

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-9

In the Matter of

Amendment of Part 73, Subpart C
of the Commission's Rules to require
licensees of noncommercial FM
stations to accommodate requests
by radio reading services to
utilize their subcarrier capacity
on an incremental cost justified
basis. RM-5509

**MEMORANDUM OPINION AND ORDER
AND
NOTICE OF INQUIRY**

Adopted: January 16, 1987; Released: February 3, 1987

By the Commission:

INTRODUCTION

1. The Commission has before it a petition for rule making filed on May 20, 1986,¹ by the Association of Radio Reading Services ("ARRS").² Petitioner requests that the Commission initiate a proceeding which would require noncommercial educational FM licensees to lease to radio reading services subcarrier capacity based upon nondiscriminatory incremental cost justified rates.³

BACKGROUND

2. In 1981, Section 399B was added to the Communications Act of 1934, as amended.⁴ This amendment, specifically subparagraph (b)(1), authorized public broadcasters to engage in entrepreneurial activities through the "... offering of services, facilities, or products in exchange for remuneration." In view of the legislative history of this provision reflecting Congress' expectation that public stations do more to provide their own support in view of anticipated reductions in the level of government funding for such stations, the Commission initiated a proceeding (BC Docket No. 82-1) to consider whether the subcarrier capacity of these stations could be used to obtain additional funds. At the conclusion of the proceeding, we found that given the broad nature of the statute's language, the plain intent of Congress to provide public broadcasters the ability to generate self-supporting income and the clear capacity of commercial subcarrier use to help meet the demonstrated need of public radio stations for such income, remunerative use of subcarriers was both consistent with the 1981 Amendments and advisable as a matter of policy. Thus, in the *Report and Order ("Report")*,⁵ the Commission amended Section 73.593 of the Commission's Rules to allow, for the first time, public

radio stations to engage in the same range of remunerative activities on their subcarriers as do commercial stations.⁶

3. Although public radio stations are authorized to use their subcarriers, Section 73.593 provides that they are not required to do so.⁷ Under our rules if subcarriers are used for remunerative activities, noncommercial licensees must ensure that neither existing nor potential radio services for the blind are diminished in quantity or quality as the result of such an undertaking. In other words, noncommercial FM stations utilizing a subcarrier for commercial purposes must accommodate radio reading services on another subchannel or ensure that alternative subchannel capacity is available for such services. However, if a public radio FM facility does provide a reading service, it is not expected to bear the fixed or operating costs of the service although it is expected to provide such services on a not-for-profit basis.

4. After the Commission's action was taken, it became apparent that some confusion existed regarding the matter of costs. Thus, on December 3, 1984, at the request of the American Foundation for the Blind, the Mass Media Bureau issued a clarification indicating that charges made by a noncommercial FM facility for a reading service to the blind must be on a not-for-profit basis whether or not the station uses its subcarrier capacity for remunerative purposes. Further, the Bureau stated that public radio stations should not impose charges which exceeded the incremental costs of conducting the radio reading service. However, licensees may charge the portion of the station's overhead that relates to providing the radio reading service.

PETITION FOR RULE MAKING

5. In its petition, the Association of Radio Reading Services argues that allowing public radio stations to use their subsidiary channels for remunerative purposes has had unanticipated negative effects on reading services for the visually impaired.⁸ From 1968 to 1983, listeners of reading services on a nationwide basis had grown from a few thousand to approximately 150,000 and reading operations had increased from 1 to 90. Furthermore, notes petitioner, in 1983, reading services were planned at 45 additional locations. However, since that time, ARRS submits, some radio reading services have ceased operation, and plans for many new reading operations have either been cancelled or put on hold. In addition, petitioner asserts that many reading services are experiencing strained relationships with their sponsor stations due to disagreements concerning the latter's imposition of allegedly improper charges.⁹ Prior to the rule change in 1983, ARRS submits, rates being charged reading services by noncommercial FM facilities ranged from zero to less than the charges imposed for subsidiary services by commercial FM stations. Petitioner contends that is no longer the case. It is asserted that not only are many public stations making unreasonable financial demands on reading services, but that National Public Radio's ("NPR") promise of reimbursement to public stations for reading operations has not materialized.¹⁰

