gazette* Part II, Vol. 112, No. 19, October 11, 1978

Enregistrement
DORS/78-768 6 octobre 1978

LOI SUR LA RADIO

Règlement général sur la radio, Partie II—Modification

En vertu de l'alinéa 7(1)*h*) de la Loi sur la radio, il plaît au ministre des Communications d'apporter par les présentes les nouvelles modifications ci-après, au Règlement général sur la radio, Partie II, établi par l'ordonnance du 6 août 1963[1], dans sa forme modifiée[2].

Ottawa, le 5 octobre 1978

Le ministre des Communications
JEANNE SAUVÉ

ANNEXE

1. La rubrique qui précède l'article 133, et les articles 133 et 134 du *Règlement général sur la radio, Partie II*, sont ainsi remplacés:

«SECTION VIII

APPAREILS DE RADIOCOMMUNICATIONS POUVANT RECEVOIR DES ÉMISSIONS DE RADIODIFFUSION TÉLÉVISUELLE

Interprétation

133. Dans la présente section, l'expression

«facteur de bruit» désigne le rapport, exprimé en décibels, entre le niveau total du bruit produit aux bornes de sortie de l'appareil lorsque la température de bruit à ses bornes d'entrée est de 290°K, et la partie de ce bruit produite par la résistance aux bornes d'entrée; (*noise figure*)

«gain de conversion» désigne le gain obtenu lorsqu'un signal radioélectrique à une fréquence est converti en signal radioélectrique à une autre fréquence; il est exprimé en décibels, sous forme de rapport entre le niveau du signal de sortie et le niveau du signal d'entrée; (*conversion gain*)

«niveau du signal» désigne la tension efficace au cours d'un cycle radioélectrique, pendant la transmission d'une impulsion de synchronisation d'un signal de télévision, exprimée

a) en microvolts par rapport à une impédance de 75 ohms, ou

b) en dBmV, 0 dBmV correspondant à un millivolt aux bornes d'une impédance de 75 ohms;

(*signal level*)

«sélection manuelle» désigne l'ajustement d'un appareil de radiocommunications qui permet d'obtenir la réception

[1] DORS/63-297, *Gazette du Canada* Partie II, Vol. 97, nº 16, 28 août 1963
[2] DORS/78-739, *Gazette du Canada* Partie II, Vol. 112, nº 19, 11 octobre 1978

(*a*) in microvolts, with respect to an impedance of 75 ohms, or

(*b*) in dBmV, with 0 dBmV corresponding to one millivolt across 75 ohms.

(*niveau du signal*)

d'un canal, en utilisant une commande continûment variable d'accès facile ou un dispositif qui peut être réglé sans l'aide d'un outil; (*manual selection*)

«sélection préréglée» désigne l'ajustement d'un appareil de radiocommunications qui permet d'obtenir automatiquement la réception d'un canal grâce à des positions distinctes, des systèmes numériques ou autres dispositifs mécaniques ou électroniques. (*preset selection*)

Channel Requirements

134. (1) Subject to subsections (2) and (3), every radio apparatus of the class of radio apparatus that is capable of receiving television broadcasting shall be capable of receiving television broadcasting

(*a*) only on all very high frequency channels and all ultra high frequency channels from both a broadcasting transmitting undertaking and a broadcasting receiving undertaking;

(*b*) only on all very high frequency channels and all ultra high frequency channels from both a broadcasting transmitting undertaking and a broadcasting receiving undertaking, and on all the mid-band channels and all the super-band channels from a broadcasting receiving undertaking; or

(*c*) after July 1, 1979, in accordance with paragraph (*a*) or (*b*) or only on all very high frequency channels, all the mid-band channels and on not less than nine super-band channels from a broadcasting receiving undertaking for the purpose of augmenting the channel capacity of a radio apparatus that conforms to paragraph (*a*).

(2) A radio apparatus of the class described in subsection (1) shall, until July 1, 1980, be deemed to conform to the requirements of paragraph (1)(*a*) if, in addition to conforming to the requirements of that paragraph, it is capable of receiving television broadcasting on less than all the mid-band channels or super-band channels from a broadcasting receiving undertaking.

(3) A radio apparatus of the class described in subsection (1) shall, until July 1, 1980, be deemed to conform to the requirements of paragraph (1)(*b*) if it is capable of receiving television broadcasting only on all very high frequency channels and all ultra high frequency channels from both a broadcasting transmitting undertaking and a broadcasting receiving undertaking and on less than all the mid-band channels or super-band channels from a broadcasting receiving undertaking.

(4) In this section,

"mid-band channels" means the nine channels, commonly identified by the alphabetical designators A, B, C, D, E, F, G, H and I, that are used in the frequency band from 120 MHz to 174 MHz;

"super-band channels" means the fourteen channels, commonly identified by the alphabetical designators J, K, L,

Exigences relatives aux canaux

134. (1) Sous réserve des paragraphes (2) et (3), les appareils de radiocommunications de la classe d'appareils pouvant recevoir des émissions de radiodiffusion télévisuelle ne peuvent recevoir ce genre d'émissions

a) que sur tous les canaux à ondes métriques (VHF) et sur tous les canaux à ondes décimétriques (UHF) en provenance d'une entreprise d'émission de radiodiffusion et d'une entreprise de réception de radiodiffusion;

b) que sur tous les canaux à ondes métriques (VHF) et sur tous les canaux à ondes décimétriques (UHF) en provenance d'une entreprise d'émission de radiodiffusion et d'une entreprise de réception de radiodiffusion, et que sur tous les canaux de la bande moyenne et de la bande supérieure en provenance d'une entreprise de réception de radiodiffusion; ou,

c) après le 1er juillet 1979, conformément à l'alinéa *a*) ou *b*), ou que sur tous les canaux à ondes métriques (VHF), sur tous les canaux de la bande moyenne et sur au moins 9 canaux de la bande supérieure en provenance d'une entreprise de réception de radiodiffusion afin d'augmenter la capacité en canaux d'un appareil de radiocommunications qui est conforme à l'alinéa *a*).

(2) Un appareil de radiocommunications décrit au paragraphe (1) est, jusqu'au 1er juillet 1980, réputé conforme aux exigences de l'alinéa (1)*a*) s'il peut recevoir les émissions de radiodiffusion télévisuelle en provenance d'une entreprise de réception de radiodiffusion, sur un nombre de canaux de la bande moyenne ou de la bande supérieure inférieur au nombre maximal de canaux de ces bandes.

(3) Un appareil de radiocommunications visé au paragraphe (1) est, jusqu'au 1er juillet 1980, réputé conforme aux exigences de l'alinéa (1)*b*) s'il ne peut recevoir des émissions de radiodiffusion télévisuelle en provenance d'une entreprise d'émission de radiodiffusion et d'une entreprise de réception de radiodiffusion que sur tous les canaux à ondes métriques (VHF) et sur tous les canaux à ondes décimétriques (UHF) et, en provenance d'une entreprise de réception de radiodiffusion, que sur un nombre de canaux de la bande moyenne et de la bande supérieure inférieur au nombre maximal de canaux de ces bandes.

(4) Dans le présent article,

«canaux de la bande moyenne» désignent neuf canaux couramment identifiés par les lettres A, B, C, D, E, F, G, H et I, respectivement, qui ont été établis dans la bande de fréquences comprises entre 120 et 174 MHz;

«canaux de la bande supérieure» désignent quatorze canaux couramment identifiés par les lettres J, K, L, M, N, O, P,

M, N, O, P, Q, R, S, T, U, V and W, that are used in the frequency band from 216 MHz to 300 MHz;

"ultra high frequency channels or UHF" means the seventy channels commonly identified by the numerical designators from 14 to 83, that are used in the frequency band from 470 MHz to 890 MHz;

"very high frequency channels or VHF" means the twelve channels, commonly identified by the numerical designators from 2 to 13, that are used in the frequency bands from 54 MHz to 72 MHz, 76 MHz to 88 MHz and 174 MHz to 216 MHz.

