FCC 75–769

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES REGARDING AM STATION ASSIGNMENT STANDARDS	Docket No. 20265

REPORT AND ORDER

(Proceeding Terminated)

(Adopted June 27, 1975; Released July 14, 1975)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The purpose of this proceeding, which was initiated by a *Notice of Proposed Rule Making*, adopted on November 27, 1974, FCC 74–1307, 39 Fed. Reg. 42920, is to examine the rules regulating the assignment of new facilities, and the modification of existing facilities in the standard broadcast service, and to determine, in the light of existing conditions, what, if any, amendments should be made in these rules. The rules principally under consideration are those in § 73.37, which govern the acceptability of applications for new and changed facilities, and which, in their present form, were adopted on February 21, 1973 (*Report and Order* in Docket 18651, FCC 73–220, 39 F.C.C. 2d 1945). Proposed in the *Notice* is an amendment of the rule governing the acceptability of applications proposing power increases for existing stations, so as to delete certain acceptability criteria which had been designed to insure that any power increase authorized would remedy a demonstrated service deficiency, either to the city to which the station is assigned or to outlying areas without standard broadcast service. However, we also indicated that we would accept comments in this proceeding going to other aspects of the 1973 amendments and of other rules which parties might consider as unnecessarily restrictive and burdensome, and suggestions for appropriate relaxations to accommodate documented needs for new service. Because our "suburban policy" (*Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 F.C.C. 2d 190, reconsideration denied, 2 F.C.C. 2d 866 (1965)), obviously stands as an impediment to power increases of stations in suburban communities whose 5 mV/m contours encompass or would encompass part or all of a larger nearby community, we invited comments as to whether this policy should be modified as it applies to major changes in existing operations.

2. As noted, § 73.37 prescribes the showings required of applicants proposing new or modified AM broadcast facilities. The first major change in this section was made in 1964 (Docket No. 15084, FCC 64–

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609, 45 F.C.C. 1515), at which time, concerned with the erosion of the service of existing stations under an allocations system which, in effect, sanctioned the imposition of measured amounts of interference on such stations, we adopted the "go-no-go" rules, which, inserted in 73.37, proscribed the acceptance of any application involving overlap of daytime service and interference contours. At this time, we also adopted, for nighttime operation, as an amendment to § 73.24, the requirement that each new nighttime proposal serve 25% "white area," (later amended to apply to area or population) as a result of our apprehension that new unlimited time stations, which, in the great majority of cases were being assigned to communities already having nighttime service, although nominally not causing objectionable interference under our rules, were nevertheless eroding the nighttime service actually provided by previously authorized stations.

3. The "25% white area" requirement served as an effective (and, it has been frequently suggested, an all too effective) brake on the previously burgeoning number of nighttime operations. However, daytime proposals continued to be filed in large numbers. In July, 1968, convinced that new daytime assignments were, in general, doing little but adding services to areas already enjoying multiple signals, and that the trend, if continued, would exhaust the resources of the standard broadcast band with little new service being afforded to those areas and communities where it is most needed, we imposed a partial "freeze" on new assignments and on major changes in existing assignments, and in September 1969 began a new proceeding to determine what rule amendments were necessary to govern the assignment of AM stations in the future. This proceeding, the previously mentioned rule making in Docket 18651, resulted in the adoption of the rules which are here under consideration.

4. The present rules incorporate a concept missing from previous rules of this nature—the recognition of AM and FM as co-equal services, each of which were to be relied on in the future in remedying aural service deficiencies. However, in furtherance of our aim of avoiding the unnecessary proliferation of new AM stations, preference was accorded FM, where it was available, for bolstering inadequate service.

5. The present rules, besides requiring adherence to daytime and nighttime interference standards, contained in or alluded to in the 1964 version of § 73.37, impose additional requirements governing the acceptability of applications for new standard broadcast stations, or changes in existing stations. In summary, they are as follows:

(1) The "25% white area" or population criterion is maintained as a required showing for new nighttime proposals, or proposals for increased nighttime power for existing stations, and is applied, for the first time, to new daytime stations, and to daytime power increases of existing stations.

(2) Alternative showings may be made, however:

(a) A new station may show that it proposes to provide a first or second "adequate" service to the community for which it is proposed.[1]

[1] Adequate service is deemed to be provided to the community by an AM station if 80 percent or more of its area or population lies within the 5 mV/m contour of that station, or by an FM station if a similar portion of the community is included within its 3.16 mV/m (70 dBu) contour.

Service of an existing AM station to a community is considered to be inadequate if less than 80% of the community lies within the 5 mV/m contour, or its interference-free contour, whichever is of a higher magnitude.

(b) An existing station proposing an increase in power may show that during that portion of the day for which the power increase is proposed, that its present service to its community is inadequate.

(3) Except in the case of existing stations seeking a power increase, "white area" is that determined as having neither AM primary service nor the FM equivalent. In determining whether a community has fewer than two adequate services, existing service from both AM and FM stations are taken into consideration (disregarding service from existing stations more than 50 miles distant). Furthermore, even if there are fewer than two adequate aural services to the communities, a new AM proposal to serve the community will not be accepted absent a showing that no FM channel is available to serve the community.

6. Since the adoption of these rules, evidence has accumulated that they may be unnecessarily restrictive in controlling the rate of expansion of the standard broadcast service, and that they fail to afford, in some cases, reasonable opportunities to satisfy developing needs for new and additional aural service. Accordingly, in this proceeding we have provided a forum for the discussion by interested parties of this matter, and an avenue through which suggestions as to appropriate changes in the rules might be offered.

7. A total of 273 pleadings were filed bearing directly or peripherally on the matters under consideration within the deadlines set for such filings, which, as extended, were March 3, 1975, for comments, and May 5, 1975, for reply comments. The list of the parties submitting this material is contained in Appendix A to this document.

8. In addition, the Docket contains in excess of one hundred letters from members of Congress and the Commission replies thereto, virtually all dealing with a single subject, the allegation that the possibility of nighttime power increases for Class IV stations has been unfairly excluded from consideration in this proceeding.

9. A summary of the views of the parties as set forth in their comments follows.

SUMMARY OF COMMENTS

Concerning Amendments of § 73.37 and Related Rules

10. More than half of the comments were addressed, in whole or in part, to the proposal to amend Section 73.37(e)(3), concerning changes in existing facilities (other than changes in frequency). Of these, all but four favored some relaxation of the present restrictions on such applications. Also, most approved of retention of the present interference standards. In support of these favorable comments, most parties cited one or more of the reasons outlined in the *Notice*, *i.e.*, urban expansion, population growth, the increasing viability of FM, and nonavailability of adequate antenna sites.[2] With respect to urban expansion, parties described a variety of population trends which, according to them, should provide a basis for amending the present allocation standards. While some emphasized the expansion of particular city limits, others focused on suburbanization, and still others on "subsuburbanization" (*i.e.*, a community, previously considered a suburb

[2] Numerous demographic, statistical and engineering exhibits were included to demonstrate the validity of these reasons.

of a major urban center, which has itself become a major population center independent of the urban center, with its own surrounding "sub-suburban" communities). Each of these circumstances, according to the parties, justifies relaxation of the rules. This approach is in some ways similar to the appeals to localism expressed by some other parties, who felt that improvement to local services should not be blocked by signals from independent, and occasionally distant, communities which happen to penetrate the proposed gain area. In addition, a number of parties asserted generally that a less restrictive policy toward power increases would result in the more efficient use of the AM spectrum. While many argued that FM service was fully viable and in many cases competitively superior in several ways to AM, others claimed that the proposal was justified because of the lack of FM penetration, attributed to both lack of available FM channels and lack of receivers. Similarly, some parties asserted that the proposal would result in few applications, while one party saw the salvation of the economy flowing from the vast amount of work to be generated by a general revision of Section 73.37(e). A variety of other relatively general factors was offered in support of the proposal. These included provision of better service, usually to a wider area [3]; promotion of competition among existing stations; increased programming diversity [4]; and parity of treatment, with respect to applications for changes in FM and TV. Several parties suggested that new assignments, power increases and frequency changes authorized by other North American countries warranted similar action by the United States, in order to prevent the possible deterioration of our own AM service as a result of the increase in foreign signals. Finally, in supporting the proposal, one comment argued that the present major change rules stunt the natural growth of developing broadcast businesses.