6. In requesting rule amendments, petitioner alleges that Section 73.593, as presently written, provides only limited protection to radio reading services. ARRS submits that the provision, not to act to the detriment of radio reading services, does not apply to stations choosing

not to use their subcarrier for remunerative purposes. Thus, a station which had a reading service prior to the new rule, but that does not pursue remunerative activities, is permitted to terminate its relationship with the reading service. Additionally objectionable to the petitioner is the alleged lack of specificity in the 1983 *Report*, as well as in the rule, regarding which costs may be assessed in determining fair rates. It is further alleged that, although the *Report* specified that noncommercial stations which make subsidiary channels available to reading services do so on a not-for-profit basis, there is no specification of what constitutes such profit. Also of concern to ARRS is the possibility that under the rule a station planning to pursue remunerative activities could delay such operation until such time as a prospective radio reading service abandons its plans to operate.

7. In view of its allegations, ARRS proposes to require public radio stations to carry reading services on request on one of their subsidiary channels.¹¹ Petitioner believes this would reverse the allegedly negative effects the current rule has on radio services, while preserving the ability of public stations to use their subcarrier capacity for remunerative purposes. Petitioner further contends that its proposal would provide radio reading services with the leverage that is lacking in the current rule, and would provide public stations with the incentive to actively cooperate with radio reading services by awarding a preference at renewal time. Regarding costs, ARRS believes that its suggested amendment would impose a duty on reading services to pay incremental costs added to station operation, if required by the noncommercial facility and, at the same time, assures that rates charged to radio reading services are just. Petitioner urges the Commission to further clarify what constitutes recoverable costs. It is asserted that guidelines are needed to determine which incremental expenses will be allowed for reimbursement. In petitioner's opinion, the best way to accomplish this task is to require that actual incremental costs be itemized in discrete categories.

COMMENTS

8. As previously mentioned, the public was provided notice of the petition for rule making on July 14, 1986. Of the six comments and two replies filed in response to that notice, only the submission of Written Communications Radio Service ("WCRS") significantly favored the proposal.¹² In support of its assertion that the current Commission rule provides no immediate concise remedy and penalty for arbitrary disruptions of reading services, WCRS notes its dispute with Station WKSU-FM, Kent, Ohio, the subject of a current Commission complaint.¹³ Because the rule is vague about a host station's dutiful public interest behavior, WCRS alleges, the only remedy is lengthy and costly litigation. Commenter contends that the existing rule has no real incentive mechanism to encourage public FM radio stations to appropriately accommodate radio reading services with indiscriminate subcarrier accessibility. According to WCRS, plans to start new radio reading services in yet unserved areas where a subcarrier may be unoccupied are stifled as interested parties learn of the financial and accessibility insecurities that the rule presents. It asserts that radio reading services have found accommodation on a subcarrier only if the host station can generate "needed revenue" from these operations under the "guise" of cost recovery. The pro-

posed amendment, submits WCRS, would provide the visually impaired with a vital radio reading service program.

9. Although Wisconsin Educational Communications Board ("WECB"), Donald P. Mullally and Calvary Bible College ("Calvary") support the concerns expressed in the petition, as do all those commenting, they oppose the proposal as not taking into account other technical or noncommercial public service uses for a station's subcarrier capacity. They suggest telemetry, instructional and second language programming as examples. They submit that the rights of other current and potential public users of this spectrum should continue to be protected. Calvary and National Public Radio ("NPR") contend that mandatory access by radio reading services is unwarranted and amounts to regulation of broadcast content with constitutional implications. NPR also indicates that since noncommercial radio relies on the public for financial support, it is committed by principle and necessity to maintaining community support. It asserts that noncommercial radio stations simply cannot diminish or sacrifice public telecommunications services for specialized audiences without damaging severely the public trust on which such financial commitments are predicated.

