

**Declaratory Ruling
Premature Construction**

Request for declaratory ruling that pouring of concrete footings for proposed broadcast tower does not constitute premature construction in violation of Section 319(a) of Communications Act granted. Expenditure of funds to pour concrete is not the type of construction intended to be precluded by the language of Section 319(a).

FCC 80-533

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by

Patton Communications Corporation

For Declaratory Ruling

September 10, 1980

Patton Communications Corporation
c/o Gordon & Healy, Chartered
1821 Jefferson Place, N.W.
Washington, D.C. 20036

IN REPLY REFER TO:
8900-RH

Gentlemen:

This refers to your December 20, 1979 request for a declaratory ruling that the pouring of concrete footings for a broadcast tower does not, by itself, constitute premature construction in violation of Section 319(a) of the Communications Act of 1934, as amended, 47 U.S.C. 319(a). Section 319(a) of the Act, in pertinent part, provides:

No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission.

In this regard, you have stated that the purpose of Section 319(a) was to discourage broadcast applicants from making considerable investments in the construction and installation of broadcast facilities and then using those investments to exert undue pressure on the Commission to authorize service. You further state that expenditures for concrete footings are probably the least expensive item (approximately several hundred dollars) associated with constructing a broad-

cast facility and, thus, would be of little use to exert undue pressure on the Commission. Therefore, it is your belief that the digging of a hole and the pouring of concrete footings is not the type of construction intended to be precluded by the language of Section 319(a).

You also state that you are the licensee of several radio broadcast stations located in Michigan and that as a practical matter it is impossible to pour concrete footings for towers about six months of the year because either the ground is too frozen to be dug or the concrete will not properly cure. As a consequence, you state that a construction permit issued between November and April in northern states is effectively conditioned to an April commencement date. You assert that this situation results in unnecessary delays in constructing new or modified facilities.

A ruling on your request must necessarily be made upon an analysis of the Congressional intent in enacting Section 319(a) and past Commission application of the statute. We focused on the Congressional intent of 319(a) many years ago in *WSA V, Inc.*, 10 RR 402 (1955), *aff'd sub nom.*, *WJIV-TV, Inc.*, 231 F. 2d 725 (1956), stating:

the Congressional intent and objective underlying [Section 319(a)] was to discourage applicants from making large investments and using such investments as "improper pressure" on the licensing authority. Aside from general reference to "considerable expenditures" related to "land installations" . . . special buildings . . . special transmitting equipment . . .", *Congressional expression is devoid of specific reference to the type of preliminary steps which an applicant might take in connection with construction of "special buildings" or "land installations."* It is also barren of reference to intent or motive of construction. At the time this requirement for securing of a construction permit (antecedent to obtaining a license to operate) was urged in Congress, the following situation prevailed: in view of the then existing state of the radio art, construction of a station to the extent it involved installation of radio equipment was dependent upon the "wave length" a station was to use; the necessity of securing a permit prior to such construction was thus intended to reduce pressure on the licensing authority in that the latter's decision to establish zones of wave lengths was not to be influenced by the *fait accompli* of prior construction of considerable proportion. Expenditures are therefore related to construction of facilities the principal value of which lies in their use for proposed broadcast purposes. [Emphasis added.]

The *WSA V, Inc.* case involved the premature construction of three steel sleeves intended for use as support for a television tower and construction of a room, both on the roof of the applicant's (licensee's) present studio and transmitter site. We held that the three steel sleeves fell within the purview of Section 319(a) since there was no evidence that the three sleeves used together could be used for anything other than to support the proposed tower. With regard to the room, however, we found its construction outside the purview of Section 319(a) since it had, in and of itself, no intrinsic television facility function.

Since the *WSA V, Inc.* decision we have continued to permit the acquisition of equipment¹ and construction of facilities² which, in and of themselves, have no intrinsic function related only to the proposed new facility. On the other hand, the Commission has found violation of Section 319(a) where prior to issuance of a construction permit: (1) a studio to transmitter link (STL) was constructed, *Merrimack Valley Communications, Inc.* 20 FCC 2d 161 (1969), (2) foundations, footings, towers, antennas and wave guides were constructed and installed in connection with two cable television relay service (CARS) facilities, *Westinghouse Broadcasting Co., Inc.*, 49 FCC 2d 1171 (1974), and (3) microwave equipment (wave guides, antennas, or passive reflectors) which is mounted on an existing tower, *Premature Construction in the Cable Antenna Relay Service*, 39 RR 2d 1515 (1977). This Commission approach indicates that, given no specific Congressional direction as to the types of preliminary steps an applicant might take in connection with construction of land installations, the Commission has found all such preliminary steps having an intrinsic broadcast use, related to the proposed facility, to come within the statute's purview.

In light of the above, the literal language of Section 319(a) must be read in conjunction with our companion statutory responsibility to provide a prompt institution of broadcast service. In order to promote a prompt institution of broadcast service, Section 319(b) of the Act requires that a construction permit specify both a required date of commencement of construction and a required date of completion of construction. It is readily apparent that in certain parts of the country, during winter months, ground conditions would foreclose the digging of holes and the pouring of concrete footings. Consequently, a significant aspect of the construction of a broadcast facility, i.e., the tower, could not commence. As a corollary, a substantial delay in the commencement of construction could make impractical the completion of construction by the required date set forth on the construction permit. Therefore, it would be anomalous to interpret Section 319(a) in a context that may hinder a permittee from complying with Section 319(b) with respect to required dates of commencement and completion of construction.

This view is reinforced by a review of the legislative history of Section 319(a). It is clear that the overriding Congressional concern was the prejudicial effect that a substantial expenditure would have on Commission consideration of a particular application. The relatively minor expenditure of funds to pour concrete is not prejudicial to our consideration of an application. In fact, such an expenditure is usually

¹ *UA - Columbia Cablevision, Inc.*, 55 FCC 2d 656 (1975), *Fostering Expanded Use of UHF Television Channels*, 4 FCC 2d 839, 846 (1966), *Childress Broadcasting Corp.*, 24 RR 669 (1962).

² *Spectrum Communications, Inc.*, 40 FCC 2d 467 (1974), *Jefferson Radio Corp.*, 29 FCC 873 (1960), *Harriscope, Inc.*, 15 RR 332 (1957).

substantially less than the purchase of broadcast equipment which is permitted under current Commission policy.

Therefore, the Commission concludes that the pouring of concrete footings should not be construed as being within the ambit of the construction proscription contained in Section 319(a) of the Act.

BY DIRECTION OF THE COMMISSION,

WILLIAM J. TRICARICO, *Secretary.*