11. While supporting the proposal generally, several parties suggested further amendments with respect to improvements to existing facilities. Some claimed that it would be appropriate to relax the present daytime interference standards to insure the ability of many stations to take advantage of the proposed deletion of the aural services/unserved area restrictions. These suggestions were for the most part non-specific. For example, one comment, filed jointly by thirteen parties, proposed that interference be permitted over "empty places far outside a station's natural market." Similarly, the Grace/Wolpin Broadcasting Company would permit interference over areas which do not include "significant population" and which the station subject to the interference does not seek to serve. The Paramount Broadcasting Company, Inc., not only would allow any interference that was "*de minimis*", but would further presume that interference was *de minimis* if the station adversely affected did not object. Other variations on the interference theme included the suggestion that, in order not to preclude new stations, any existing station taking advantage of the proposed relaxation be required to accept interference from new stations in its gain area. Under one plan, new stations would also be permitted to accept interference up to their 1 mV/m contour. Thus, the number of mutually exclusive situations would be reduced. With more limited

[3] Several parties who cited this factor indicated that power increases were necessary to overcome low soil conductivity not predicted by the values on FCC Figure M–3.
[4] See also paragraph 24, *infra*, regarding specialized programming.

scope, some parties suggested that Class III stations adjacent to Class IV channels be permitted to increase their power as long as no new overlap with Class I, II, or III stations, or to the Class IV's interference-free area, would be created. Such a move would tend to counteract the effects of the general daytime power increase previously authorized to Class IV stations.

12. A number of other parties argued that the most appropriate way of achieving the goals set forth in the *Notice* would be to increase maximum power limits. One party, for example, noting the technical difficulties inherent in operation at its frequency, suggested that stations operating at 1600 kHz be authorized to operate with 10 kW. In the same vein, others suggested an increase of all Class III stations to 10 kW. Still others suggested an across-the-board, or "horizontal", power increase, raising the maximum permissible power levels of all classes of stations. This, in conjunction with the proposed amendment, would assure adequate service by existing stations. While various specific power levels, and accompanying, revised, protection standards, were suggested, the most notable was that of A. Earl Cullum, Jr. and Associates (Cullum), who asserted that an increase in all levels by a factor of nine was called for, since, according to Cullum, the Commission's proposal alone would in fact benefit very few parties. It was argued that such a parallel increase would solve the adequacy of service problem discussed in the *Notice* while enabling the Commission to retain its present interference standards. In addition, it was noted that the Commission's experience with Class IV operations established the feasibility of such an approach. Cullum asserted that any international problems arising from such revision would "not present too much difficulty." Four parties filed comments specifically supporting Cullum's proposal. Two parties specifically opposed it, noting that such an across-the-board increase would raise significant treaty problems, and would further work a hardship on any station which, by choice or by economic (or other) necessity, would be unable to take advantage of the increased levels. In a general comment. The Association for Broadcast Engineering Standards, Inc. (ABES) approved the proposed Section 73.37(e)(3), but argued that increases in maximum power levels and relaxation of the present interference and overlap rules should be avoided.

13. The possibility of incremental power increases within the existing structure of maximum levels was also raised in several comments. Virtually all parties making this suggestion supported an intermediate power level of 2.5 kW between the present authorized levels of 1 kW and 5 kW.[5] Some also suggested specific levels at 0.25 kW, 0.75 kW, 1.5 kW, 3.75 kW, and 10 kW, or, more generally, "intermediate levels between the present levels." In support of the idea of intermediate levels, it was pointed out that such would make it easier to improve signal strength without the necessity of complex, and expensive, directional arrays. It was asserted that no technical barriers to such a proposal exist, and that Commission experience with reduced power in pre-sunrise operations has demonstrated its feasibility. In addition, it was pointed out by several parties that a 2.5 kW level is not prohibi-

[5] Several parties noted that a petition for rule making, RM-1371, concerning this proposal was already on file at the Commission, and suggested that any action on it be incorporated into this proceeding.

ted by either NARBA or our Mexican agreement. Finally, one party suggested that the simplified directional antenna proposals resulting from institution of a 2.5 kW level would help to reduce the Commission's processing load.

14. Only four parties objected to the proposed Section 73.37(e)(3). Two of these, KDEN Broadcasting Company, Inc. (KDEN), and Bloomington Broadcasting Corporation, argued that the effect of the proposal would be to put Class IV operations at a significant competitive disadvantage and that, in light of this discrimination against Class IVs, the proposal should be rejected.[6] Ray Odom, general manager of KJJJ, Phoenix, Arizona, merely stated that "it is the opinion of this licensee that a power increase cannot be effected without some interference to the already existing facilities." On the basis of this alone, with no supporting data, he opposed the proposal. Finally, the National Black Media Coalition (NBMC, or the Coalition) raised a number of questions, ranging from certain procedural aspects of this proceeding to the probable inefficacy of the proposal. Specifically, NBMC asserted that, by virtue of the Commission's failure to solicit comments from minorities and consumers, the record developed from the comments filed is inadequate. A court opinion in the Prime Time Access Rule litigation is cited in support of this argument.[7] NBMC also claimed that this rule making is procedurally defective because the *Notice* lacked any data supporting the proposal. With respect to the proposal itself, the Coalition argued that relaxation of the restrictions on power increases would only serve to preclude new "drop-in" station assignments, and thus would prevent Blacks from applying for any new stations. As a result, in order to acquire broadcast interests, Blacks would be required to pay expensive prices for existing operations. rather than have the opportunity to build and develop a new station. Noting that there are only twenty-one Black-owned AM stations, NBMC asserted that the proposal would merely "carve in granite a system of separate but unequal use of the AM band." Further, the Coalition saw the proposal as being primarily a response to broadcast lobbyists seeking to maintain control of the aural media in their respective markets. The factors mentioned in the *Notice* (*e.g.*, urban expansion) were viewed by NBMC as irrelevant to the situations of the "small-town operators" who, according to the Coalition, would be the primary beneficiaries of the proposal. As a result of the above, NBMC urged that this entire proceeding be begun all over again, and rejected.

15. In response to paragraph 6 of the *Notice*, approximately 108 comments discussed in whole or in part the subject of new AM assignments, and, particularly, new nighttime assigments for existing daytime-only stations. As detailed in paragraph 18, *infra*, only one of these parties objected to relaxation of the present restrictions of Section 73.37(e)(2)(ii) and (iii). Most comments merely indicated support for some general relaxation, or deletion, of those restrictions, without providing any more detailed proposals. The general need for

[6] It should be noted that more than sixty comments raised the question of Class IV exclusion. Of these. however, approximately 25% specifically indicated that they either generally supported, or at least did not object to the proposal (while also noting a desire for inclusion of Class IV operations), and, with the exception of the two parties mentioned in the text. the rest expressed no opinion on the proposal.

[7] Although the case relied on is not precisely identified, the Coalition appears to be referring to *National Association of Independent Television Producers and Distributors, et al.* v. *F.C.C.*, 502 F. 2d 249 (2d Cir. 1974).

broader, full time service in various areas of the country was one of the factors most often mentioned in these comments. Variations of this broad argument included the claims that *local* nighttime service is necessary, that daytime-only service is, by its very nature, inadequate, or that, regardless of technical considerations, *some* nighttime coverage is better than none at all. Several parties noted that the needs and problems sought to be answered by daytime programming do not go away at sunset. Other factors cited included the viability, inadequacy, and/or lack of penetration of FM services in many areas; the public's general interest in diversity of nighttime programming; and the likely increase in competition among stations. Some parties asserted that more nighttime assignments are necessary to insure efficient utilization of the AM band,[8] and that the Commission should make all possible means of effecting such utilization available to its licensees. Several comments argued that the number of applications generated by relaxation or deletion of Section 73.37(e)(2)(ii) and (iii) would not be great, and that the Commission need not fear the preclusionary effect discussed in earlier reports on allocation policy. Further, according to these comments, the limited negative effects resulting from relaxation of the rules would easily be offset by the benefits of improved service. Other preclusion arguments included the notion that daytime-only stations themselves have a preclusionary effect, and that new nighttime services will not add to that significantly. In the same vein, one party argued that the effect of creating a number of new 500W nighttime services would be no more preclusionary than permitting substantial power increases for existing nighttime stations under the proposed Section 73.37(e)(3). A number of parties specifically challenged the rationale of the present rules that large numbers of new nighttime assignments will result in the overall deterioration of all nighttime service. They asserted that there is, in fact, no proven basis for the Commission's claim. One party claimed that technology now available to broadcasters has in large measure eliminated the Commission's concerns. It must also be noted that, again, most parties supported retention of the present technical standards regarding "objectionable interference" as outlined in Section 73.182(o) of the Rules.