Additional Technical Requirements Applying to Standard Television Apparatus

135. (1) Every radio apparatus that conforms to the requirements of paragraph 134(1)(*a*) shall, in addition to those requirements, conform to the following technical requirements:

(*a*) the noise figure for the radio apparatus shall,

(i) for channel numbers 2 to 13, not exceed 10 dB, and

(ii) for channel numbers 14 to 83,

(A) if manufactured in or imported into Canada on or before October 1, 1981, not exceed 18 dB,

(B) if manufactured in or imported into Canada after October 1, 1981, and before October 2, 1984, not exceed 14 dB, or

(C) if manufactured in or imported into Canada after October 1, 1984, not exceed 12 dB;

(*b*) if the viewable area of the television screen exceeds 170 cm², the radio apparatus shall be equipped with preset selection;

(*c*) the radio apparatus shall be equipped with a channel selection system that has a UHF channel selector or tuning mechanism comparable to its VHF channel selector or tuning mechanism with respect to ease of operation and, in particular, with respect to location, accessibility and readability for channel identification purposes;

(*d*) without limiting the generality of paragraph (*c*), where preset selection is provided, a channel selection system described in that paragraph may be

(i) a dual knob channel selection system

(A) whose VHF channel selector or tuning mechanism is equipped with a numerical readout for each of the 12 channel numbers,

(B) whose UHF channel selector or tuning mechanism is equipped with a numerical readout for each of the 70 channel numbers or, alternatively, for at least every other one of the 70 channel numbers with a mark to indicate each channel that is not displayed numerically, and

(C) with which it is possible to change from the reception of VHF channels to the reception of UHF channels and vice versa by using either a clearly labelled position on the VHF channel indicator or a clearly labelled switch,

Q, R, S, T, U, V et W, respectivement, qui ont été établis dans la bande de fréquences comprises entre 216 et 300 MHz;

«canaux à ondes décimétriques (UHF)» désignent soixante-dix canaux, couramment identifiés par les chiffres 14 à 83 inclusivement, qui ont été établis dans la bande de fréquences comprise entre 470 et 890 MHz; et

«canaux à ondes métriques (VHF)» désignent douze canaux couramment désignés par les chiffres 2 à 13 inclusivement, qui ont été établis dans les bandes de fréquences comprises entre 54 et 72 MHz, 76 et 88 MHz et 174 et 216 MHz.

Autres exigences techniques applicables aux téléviseurs ordinaires

135. (1) Les appareils de radiocommunications qui sont conformes aux exigences de l'alinéa 134(1)*a*) doivent également être conformes aux exigences techniques suivantes:

a) le facteur de bruit de l'appareil ne peut excéder,

(i) pour les canaux 2 à 13, 10 dB; et

(ii) pour les canaux 14 à 83,

(A) 18 dB, s'ils ont été importés ou fabriqués au Canada le ou avant le 1er octobre 1981,

(B) 14 dB, s'ils l'ont été entre le 1er octobre 1981 et le 2 octobre 1984, ou

(C) 12 dB, s'ils l'ont été après le 1er octobre 1984;

b) les téléviseurs ordinaires dotés d'un écran possédant une surface de vision de plus de 170 cm² doivent être munis d'un dispositif de sélection préréglée des canaux;

c) les téléviseurs ordinaires doivent être munis d'un système de sélection des canaux comportant un sélecteur de canaux ou un dispositif de réglage UHF dont la facilité de fonctionnement, et plus particulièrement la position, l'accessibilité et la lisibilité aux fins d'identification des canaux sont comparables à celles de leur sélecteur de canaux ou dispositif de réglage VHF;

d) sans limiter la généralité de l'alinéa *c*), lorsque la sélection préréglée est fournie, un système de sélection des canaux visé audit alinéa peut être

(i) un système de sélection des canaux à deux boutons

(A) dont le sélecteur de canaux ou dispositif d'accord VHF est doté d'un indicateur affichant le numéro de chacun des 12 canaux,

(B) dont le sélecteur de canaux ou dispositif d'accord UHF est doté d'un indicateur affichant le numéro de chacun des 70 canaux ou affichant alternativement un numéro et une marque indiquant chaque canal qui n'est pas affiché numériquement, et

(C) au moyen duquel il est possible de passer de la réception des canaux VHF à la réception de canaux UHF, et vice versa, soit en plaçant le sélecteur de canaux VHF à une position clairement indiquée, soit en actionnant un commutateur clairement identifié,

(ii) un système de sélection des canaux à bouton unique, doté d'un indicateur affichant le numéro de chacun des 82 canaux, ou affichant alternativement un

(ii) a single knob channel selection system that has a numerical readout for each of the 82 channel numbers or, alternatively, for at least every other one of the 82 channel numbers with a mark to indicate each channel that is not displayed numerically, or

(iii) a push button or other type of channel selection system that has

(A) at least twelve positions, each of which can be preset using manual selection to receive any VHF or UHF channel, or

(B) twelve positions that are preset for the selection of very high frequency channels and at least six additional positions that can be preset using manual selection to receive any ultra high frequency channel, and

(C) a means whereby the channel selected for reception can be clearly and easily identified;

(*e*) every channel selection system described in paragraph (*c*) that has preset selection shall be capable of eliminating the need for routine fine tuning by having a reset accuracy that, regardless of the channel selected or the order of channel selection,

(i) is within the pull-in range of the automatic frequency control circuitry, or

(ii) where automatic frequency control circuitry is not provided or is insufficient to ensure a pull-in capability on every channel, is such that

(A) the average of all deviations from the correct frequency on channel numbers 14 to 83 does not exceed 0.75 MHz, and

(B) the deviation from correct frequency on any of channel numbers 14 to 83 does not exceed 2 MHz;

(*f*) where a radio apparatus is capable of receiving television broadcasting on mid-band channels or super-band channels, subparagraph 136(*a*)(viii) is applicable; and

(*g*) every radio apparatus that is manufactured in or imported into Canada after July 1, 1979, and is equipped with a VHF antenna shall,

(i) if the antenna is affixed to the apparatus and connected to the VHF antenna terminals, be equipped with a UHF antenna that is

(A) affixed to the apparatus by connection to the UHF antenna terminals or otherwise,

(B) connected to the UHF antenna terminals, and

(C) designed for the reception of all UHF channels,

(ii) if the VHF antenna is not affixed to the apparatus, be equipped with a UHF antenna that is

(A) capable of being connected to the UHF antenna terminals, and

(B) designed for the reception of all UHF channels, or

(iii) if the antennas specified in subparagraph (i) or (ii) are combined in a common VHF-UHF antenna, that antenna shall be designed for the reception of all VHF and UHF channels.

