F.C.C. 75-1263

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of

RE-REGULATION OF RADIO AND TELEVISION BROADCASTING

ORDER

(Adopted: November 12, 1975; Released: November 19, 1975)

BY THE COMMISSION:

1. As a result of its continuing study concerning the re-regulation of radio and television broadcasting, the Commission has amended certain provisions in Parts 1, 73 and 74 of its Rules. These amendments will update certain rules, delete parts of others which are no longer necessary, and make corrections and revisions where indicated.

2. The following rule changes are made for the reasons indicated:

(a) In § 1.548, Application to operate by remote control, the title of FCC Form 301-A is incorrectly stated.

The rule also fails to state that application for TV remote control operation is made on Form 301-A (as well as application for AM and FM station remote control operation).

(1) Modifications of the rule are made correcting these inaccuracies and omissions.

(b) The rule regarding Indicating Instruments—Specifications (§ 73.39) allows the use of only one type of measuring instrument for indications of radio frequency currents, a thermocouple type ammeter. The rule is updated herein to accommodate the use of new devices which have been developed for indications of RF currents.

(1) The rule revision will allow for the use of thermocouple type ammeters *or other devices capable of providing* a suitable indication of RF current.

(c) The rule regarding determination of antenna input power (§ 73.51), requires it be determined by the direct method, i.e., as the product of the antenna resistance at the operating frequency (per § 73.54), and the square of the unmodulated antenna current at that frequency, measured at the point where the antenna resistance has been determined. There are four circumstances described in this section (§ 73.51) in paragraph (d), wherein antenna input power may be determined, on a temporary basis, by the indirect method (as described in § 73.51(e) and (f) ). The language of paragraph (d) in the present rule is silent regarding a defective common point meter being one of the circumstances triggering the allowance of determination by the indirect method.

In these situations (where the antenna current meter or the common point current meter become defective), the indirect method may be

used *only* if the station does not employ a remote reading antenna or common point meter (per § 73.58(b)(3) ). This qualifying situation is also missing from § 73.51(d), and is added to make the rule complete and in conformity with § 73.58.

(1) These omissions from § 73.51 are rectified as shown in the attached Appendix.

(d) As stated in § 73.58 (Indicating Instruments), if a remote reading antenna or common point meter becomes defective, the normally required three hour logging of the pertinent parameter is suspended pending return of the remote reading meter to service. In lieu thereof, a once-daily logging requirement is prescribed. Since antenna current and common point current extension meters are functionally identical to remote reading antenna and common point meters, procedures applicable when remote reading meters malfunction are equally applicable for malfunctioning antenna or common point extension meters, the requirements for which are in § 73.70—Extension Meters.

(1) These meter reading and log entry procedures will be included in § 73.71(i) and will henceforth pertain to malfunctioning antenna or common point extension meters.

(e) In § 73.638, Auxiliary Transmitter, the Note following paragraph (a)(2)(ii) is deleted.[1] It imposes a five day restriction on the use of an auxiliary transmitter when making *equipment changes* without further authority from the Commission. A five day restriction on the use of auxiliary transmitters during *maintenance* and *modification* work on the main transmitter was removed via the Re-regulation Order effective April 4, 1973 (FCC 72-1178) from the FM and TV rules. (A corresponding rule for AM stations never included this restriction.) This Note is not in the corresponding AM and FM rules. With the removal of the restriction during maintenance and modification work on the transmitter, there is no argument for retaining it for equipment changes.

(1) We are eliminating the Note, which will conform the TV rule to the AM and FM rules and by so doing we eliminate a source of time consuming filings and staff paper work.

(f) The rules governing "acceptability of broadcast transmitters for licensing" are found in §§ 73.48 (AM); 73.250 (FM); 73.550 (NCE-FM); and 73.640 (TV). The AM and FM rules allow permittees and licensees to install a transmitter, other than that specifically authorized in its construction permit (for a permittee), or station license (for a licensee), if it is listed in the Commission's "Radio Equipment List" as acceptable for the transmitter output power authorized. (See §§ 73.48(a)(4) and (5) for AM; 73.250(a)(4) and (5) for FM; and 73.550(a)(4) and (5) for NCE-FM.) The TV rules (§ 73.640) do not permit such substitution of type-accepted equipment without authority of the Commission. The TV rule is herewith conformed to the AM and FM rule allowing the substitution of a type-accepted transmitter, if listed as acceptable for the output power authorized. AM and FM, and now TV, licensees must