16. A number of proposals, varying from general to specific, were submitted with respect to relaxation of the present restrictions on new facilities, and especially new nighttime authorizations. Some were willing to retain the notion of "available aural services" as a criterion, but sought to revise the definition of that term. For example, one party suggested that its meaning be expanded to include the notion of *actual*, rather than authorized, hours of operation. In this way, for instance, an FM station which in fact signs off at midnight would not represent an "available aural service" from sign-off until sign-on, thus possibly creating unserved area during that time. It was also suggested that the number of services specified by the rule be enlarged to three. The Mutual Broadcasting System, Inc. (Mutual), proposed that new nighttime authorizations be granted if the "network market" in which the applicant operates has three or fewer full time standard broadcast

[8] The "fair, efficient and equitable" language of Section 307(b) of the Act was cited by several as mandating such action.

stations.[9] McKenna, Wilkinson & Kittner (MWK) supported this proposal, but would prefer to use the more specific "standard metropolitan statistical area," as defined by the Census Bureau, rather than "network market." Other parties willing to retain the existing rule suggested lowering the minimum nighttime power level to permit interference-free, albeit limited, nighttime service. Several noted, in this regard, that power at or lower than presently authorized pre-sunrise authority levels would be acceptable, based on the successful operation of most stations at their PSA power. It was suggested that the Commission's experience with pre-sunrise, and also the 1974 temporary 50W pre-sunrise, operations established the feasibility of such low power service. Another suggestion raised in a small number of comments was the relaxation of interference standards. As with similar suggestions raised in the context of power increases, and discussed above in paragraph 11, these were neither specific nor technical. Several parties advocated case-by-case analyses of applications. According to some, this would involve balancing the need for the new facility against the benefits underlying the rules. "Need" in this sense could encompass such factors as general diversity of programming, competition among stations, or specialized, or minority, programming needs. A variation of the balancing technique would carve out specific exemptions from the present restrictions, so that, for example, an application for a first, or first competitive, AM nighttime service to "a substantial segment of the community having special needs" would only have to meet interference standards. Other exemptions proposed included applications: by "single market" daytime-only stations; by stations, near a border or a coast, whose proposed main radiation lobe would be directed away from the U.S. mainland; or which would help create a competitive situation of at least two standard broadcast and two FM stations in each city. One party would permit waiver of the aural services/unserved area rules for new nighttime applications if it were shown that no FM channel was available in the community.

17. Finally, several parties proposed more or less wholesale revisions of the rules governing new nighttime authorizations. Cohen & Dippell, P.C., and WGBA, Inc. would retain the present format, including the objectionable interference criterion of § 73.182(o), but would lower the "unserved area" requirement from 25% to 15%, while restricting the definition of "unserved area" to places not receiving interference-free primary service or "a combination of first and second services" from authorized *standard broadcast* stations. In addition, their proposed aural services rule, to replace the present Section 73.37(e)(2)(iii), also would be limited to AM services. And a final alternative subsection, suggested as Section 73.37(e)[2](iv), would permit new nighttime authorizations on a showing that the proposed operation would not affect any possible establishment of a future nighttime operation in any area with less AM and FM service. MWK, taking the view that nighttime service is merely a complement to daytime service, would permit any new nighttime proposal if daytime requirements were sat-

[9] Mutual's proposal included modified service requirements consistent with the general notion of licensing stations to "areas," rather than particular cities or communities. It must be noted that several other parties suggested similar re-definitions of the "community of license" concept in light of demographic trends. None, however, was as detailed as those of Mutual and MWK.

isfied and no objectionable interference would result. Perhaps the most radical suggestion was that of Contemporary Media, Inc. (CMI), who urged establishment of an AM Table of Assignments similar to those used in FM and TV allocations. CMI also suggested that, if the licensee of a daytime-only AM station could not receive a nighttime authorization, that licensee should be granted a fulltime FM in its community of license. In addition, any FM channels still available after this initial distribution would then be offered to any AM licensees with "inadequate facilities."

18. As noted above, only one party specifically opposed relaxation of the rules regarding new nighttime authorizations for existing daytime-only stations. Sanford Schafitz, licensee of WFAR, Farrell-Sharon, Pennsylvania, argued that the introduction of "flea power operation(s) on regional or clear channels for the sole purpose of accommodating daytime stations would be a 'slap in the face'" to those broadcasters who have been using "complicated and expensive" directional antennae. In addition, Schafitz asserted that, in light of the number of FM stations in operation, no compelling need for more nighttime AM service exists, and, in any case, very little interference-free nighttime service is likely to result from any relaxation of the rules.

19. The question of relaxation of restrictions on frequency changes was discussed in approximately twenty-five comments. Support for relaxation or deletion of the present rules was unanimous, with most comments seeking equivalent treatment of frequency changes and power increases. Almost all parties raising this issue cited either general or specific needs for new nighttime service or overall improved service which could only be achieved by changes in frequency. Many claimed that relaxation or deletion of the aural services/unserved area rules with respect to such changes would promote more efficient use of the spectrum, since they would result in both improved service to one area, and the freeing of a channel which might likewise be put to better use elsewhere. Several parties asserted that, if such changes had any negative impact on the Commission's allocation policy, such impact would be minor, particularly relative to the benefits of improved service to be gained. Others noted that a maximum number of options by which to improve service, including frequency switches, should be made available to broadcasters. It was suggested by several parties that to relax the rules governing power increases without equivalent treatment for frequency changes would be illogical. Other factors cited in support of facilitation of such improvements were increases in competition and diversity, inadequacy of existing FM nighttime service, and the general factors of urban sprawl mentioned in the *Notice*. E. W. Bie (Bie) suggested that the "other than frequency" restriction be removed from Note 2 of Section 73.37, since, according to Bie, a frequency change is simply another way of serving more people, and thus, should be treated as a power increase. The Progressive Broadcasting Corporation advocated liberalization of the frequency change policy, but added that new nighttime authorizations resulting from such changes could be limited to 1 kW, with a directional array, if necessary. KDEN urged that Class IV operators in particular be given favorable consideration in seeking frequency changes in order to overcome presently inadequate service. One party sought a frequency

change because its own frequency, 910 kHz, is subject to the "characteristic 910 squeal", and thus is "not ideal." Finally, two parties suggested that, if the licensee of a daytime-only station could not gain a nighttime authorization on its station's channel, the licensee should be authorized to broadcast at night on a different frequency while maintaining its normal daytime operation. It was submitted that this situation would be roughly equivalent to that faced by the owner of an FM and daytime-only AM combination who, in signing off the AM, indicates that the same or similar programming is available on the FM. Thus, according to the parties, it would not be overly burdensome to the audience, and it would serve to increase efficiency of spectrum use.

20. As an alternative to full nighttime authorizations, seven parties suggested that daytime stations be permitted to operate for a limited period of time after sundown. This "post-sunset authorization", modelled after the existing pre-sunrise rules, would involve low power operations and, according to some of the parties, could extend to 6:00 p.m. without violating the present Mexican Agreement. Such a service would satisfy the need for programming in the evening drive time, it was argued, and would serve to maximize utilization of the spectrum. FM penetration into cars, it was pointed out in one comment, is not substantial. One party suggested that powers higher than PSA authorizations be permitted, as long as no derogation of service would result. Another urged careful study of the Commission's 50W minimum temporary pre-sunrise authority experience of January-April, 1974, with the idea that, in light of that experience, higher powered pre-sunrise and post-sunset operations might be deemed advisable.

