F.C.C. 76-78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS TO REQUIRE NONCOMMERCIAL EDUCATIONAL BROADCAST STATIONS TO RETAIN AUDIO RECORDINGS UNDER CERTAIN CIRCUMSTANCES.	Docket No. 19861

MEMORANDUM OPINION AND ORDER

(Adopted: January 29, 1976; Released: February 19, 1976)

BY THE COMMISSION:

1. The Commission has under consideration a "Joint Motion for Stay of Order Pendente Lite and Request for Expedited Consideration" filed January 19, 1976, on behalf of thirteen noncommercial, educational broadcast licensees (hereinafter referred to as "petitioners").[1]

2. We are asked by the petitioners to stay the effective date of certain recently adopted rules[2] which require the licensees of noncommercial, educational broadcast stations which receive federal financial assistance under Title III, Part IV, of the Communications Act of 1934, as amended, to record and retain for a period of sixty days programs they broadcast in which any issue of public importance is discussed, and to make copies of those programs available on request to members of the general public and others. See *Report and Order* in *Docket No. 19861*, released December 19, 1975, 40 Fed. Reg. 59736. The petitioners state that they are also filing a Petition for Review and Motion for Stay in the United States Court of Appeals for the District of Columbia Circuit.

3. In support of the motion, the petitioners maintain that Section 399(b)[3], which the new rules implement, is constitutionally defective. In this regard, they assert that the statute is unenforceably vague for it fails to include specific standards by which licensees may identify programs in which any issue of public importance is discussed. Further, the petitioners contend that the new section violates the constitutional doctrine requiring that "less drastic means" be utilized when legitimate government purposes are found to conflict with funda-

[1] The petitioners include:
Community-Service Broadcasting of Mid-America, Inc., the Connecticut Educational Television Corporation, The Regents of the University of Michigan, The University of Nebraska, The Nebraska Educational Television Commission, Northeastern Educational Television of Ohio, Inc., Northeast Pennsylvania Educational Television Association, Sangamon State University, South Carolina Educational Television Commission, South Central Educational Broadcasting Council, St. Louis Educational Television Commission, State of Wisconsin—Educational Communications Board, and The Board of Regents of the University of Wisconsin System.

[2] 47 C.F.R. 73.127; 47 C.F.R. 73.600; and 47 C.F.R. 73.622.

[3] 47 U.S.C. 399(b), 87 Stat. 219, August 6, 1973.

mental personal liberties. Finally, the petitioners assert that the statute is demonstrably unconstitutional on its face in that it specifically denies noncommercial, educational licensees equal protection under the law. The effect of these constitutional infirmities, say the petitioners, is to cause noncommercial, educational licensees irreparable injury since attempted compliance with the assertedly faulty statute exacts a severe burden in terms of financial and manpower resources. The petitioners conclude by contending that the granting of a stay by the Commission will not harm the public interest nor will it result in substantial injury to other interested parties.

4. The major purpose of a stay is to preserve the public interest from injury or destruction while other remedies are being pursued.[4] Parties seeking a stay must establish (a) the likelihood of prevailing upon the merits of an appeal; (b) the existence of irreparable injury to the petitioner should the stay be denied; (c) that no harm will result to other interested parties if the stay is granted; and (d) that the stay would be in the public interest.[5] The burden is heavy particularly where, as here, the statute and rules promulgating the statute are intended by the Congress to benefit the public interest. Absent a strong showing and without a substantial indication of probable success on the merits of an appeal, the granting of a stay cannot be justified.[6]

5. We conclude that the petitioners have failed to sustain their burden. There is, in our opinion, no strong and substantial showing of probable success on the merits of the appeal. Congress directed this Commission to implement the statute and in doing so impliedly mandated the Commission to set forth with requisite specificity the standards by which licensees should act in complying with the statute. This we have done, and in a manner which we believe is reasonable and clear yet which refrains from encroaching upon programming content or the licensee's own good faith judgment. Further, it is our view that neither the "less drastic means" doctrine nor the equal protection arguments advanced by the petitioners are meritorious. In the first instance, neither the statute nor our rules can be said to infringe upon the traditional and fundamental First Amendment freedoms. Secondly, classification or selection methods of the type utilized here may be justifiably imposed by Congress where needed to effect a legitimate governmental interest (e.g., providing members of the general public and others with the opportunity of examining recordings of specified programming broadcast by noncommercial, educational licensees who receive federal financial assistance) so long as the selection method bears a rational relationship to the governmental interest involved.

6. Nor do we believe that petitioners have substantiated their claim of irreparable injury. The assertion by the petitioners that noncommercial, educational licensees will suffer irreparable harm is seemingly based on two theories: first, the vagueness of the statute will require licensees to record all programming at a burdensome financial cost, and secondly, the equipment needed to perform the recording required by the statute will cost approximately $4,000.00 per licensee. As to the

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[4] 24 F.C.C. 2d 614 (1970) citing *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4 (1942).
[5] *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F. 2d 921, 925 (D.C. Cir. 1958).
[6] *Id.*

first claim, we reiterate the conclusions expressed above. As for the second point, the unsubstantiated allegation as to equipment costs without further supportive evidence is insufficient, in our view, to establish the existence of irreparable injury and thus, the need for a stay. Clearly, it does not rise to the level of the criteria set forth in the *Virginia Jobbers* decision, *supra*. Finally, contrary to the assertions of the petitioners, we perceive a potential harm to the public interest in that the granting of a stay would deprive the general public and interested individuals of the access opportunities specifically provided in the rules. Balancing the possible harm to the petitioners and to the public interest if the stay is alternately granted or denied,[7] we find a greater public benefit in maintaining the right of access as specifically set forth in the rules during the pendency of any judicial proceedings involving the validity of Section 399(b).

7. Accordingly, IT IS ORDERED, That the "Motion for Stay of Order Pendente Lite" filed by the petitioners[8] IS DENIED.

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

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[7] *United States Steel Corp. et al.* v. *F.P.C.*, 510 F. 2d 689 (D.C. Cir. 1975).
[8] The petitioners are identified at footnote 1.