(2) In this section, "dual knob" means two concentric or separate knobs, one of which controls the VHF channel

numéro et une marque indiquant chaque canal qui n'est pas affiché numériquement, ou

(iii) un système à boutons-poussoirs ou autre genre de système de sélection des canaux

(A) ayant au moins douze positions, chacune pouvant être préréglées par sélection manuelle pour recevoir n'importe quel canal VHF ou UHF, ou

(B) ayant douze positions qui sont préréglées pour la sélection des canaux VHF et au moins six autres positions qui peuvent être préréglées par sélection manuelle pour recevoir n'importe quel canal UHF, et

(C) permettant d'identifier clairement et aisément le canal de réception choisi;

e) les systèmes de sélection des canaux visés à l'alinéa *c*) qui sont munis d'un dispositif de sélection préréglée doivent pouvoir éliminer la nécessité d'effectuer le réglage précis habituel, en ayant une tolérance de réglage qui est, peu importe le canal choisi ou l'ordre de sélection des canaux,

(i) en deçà de la plage d'enclenchement du circuit de commande automatique de la fréquence, ou

(ii) lorsqu'un circuit de commande automatique de la fréquence n'est pas fourni ou qu'il est insuffisant pour assurer une capacité d'enclenchement sur tous les canaux, telle

(A) que la moyenne de toutes les déviations par rapport à la fréquence exacte sur les canaux 14 à 83 inclusivement ne dépasse pas 0,75 MHz, et

(B) qu'aucune déviation d'un canal particulier de cette gamme ne dépasse 2 MHz;

f) lorsqu'un appareil peut également recevoir des émissions de radiodiffusion télévisuelle sur les canaux des bandes moyenne et supérieure, le sous-alinéa 136*a*)(viii) s'applique; et

g) les appareils fabriqués ou importés au Canada après le 1er juillet 1979 et qui sont munis d'une antenne VHF doivent,

(i) si l'antenne est fixée à l'appareil et raccordée aux bornes d'antenne VHF, être munis d'une antenne VHF qui est

(A) fixée à l'appareil par raccordement aux bornes d'antenne UHF,

(B) raccordée aux bornes d'antenne UHF, et

(C) conçue pour capter tous les signaux UHF;

(ii) si l'antenne VHF n'est pas fixée à l'appareil, être munis d'une antenne UHF qui

(A) peut être raccordée aux bornes d'antenne UHF, et

(B) est conçue pour capter tous les canaux UHF, ou

(iii) si les antennes visées aux alinéas (i) ou (ii) sont combinées en une antenne VHF-UHF unique, cette dernière doit être conçue pour capter tous les canaux VHF et UHF.

(2) Dans le présent article, l'expression «à deux boutons» désigne deux boutons concentriques ou distincts dont l'un

selector or tuning mechanism and the other the UHF channel selector or tuning mechanism.

Additional Technical Requirements Applying to Cable Compatible Television Apparatus

136. Every radio apparatus that conforms to the requirements of paragraph 134(1)(*b*) shall, in addition to those requirements, conform to the following technical requirements:

(*a*) when the apparatus is adjusted to receive signals from a broadcasting receiving undertaking, it shall be equipped and have characteristics as follows:

(i) the channel selection system shall have

(A) at least eighteen positions, each of which can be preset without the use of tools to receive any VHF, mid-band, or super-band channel, and

(B) manual selection for any such channel that has not been preselected,

(ii) the fine tuning control or automatic frequency control shall provide sufficient adjustment of the apparatus over a range of frequencies to ensure

(A) for the very high frequency channels, reception of input signals whose visual carrier frequencies are offset by up to ±0.55 MHz from their nominal visual carrier frequencies, and

(B) for the mid-band channels and super-band channels, reception of input signals whose visual carrier frequencies are offset by up to −1.31 MHz from their nominal visual carrier frequencies,

(iii) the noise figure for any channel shall not exceed 10 dB except that, where the circuitry or configuration of the apparatus involves a double conversion of input signals, the noise figure may exceed 10 dB but shall not exceed 13 dB,

(iv) the apparatus shall be so shielded that there is no noticeable evidence of interference when

(A) the apparatus is in the field of a co-channel synchronous television signal having a measured field strength of 100 millivolts per metre, and

(B) the signal level of the desired input signal is adjusted to 1 millivolt (0 dBmV) at the input terminals of the apparatus,

(v) the signal input shall be through a 75 ohm impedance coaxial connector,

(vi) there shall be no overloading of the apparatus at any signal level below 5 millivolts (14 dBmV),

(vii) the image rejection shall be at least 60 dB for any image frequency below 300 MHz,

(viii) the level of any local oscillator signal and of any signal of an undesired or spurious nature, generated within the apparatus and arriving at the cable input terminals of the apparatus,

(A) in the frequency range above 5 MHz and below 54 MHz, shall not exceed −50 dBmV,

(B) in the frequency range from 54 MHz to 300 MHz, shall not

commande le sélecteur de canaux ou dispositif de réglage VHF, et l'autre, le sélecteur de canaux ou dispositif de réglage UHF.

Autres exigences techniques applicables aux téléviseurs câblocompatibles

136. Les appareils de radiocommunications qui sont conformes aux exigences de l'alinéa 134(1)*b*) doivent également être conformes aux exigences techniques suivantes:

a) les appareils qui sont réglés pour capter les signaux d'une entreprise de réception de radiodiffusion doivent être équipés comme suit et posséder les caractéristiques suivantes:

(i) le système de sélection des canaux doit comporter

(A) au moins 18 positions, chacune d'entre elles pouvant être préréglée sans outil pour recevoir n'importe quel canal VHF ou canal de la bande moyenne ou de la bande supérieure, et

(B) la sélection manuelle de tout canal qu'il n'est pas possible de recevoir au moyen de la sélection préréglée,

(ii) la commande de réglage précis ou la commande automatique de fréquence doit permettre un réglage suffisant de l'appareil sur une gamme de fréquences qui,

(A) pour les canaux VHF, permet la réception des signaux d'entrée dont la porteuse vision est décalée de ±0,55 MHz par rapport à la porteuse vision nominale, et

(B) pour les canaux de la bande moyenne et de la bande supérieure, permet la réception de signaux d'entrée dont la porteuse vision est décalée de −1,31 MHz au plus par rapport à leur porteuse vision nominale respective,

(iii) le facteur de bruit, pour tout canal, ne doit pas excéder 10 dB; si les circuits ou la configuration de l'appareil nécessitent la conversion double des signaux d'entrée, le facteur de bruit peut se situer entre 10 et 13 dB au maximum,

(iv) l'appareil doit être blindé de sorte qu'il n'y ait aucun brouillage perceptible lorsque

(A) l'appareil se trouve dans le champ d'un signal de télévision synchrone d'une station utilisant le même canal et dont l'intensité de champ mesurée est de 100 millivolts par mètre, et

(B) le niveau du signal d'entrée désiré est réglé à 1 millivolt (0 dBmV) aux bornes d'entrée de l'appareil,

(v) l'entrée du signal doit se faire par câble coaxial de 75 ohms d'impédance,

(vi) l'appareil ne doit pas être surchargé lorsqu'un niveau de signal quelconque est inférieur à 5 millivolts (14 dBmV),

(vii) la réjection de la fréquence image doit être d'au moins 60 dB pour toutes les fréquences images inférieures à 300 MHz,

(viii) le niveau de tout signal de l'oscillateur local ou de tout signal non désiré ou non essentiel, produit dans

(I) on or after July 1, 1979 exceed −20 dBmV,

(II) on or after July 1, 1981 exceed −26 dBmV,

(III) on or after July 1, 1983 exceed −31 dBmV, and

(C) in the frequency range above 300 MHz and below 1000 MHz, shall not exceed −10 dBmV; and

(*b*) when the apparatus is adjusted to receive signals from a broadcasting transmitting undertaking it shall conform to the requirements set out in section 135 except that the noise figure for channel numbers 2 to 13 shall not exceed 10 dB unless the circuitry or configuration of the apparatus involves a double conversion of input signals in which case the noise figure may exceed 10 dB but shall not exceed 13 dB.