Concerning Changes in Policy Statement on 307(b) Considerations

21. Approximately 67 comments discussed the possible revision of the Commission's *Policy Statement on 307(b) Considerations for Standard Broadcast Applications Involving Suburban Communities*, 2 F.C.C. 2d 190, reconsideration denied, 2 F.C.C. 2d 866 (1965). Many concurred with the observation in the *Notice* that continuation of the present policy would appear to countervail the more liberal allocation policy which is the heart of this proceeding. It was also suggested by most parties that the current 307(b) policy, independent of this rule making, is not a beneficial rule. The bases for these statements were varied. Several parties argued that the validity of the presumption itself is suspect, and that, generally, a service contour is not indicative of a licensee's intent. Other parties attacked the underlying assumptions of the policy, *i.e.*, that a suburban community must have unique problems and needs, or that a licensee cannot meet a suburb's problems and needs while providing a secondary service to the metropolitan area. It was submitted that the nature of many suburban areas is such that the problems and needs of city and suburb often merge, and to set up a barrier to service to the whole area is unrealistic and an inefficient use of the AM band, tending to frustrate the goal of maximum utilization of the spectrum. Some argued that the policy, in general terms, has failed to achieve its purpose. Many parties raised more specific questions about the theory and application of the policy. Citing several Commission opinions, one claimed that the policy is presently applied inconsistently. Some asserted that application of the policy is particularly unfair in situations involving rapidly expand-

ing, or irregularly shaped, cities, where improvement of suburban service may be effectively stopped by the vagaries of the nearby city's changing borders. Others argued that the 307(b) policy is inconsistent with the Commission's policy on dual city identification, and with the general policy of required service to the licensee's community *and* service area.[10] It was also suggested that the policy unreasonably discriminates against AM broadcasters in favor of FM and TV licensees, and that, in light of the present restrictions on new and improved stations, it is obsolete. Finally, abandonment or relaxation of the policy was seen by some as increasing competition among broadcasters while easing the administrative burden on the Commission.

22. On the basis of the above-described observations, many parties proposed alternatives to the present policy. Some, apparently willing to retain the present format, suggested that certain exceptions be instituted, *e.g.*, with respect to irregularly shaped cities, or stations featuring specialized, or minority, programming. One party proposed that the policy be retained in the form of a standard for acceptance of applications, with 25 mV/m penetration, rather than 5 mV/m, as the relevant factor. Most, however, sought the elimination of the presumption, at least with respect to applications for the improvement of existing facilities. Two parties, however, noted that, if such limited relaxation occurred, any continuing restrictions on new applications might be easily circumvented by a two-step approach. These two parties were among the many who proposed the total elimination of the *Policy Statement*. In most comments it was suggested that the number of abuses would probably be slight, and that a case-by-case approach would be more appropriate than the present, across-the-board presumption. Many argued that the Commission's renewal process, particularly in conjunction with the ascertainment requirements set forth in the *Primer*,[11] would be sufficient to detect, and prevent, such abuses. A small number of parties suggested that the policy should be applied only in the context of hearing cases, "as originally intended when the policy initially was adopted."

23. Three parties felt that the present policy is valid and should therefore be retained. KDEN argued that relaxation of the policy statement restrictions would lead to abandonment of suburban audiences and advertisers. Similarly, the Circle Corporation viewed the existing policy as a deterrent to the "opportunistic few" who might reorient their service toward the central city. ABES found that the policy "fulfills an essential function in discouraging the shoehorning of new stations into large urban areas", and although reluctant to set up a barrier to improved facilities, still approved the present system of rebuttable presumptions.

Concerning Other Matters

24. Several comments, some of which have been briefly described in previous paragraphs, proposed generally that the Commission's allocation rules should take into account the need for unique, specialized or minority program formats. Some suggested specific exemptions to the

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[10] The Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C. 2d 650 (1971), was cited by several parties in support of this particular argument.

[11] See fn. 10, *supra*.

present restrictions, and sought the codification of these exemptions as sub-sections of Section 73.37(e). Others were less specific, and would apparently approve of consideration of "need" as a basis for case-by-case waiver of the rules. While some of the comments contained very limited substantive discussion, others cited a variety of precedents assertedly establishing the legal basis for such an approach, as well as its consistency with the public interest. The cases cited included primarily the recent line of "format" cases [12] together with the *WAIT* decisions [13] and the Commission's opinion in *Alabama Educational Television Commission*, 50 F.C.C. 2d 461 (1975). In most instances the parties sought to establish that there is a clearly recognizable need for minority programming and that, in light of the format cases, the nature of a station's programming is no longer a transitory element. According to several of the parties, these two factors are sufficient to justify an overall allocation policy based in part on programming format.

25. Despite the fact that the scope of this proceeding was limited to revisions of both Section 73.37(e) and, to the extent necessary, the 307(b) policy statement, numerous parties attempted to raise a wide variety of additional issues. The exclusion from this proceeding of any revisions of the rules governing Class IV operations was the question raised most frequently. Most parties asserted that this was "blatant discrimination" which would put Class IV operators at a significant competitive disadvantage. Other issues discussed in the comments included revision of the clear channel rules, revision of various technical standards (*e.g.*, Sections 73.182(o) and 73.150), revision of FCC Figure M–3, and revision of certain pre-sunrise operation requirements. Some put forward alternative means of assigning priorities to applications, while at least one party offered a more or less comprehensive re-working of our general allocation policies. Inasmuch as these proposals and others not otherwise discussed in this *Report and Order* were outside the scope of this proceeding, they will be rejected without further comment.

DISCUSSION

26. This proceeding was intended to be quite limited in scope, concerning itself primarily with possible amendments of Section 73.37, that portion of the standard broadcast rules which establishes the criteria governing the acceptance of applications for new and changed broadcast facilities. In addition to standards either set forth in or referred to, which prescribe the permissible limits of inter-station interference, this section establishes various other requirements aimed at controlling the direction and pattern of station growth.

27. The rules contained in § 73.37 were formulated in 1973 on the basis of an assumption that, at the rate of growth in the number of

[12] These cases include: *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *F.C.C.*, 141 U.S. App. D.C., 109, 436 F. 2d 263 (D.C. Cir. 1970); *Hartford Communications Committee* v. *FCC*, 151 U.S. App. D.C. 354, 467 F 2d 408 (D.C. Cir. 1972); *Lakewood Broadcasting Service, Inc.* v. *FCC*, 156 U.S. App. D.C. 9, 478 F. 2d 919 (D.C. Cir. 1973); *The Citizens Committee to Keep Progressive Rock* v. *FCC*, 156 U.S. App. D.C. 16, 478 F. 2d 926 (D.C. Cir., 1973); *Citizens Committee to Save WEFM* v. *FCC*, —— U.S. App. D.C. ——, 506 F. 2d 246 (D.C. Cir. 1974).

[13] *WAIT Radio* v. *FCC*, 135 U.S. App. D.C. 317, 418 F. 2d 1153 (D.C. Cir. 1969), appeal after remand, 148 U.S. App. D.C. 179, 459 F. 2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

stations then current, the standard broadcast band was approaching saturation, without a sufficient attendant improvement in the provision of service to areas and communities without adequate service. Accordingly, these rules were designed to restrict the assignment of new stations, and increases in power of existing stations, to situations where the addition of new facilities or the augmentation of existing facilities would result in the improvement of clearly inadequate service. The rules also, for the first time, fully equated AM and FM as a single aural service, and accorded priority to FM where channels were available on which needed new service could be established.

28. We believed then, and continue to believe, that the most pressing need is to extend aural service to areas in the United States (which are vast) which have no primary aural service, and, in the 1973 rules, the provision of service to "white areas," daytime and nighttime, was made a primary goal. At the same time, recognizing that, because stations must be based on population centers capable of providing adequate financial support, service to outlying "white areas," while highly desirable, is often difficult to achieve, we aimed our rules toward an alternative, a somewhat less pressing, but nevertheless desirable objective, the improvement of service to those generally smaller communities located outside of metropolitan areas, which have little or no local or locally oriented service.

29. For existing stations, the rules permit increases in power, up to the ceilings for the classes of stations involved, on the basis of a showing that, with its authorized power, a station fails to provide adequate service to the community to which it is licensed, or that, with increased power, it will serve areas or populations hitherto without primary standard broadcast service.