[1] This paragraph number is a redesignation which was made in the Re-regulation Order effective May 9, 1975 (FCC 75-351). The former paragraph number (which will be shown in the rule book until transmittal sheet No. 7 for Part 73 is received) was (c)(2).

notify the Commission and the Engineer in Charge of the radio district in which the station is located within 3 days of the transmitter installation. Further, for TV, the new rule will provide that the notification shall include certification by the licensee that the transmitter and overall station performance complies with the terms of the station's license and all the technical requirements of this subpart (Subpart E, Part 73). Also, certification shall be made attesting that transmitter and station performance measurements have been made and are on file at the station, and that such data confirms that the transmitter and station performance are as certified. The present procedure of filing application for changes of this type is discontinued effective with the adoption of this Order.

(1) Significant manpower savings will be effected at the Commission with this change, and a major easing of administrative detail for the TV licensee. In the case of permittees, one filing is discontinued; and for licensees at least two filings for changes of this type (and possibly more) will no longer be required.

(g) The revisions in § 73.640, described in paragraph (f), above, create a need to amend TV rule § 73.639—Changes in equipment and antenna system. In this rule, licensees at TV stations are directed to observe certain provisions with regard to changes in equipment and antenna systems. One of the provisions states that "specific authority, upon filing formal application therefor (FCC Form 301 or such other form as is provided therefor), is required for . . . a replacement of the transmitter as a whole."

This part of the rule will be retained to "cover" changes to transmitters which are not on the Commission's "Radio Equipment List," but will be amended to relieve the licensee of filing on FCC Form 301, if the transmitter replacement is in accordance with the provisions described in paragraph (f), above.

(h) In the Commission's rules for the Citizens Radio Service (Part 95), one of the prohibited uses of a Citizens radio station is "To convey program material for retransmission, live or delayed, on a broadcast facility." This prohibition is absent from the Rebroadcast rule for the broadcast services (§ 73.1207), and will be added here to conform with Part 95. It should be noted that there are strong reasons, in addition to conformance, for this modification: the broadcast services are adequately served by the remote pickup broadcast services for remote transmissions of this type; the Citizens Radio Service is essentially designed to provide for private, short distance radiocommunications for business and personal messages; and that congestion in the Citizens Radio Service increases constantly, making sole use of a channel beyond guarantee and therefore impractical for use in conjunction with the broadcast services.

(1) A broadcasting station, while not allowed to rebroadcast, either live or delayed (via audio tape) the transmission of a Citizens Radio Service Station is not precluded from using C.B. service to relay information or messages to and from station employees or aides in the field, so long as no rebroadcast of the messages takes place.

found it practical or desirable in citizen-broadcaster agreements to adopt specific rules governing them or certain clauses in them. Balancing government intrusion against freedom of contract and broadcaster-citizen dialogue, we chose to deal with this problem on an *ad hoc* basis under our existing procedures of review upon renewal, transfer, or complaint. We cautioned that to the extent any agreement transfers a broadcaster's programming discretion to others, it cannot be considered by this Commission as having any force or effect before us.[10]

12. We have held that time brokerage agreements, involving the sale of excessive amounts of broadcast time to others are against the public interest. *Metropolitan Broadcasting Corp.*, 8 F.C.C. 557 (1941). Because of the lessening of licensee control involved in time brokerage cases, a requirement for the filing of time brokerage agreements was adopted in 1945, along with other filing requirements now contained in Section 1.613(c) of the Commission's rules.[11] Our concern was that the broadcaster retain his program responsibility. See *United Broadcasting Co. of New York, Inc.*, 4 R.R. 2d 167 (1965); *Liability of WGOK*, 2 F.C.C. 2d 245 (1965). The filing requirement was extended to "trade-out" arrangements (other parties receiving the right to sell spot announcements in return for goods or services to the licensee) in our *Notice of Apparent Liability to Rand Broadcast Company*, 22 R.R. 2d 155 (1971). Later, however, we exempted "trade-out" or "barter" agreements from filing requirements, when it appeared that they did not amount to a lessening of licensee control. *Filing of Agreements*, 33 F.C.C. 2d 653 (1972).