Additional Technical Requirements Applying to Cable Converting Television Apparatus

137. (1) Every radio apparatus that conforms to the requirements of paragraph 134(1)(*c*) shall, in addition to those requirements, conform to the following technical requirements:

(*a*) every converter that converts the received television broadcasting signals to a particular output channel in the very high frequency band for delivery of signals to a radio apparatus that conforms to the requirements of paragraph 134(1)(*a*) shall be equipped with

(i) a channel selection system providing preset selection for at least eighteen channels and manual selection for any channel that has not been preselected, and

(ii) a fine tuning control, an automatic frequency control, or an internally adjustable control for each channel received or any combination of such controls that will provide sufficient adjustment of the converter over a range of frequencies to ensure,

(A) for the very high frequency channels, the reception of input signals whose visual carrier frequencies are offset by up to ±0.55 MHz from their nominal visual carrier frequencies, and

(B) for the mid-band channels and super-band channels, the reception of input signals whose visual carrier frequencies are offset by up to −1.31 MHz from their nominal visual carrier frequencies;

(*b*) every converter that converts the received television broadcasting signals as a block of input channels to an equivalent number of output channels for delivery of signals to a radio apparatus that conforms to the requirements of paragraph 134(1)(*a*) shall be equipped with a means whereby

l'appareil et acheminé aux bornes d'entrée du câble de l'appareil,

(A) dans la gamme des fréquences comprises entre 5 MHz et 54 MHz, limites exclues, doit être d'au plus −50 dBmV,

(B) dans la gamme des fréquences comprises entres 54 et 300 MHz doit être

(I) à compter du 1er juillet 1979, d'au plus −20 dBmV;

(II) à compter du 1er juillet 1981, d'au plus −26 dBmV,

(III) à compter du 1er juillet 1983, d'au plus −31 dBmV; et

(C) dans la gamme des fréquences comprises entre 300 MHz et 1 000 MHz, limites exclues, doit être d'au plus −10 dBmV; et

b) les appareils réglés de façon à capter les signaux d'une entreprise d'émission de radiodiffusion doivent être conformes aux exigences de l'article 135, sauf que le facteur de bruit pour les canaux 2 à 13 ne doit pas dépasser 10 dB, à moins que les circuits ou la configuration de l'appareil nécessitent la conversion double des signaux d'entrée, le facteur de bruit pouvant alors se situer entre 10 dB et 13 dB au maximum.

Autres exigences techniques applicables au câbloconvertisseur

137. (1) Les appareils de radiocommunications qui sont conformes aux exigences de l'alinéa 134(1)*c*) doivent également être conformes aux exigences techniques suivantes:

a) les convertisseurs qui convertissent les signaux de radiodiffusion télévisuelle reçus à un canal de sortie particulier de la bande de fréquences métriques (VHF) afin d'acheminer les signaux à un appareil de télévision ordinaire conforme à l'alinéa 134(1)*a*) doivent être équipés

(i) d'un système de sélection des canaux permettant la sélection préréglée d'au moins 18 canaux et la sélection manuelle de tout canal qu'il n'est pas possible de capter par sélection préréglée, et

(ii) une commande de réglage précis, une commande automatique de fréquence ou une commande interne pouvant être réglée pour chaque canal reçu, ou une combinaison de ces commandes doivent assurer un réglage suffisant du convertisseur sur une gamme de fréquences afin d'assurer,

(A) pour les canaux VHF, la réception des signaux d'entrée dont la porteuse vision est décalée de ± 0,55 MHz par rapport à la porteuse vision nominale, et

(B) pour les canaux de la bande moyenne et de la bande supérieure, la réception des signaux d'entrée dont la porteuse vision est décalée de −1,31 MHz par rapport à la porteuse vision nominale respective de ces signaux;

b) les convertisseurs qui convertissent les signaux de radiodiffusion télévisuelle reçus sur un ensemble de canaux d'entrée en un nombre équivalent de canaux de sortie afin de les transmettre à un téléviseur ordinaire

(i) the output channels can be shifted sufficiently to avoid interference from local television stations, and

(ii) the received signals on channel numbers 5 and 6 in the very high frequency band can be bypassed around the conversion circuits for direct delivery to the apparatus; and

(c) every converter to which paragraph (*a*) or (*b*) is applicable shall have the following characteristics:

(i) the frequency stability obtained with any line voltage in the range from 104 to 127 volts and measured, after twelve hours of warm-up operation, over a period of three hours shall be such that the visual carrier frequency of signals received via any input channel, converted and delivered to a radio apparatus that conforms to the requirements of paragraph 134(1)(*a*) via an output channel will,

(A) if the converter is equipped with a fine tuning control, be maintained within 450 kHz of the nominal carrier frequency for the output channel, or

(B) if the converter is not equipped with a fine tuning control, be maintained within 250 kHz of the nominal carrier frequency for the output channel,

(ii) the gain characteristics shall be such that,

(A) for a converter having automatic gain control circuitry, the output signal levels are not less than 1 millivolt (0 dBmV) and not more than 5 millivolts (14 dBmV), or

(B) for a converter not having automatic gain control circuitry, the conversion gain is not less than 0 dB nor more than 7 dB,

(iii) the noise figure for any channel shall not exceed 13 dB,

(iv) when the converter is exposed to a radiation field having a measured field strength of 1 V/m at any frequency in the range from 1.6 MHz to 300 MHz, the shielding shall be sufficient to ensure that no voltage attributable to the field exceeds 10 microvolts (−40 dBmV) as measured at the output terminals of the converter,

(v) the signal input shall be through a 75 ohm impedance coaxial connector,

(vi) with no input signal present, the level of any local oscillator signal and of any signal of an undesired or spurious nature generated within the converter and arriving at the cable input terminals of the converter,

(A) in the frequency range above 5 MHz and below 30 MHz, shall not exceed −50 dBmV,

(B) in the frequency range from 30 MHz to below 54 MHz, shall not exceed −35 dBmV,

(C) in the frequency range from 54 MHz to 300 MHz, shall not exceed −31 dBmV, and

(D) in the frequency range above 300 MHz and below 1000 MHz, shall not exceed −10 dBmV,

(vii) with input signals present, any spurious signal generated within the converter and appearing at the input terminals shall be at least 25 dB below input signal levels,

conforme à l'alinéa 134(1)*a*) doivent être équipés de mécanismes permettant de

(i) déplacer les canaux de sortie suffisamment pour éviter le brouillage par les stations de télévision locales; et

(ii) dévier les signaux reçus sur les canaux cinq et six de la bande à ondes métriques (VHF) au moyen de circuits de conversion, afin de transmettre les signaux directement à un téléviseur ordinaire; et

c) les convertisseurs visés par les alinéas *a*) ou *b*) doivent posséder les caractéristiques suivantes:

(i) la stabilité de fréquence obtenue à l'une ou l'autre des tensions de la ligne comprises entre 104 et 127 volts et mesurée sur une période de trois heures, après douze heures de réchauffement, doit être telle que la fréquence de la porteuse vision des signaux reçus par l'intermédiaire d'un canal d'entrée quelconque, puis convertis et transmis à un téléviseur ordinaire conforme à l'alinéa 134(1)*a*) doit,

(A) si le convertisseur est muni d'un dispositif de réglage précis, être maintenue en deçà de 450 kHz de la porteuse nominale pour ce qui est du canal de sortie, ou

(B) si le convertisseur n'est pas muni d'un dispositif de réglage précis, être maintenue en deçà de 250 kHz de la porteuse nominale pour ce qui est du canal de sortie,

(ii) les caractéristiques du gain doivent être telles que

(A) dans le cas d'un convertisseur doté de circuits de commande automatique de gain, les niveaux du signal de sortie soient d'au moins 1 millivolt (0 dBmV) et d'au plus 5 millivolts (14 dBmV), ou

(B) dans le cas d'un convertisseur qui ne possède pas de circuits de commande automatique de gain, le gain de conversion soit d'au moins 0 dB et d'au plus 7 dB,