30. We have reviewed the rate and pattern of station growth during the period of more than two years which has elapsed since the present rules were adopted, as evidenced by applications filed with and accepted by the Commission during that period. If the number of such filings had remained at a high level, the indication would have been that these rules were efficiently achieving the service objectives toward which they were aimed, and we would have been loathe to consider measures which would, in any way, reduce or dilute their effectiveness. On the other hand, if their implementation has had the effect of slowing the rate of AM growth to such a degree that the feared saturation of the band is moved into the indefinite future, we would conclude that even though the ends sought to be achieved remain of primary importance, their practical realization is to be achieved only slowly, and in limited degree. If this is the case, it seems reasonable to consider the ways in which the present rules may be relaxed, so that while station growth will still be held within reasonable limits, service objectives of somewhat lower priority may be attained.

31. For a 21 month period since our 1973 rules went into effect, we have accepted approximately 113 applications for new or augmented facilities, have granted 59 (or at the rate of 34 per year), and have designated 14 for hearing. Of the 59 applications granted, new daytime service is provided in 31 instances, and new nighttime service in 17. While it is encouraging to see that this many facilities have been able to meet the service objectives set forth in our present rules, it is

evident that these rules are so restrictive as to have slowed the rate of station growth to an unnecessarily low level, and that a considerably higher rate of growth may be accommodated without an immediate or even distant danger of standard band saturation. We would also note that the FM band, to which we look as a primary source of needed new aural service, is not a resource capable of indefinite expansion, and in many areas where a legitimate need exists for new or expanded aural service, unused FM channels are not assigned, and new channels cannot be assigned on which to provide this service.

32. This being the case, the question is presented as to the best way of amending our rules, so that, while the number of new and augmented facilities granted may be increased, these facilities will contribute in some meaningful way to the rendition of improved broadcast service to the public.

33. The amendment of our rules to remove certain of the present restrictions on increases in power of existing stations, as proposed in the *Notice* herein, we believe is a relaxation which should promote early improvements in broadcast service.

34. The great majority of the parties who have addressed themselves to this proposal favor its adoption. Those who do not, see it as facilitating the further expansion of facilities of entities already occupying entrenched positions in the broadcast band, and as making more difficult the task of those, including minority applicants, who seek suitable channel space for new stations.

35. With respect to this latter contention, we are of the opinion that the impact on channel occupancy of the adoption of this rule amendment would be quite limited, and certainly not sufficient to exert a substantially preclusive effect on the ability to assign new broadcast stations. Indeed, many of those who support the adoption of the proposal, *per se*, believe that the relaxation of those restrictions on power increases now contained in § 73.37 is, alone, insufficient to permit meaningful increases in a significant number of cases, and other rules should be amended, both those which restrict the flexibility of the applicant in achieving incremental power increases, and those which limit the extent to which service may be improved with increased power.

36. Those proposals which appear to contemplate that some compromise in our present rules controlling interstation interference should be tolerated in the interest of facilitating power increases, we would reject out of hand. We have no intention of reverting either wholly or partially to the kind of situation which obtained prior to 1964 when our rules permitted the imposiiton of interference on existing stations on the basis of a showing "that the need for the proposed service outweighs the need for the service which will be lost by reason of such interference." Under these rules, the erosion of the service of existing stations to outlying areas proceeded apace, until brought to a virtual halt by the adoption of the "go-no-go" rules (73.37(a)), which prohibit the overlap of service and interference contours. We believe that these rules have contributed greatly to the orderly growth of the standard broadcast service, and, at the same time, have reduced the tremendous comparative hearing load which the previous system engendered. We would not, absent the most compelling circumstances,

consider the substantial modification, much less abandonment, of such rules.

37. Other proposals look toward the raising of the power ceilings for the various classes of stations beyond those set in 73.21 of the rules, either selectively or on a general basis. While the first mentioned approach would generally be implemented with due attention to the maintenance of interference protection for other stations, Cullum's plan for a nine-fold increase in the power of all stations would be accomplished without regard for the increased level of interstation interference resulting from such higher power operation (in each case, the stronger interfering signals would be counter-balanced by the stronger service signal). Generally, the gains resulting from the implementation of such a plan would be in the improvement in the quality of service rendered by each station over its present service area, although appreciable gains would result in the extent of daytime service provided, in instances where the service is not presently interference-free.

38. The pending petition of the Community Broadcasters Association seeking an increase in nighttime power of all Class IV stations to 1 kilowatt, an action sought by many of the licensees of such stations which filed comments in this proceeding, exemplifies this kind of approach with respect to a single class of standard broadcast station. The Cullum proposal would apply the principle of "concurrent" power increases completely across the board—to all stations on all channels.

39. The question of raising existing power ceilings, either selectively or generally is one which is beyond the scope of this proceeding, and accordingly, any extended critique of proposals of this nature would serve no useful purpose. It is sufficient to note that their implementation would require the solution of many problems, both domestic and international, although it is rather obvious that proposals falling in the first category present fewer problems than those in the second. We would only remark that domestically, the implementation of a system for "concurrent" increases in power would depend on the willingness and ability of the vast majority of station licensees to take this step, where, in many cases, the gains in the quality of service might be considered unnecessary, and in its extent, minimal. Neighboring countries would also have to take parallel action, or suffer the effects of greatly increased interference to their stations. Obviously we would have to negotiate major changes in existing treaties before undertaking any amendment in our rules to adopt such a system for internal use.[14] [15]

40. Other comments concerning station power suggest we abandon, either wholly or partially, the rules requiring that each station operate at one of the discrete power levels set forth in Section 73.41 of our rules, and license each station to operate at a power level restricted in the individual case to that necessary to afford the required degree of inter-

[14] For discussion of the matter of nighttime power increases for Class IV stations, see the Commission's *Orders* of April 26, 1972, and July 19, 1972, in RM–1955, FCC 72–340.

[15] It is suggested by two parties that nighttime power increases for Class IV stations might be implemented in connection with the installation of "tall" towers—approximately ⅝ wavelength in height—which could be expected to afford an improved ratio of groundwave to skywave signal, and, if employed by all stations, result in an actual increase in the nighttime interference-free area served by each station. This is an appealing and technically sound proposal, but could involve practical problems in its implementation. Moreover, it would not appear to cope with the principal impediment to Class IV nighttime power increases—the increased interference which would result to foreign broadcast stations from higher power operation of domestic Class IV stations.

ference protection to other stations. The latter procedure, if implemented, would undoubtedly allow many new stations which could not meet the "go-no-go" rules under the present system of power classification, to be "shoehorned in", and permit nighttime non-directional operation, possibly only with highly restricted power, by stations which otherwise either could not operate during these hours, or could operate only with complicated and expensive directional antennas. It may be that the authorization of "odd" power levels for pre-sunrise operation has convinced many of the feasibility of such an approach.

41. Assuming the adoption of such a system were found to be in the public interest, and did not impose intolerable administrative difficulties, our adherence to the North American Regional Broadcasting Agreement, which prescribes a power hierarchy similar to that set forth in our rules, would preclude our adoption of such a system. However, even if this were not the case, we remain to be convinced that the adoption of such a system, which would encourage the proliferation of many stations of extremely limited coverage, would be consonant with an efficient use of channel resources, and produce a result in the public interest.

42. We have similar problems with proposals that we establish a number of intermediate levels in the power classification table of § 73.41—not only would such an action conflict with the NARBA, but its adoption would tend to lead to the undesirable result cited above. However, while we will not undertake to adopt additional intermediate power classifications on any general basis, we believe that the creation of a single new classification at 2.5 kilowatts should be considered. The ratio between the powers presently specified immediately above and below this level, 5 kilowatts and 1 kilowatt, respectively, is considerably greater than that which exists between adjacent values in any other portion of the table. The provision of an intermediate step between 1 and 5 kilowatts is not only logical, but useful, as it would facilitate the maximum employment of facilities in instances where power greater than 1 kilowatt is feasible, but operation at the much higher power of 5 kilowatts is not. Furthermore, the adoption of the 2.5 kilowatt classification presents no treaty problem—the NARBA presently provides for this power step. Even though a rule change of this nature, strictly speaking, is beyond the scope of this proceeding, we deem it unlikely that it would be opposed by any party, and its adoption would further the objectives herein. Accordingly, we are adopting such a rule amendment.