13. We now reach the question of what, if any, action is warranted with regard to music format service contracts. We must start from the premise that licensees have the duty to enter only those agreements which allow them flexibility to forward the public interest. Some of the agreements we received have clauses which allow the licensee to subsequently modify his programming if he finds that the public interest so demands. Termination of a music format service contract is sometimes a risk of such modification. While the parties apparently deal at arms length, a subtle pressure is presented by those contract clauses providing for cancellation if the broadcaster changes his programming in the interest of the public. The comments suggest that in actual practice this clause is seldom utilized. That is no excuse, however, for if the clause is contrary to the public interest, it must fall. Likewise, the "restrictive provisions," be they suggestions, representations, or selection criteria, are contrary to the public interest if they could potentially inhibit licensee responsibility. If the provisions are mere representations, suggestions, or selection criteria, then the contracts should so state. If they are modifiable without penalty or cancellation, then that should be expressed rather than the opposite. The potential inhibiting effect of the "restrictive provisions" coupled with the subtle pressure of cancellation clauses could result in the abdication of licensee responsibility. We consider such terms to be against the public

[10] See, *e.g.*, Letter to Public Communications, Inc., regarding KCST(TV), San Diego, California (September 30, 1974), FCC 74-10; Letter to Frank Lloyd, Citizens Communications Center, regarding Metromedia-NABB Agreement, FCC 75-1028, 55 F.C.C. 2d——(September 9, 1975).

[11] Adopted in Docket No. 6756, amended in Docket No. 10409, 9 R.R. 1547, 1553-54 (1953).

interest. Furthermore, we find the public interest is impaired by any contract which inflexibly binds a licensee to prior programming decisions by means of provisions such as those set out in the *Notice of Inquiry* (see para. 3, *supra*).

14. We are reluctant to engage in unnecessary rule making. The situation here is unlike the network situation, where the number of networks was few, the effects of the practices under consideration were widespread, and the potential coercive effects to abdicate program responsibility were great, not to mention the anticompetitive effects of the practices and their damping effect on program diversity. Here, the number of format supplier companies is much greater, the coercive effects are apparently limited, and the damping effect on diversity of programming is less. We consider this matter to be more akin to the time brokerage agreements or the citizens' agreements. As with time brokerage agreements, the formal adoption of rules prohibiting musical format service contracts is unnecessary. And like the approach used as to citizen-broadcaster agreements, we have decided that the better solution lies in the issuance of a *Policy Statement.* Since we expect all contracts that restrict licensee responsibility to be reformed in view of this *Policy Statement*, and since the record demonstrates the availability of music format services without restrictive contracts, we consider network-type rules to be unnecessary at the present time.

15. Concerning the filing of written agreements, we require network contracts and time-brokerage contracts to be filed with the Commission. We have proposed that citizen-broadcaster agreements be retained only in the stations' public files, and we no longer require the filing of trade-out agreements. Since we are primarily concerned with the actual practices of licensees in programming, and since there does not appear to be great abuse in this area, we are willing, for the present, to see if the problem can be remedied without imposing a filing requirement on licensees with respect to music format service contracts.

16. We place the duty upon the licensee to be party only to those agreements which do not curtail its programming discretion and flexibility. We do not wish to be over-protective of licensees, or become an intermediary in their private contracts. Licensees are aware that they must answer to the Commission as public trustees. The Commission already has adequate means of dealing with abdication of responsibility by licensees, and we will scrutinize music format service contracts closely in this regard, when brought to our attention upon renewal, transfer, assignment, or complaint. At that time we shall determine whether the contract or the licensee's operation under the contract amounts to an abdication of licensee responsibility in contravention of the public interest. To avoid any vagueness, we hereby set forth a *Policy Statement* with guidelines for licensees contracting with music format service companies, which will be used to determine whether a licensee has abdicated its responsibility.

17. Authority for the actions herein is contained in Sections 4(i) and (j), 303(g) and (r), and 403 of the Communications Act of 1934, as amended.