(iii) le facteur de bruit pour le convertisseur doit être d'au plus 13 dB,

(iv) lorsque le convertisseur est exposé à un champ de rayonnement dont l'intensité mesurée est de 1 V/m pour toute fréquence comprise entre 1,6 et 300 MHz, le blindage doit être suffisant pour assurer qu'aucune tension attribuable au champ est supérieure à 10 microvolts (−40 dBmV), telle qu'elle est mesurée aux bornes de sortie du convertisseur,

(v) l'entrée du signal doit se faire par câble coaxial de 75 ohms d'impédance,

(vi) en l'absence d'un signal d'entrée, le niveau de tout signal de l'oscillateur local et de tout signal non désiré ou non essentiel, produit dans le convertisseur et acheminé aux bornes d'entrée du câble du convertisseur,

(A) dans la gamme des fréquences comprises entre 5 MHz et 30 MHz, limites exclues, doit être d'au plus −50 dBmV,

(B) dans la gamme des fréquences comprises entre 30 MHz, inclusivement, et 54 MHz, exclusivement, doit être d'au plus −35 dBmV,

(viii) the field strength of any emission emanating from the converter shall not exceed

(A) 20 uV/m at a distance of 10 metres in the frequency range above 5 MHz and below 54 MHz,

(B) 20 uV/m at a distance of 3 metres in the frequency range from 54 MHz to below 108 MHz,

(C) 10 uV/m at a distance of 3 metres in the frequency range from 108 MHz to below 174 MHz,

(D) 20 uV/m at a distance of 3 metres in the frequency range from 174 MHz to below 216 MHz,

(E) 20 uV/m at a distance of 10 metres in the frequency range from 216 MHz to below 300 MHz, and

(F) 70 uV/m at a distance of 10 metres in the frequency range from 300 MHz to 1000 MHz, and

(ix) the level of any spurious signal produced by the converter and falling within the pass-band of any output channel shall not, in the worst case, be less than 60 dB below the signal level of the output visual carrier, as measured separately for each input channel where signals at the same level in the range from 1 millivolt (0 dBmV) to 5 millivolts (14 dBmV), are supplied to all inputs except the one under test.

(2) In this section, "converter" means a cable converting television apparatus."

(C) dans la gamme des fréquences comprises entre 54 MHz et 300 MHz, limites incluses, doit être d'au plus −31 dBmV, et

(D) dans la gamme des fréquences comprises entre 300 MHz et 1 000 MHz, limites exclues, doit être d'au plus −10 dBmV,

(vii) en présence de signaux d'entrée, tout signal non essentiel, produit par le convertisseur, qui apparaît aux bornes d'entrée doit être d'au moins 25 dB inférieur aux niveaux du signal d'entrée,

(viii) l'intensité de champ de toute émission en provenance du convertisseur doit être d'au plus

(A) 20 uV/m, à une distance de 10 mètres, dans la gamme des fréquences comprises entre 5 MHz et 54 MHz, limites exclues;

(B) 20 uV/m, à une distance de trois mètres, dans la gamme des fréquences comprises entre 54 MHz inclusivement et 108 MHz exclusivement,

(C) 10 uV/m, à une distance de trois mètres, dans la gamme des fréquences comprises entre 108 MHz inclusivement et 174 MHz exclusivement,

(D) 20 uV/m, à une distance de trois mètres, dans la gamme des fréquences comprises entre 174 MHz inclusivement et 216 MHz exclusivement,

(E) 20 uV/m, à une distance de dix mètres, dans la gamme des fréquences comprises entre 216 MHz inclusivement et 300 MHz exclusivement, et

(F) 70 uV/m, à une distance de dix mètres, dans la gamme des fréquences comprises entre 300 MHz et 1 000 MHz, limites incluses, et

(ix) le niveau de tout signal non essentiel produit par le convertisseur et qui tombe en deçà de la bande passante de quelque canal de sortie que ce soit, doit, même dans les cas les plus graves, être inférieur au niveau du signal de la porteuse vision de sortie d'au moins 60 dB, lorsqu'il est mesuré séparément pour chaque canal d'entrée, lorsque des signaux d'entrée du même niveau, de 0 à 14 dBmV (de 1 à 5 millivolts), sont fournis à toutes les bornes d'entrée, exception faite de celle qui est à l'essai.»

(2) Dans le présent article, «convertisseur» désigne un câbloconvertisseur.

QUEEN'S PRINTER FOR CANADA, OTTAWA, 1978 IMPRIMEUR DE LA REINE POUR LE CANADA, OTTAWA, 1978

Registration
SOR/78-779 13 October, 1978

RADIO ACT

General Radio Regulations, Part I, amendment

P.C. 1978-3143 12 October, 1978

His Excellency the Governor General in Council, on the recommendation of the Minister of Communications, pursuant to subparagraph 6(1)(*b*)(ii) of the Radio Act, is pleased hereby to amend the General Radio Regulations, Part I made by Order in Council P.C. 1968-1321 of 12th July, 1968[1], as amended[2], in accordance with the schedule hereto.

SCHEDULE

1. The heading preceding section 22 and section 22 of the *General Radio Regulations, Part I* are revoked and the following substituted therefor:

"SALE OF BROADCASTING RECEIVING APPARATUS

Prohibition

22. (1) No person shall offer for sale for use in Canada radio apparatus of the class of radio apparatus that is capable of receiving television broadcasting unless it conforms to the technical requirements established in relation to that class of radio apparatus by the *General Radio Regulations, Part II*.

(2) Subsection (1) does not apply to radio apparatus that

(*a*) is intended for and capable of recording television broadcasting; or

(*b*) is intended and used for a purpose other than home entertainment.

(3) Any person who violates subsection (1) is liable on summary conviction to a fine not exceeding one hundred dollars for each day during which such violation continues.

Regulation

23. (1) Before offering for sale for use in Canada any radio apparatus of the class described in subsection 22(1), the manufacturer or importer shall ensure that the apparatus or a production sample or other representative unit of that type of apparatus is tested in accordance with a procedure approved by the Minister to determine whether or not it conforms to the applicable technical requirements established by the *General Radio Regulations, Part II*.

[1] SOR/68-316, *Canada Gazette* Part II, Vol. 102, No. 14, July 24, 1968
[2] SOR/77-1063, *Canada Gazette* Part II, Vol. 111, No. 23, December 14, 1977

Enregistrement
DORS/78-779 13 octobre 1978

LOI SUR LA RADIO

Règlement général sur la radio, Partie I—Modification

C.P. 1978-3143 12 octobre 1978

Sur avis conforme du ministre des Communications et en vertu du sous-alinéa 6(1)*b*)(ii) de la Loi sur la radio, il plaît à Son Excellence le Gouverneur général en conseil de modifier, conformément à l'annexe ci-après, le Règlement général sur la radio, Partie I établi par le décret C.P. 1968-1321 du 12 juillet 1968[1], dans sa forme modifiée[2].

ANNEXE

1. L'article 22 du *Règlement général sur la radio, Partie I* et la rubrique le précédant sont ainsi remplacés:

«VENTE D'APPAREILS DE RÉCEPTION DE RADIODIFFUSION

Interdiction

22. (1) Il est interdit d'offrir en vente, pour utilisation au Canada, un appareil de radiocommunication pouvant recevoir des émissions de radiodiffusion télévisuelle, sauf s'il répond aux exigences techniques établies pour sa classe dans le *Règlement général sur la radio, Partie II*.

(2) Le paragraphe (1) ne vise pas un appareil de radiocommunication

a) construit pour enregistrer des émissions de radiodiffusion télévisuelle ou

b) destiné et utilisé à des fins autres que le divertissement au foyer.

(3) Quiconque enfreint le paragraphe (1) est passible, sur déclaration sommaire de culpabilité, d'une amende maximale de $100 pour chaque jour d'infraction.