43. AFCCE has asked for consideration in this proceeding of a proposed amendment to the rules governing the design and adjustment of directional antennas, relative to the control of antenna input power in the determination of the size of the radiation pattern of the antenna. It holds its proposal to be pertinent to the matters discussed herein, since the feasibility of power increases of existing stations in individual cases may depend, to some extent, on the degree of flexibility afforded by our rules in adjusting radiation pattern size to meet the interference and service considerations which are unique to each case. While this is, of course, true, we do not believe that this proposal, which involves a change in the highly technical and specialized rules on directional antenna design, can be given proper consideration in a

proceeding dealing principally with allocations policies. The proposal appears to have substantial merit, but we wish to examine it more closely in a separate proceeding instituted for that purpose. We will endeavor to expedite such consideration when the matters directly involved in the instant proceeding are disposed of.

44. Those proposals, usually put forward in behalf of licensees of daytime stations which look toward nighttime operation with facilities other than those required to accord protection to other stations—such as operation with daytime facilities until at least 6 PM on a year-round basis, or non-directional operation during the nighttime period with some lower, but arbitrarily set power, usually cite the alleged satisfactory functioning of our rules permitting pre-sunrise operation as evidence that operating modes sanctioned during this period can be instituted for post-sunset operation.

45. It should be unnecessary to again review the situation that exists with regard to the extent of groundwave service rendered by stations operating at night on the standard broadcast band—it is, by almost any standard, inadequate. With the exception of the few Class I stations, every station provides a far less extensive service nighttime than during daytime hours, and, in very many cases, interference-free service at night is available barely beyond the confines of the community to which a station is assigned. From the standpoint of the licensees of such stations, this situation, although undesirable, is tolerable—they are still able to serve the densely populated centers which provides the bulk of the advertising revenue which supports them. However, to those many millions of people who reside in areas more than a few miles from any station, nighttime standard broadcast service remains at a highly unsatisfactory level.

46. The nature of the skywave interference problem is such that little can be done to improve this situation, but the Commission has been concerned that no action be taken which would worsen it. It has been reluctant to authorize new nighttime assignments, even in instances where protection is afforded existing stations in accordance with our technical standards, because it believes that the incremental interference which new stations impose on existing stations inevitably results in a further diminution of the already limited service rendered by those stations. The operation of perhaps many daytime stations during some or all nighttime hours with facilities which do not even afford the degree of protection to existing stations which our technical standards require would result in incalculable damage to such nighttime service as is presently available from standard broadcast stations.

47. Moreover, we must categorically reject, at least within the context of this proceeding, the concept of post-sunset operation by daytimers holding pre-sunrise service authorizations (PSA's), using the reduced-power facilities specified therein. The rules under which PSA operations are conducted stem directly from a 1967 agreement with Canada (TIAS–6268), under which that country agreed to protection standards which enable more than 2,000 U.S. stations (mostly daytimers assigned to regional channels) to operate immediately prior to local sunrise with their authorized daytime facilities, but with power reduced to 500 watts (or less if necessary to provide co-channel Canadian protection under an agreed family of curves). Domestic inter-

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station skywave interference among U.S. stations assigned to the same channels was ignored, under the PSA program, on the ground that remote regions of the country would continue to be served during all nighttime hours by the clear channel stations, and because the 500-watt PSA power ceiling provides a means of interference control during the early morning transitional hours. The use of PSA facilities after local sunset is not provided for in the 1967 agreement with Canada, nor would such modes of operation be notifiable internationally by the United States. Because of the severity of nighttime skywave interference problems among the hundreds of fulltime stations presently operating on these channels throughout the North American Region, there is little likelihood that the 1967 agreement with Canada, which has virtually no daytime-only stations, can be further relaxed to accommodate post-sunset operation by daytimers in the United States. Finally, our rule making proceeding which implemented the existing agreement—*Report and Order* in Docket 14419, 8 F.C.C. 2d 698 (1967)—established an overriding need in many communities for early morning service, notably for weather information and for school cancellation announcements. No parallel need has been established for the post-sunset hours, nor is it likely that any such need, if established, could outweigh the resulting co-channel nighttime skywave interference problems.

48. The implementation of any proposed scheme which would permit individual stations to operate on two frequencies, one for daytime, and another for nighttime operation, would require basic changes in the standard broadcast allocation plan, as incorporated in our rules, and parallel revisions of the NARBA and the U.S./Mexican Agreement. Even if we believed that such a proposal had merit, these treaties would stand as a long-term obstacle to any action aimed toward effecting it. However, while the ability to operate on two frequencies might offer a solution to the particular problems of certain daytime stations seeking to extend their periods of operation into the nighttime hours, we believe any general application of the concept to standard broadcast allocations would be extremely wasteful of the resources of this band, and produce a result at odds with our aim to conserve these resources, and direct their future exploitation into avenues where the greatest public benefit would redound.

49. For the reasons we have set forth, generally we are rejecting, at this time, those proposals which look toward major changes in fundamental rules and policies regarding standard broadcast stations, and are adhering to our original intention of making such amendments of § 73.37, as will lower or remove certain of the barriers which it presents to the expansion of AM service. The only exception is with respect to § 73.41 of the rules, which is amended to incorporate a new power level of 2.5 kilowatts (and with a parallel amendment of § 73.14, which also lists the present power classification scale), and, as discussed subsequently, limitations in the sweep for the "suburban policy" as it applies to uncontested applications for new and augmented facilities.

50. A study of the comments filed herein has convinced us of the wisdom of proceeding with the proposed amendment of § 73.37 so as to remove the special showings presently required by applications seek-

ing power increases for existing stations, and we are taking this action, although, as described later, the textual changes made in the rules to accomplish this end differ from those proposed in the *Notice*.

51. To accommodate, to the extent possible, the need for new daytime and nighttime transmission facilities for developing suburban centers of population, and to facilitate the provision of truly community-oriented services to as many separate towns and cities as possible, we are altering the basic acceptability criteria to permit new nighttime or daytime assignments to communities which have fewer than two aural transmission facilities during the relevant portion of the broadcast day.

52. When we last considered this matter, we determined that each community was entitled to two, but not necessarily more than two competing aural "voices" and decided at that time that this complement of services would be considered to have been attained if such services were provided by stations which were located outside, but sufficiently close to the community that technically good service would be provided, and that the program service could be expected to be oriented, to a considerable extent, to serve the needs of the community. We adopted this formulation, even though we recognized that service provided to a community from stations not assigned to the community is not a fully adequate substitute for service provided by community-assigned stations, because we believed that any more permissive approach would result in a too rapid occupancy of available standard broadcast channel space. However, as we have stated, our experience with the application of the present rule indicates the feasibility of applying more relaxed standards to the determination of the circumstances in which new facilities may be assigned, and we are accordingly raising our sights to permit such new assignments as are necessary to provide each community with two independent aural transmission facilities.

53. Thus, under the rules as we have revised them, an application for a new daytime or unlimited time standard broadcast station, or for nighttime facilities for an existing daytime station will be accepted on the basis of a satisfactory showing that the community for which the station is proposed presently has fewer than two independent aural transmission facilities during the portion of the day for which the new service is proposed.

54. As these rules are applied, a proposal for a new unlimited time station would be accepted, if it would provide a first or second nighttime transmission facility for the community, even though, during daytime hours, its operation might result in the provision of more than two transmission services to the community.

55. We are continuing to maintain, as an alternative showing to the above, the same alternative available in our present rules, a demonstration that at least 25% of the area or population served by the new station will, for the first time, receive primary aural service.

56. It should be emphasized that we are not abandoning our policy, duly established in the 1973 *Report and Order*, of considering both AM and FM in determinations of existing aural service, and in favoring FM, where channels are available, for providing new aural service. Certainly, the promotion and extension of FM service to the greatest

possible degree is necessary if any substantial improvement is to be made in the extent of presently inadequate nighttime aural service, and we believe that the public interest requires that we maintain rules and policies directed toward this end. However, in the amended rules, we continue to treat commonly owned FM and AM stations, assigned to the same community, as a single source of aural service.