10. NPR and Donald P. Mullally also maintain that petitioner's assertion of need, the basis for its proposal, is questionable since alternative media (e.g., cable, cassette and disc recordings) can perform just as efficiently and at competitive costs. In fact, one problem with radio reading services, states NPR, lies in the prohibitive cost (\$60-\$100) of the home receiver needed for reception of the service. Additionally, commenter submits that television's subcarrier capacity can be used for reading services as well as main channel radio service. Also, NPR states that some public radio stations have resisted aural service subcarrier operation due to interference potential. Since the decision to use subcarrier capacity is complex, NPR argues, it is critical for a station to maintain complete discretion in controlling its signal quality as well as other aspects of its broadcast service. As to the matter of costs, NPR is unaware of any data on what public radio stations are charging for use of their subcarrier channels. NPR further submits that its compensation policy designed to induce public stations to continue providing reading services was not implemented because noncommercial stations are not free to use, without restriction, all their subcarrier channels for revenue producing purposes.

11. Contrary to ARRS's assertions, NPR finds that radio reading services have increased in the past several years. As of January 1986, 72 NPR member stations operated reading services for the print-handicapped while telemetry services were offered by only 41 NPR members and data transmission and other digital information services were provided by only 21 NPR members. NPR also noted that a survey conducted in 1986 by the Corporation for Public Broadcasting ("CPB") indicated that the most regularly-transmitted subsidiary services of CPB-qualified FM public radio stations were reading services for the print-handicapped.¹⁴ According to NPR, of the 193 CPB-qualified FM public stations that had SCA transmission capability, 81 provided reading services, 46 provided telemetry services, and 27 offered data transmission.¹⁵ In its submission, CPB asserts that petitioner recommends an extreme and unnecessary remedy. Rather, notes commenter, what is necessary is a clarification of which charges may be appropriately included in the category of

"incremental costs." CPB believes that radio reading services need the assurance that stations are not treating them as commercial entities and stations need a guarantee that the costs incurred in accommodating radio reading services will be recouped. Therefore, it is commencing an investigation into stations' use of their subsidiary channels and their arrangements with radio reading services, and suggests the FCC do likewise.

12. In reply to comments, ARRS reports on the results of its recently conducted informal telephone survey of 76 radio reading services operating on 112 different FM radio stations.¹⁶ While 56 of the stations provide their subsidiary channel free of charge, the remaining 56 (5 are commercial) charge anywhere from \$1200 to \$12,548 annually. Nine stations charge \$3000 or less and another 17 charge between \$3,000 and \$5,999. The remaining 28 facilities all charge \$6,000 or more per year with 17 of them charging \$10,000 or more on an annual basis.¹⁷ The ARRS study found that in most cases neither the subsidiary channel's hourly use, nor the radio station's power, had any correlation with the rate charged. Petitioner states that of the five commercial facilities studied, the majority of their rates were well below that of most noncommercial stations.¹⁸ ARRS notes, however, that some commercial stations offer a reduced rate for non-profit reading services. According to petitioner, the rates charged by commercial stations for "for-profit" services are not significantly higher than the rates charged by many noncommercial services for non-profit reading services. Other than in the top 30 markets, asserts petitioner, subcarrier rates for commercial services are generally between \$12,000 and \$18,000 annually which is the same rate many reading services in relatively small markets are paying for operation on public stations. ARRS further asserts that these subcarrier rates represent a significant increase over those charges imposed prior to 1983. Before that time only five reading services were paying over \$9,000 annually for subcarrier access. Now, petitioner points out, the number has increased to eighteen.¹⁹ The excessive charges and the wide variability in the charges are, in part, submits ARRS, attributable to the lack of definitions or guidelines in the rules as to the proper method of calculating incremental costs.