Règlement

23. (1) Avant d'offrir en vente, pour utilisation au Canada, un appareil de radiocommunication visé au paragraphe 22(1), le fabricant ou l'importateur doit s'assurer que cet appareil ou un échantillon représentatif ait été soumis à des essais approuvés par le Ministre, pour déterminer s'il répond aux exigences techniques qui lui sont applicables selon le *Règlement général sur la radio, Partie II*.

[1] DORS/68-316, *Gazette du Canada* Partie II, Vol. 102, nº 14, 24 juillet 1968
[2] DORS/77-1063, *Gazette du Canada* Partie II, Vol. 111, nº 23, 14 décembre 1977

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(2) Every manufacturer or importer referred to in subsection (1) shall

(*a*) forward to the Director, Broadcasting Regulations Branch Telecommunication Regulatory Service of the Department of Communications, the type number and manufacturer's specifications for each type of apparatus tested as required by subsection (1) and offered for sale for use in Canada; and

(*b*) keep and make available to the Minister on demand for a period of five years a copy of all test data obtained as a result of the tests carried out as required by subsection (1).

(3) Every manufacturer or importer referred to in subsection (1) shall ensure that each unit of a type offered for sale by him pursuant to that subsection, whether or not the unit is equipped with inputs and outputs for connecting auxiliary equipment or apparatus, bears, in a location convenient for inspection, a permanent label or marking containing, in both official languages, the following statement:

(*a*) where paragraph 134(1)(*a*) of the *General Radio Regulations, Part II* is applicable to the unit, the statement "Standard Television Apparatus Canada GRR Part II";

(*b*) where paragraph 134(1)(*b*) of the *General Radio Regulations, Part II* is applicable to the unit, the statement "Cable Compatible Television Apparatus Canada GRR Part II"; or

(*c*) where paragraph 134(1)(*c*) of the *General Radio Regulations, Part II* is applicable to the unit, the statement "Cable Converting Television Apparatus Canada GRR Part II".

(4) For the purpose of this section, "type" means a unit that, as one of many similar units, has been manufactured in accordance with a particular electronic design and physical pattern, subject to such improvements or minor changes as, while not degrading performance, may be necessary to satisfy marketing requirements.

(5) This section shall come into force on July 1, 1979."

(2) Ces fabricants et importateurs doivent

a) envoyer au Directeur, Direction de la réglementation de la radiodiffusion, Service de la réglementation des télécommunications du ministère des Communications, le numéro du modèle et les spécifications techniques du fabricant, pour chaque modèle d'appareil soumis aux essais selon le paragraphe (1) et

b) conserver pendant cinq ans tous les résultats des essais ainsi effectués et les mettre à la disposition du Ministre, sur demande.

(3) Ces fabricants et importateurs doivent, sur chaque appareil visé au paragraphe (1), qu'il soit ou non muni d'entrées ou de sorties permettant d'y raccorder du matériel ou un équipement auxiliaire, apposer de façon permanente, à un endroit facile d'accès et dans les deux langues officielles, l'inscription suivante:

a) s'il s'agit d'un appareil visé par l'alinéa 134(1)*a*) du *Règlement général sur la radio, Partie II*: «Téléviseur ordinaire, RGR, Partie II, Canada»;

b) s'il s'agit d'un appareil visé par l'alinéa 134(1)*b*) du *Règlement général sur la radio, Partie II*: «Téléviseur câblocompatible, RGR, Partie II, Canada»; ou

c) s'il s'agit d'un appareil visé par l'alinéa 134(1)*c*) du *Règlement général sur la radio, Partie II*: «Câbloconvertisseur, RGR, Partie II, Canada».

(4) Aux fins de cet article, l'expression «modèle» désigne un appareil selon lequel d'autres appareils peuvent être reproduits et qui a été fabriqué selon une conception électronique particulière et un diagramme donné, exception faite toutefois d'améliorations et de modifications minimes qui, sans diminuer son rendement, peuvent s'avérer nécessaires pour répondre aux exigences de sa mise en marché.

(5) Cet article entre en vigueur le 1er juillet 1979.»

QUEEN'S PRINTER FOR CANADA, OTTAWA, 1978 IMPRIMEUR DE LA REINE POUR LE CANADA, OTTAWA, 1978

Mr. VAN DEERLIN. We have as the balance of our hearing today a panel of four who will begin, after a brief recess, at 11:30.

[Brief recess.]

Mr. VAN DEERLIN. We will resume with a panel made up of NAB observers of the communications and social scene.

We are pleased to have the distinguished board chairman of the NAB, Mr. Donald Thurston, who in real life is himself a prominent radio broadcaster in Massachusetts; Mr. Thomas Bolger, the chairman of the association's television board of directors; Mr. Walter May, chairman of the radio board of directors; and Mr. Vincent Wasilewski, president of NAB.

Welcome to the subcommittee.

STATEMENTS OF DONALD A. THURSTON, CHAIRMAN, NATIONAL ASSOCIATION OF BROADCASTERS; THOMAS BOLGER, CHAIRMAN, TELEVISION BOARD; AND WALTER E. MAY, CHAIRMAN, RADIO BOARD, ACCOMPANIED BY VINCENT WASILEWSKI, PRESIDENT, AND ERWIN KRASNOW, GENERAL COUNSEL, SENIOR VICE PRESIDENT

Mr. WASILEWSKI. Thank you, Mr. Chairman.

Mr. Chairman, each of these gentlemen have brief comments to make with respect to your bill. If it is agreeable with you, Mr. Thurston will deal with some of the broader issues, Mr. May more specifically with radio matters, and Mr. Bolger with television matters.

I would like to present first, if it is agreeable, Mr. Donald Thurston, the chairman of the board of the National Association of Broadcasters.

Mr. VAN DEERLIN. Mr. Thurston.

Mr. THURSTON. Thank you very much, Mr. Chairman. It is nice to be here again. Thank you very much for the opportunity.

I am happy to be able to testify again, this time regarding H.R. 3333. Certainly this new version of the rewrite of the Communications Act demonstrates again the great amount of hard work that has characterized this project since you began. I want to take this opportunity to thank you and your colleagues for the many hours you have spent in improving and redrafting this bill.

Now that the hearing process is coming to an end, I will be brief and succinct with some of my comments and will be as helpful as possible.

First let me say to you that the National Association of Broadcasters does want legislation in the broadcasting area. We know that it might be very tempting to break out the common carrier sections of the bill and leave broadcasting to perhaps another day, but I sincerely hope that you will not follow that course.

While as an industry we still have our differences among ourselves on the various provisions of the bill, I still believe these matters can be treated in the context of a comprehensive version of the act and that it continues to be most worthwhile to continue to work out those differences.

In my perception, this is a golden opportunity to redress some of the problems of broadcast regulation, and we do not want to miss it, recognizing that it means making some very hard choices and treating radio and television problems in different manners.

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So please resist the temptation to cut us adrift. As a radio broadcaster I again salute you for the deregulation contained in the bill. It is most welcome and I believe it will mean more time and energy devoted by licensees to serving the community. Television could also look forward to greater deregulation, particularly after a 10-year period and two 5-year license terms.

While this is an improvement, we would continue to urge that television also be freed from the fairness doctrine and equal time requirements and other programing restrictions which exist today, and we would like to see TV freed of them upon enactment of the bill.

As you know, Mr. Chairman, I have also been very involved in working to expand opportunities for more broadcast service. At our winter board of directors meeting in January, the association unanimously—well almost, save one abstention—resolved to support efforts to provide maximum full-time local broadcast services to the communities of this Nation.

I believe our efforts in this regard coincide with provisions of H.R. 3333 with respect to the allocation and assignment of radio frequencies, and, I might add, to Congressman's Findley's very special efforts regarding daytime broadcasting.