57. Pursuant to our present rules, an application seeking authority to change an existing station to a new frequency, besides being subject, as it must be, to the same limitations on interference caused and received as would a new station applying for that frequency, must also meet those criteria designed to restrict the number of services available to the community to which the station is assigned. This, many parties allege, places an unreasonable and unnecessary burden on a licensee seeking, by an appropriate frequency change, to improve the service which its station may render. In the typical case, an existing station may provide one of the two aural services to which a community is entitled. As the present rule operates, its existing operation stands as a bar to the acceptance of an application for a change in frequency, since such an application, treated in the same manner as an application for a new station, in effect contemplates the addition of a service to the community above the permitted maximum. This, in fact, could occur, since the application for frequency change by an existing station is subject to comparative consideration with conflicting applications, one of which, after hearing, might be granted in lieu of the application of the existing station. Under such circumstances, the existing station would continue to operate on its present frequency, and a new station, operating on the frequency which was sought by the existing station, might be assigned to the community, with the result that the number of services provided would exceed the prescribed ceiling. It is to avoid this kind of occurrence that existing rules provide for parallel treatment of new stations and changes in frequency of existing stations.

58. We have thoroughly reviewed the considerations with respect to this matter in the light of the comments, and are of the opinion that the rules may be modified without a substantial hazard being incurred that our policies, designed to prevent the undue multiplication of stations serving the same community, will be frustrated. Granted, that should we change our rules so that applications for changes in frequency, like applications for increases in power, are required only to meet the standards governing daytime and nighttime interference, occasions may arise when *de facto* violations of service ceilings may occur. However, it does not appear that the opportunities for moving to more favorable frequencies will be so numerous, and conflicts leading to the untoward results described above will occur so often that the aims sought to be achieved will be compromised substantially.

59. Accordingly, we are amending our rules so that henceforth the acceptability criteria applying to applications by existing stations for changes in frequency will be the same as those applicable to power increases—namely, a demonstration of compliance with the "go-no-go" rules, and, for nighttime operation; that objectionable interference will not result as determined pursuant to § 73.182(o).

60. While the adoption of rule amendments which contemplate the provision of two transmission facilities for each community should

create opportunities heretofore unavailable for daytime stations to qualify for nighttime operation, undoubtedly many prospective applicants for such facilities will be disappointed that we have not relaxed our technical rules to make it easier and less expensive to engage in such operation. We have hereinbefore explained why we are unable or unwilling to take such a step.

61. Be that as it may, the rules we are adopting in § 73.37, particularly regarding nighttime operation, are less restrictive than any which have obtained in the last thirteen years, and we are in some degree concerned that their adoption may result in a too rapid proliferation of new nighttime assignments, leading to an undue concentration of such facilities, with adverse effects on overall service. We do not believe this will happen, but should such a trend develop, it may be necessary for us to reconsider our decision herein. In any event, we intend to review, on a continuing basis, the rate and pattern of station growth under these rules. Should it appear that assignments of new stations and the augmentation of the facilities of existing stations are contributing too little to needed improvements in service to the public, in view of the attendant depletion of the resources of the standard broadcast band, we will institute further proceedings looking to the adoption of corrective measures.

The Policy Statement on 307(b) Considerations

62. As noted both in the comments and in the *Notice*, it is apparent that the continued application of our *Policy Statement on 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 F.C.C. 2d 190, Recon. Denied, 13 F.C.C. 2d 866 (1965), would tend to countervail the more liberal allocation policy which forms the basis for the rule revisions previously discussed. By amending the rules as indicated while continuing to impose the significant burden of the 307(b) presumption, particularly on applications for improvements to existing facilities, we would merely be removing one so-called artificial barrier while leaving another in its place. This is not to say that the presumption has been ineffective. On the contrary, as a device to assist in complex determinations between or among competing applicants, it has proved successful. However, for those uncontested applications swept within the broad reach of the presumption, it has often resulted in unnecessary complications which have served only to hinder the initiation or expansion of service. Accordingly, we have decided that a significant relaxation of the 307(b) presumption is appropriate, and we have concluded that the presumption described in our 1965 *Policy Statement* will henceforth be applicable only in situations involving competing applications in a hearing context. Inasmuch as the presumption serves to raise issues which would perforce be raised in a hearing between applicants competing for a 307(b) preference, we believe that retention of the presumption in that limited class of cases will continue to be beneficial. However, in light of our experience during the last ten years, it appears to us that any attempted abuses by uncontested applicants may be readily detected during standard review procedures, and nothing will be gained by retaining such applications within the presumption's scope. Although we will not then invoke the presumption, the factors underlying the original *Policy Statement* will continue to be of concern to

us with respect to all AM authorizations. Since the essential element in our 307(b) considerations will therefore continue to be the *intent* of the applicant with respect to service to the community of license, our analysis will focus on those facts and circumstances in the application which may bear on this question of intent. Obviously, such factors will vary from case to case, and no comprehensive list can be assembled. Applicants should be on notice that applications proposing power clearly in excess of that necessary to serve the proposed community of license and its immediately surrounding areas will be examined with care. Such scrutiny will also be accorded to any application the timing of which is inherently suspect.[16] In any case, we emphasize that we will continue to guard against those situations, described in the 1965 *Policy Statement*, which the presumption was designed to prevent.[17] We note also that other parties may seek to raise such an issue by filing objections to the application, pursuant to Sections 1.580(i), 1.587 and 1.106 of our rules. Of course, the procedural requirements set out in those sections will be applicable to all parties.[18]

Minority or Specialized Programming

63. We are rejecting proposals seeking to carve out more or less permanent exemptions for specialized or minority programming. As we have consistently held, program formats are by their nature transitory, and we have accordingly refused to consider them in designing and implementing our allocation system. See, *e.g.*, *Mel-Lin, Inc.*, 22 F.C.C. 2d 165 (1970). We are, of course, aware of the format cases cited to us for the proposition that programming is no longer a transitory consideration. However, those cases arose in the narrow context of the assignment or transfer of a license. The holdings in those cases were also narrow, and it should be noted that no court has held that the Commission must *require* a licensee to provide any particular programming format. Rather, the format cases merely held that, in reviewing an application for assignment or transfer of a broadcast license, the Commission may be required to institute an evidentiary hearing to inquire into the effect on the public interest of a proposed change of format if it appears that the proposed change would significantly lessen the available diversity of programming within the subject station's service area. Further, the present context, that of a broad rule making proceeding, is significantly different from that of any of the cited cases, since we are now focusing on general, nationwide goals rather than the needs of any particular community. As a result, we continue to believe that the transitory nature of programming makes programming a particularly inappropriate factor to consider in the context of the adoption of such generally applicable rules as are

[16] The most obvious example of such suspect timing would be an application for a power increase before construction of the originally authorized facility is completed. Other, more subtle, attempts to circumvent the remaining restrictions on new facilities may also arise, and will be dealt with as the circumstances warrant.

[17] The new policy announced herein will apply to all applications currently pending before the Commission. Broadcast Bureau counsel will, of course, be free to request the addition of appropriate issues in those ongoing hearings where the presumption no longer applies.