POLICY STATEMENT RE MUSIC FORMAT SERVICE CONTRACTS

18. Licensees have a non-delegable responsibility as to the programming and operation of their stations. Any agreement entered into by the licensee which unduly fetters the free exercise of independent judgment in programming will be considered an abdication of that responsibility by the licensee and contrary to the public interest. This includes, but is not limited to, any music format service agreement that:

(a) fixes the number of broadcast hours;
(b) prohibits AM/FM duplication;
(c) prohibits sub-carrier authorization;
(d) requires the exclusive use of any music format service or prohibits other sources;
(e) fixes the amount of format service company music broadcast;
(f) prohibits any announcement by the station;
(g) fixes the number of commercials broadcast;
(h) limits the content or source of any non-musical programming;
(i) fixes the amount of air time for news, music, or other programming;
(j) prohibits automatic gain control of company supplied material; or
(k) allows termination in the event of program changes by a licensee exercising his responsibility for the public interest.

Those music format service contracts which contain no provisions restricting licensee flexibility; expressly state the licensee's right to reject or substitute programs; and subordinate the contract to FCC rules, regulations, policies and licensee responsibility, do not impair the public interest.

19. IT IS HEREBY ORDERED, That this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

SUMMARY OF COMMENTS

1. Drake-Chenault Enterprises, Inc. ("Drake"), says that its contract contains none of the restrictions illustrated in our *Notice* (see *Report and Policy Statement*, para. 3, *supra*), and furthermore, its contract states:

> This agreement is subject to the rules, regulations, and orders of the Federal Communications Commission now or hereafter in force; and neither party hereto shall be required to furnish any performance hereunder which would be a violation of any such rule, regulation, or order. The station shall at all times continue absolute control over its facility and programming broadcast thereof.

Drake says it has never terminated or recommended termination of its station agreements for any reason except default of payment. Drake contends that the Commission already has ample authority to deal with the problem raised by this proceeding, and recommends issuance of a Public Notice illustrating restrictive contract provisions, rather than further rule making.

2. TM Programming, Inc. ("TM"), provides taped musical services and program consulting to radio stations. TM's contract contains provisions similar to those we questioned in the *Notice* (see *Report and Policy Statement*, para. 3, *supra*). TM insists that the limits in these provisions are determined after discussion with the licensee, and only reflect the station's self-imposed policies. If the station's proposed policies are consistent

with TM's goals to provide a successful and competitive service, it will allow the station to subscribe. The contract also gives the station the right to change its policies if the licensee decides that the public interest will be served thereby. However, TM reserves the right to cancel the contract without penalty to the station in such event. TM states that considerable vaariation of format has been permitted and it has never cancelled or threatened cancellation for changes in programming, though it does not waive the right to do so if necessary to protect its reputation and business. Another clause gives the station the right to reject or refuse any program it considers unsatisfactory, unsuitable, or not in the public interest; and the right to substitute programs of oustanding local or national importance.[1] TM therefore contends that its contracts do not limit a station's programming flexibility.

3. International Good Music, Inc. ("IGM") states that it supplies music for use at the licensee's discretion, but it does not supply format services. Clauses in IGM's contracts do not require broadcast of music programs supplied in IGM, "the broadcaster remaining at all times in control of the program broadcast over its facilities." Other clauses subordinate the agreements to terms in the broadcast license and Commission rules and regulations.

4. Bonneville Program Services ("BPS") says its contract restrictions only assure that its work product is broadcast without unnecessary interruption of continuity to insure the intended artistic objective. It notes that, while the Commission has the power to prohibit licensees from executing contracts inconsistent with the public interest, it has been reluctant to prevent licensees from freely negotiating contracts. The BPS agreement states:

> *Manner of Use.* Station agrees to utilize, to the extent practicable, the format and other recommendations made by BPS in connection with the musical programming supplied hereunder.

BPS claims that this provision is merely suggestive. BPS provides a consulting service, "Format Consideration,"[2] to subscribers which contain provisions like some of those questioned in our *Notice* (see *Report and Policy Statement*, para. 3, *supra*). BPS states that the contract provisions attached to our *Notice of Inquiry* could bring about an abdication of licensee responsibility, but distinguishes its own contracts by the absence of a termination clause in case of deviation from format suggestions. BPS says that it has not cancelled or threatened cancellation of any subscription for any reason other than nonpayment; therefore, it submits, there is no need for further regulations.