13. In regard to viable alternatives, petitioner contends there are none. Cable television is not universally available and, furthermore, ARRS asserts, many visually handicapped persons cannot afford its monthly subscription fee. Tapes and audio cassettes are important, petitioner argues, but only a live radio reading service can provide current news and public affairs. ARRS also finds that television subcarriers require a substantially higher investment if both transmitting and receiving equipment are to obtain a high quality signal. Since these subcarriers were conceived and developed for second language transmission, petitioner questions their availability for radio reading services. Additionally, since the signals from television subcarriers are available to the general public, unlike the signals from radio subcarriers ARRS is concerned that use of TV subcarriers for reading operations could cause copyright infringement difficulties. As to full-time reading services on a main FM or AM radio channel, petitioner argues the cost would be prohibitive and again a non-private means of communication. Therefore, it concludes that FM subcarriers are currently the only affordable means of reaching large numbers of the visually impaired.²⁰

14. In conclusion, petitioner disputes commenters' claims that its suggestion would be an impermissible form of mandatory access to broadcast facilities. It notes that limited rights of access are constitutionally valid, such as the equal time requirements of Section 315 and the personal attack rules. ARRS is of the opinion that its recommendation is just that, a limited access provision, and thus not content related. It merely meets, asserts petitioner, a critical need for service to an underserved group. Also, petitioner distinguishes between the use of main and subsidiary channels and since its request concerns the latter sees no constitutional difficulty in this regard.

DISCUSSION

15. The petition for rule making has raised questions regarding the viability of radio reading services, but for the most part we believe the petitioner's claims are unsubstantiated. Petitioner has provided little evidence that allowing public radio stations to use their subsidiary channels for remunerative purposes has adversely affected reading services. In fact, the most commonly transmitted subsidiary services, whether on NPR or CPB-qualified FM public radio stations, were reading services for the visually impaired. The next nearest competitor for subsidiary use, telemetry services, had approximately half the number of operations. Although some proposed radio reading services may not have been effectuated, and others may have failed, there are ample reasons other than the 1983 rule modification to explain this phenomenon. Indeed, ARRS concedes in its RM 5434 petition, that the costs of initiating radio reading services on subsidiary channels (particularly purchasing subsidiary channel receivers which range from \$60 to \$100) and technical difficulties in providing such a service are to a great extent responsible for the failure of radio reading services to expand. In view of the significant number of reading services on public radio subsidiary channels and the more than adequate explanation for any failure to thrive or commence operation, we do not believe that it has been demonstrated that Section 73.593 ineffectually protects reading services or that a mandatory access requirement should be imposed. We also agree with NPR that imposing a mandatory access requirement on noncommercial stations would have significant first amendment implications as well as other adverse consequences, *see* para. 10, *infra*, and thus would not undertake to impose such a requirement without stronger evidence of need.²¹

16. By not allowing licensees to pursue remunerative aims without providing for the operation of radio reading services, we have ensured that reading services will be provided outlets across the country. We continue to believe that noncommercial FM licensees can be relied on to meet their public interest obligations regarding the print-handicapped. As noted in the 1983 *Report*, obtaining revenues from subcarrier use does not reflect negatively on public broadcasting's traditional pursuits. Rather, it reflects the vital need to provide support for public stations in view of the limited funds available from federal, state and local sources. Thus, funds other than governmental ones will be needed if public radio is not only to exist but to prosper.