[18] These requirements include the burden, imposed by Section 309 of the Act, of raising a substantial and material question of fact before a pleading will result in the designation of an application for hearing.

under consideration here. Accordingly, those suggestions regarding allocation by format are rejected.[19]

Procedural Questions

64. With respect to the two procedural points raised by the National Black Media Coalition [20], we are of the opinion that the "defects" relied on by the Coalition are not, in fact, defects. The *Notice* of this proceeding was duly published in the Federal Register, as required by the Administrative Procedure Act [21] and contained all the information stipulated by that Act.[22] It must be noted that the Prime Time Access Rule decision cited by the NBMC did *not* create any further necessary procedures. Rather, the court indicated that any public interest determination must include consideration of the needs of the public as well as those of particular representatives of the broadcast industry then before the Commission. And, in light of the particularly immediate impact of the Prime Time Access Rule on the viewing public, the court *suggested* that the Commission make some affirmative efforts to involve members of the public in the proceeding. This clearly did not constitute a judicial revision of the Administrative Procedure Act. Nor does the fact that we did issue further notice in response to the court's suggestion bind us to issue such notice in all rule making proceedings.[23] It should also be noted that the rules presently in question, albeit significant in terms of allocation policy, will hardly have the immediate impact on the general public that the Prime Time Access Rule would.[24] Finally, we point out that, in response to the *Notice* that was published, we received approximately 273 comments from a total of 294 parties.[25] Among these were several private citizens as well as a number of Black licensees. In addition, many of the comments included exhibits containing numerous letters from a broad range of individuals, Black and White, interested in the outcome of this proceeding. Although not expressly directed to the Commission as comments in this docket, these letters have nonetheless provided us with an indication of the public's sentiments. It does not

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[19] In addition, we recognize the recent opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *Garrett* v. *F.C.C.*, —— F. 2d ——, No. 73–1840, decided June 2, 1975, which holds, *inter alia*, that Black ownership, participation and programming are relevant factors in making a determination of public interest, citing *TV 9, Inc.* v. *F.C.C.*, 161 U.S. App. D.C. 349, 495 F. 2d 929 (1973), *cert. denied*, 419 U.S. 986 (1974). Again, however, the nature of this proceeding is fundamentally different from the situations posed in *Garrett* and *TV 9*, and we do not read either case to require us to incorporate minority ownership and/or programming as a determinative aspect of the overall allocation policy presently under consideration.

[20] See paragraph 14, *supra*.

[21] See 5 U.S.C. § 553 (1970). The *Notice* may be found at 39 Fed. Reg. 42920.

[22] In relevant part, the Act requires that the Notice of a rule making shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(a)(3). It is clear that the notice in the instant proceeding satisfied this requirement.

[23] We note, however, that we are presently investigating a variety of alternate means of informing the public of Commission proposals. A staff committee has been formed and its preliminary findings in this matter should be prepared shortly.

[24] In discussing that impact, the Court said: "These dictates [regarding consideration of the public's interest] should apply with even greater force where the Commission's rule has as broad an impact on the public as the Prime Time Access Rule. The rule directly affects what millions of Americans watch on television for an hour every night and, indirectly, may affect all prime time programming." 502 F. 2d at 257.

[25] The total number of parties that had participated in the Prime Time Access Rule proceeding at the time of the court's opinion was significantly less than 100. See *Prime Time Access Rule*, 44 F.C.C. 2d 1081, 1161 (Appendix B). Even this number was *not* held to be "insufficient as a matter of law." 502 F. 2d at 258.

appear to us that we have "utterly failed" to develop an adequate record and thus the Coalition's threshold procedural arguments must be rejected.

Amendment of the Rules

65. The text of the rule amendments which we are adopting is set forth in Appendix B.

66. It should be observed that, while we have, among other things, adopted and expanded the substance of the rule change proposed in the *Notice*, we have somewhat altered the organization of paragraph (e) of 73.37, so that (e) together with paragraph (a) establish the basic interference standards which all applications for new facilities, or for major changes in existing facilities must meet. Since increases in power of existing stations and changes in frequency of existing stations are major changes, which henceforth will be subject only to these standards, applications for increased power or changes in frequency will be acceptable if they meet the requirements of (a), and of (e), if appropriate.

67. We have revised the language of paragraph (e) and succeeding subparagraphs to eliminate the employment of the phrase "other than Class IV stations," which, it appears, has been a source of misunderstanding in the past.

68. Present Note 6 of § 73.37 which deals with the circumstances in which an FM channel is to be considered "available" or "not available" to serve a particular community has been amplified to identify the point in time at which a newly assigned channel is to be deemed "available."

69. In determining the number of transmission facilities available to a particular community, the treatment of stations proposed in pending applications for that community becomes a matter of sometimes critical importance. We are adding a new Note 8 which defines the status of such proposed stations in accordance with previous Commission precedent in similar matters.

70. In rather common usage, a broadcast station is a "transmission facility" for the community to which it is licensed, and provides a "transmission service" for that community. Since these terms, while employed in the section, are not elsewhere in the rules, we consider it advisable to define them herein. We have appended a new Note 9 for this purpose.

71. The implementation of these rule amendments should provide many opportunities, unavailable since the adoption of the restrictive amendments of 1964, for the assignment of new standard broadcast stations, and the expansion of facilities of existing stations, and can be expected to result in an increased flow of applications seeking new or augmented facilities. We are unable to forecast the rate at which such applications may be filed, and, accordingly, anticipate whether the Commission's processing staff will be able to dispose of these applications without inordinate delays. In the event a large backlog of unprocessed applications appears to be developing to the point where it is administratively burdensome, we may find it necessary to impose measures controlling the rate of application filing. These measures will probably involve the declaration of "open" and "closed" seasons for the filing of applications. If it becomes necessary to institute such measures,

they will be temporary in nature, and advance notice will be given, so all parties will have ample time to complete and submit any applications which are in preparation.

72. Accordingly, IT IS ORDERED, That effective August 22, 1975, Part 73 of the Rules and Regulations IS AMENDED as set forth in Appendix B hereto. Authority for this action is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

73. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

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

APPENDIX A

The following is a list, in alphabetical order, of the parties filing comments in this Docket. The numbers in parentheses which follow some names indicate the number of separate comments filed by those parties.

Adler Communications Co., Inc.
AHB Broadcasting Corporation
Annapolis Broadcasting Corporation
Artlite Broadcasting Company
Asheboro Broadcasting Company
Association for Broadcast Engineering Standards, Inc. (2)
Association of Federal Communications Consulting Engineers
Edward G. Atsinger, III
Auburn Broadcasters, Inc.
Baker Broadcasting Company
Bangor Broadcasting Corporation
Batavia Broadcasting Corporation
Beacon Broadcasting Corporation
Lawrence Behr Associates, Inc.
Belo Broadcasting Corporation
Benay Corporation
Serge Bergen
E. W. Bie
Big Brother/Big Sister
Blacksburg-Christiansburg Broadcasting Company
Bloomington Broadcasting Corporation
Boman Broadcasting, Inc.
Booth and Freret
Roger P. Brandt
Jack L. Breece
Bride Broadcasting, Inc.
Broadcast House Inc.
Brokensword Broadcasting Co.
Call of Houston, Inc.
Campbell Broadcasting Corporation
Central Nebraska Broadcasting Company, Inc.
Christian Enterprises, Incorporated
The Circle Corporation
Clear Channel Broadcasting Service (2)
Clinch Valley Broadcasting Company
Cloverleaf Broadcasting Corporation
Coastal Broadcasting Corporation
Cohen and Dippell, P.C.
Commonwealth Broadcasters, Inc.
Communications Properties, Inc. (4)
Communico Broadcasting (3)
Community Broadcasters Association, Inc. (2)
Contemporary Media, Inc.
Corbin Times-Tribune
Cosmopolitan Enterprises of Victoria, Inc.
Cove Broadcasting Company, Inc.
Oscar Leon Cuellar
A. Earl Cullum, Jr., and Associates (4)
Richard Culpepper
DAE Broadcasting Company (3)
Dairyland Managers Inc.
Deep South Radio, Inc.
Dome Broadcasting, Inc.
Doubleday Broadcasting Company, Inc.
Eagle Enterprises, Inc.
Edgefield-Saluda Radio Company, Inc.
Educational FM Associates
El Dorado Broadcasting Company
Elektra Broadcasting Corporation
Eureka Broadcasting Company, Inc.
Everbach Broadcasting Co., Inc.
Fairbanks Broadcasting Company of Massachusetts, Inc.
Fairview (Tenn.) High School
Fetzer Broadcasting Company
Walter L. Follmer, Inc.
Forjay Broadcasting, Inc.
Fort Wayne Broadcasting Co., Inc.
Gaffney Broadcasting, Inc.
Emanuel Garrett
Garrett Broadcasting Service (2)
Gatorland Broadcasting, Inc.
Golden West Broadcasters, Inc.
Golden West Broadcasters
Curt Gowdy Broadcasting Corp.
Gowdy Florida Broadcasting
Grace/Wolpin Broadcasting Company
Grass Roots American, Inc.
Great Southern Broadcasting Company, Inc.
Great Trails Broadcasting Corporation