I would urge you to use your influence to get the FCC to act on the NAB request for a joint Government-industry committee that could begin to study the consequences and rewards of new ways to provide full-time local broadcast facilities.

To this point today, the Commission has taken no action on that request, and it would seem to me this is one area where they could move ahead and put us leagues ahead not only of present practice, but also, in the event that your bill goes through as it is presently drafted, the study is going to be necessary and it might just as well get underway now.

Mr. VAN DEERLIN. How long has that request been on file?

Mr. THURSTON. Shortly after we got back in January. I think February it was filed. I can't give you the exact date. And we have a letter that says yes, it is a good idea, but nothing has happened. And the studies simply have to be made. We are not treating this issue of allocation with current data. There is a lot of emotionalism involved and we need some studies.

I might also add, hearing a discussion on standards this morning, that one of my personal disappointments with H.R. 3333 is that it does not have anything to say about a project that you and I have talked about before, and that is AM and FM all-channel radios.

One of the possible solutions of the maximum full-time local service in this country is a new kind of license that would involve the joint issuance of a joint AM–FM facility, especially with short-space FM or FM directional antennaes in order to solve the local service problem.

That, of course, would be made much more interesting were the receivers sold in this country required to carry both an AM and FM band. It is simple sometimes to look to 9 kilohertz as a worldwide solution, but nowhere else in the world do we experience the transmitter density that you do in the United States.

Last week in Chicago, some of us were with the consumer electronics show in the EIA talking with some representatives of the

CES concerning radio performance standards, believe it or not, and one of the things an RCA design engineer brought to our attention was the possibility of 9 kilohertz further reducing the standards of automobile radios because of the interference problems we are already experiencing because of transmitter density. So there are real concerns.

I also, while I am adlibbing, a departure from the prepared testimony, might want to agree that performance standards would be very difficult if they were legislated on a governmental basis. There is a joint committee on intersociety cooperation that works as a representative of all the technical industries, and that is how we hope to solve the radio standards problem.

It has worked very well with color television to date, and perhaps with a little more urging it can work to solve that problem.

With respect to the problems of common concern to the entire industry that are still in the bill, let me raise a few very briefly. The creation of a new spectrum tax continues to be an issue that seems to unite all broadcasters in opposition. The tax is billed as a fee on the use of the spectrum which will help to regulate the use of the spectrum and reduce the scarcity that now exists.

We do not believe that taking large sums of moneys from broadcasters is in any way going to encourage a more efficient use of the spectrum, unless, of course, the tax is so great that some broadcasters cannot continue to operate, thereby freeing up the frequencies.

We continue to contend that we pay our fair share of taxes at all levels of Government and that any additional payment beyond the cost of regulation is unjustified.

We would also have to object to the provisions in the rewrite that would allow public broadcasters to begin commercial advertising. It is our belief that the public system was created to provide the kind of alternative educational and cultural programing that many times does not attract large audiences and therefore is not attractive to the commercial broadcaster. We do not object to the competition as long as it is fair and everyone plays by the same rules. That would not be the case here.

Perhaps our most serious concerns about this legislation are the many words, phrases and concepts that are not yet well-defined in the legislation or in the staff explanation. We are not saying this in a critical way, since we understand the legislation at this stage many times suffers from this kind of infirmity. But it is essential that all broadcasters have a clear understanding of how any new communications act might affect them in the future. While we are very interested in achieving the deregulation that the bill promises, we are not ready to give up stability or certainty for it.

So we hope our questions can be resolved during the markup process, and that very tight few days that remain and that will follow at the end of these hearings. We believe that the intent of the sponsors of this legislation is good and that the emphasis on full and fair competition in the marketplace is appropriate, and we are quite willing to compete with all other media where competition is equitable.

For this reason, we offer our full support of the program consent provision included in your bill. My colleague Mr. Bolger will discuss it in more detail in a moment. I would like to just remind the

committee of an editorial that we don't see very often in the New York Times supporting broadcast issues.

I understand it has been submitted complete for your record, but I would like to just quote the first paragraph of that editorial:

> Just as they are finally winning rescision of rules that unfairly shielded broadcast television against their competition, cable television companies are grasping to hold on to some unfair protection for themselves. They are to be free at last to carry programs from every part of the country, but they do not want to pay the market price for such shows. They want to attract customers with high quality entertainment but without paying a fair royalty. That is not our idea of fair competition.

We agree with the sponsors of this bill that some action must be taken to make sure it is fair, and we support the program's current concept.

Again, thank you very much for the opportunity to appear before you. Of course, I would be happy to answer any questions.

Mr. COLLINS [presiding]. Thank you very much.

Mr. Bolger, are you the next member of the panel?

Mr. BOLGER. I can be, Congressman.

Mr. COLLINS. Go ahead.

STATEMENT OF THOMAS BOLGER

Mr. BOLGER. My name is Tom Bolger. I am chairman of the television board of directors of the National Association of Broadcasters. I am also president of a UHF station in Madison, Wisc., WMTV.

I am here today to comment on the portions of H.R. 3333 that pertain to the television industry.

In general, Congressman, I think most television broadcasters find the provisions of H.R. 3333 to be much improved over the earlier version. We appreciate the sponsors' attempt to further deregulate our industry and allow us to spend more of our efforts on improving services to our communities. However, since I have a limited time to speak this day, I want to concentrate on several areas that I believe are some of the most critical to my industry.

As in H.R. 13015, the new bill totally deregulates cable television. Last year I expressed great concern over the treatment of cable since I felt that cable with no Federal regulation and the advantage of a compulsory license fee would have a tremendous competitive advantage in the marketplace as compared to television broadcasters who must pay full marketplace prices for their programing.

I believe the inclusion of program consent in H.R. 3333 would go a long way toward resolving the fears of last year and I support the sponsors' decision to include it in this bill.

Broadcasters are not afraid of cable competition if we are placed on the same footing and left to provide service to our communities in our own ways. But the competition must be fair. Let the viewer choose among the sources of programing for the best value for his dollar. But competition wouldn't be fair if cable were totally deregulated and then allowed to compete by retransmitting broadcast programs for a small fraction of their actual worth.

Cable can provide many valuable services to the people of this Nation and should be free to do so. Your bill would give them the freedom that they desire but would also treat them like the rest of

us who must go into the marketplace and pay a full and negotiated price for the product that we want and that includes the pay cable industry. We support your approach.

On another subject, we do have some concern over the provisions of section 331(e) of the bill that would allow carriers to also produce and own programing. We do not believe that conventional television programing as we know it should be owned and transmitted by what we now know as common carriers.

We are very concerned that local broadcasters might eventually lose access to the home receiver and thereby destroy the value of providing local broadcast service. We applaud the attitude of A.T. & T. on this matter and hope that the committee will extend a prohibition on program ownership to all common carriers.

I would also like to express my objections to the section of H.R. 3333 that requires broadcasters to provide news, public affairs, and locally produced programing—including news and public affairs—throughout the broadcast day.

Your bill would continue to regulate television for at least 10 years and perhaps well after that. I suggest that during that 10-year period the Congress will have ample time to assess the effect of deregulation in radio and in certain television areas. You could judge our "good faith" over this period and then decide whether any programing restrictions such as those contained in section 462 are justified.

I understand, Mr. Chairman, that this provision is designed to prevent broadcasters from presenting their news and pubic affairs programs at hours when there is little audience to view the programing. I think these fears are greatly exaggerated and do not call for such drastic treatment.

Many broadcasters today have news and public affairs programs in prominent time slots and, as the public demands more, we will see an increase in this type of informational programing.

This bill contemplates a lot of new competition for the television broadcaster in the form of cable, and all manner of new video services created by the continuing wonders of advancing technology. The major area where television may be able to remain competitive is in the provision of news, public affairs and local programing.