17. Of the matters raised by petitioner, there is one which presently cannot be resolved herein, that being the issue of costs. As indicated by all those commenting, as

well as by an earlier request for a clarification of appropriate charges and WCRS' 1985 complaint in the same regard, there is no general understanding of what costs may be legitimately charged to reading services. Further, there appears from the record in this case to be a great disparity among stations in the amount of the charges imposed on reading services. We are unable to discover from the record, at this juncture, whether this is warranted. In order to determine whether costs imposed by public radio stations are fair, that is, charged on a not-for-profit basis as required by the Commission, an inquiry appears necessary. We would like commenting parties to address various questions to help us determine the costs of actually operating radio services for the visually impaired. In particular, commenters should provide itemized statements of charges assessed by stations for radio reading operations. Also to be specified are any types of costs that would not have been incurred but for the provision of reading services. In addition, why is there such an apparent disparity, as appears in petitioner's survey, among public stations in their charges for reading services? Would the matter of costs be clarified if the Commission required that stations use a particular method in calculating their costs and, if so, what method? Further, we would like respondents to indicate their nature, that is are they noncommercial broadcast licensees, reading services or interested members of the public. Any noncommercial facility responding to this inquiry should provide us with information regarding the number of subsidiary channels it has in use and whether any are utilized for profit. Also, if a public radio station does use a subsidiary channel for remunerative purposes, has it been requested to accommodate reading services and, if so, how has it provided this accommodation. Additionally, what does the noncommercial radio facility charge for remunerative use as well as non-profit use of its subsidiary channels. We believe the responses to these questions will aid us in resolving the matter of what charges may be appropriately charged for radio reading operations.

ADMINISTRATIVE MATTERS

18. Authority for this inquiry is contained in Sections 4(i) and (j), 303(r) and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before April 3, 1987, and reply comments on or before April 20, 1987. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in *Memorandum Opinion and Order* or *Policy Statement*, whichever is appropriate.

19. For purposes of this nonrestricted notice and comment inquiry proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of inquiry until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is

adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceedings must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules.

20. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

21. According, IT IS ORDERED, That the Petition for Rule Making IS GRANTED as to the institution of a *Notice of Inquiry* and IS DENIED in all other respects.

22. For further information on this proceeding, contact Freda Lippert Thyden, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

¹ Public notice of this petition was given on July 14, 1986. (Report No. 1605). Comments and reply comments were due on August 14, 1986, and August 28, 1986, respectively. The time for filing reply comments was extended, however, to September 11, 1986 (MM 6596).

² ARRS is a non-profit organization with a membership of over 70 radio reading services nationwide. Its members transmit comprehensive news and other information to blind and other print-handicapped individuals.

³ In addition to the programming FM stations present on their main channel, all FM stations have the capacity to program their subcarriers on multiplex basis. It was the Commission's decision in *FM Licensees; Amendment of the Commission's Rules Concerning Use of Subsidiary Communications Authorizations*, BC Docket No. 82-536, 48 Fed. Reg. 28445, June 22, 1983, broadening the FM baseband which enabled public radio stations to conduct more than one subcarrier operation. One such subcarrier may be used to provide the second signal needed for stereo operation. Conventional FM sets can receive the main channel and, if they are so designed, the stereo channel as well. However, these sets are unable to receive other subcarrier signals that can be heard only on special receivers, such as those provided for radio reading service reception.

⁴ Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, Section 1231, 95 Stat. 357, 731 (codified at 47 U.S.C. Section 399B 1982).

⁵ *Amendment of Section 73.593 of the Commission's Rules*, 48 Fed. Reg. 26608, 26615, June 9, 1983. Noncommercial educational FM stations also are referred to as public radio stations. The two terms are used interchangeably in this document.

⁶ This action had been recommended by the Temporary Commission on Alternative Financing for Public Telecommunications created in 1981 (Omnibus Budget Reconciliation Act of 1981, *supra* n. 4, at Section 1232(a)(2)) to identify funding options which would ensure that public telecommunications as an alternative and diverse programming sources would be maintained and enhanced. *Alternative Financing Options for Public Broadcasting*, 4 (1982) (Report to the Congress of the United States).

⁷ Section 73.593 reads as follows:

The licensee of a noncommercial educational FM station is not required to use its subcarrier capacity, but if it chooses to do so, it is governed by Sections 73.293 through 73.295 of the Commission's Rules regarding the types of permissible subcarrier uses and the manner in which subcarrier operations shall be conducted; *Provided*, however, that remunerative use of a station's subcarrier capacity shall not be detrimental to the provision of existing or potential radio reading services for the blind or otherwise inconsistent with its public broadcasting responsibilities.