5. National Citizens Committee for Broadcasting ("NCCB") is a non-profit organization, organized to assist local citizens' groups in improving broadcasting. NCCB expresses its concern about the effect Commission action in this area will have on citizen-broadcaster agreements.[3] NCCB finds parallels in our policy to allow licensees to place "practical reliance" on networks for the selection and supervision of programming. NCCB also points to our policy of encouraging free negotiation between broadcasters and citizens groups. It comments that rule making or a policy statement barring specific contract terms in this proceeding may be so overbroad as to encompass citizen-broadcaster agreements. NCCB fears the result would be to inhibit public access and diversity of expression. NCCB contends that a broadcaster does not abdicate its responsibility or act contrary to public interest by entering into a contract agreement, as long as it reserves the authority to review and cancel programs. NCCB also points out that the

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[1] This provision is patterned after Section 73.125 of the FCC Rules governing network contracts. The same provision appears in the Stereo Radio Productions, Ltd. contract.

[2] BPS's "Format Considerations" are as follows:

To maximize the effectiveness of material and service which we provide, we suggest the following basic policies:

1. Broadcast at least 45 minutes of Bonneville music during each hour the station is on the air.
2. Broadcast a minimum of 19 1/2 hours per day (5:30 a.m. to 1 a.m.). If in a competitive market, operation should be 24 hours per day.
3. Talk breaks limited to 4 per hour (except during 5:30 a.m. to 9 a.m.) with maximum limit of 8-spot availabilities per hour, if using Programme-I; 12 hours if using Programme-II.
4. All news to be locally originated (no duplication of sister facilities). Non-music commitment shoult be approximately 5%. We will advise best implementation and distribution.

You will note that these are policies under your control. To meet individual market needs, deviations may be necessary—a routine situation which is handled within the basic format concepts on a station-by-station basis.

[3] See *Proposed Policy Statement and Notice of Proposed Rule Making* re: Agreements Between Broadcast Licensees and the Public, FCC 75-633, 40 Fed. Reg. 25689 (adopted May 29, 1975). NCCB has filed comments in that proceeding also.

Commission has adequate tools to prevent individual abuses in contractual agreements, namely review on renewal. Therefore, it recommends an announcement that actual operation of all contractual agreements regarding programming would be closely examined at renewal time [4], and that such agreements are within the discretion of the licensee to adopt.

6. The Stereo Radio Productions, Ltd. ("SRP") contract contains the same provisions as attached to our *Notice of Inquiry* (see *Report and Policy Statement*, para. 3, *supra*). [5] SRP states that its contract is not intended to inhibit broadcasters in the selection of non-musical programming. SRP contends that it does not dictate programming to its subscribers, but rather uses the criteria in its selection process to determine who its subscribers will be. SRP also asserts that agreement does not bind the subscriber to any policy, but merely recites those representations which the subscriber has already determined to be its operating policies with variances taken into account in the negotiation stages. The right to terminate is reserved by SRP if the subscriber changes programming policy in the public interest. SRP says that it has terminated on two occasions, both involving an increase in the number of commercials broadcast. SRP also filed reply comments pointing out the lack of initial comments by broadcasters, and the fact that no one has suggested undue influence on a broadcast licensee in the comments that were filed. SRP states that agreements could result in abdication of responsibility only if the licensee voluntarily abdicates its responsibility. Therefore, SRP recommends termination of this proceeding, and asks that the Commission find music format service agreements do not impinge upon licensee discretion and flexibility in programming. (See Appendix n. 1, *supra*.)

7. Wally Neskog and Associates, Inc. ("WNA") provides taped music to subscribing stations. WNA contends that it does not specify when or how to use the tapes and makes no non-musical programming demands. WNA commented as both a licensee and a music format supplier.

8. International Planned Music Association ("IPMA"), a non-profit corporation with more than 130 Muzak franchise operators, provides background music to subscribers. IPMA's only recommendation, that all FM stations should limit modulation of main carriers to 90%, and the comments received in reply from the National Association of FM Broadcasters, are beyond the scope of this inquiry.

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[4] Broadcasters are not now required to file musical format service contracts or citizen-broadcaster agreements with the Commission, nor are they required to keep them in their public files. Proposed rule making would require citizen-broadcaster agreements to be kept in the station's public files. Appendix, n. 3, *supra*. See also *Report and Policy Statement*, para. 15, *supra*.

[5] We are informed that the provisions are in the process of being revised to eliminate ambiguities, and should be interpreted to mean that the subscriber will broadcast SRP tapes at all times that it is not broadcasting other programs. Thus, the agreement means that the subscriber plans to broadcast 50 minutes or more of SRP music an hour, *except* insofar as time is required for news, commercials, and other programming.