The sponsors of this legislation seem to be confident that the marketplace can work and have pegged the bill on a marketplace philosophy with Government intervention only where needed. I firmly believe that television's future may well depend on the individual broadcaster doing an even better job of producing news, public affairs and locally oriented programing and I assume that you also see that role for us and would be willing to let the marketplace take care of the need for this special service.

Finally, I would like to make several comments about the spectrum tax provisions of this bill.

I find it difficult to believe that I have to buy my way out from under oppressive Federal regulation. If it is right to deregulate, then I think it should happen without all the talk about tradeoffs and prices to pay. I am not trying to be disrespectful. I understand the position that you find yourself in. And while I am no politician,

I know that there is a belief in Congress that for the broadcaster to get some relief from regulation, there must be some quid pro quo.

I guess I could be accused of being naive, but I just don't see why that is right. It seems to me that we have been overregulated and that the mood of the country, including the administration and the Congress and the people of this Nation, is to get rid of government intrusion where we can. I hear no great calls from the public demanding something in return for giving broadcasters freedom to operate as most businessmen do. And I am not arguing poverty. It is the principle that offends me and that I object to.

Let me end, Mr. Chairman, on a positive note by indicating that as the television board chairman, I believe this bill, H.R. 3333, is much improved over the earlier version. As I said before, I also want to indicate, though, television support for comprehensive radio deregulation even if it is not possible to have corresponding television deregulation. I am hoping we can continue to work with you to resolve the problems that do remain, and I believe that we can finally end with a bill that will assure continued valuable service to the public with less Government interference in our business.

I thank you for your great efforts to bring welcome change in broadcasting regulation.

Mr. COLLINS. Thank you, Mr. Bolger.

Now Mr. May.

STATEMENT OF WALTER E. MAY

Mr. MAY. Thank you, Mr. Chairman.

I am Walter E. May, chairman of the radio board of the National Association of Broadcasters. My home is in Pikeville, Ky. I own an interest in five small radio stations in Kentucky and Tennessee.

As a radio broadcaster and small businessman I am most impressed with the effort of the sponsors of H.R. 3333 to relieve radio operators of many of the burdensome provisions which have been created over the years by the Federal Communications Commission.

Of course, I am pleased that the Commission has seen the need for deregulation and has at last begun a proceeding to rescind some of the most burdensome provisions; but that proceeding is only crawling along at the Commission, and although our hopes are high, I am afraid my past experience with the Commission's slow motion activity gives birth to some pessimism about the final outcome. So I am here to support your deregulatory efforts and urge you to continue them.

When I testified before you last year I listed many of the good things I found in your bill. Virtually all of them remain, but in the interest of time I see no reason to go down the list again.

There also remain some provisions that I am concerned about mainly because I don't really know how they will work or what they mean. I hope you understand that I am not being negative in bringing these matters up. It is just that I guess it is natural to mention the items that create problems in the hope that some solution can be found. I agree with Don Thurston that we would like to cooperate to work these matters out where it is possible, although I admit that I don't have concrete answers.

As a nonlawyer I am still a little perplexed about the new standard of the bill that replaces the public interest standard. As I understand the intent of the sponsors, you hope to free radio from most of the program-type regulation that has given us nonentertainment percentages, commercial time limitations, ascertainment, format considerations and others.

I concur with this and think it is a wonderful idea. It was through the use of the public interest standard that this program regulation was instituted and now we have a new standard which seems to rely on the marketplace and only would cause regulation where marketplace forces are deficient.

In the event that these marketplace forces are deficient, the Commission is charged with regulating to protect the public interest. I guess what I am concerned about at this point is the possibility that the Commission might find these forces deficient somewhat as a matter of course and we would again find ourselves fighting new regulations that might become just as numerous as the old ones.

I have no concrete language to suggest in lieu of your language here, but I hope you see what I am driving at. I think your intention is good, but I am just not sure that a bunch of bureaucrats won't be able to create whole volumes of new rules and regulations out of your standard just as they have done with the old one. Perhaps this can be made abundantly clear, Mr. Chairman.

I also have some similar concerns about the revocation provisions. Let me say right now that the Commission should continue to have the power of revocation and the public should have some way of bringing a broadcaster's conduct to the attention of the Commission. I have no quarrel with that in conjunction with an indefinite license. I do have two other concerns, though.

First, the petition to revoke proceedings continues to be openended. Now, I know the burden is on the petitioner and even assuming that the grounds are quite limited, it still looks to me like some poor devil is going to think it is open season on his license under these provisions.

And you cannot afford to take any of these types of petitions lightly. You have to defend them. And with the provisions for prehearing discovery, you could be spending a lot of time answering questions for a persistent petitioner. This certainly isn't going to happen in every community, but in many communities where there is a good concentration of the self-annointed public interest groups, I can foresee periods of continual proceedings. Maybe some will be successful, but the tool provided will be abused, Mr. Chairman, probably in ways that we cannot even anticipate at this point.

Perhaps there could be some provision drafted that would require a bond when the petition is filed or at least some payment of costs to the broadcaster when the challenge is deemed frivolous. If this is to correspond with the petition to deny, maybe the petitions could only be filed by the public every 3 years with the Commission having the right at any time. In any case, I see this as a real problem under this bill and hope that we can find some way to work it out.

The second problem with revocation concerns the grounds for revocation. I think the grounds are clear and appropriate with the exception of section 418(a)(2), which would allow revocation because of the existence of conditions that would have meant a refusal to grant a license on the original application.

Mr. Chairman, that takes in one heck of a lot of territory, in my opinion, including a catchall phrase like the character of the owner. Is there really anything that doesn't bear on character, which the Commission must consider in an original application?

And ownership. Even though the bill sets no limits on radio ownership, suppose I decide to get into the newspaper business in one of the small towns in which I operate a radio station. Wouldn't that violate the diversity standard of the bill and be a consideration on an original application? And if so, would I then be subject to a petition to revoke on a diversity basis? If you could assure me that these things can't happen, I would be much relieved, but it appears to me that they can as the bill is now drafted.

Mr. Chairman, I keep hearing that revocation will be only for technical matters. If that is the fact, why don't you just say that in section 418 instead of keeping this language that would seem to allow many other grounds to be considered?

Briefly on the allocation secton of the bill, I think the provisions are much improved. My only thought is that the committee should make sure that any new system of assignment, such as going to 9 kilohertz spacing, be thoroughly studied before the implementation. I am not concerned over more competition in the marketplace and heartily support the effort to provide more full-time facilities in those communities that now have daytime-only stations.

Finally, I am still opposed to a spectrum fee. While I understand that the fee would not be great under your bill for radio broadcasters, I think I represent the feelings of most of our radio membership by opposing it. We see it as an effort to make us buy what we think we are entitled to, the right to operate in the marketplace without Government agents hanging around our necks 24 hours a day. We still believe the public is getting tremendous value out of our use of the radio spectrum and we see no need for further tribute.

I hope this statement has not sounded too negative, Mr. Chairman. Again, the entire radio industry is indebted to you and the other sponsors of this legislation for taking on the burden of deregulation in the face of a lot of stern critics from the self-appointed defenders of the public who usually represent themselves and no one else.

Thank you very much.

Mr. VAN DEERLIN. I assure you that I don't look upon this as negative testimony. You would be foolish to come in and use up all your time talking about the things you like in the bill. The thing to do is to come in and try to see about things that you don't like.

I suppose that with the battery of legal talent you command down at the NAB, we might get some suggested legislative language on some of these proposals. Now, you know what the purpose of the term "throughout the broadcast day" is, and I will agree with you that it is ambiguous as stated. Could you give us some help on that?