⁸ Previous to the filing of the instant petition, that is on April 15, 1986, ARRS filed a petition for rule making (RM-5434), seeking an allocation of frequency spectrum space for use by radio reading services. This request will be considered by the Commission separately.

⁹ As an example of such an improper charge, petitioner cites the \$18,000 annual charge WVPN-FM, Charleston, West Virginia, imposes on its reading service for 7 hours of daily operation. In ARRS's opinion, the realistic charge for this operation's incremental costs should be approximately \$3,000 annually.

¹⁰ In NPR's submissions filed in BC Docket No. 82-1, it offered \$500 monthly per eligible station to support radio reading services. NPR also agreed to reimburse radio reading operations for the cost of changing from their then channel of operation (67 kHz) to a new subsidiary channel. Three million dollars was offered by NPR for this purpose, although it doubted that the full amount would be needed for such modifications.

¹¹ Petitioner proposes the following rule:

The licensee of a noncommercial educational FM station must accommodate a request by a radio reading service to utilize its subcarrier capacity, if: (1) the request is made in writing, and (2) the written request includes an acknowledgment by the radio reading service that the station may charge the incremental costs incurred by the licensee to facilitate the operation of the radio reading service. The requirement that the licensee of a noncommercial educational FM station accommodate a radio reading service upon request is part of the station's public interest responsibilities under Section 309 and 399B of the Communications Act. A licensee of a noncommercial educational FM station which accommodates a radio reading service shall be awarded a credit in any license renewal proceeding equivalent to the credit awarded noncommercial educational FM stations which air exemplary public affairs programming.

¹² Comments were filed by WCRS, Wisconsin Educational Communications Board, Calvary Bible College, The Corporation for Public Broadcasting, National Public Radio and Donald P. Mullally. Also, the Association of Radio Reading Services, Inc., requested that the Commission consider its petition for rule making as its comments. Replies were later submitted by petitioner and Summit County Society of the Blind.

¹³ A complaint was filed on April 10, 1985, against noncommercial educational station WKSU-FM, Kent, Ohio, concerning charges it imposed on WCRS for use of its subcarrier as a radio reading service. Complaint from WCRS to FCC (dated March 8, 1985). Since the crux of the complaint is essentially one of the matters raised by petitioner, it will await resolution until after this proceeding has concluded.

¹⁴ Not all CPB-qualified public radio stations are NPR members.

¹⁵ The difference between the number (81) of CPB-qualified FM public stations providing reading services and the number (90) of reading services cited by petitioner does not reflect a decrease in reading services. This difference merely indicates that some reading services are aired on non-affiliated public stations.

¹⁶ In reply comments, Summit County Society of the Blind ("Summit") expresses general support for petitioner's proposal. Summit notes that expansion of reading services will allow the print-handicapped to be more informed enabling them to be an asset to the general public.

¹⁷ Petitioner has not accounted for 2 of the 56 stations charging for radio reading services.

¹⁸ Commercial station rates for reading services were \$1,200 (York, PA), \$2,000 (Lawrence, KS), and \$4,200, \$7,800 and \$12,000 (all three Middletown, NY).

¹⁹ Petitioner concludes that stations inaugurated higher fees when public subsidiary channels became available for for-profit ventures, but does not address what, if any, the effects of inflation have had on this increase.

²⁰ Regarding RM-5434, petitioner argues that the requested reallocation of a portion of the 220-225 MHz band alone will not solve the needs of all reading services. That suggestion and the instant proposal together, submits ARRS, present a comprehensive approach to providing reading services.

²¹ In view of our disposition of the petition for rule making we need not decide the effect, if any, of Section 3(h) of the Communications Act, 47 U.S.C. Section 153(h), on petitioner's proposal. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).