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

In re Applications of

HARRISCOPE OF CHICAGO, INC., *et. al* A Joint Venture d/b/a VIDEO 44	**MM DOCKET NO. 83-575** File No. BRCT-820802J9

For Renewal of License of
Station WSNS-TV, Channel 44
Chicago, Illinois

and

MONROE COMMUNICATIONS CORPORATION Chicago, Illinois	**MM DOCKET NO. 83-576** File No. BPCT-821101KH

For a Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: January 13, 1989; Released: January 31, 1989

By the Commission:

1. Before the Commission are: (1) Applications for Review filed June 24, 1988 by Monroe Communications Corporation and July 6, 1988 by the Mass Media Bureau; (2) the Mass Media Bureau's Comments on Monroe Broadcasting Corporation's Application for Review filed July 11, 1988; and (3) the Consolidated Opposition to Applications for Review filed July 21, 1988 by Video 44. These pleadings relate to a decision of the Review Board granting Video's application for renewal of its license to operate station WSNS-TV in Chicago, Illinois and denying Monroe's mutually exclusive application for a construction permit. *Video 44*, 3 FCC Rcd 3587 (Rev. Bd. 1988).

2. The Commission agrees with the Board's disposition of this case. In our view, the Board correctly found that WSNS-TV's record during the 1979-82 license term warrants awarding a renewal expectancy for Video and that this renewal expectancy outweighs Monroe's comparative advantages. We therefore deny Monroe's and the Bureau's applications for review. However, because this case raises a question about the nature of the renewal expectancy, we believe it is appropriate for us to elaborate on our reasons for upholding the Board.

I. BACKGROUND

3. In this comparative renewal proceeding, Video 44 seeks renewal of its license to operate station WSNS-TV in Chicago, Illinois, and Monroe Communications Corporation has filed a mutually exclusive application for a construction permit. Administrative Law Judge Joseph Chachkin denied Video's application and granted Monroe's. *Video 44*, 102 FCC 2d 419 (I.D. 1985). The ALJ found that near the end of the 1979-82 license term, at issue here, Video evolved from a conventional television operation to almost full-time subscription television (STV) operation, with no local programming and virtually no news or public affairs programming. Holding that this latter STV performance was most probative, the ALJ gave Video no renewal expectancy. In the absence of a renewal expectancy, Monroe's advantages over Video for integration of ownership into management and diversification of media control proved decisive.

4. On appeal, the Review Board sought Commission guidance as to the standard applicable in determining whether an STV operator is entitled to a renewal expectancy. The Board also added an issue against Video to determine whether Video had violated 18 U.S.C. § 1464 by carrying obscene programming. *Video 44*, 102 FCC 2d 408 (Rev. Bd. 1985). The Commission ruled that the renewal expectancy for an STV operator should be determined by the same factors applicable to a conventional station and, additionally, deleted the obscenity issue, explaining that issue was better adjudicated in the courts first. *Video 44*, 103 FCC 2d 1204 (1986). On reconsideration, the Commission affirmed this standard of review and indicated that it would be willing under appropriate circumstances to determine what is obscene. It deleted the obscenity issue here, however, because no complaints had been filed contemporaneously raising a prima facie violation. *Video 44*, 3 FCC Rcd 757 (1988).

5. The Board then reversed the ALJ and granted Video's renewal application. The Board held that Video was entitled to a renewal expectancy, which outweighed Monroe's integration and diversification advantages.

II. RENEWAL EXPECTANCY

6. To merit a renewal expectancy, a broadcast renewal applicant must demonstrate that its past record has been "substantial" -- that is, "sound, favorable and substantially above a level of mediocre service which might just warrant renewal." *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1006 ¶ 40 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC.*, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983). This standard requires the licensee to have made a "diligent, positive, and continuing effort to discover and fulfill the tastes, needs, and desires of his community or service area." *WPIX, Inc.*, 68 FCC 2d 381, 400 ¶ 56 (1978) (quoting *En Banc Programming Inquiry*, 44 FCC 2303, 2316 (1960)). Among the factors examined by the Commission in making this determination are: (1) the amount of non-entertainment programming presented by the station -- especially news and public affairs programming (and the time of day presented); (2) whether the non-entertainment programming presented appears reasonably directed to local needs and interests; (3) the amount of locally produced programming; and (4) the reputation of the station in the community -- as demonstrated by testimony on behalf of the station and by complaints. *See Radio Station WABZ, Inc.*, 90 FCC 2d 818, 840-42 ¶¶ 45-48 (1982), aff'd sub nom. *Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756 (D.C. Cir. 1983); *Cowles Broadcasting, Inc.*, 86 FCC 2d at 1006-07 ¶¶ 41-44. *See also Simon Geller*, 90 FCC 2d 250, 264-66 ¶¶ 28-29, recon. denied, 91 FCC 2d 1253 (1982), rev'd on

other grounds sub nom. *Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984). If a renewal applicant receives a renewal expectancy, this counts as a strong comparative preference in its favor. *Cowles Broadcasting, Inc.*, 86 FCC 2d at 1012 ¶ 61.

7. The issue in this case is the effect, on the merit of WSNS-TV's record, of its conversion from a conventional broadcast station to an STV station. This conversion took place in stages. 102 FCC 2d at 430-31 ¶ 26. At the beginning of the license term (December 1, 1979), WSNS-TV presented 121 hours per week of conventional programming. The station began STV programming on a limited basis on September 22, 1980 -- presenting 46 hours of STV programming per week and 73 hours of conventional programming. On November 9, 1981, Video increased its STV programming to 66 hours per week, with 59 hours per week in the conventional mode. This increased, on June 1, 1982, to 133 hours of STV programming and 30 hours of conventional programming. Finally, on August 23, 1982, STV programming increased to 163 hours per week, leaving only five hours per week of conventional programming. The five hours of conventional programming carried until the end of the license term (November 30, 1982) was presented on weekdays from 6:00 to 7:00 a.m.

8. The conversion from conventional broadcast operation to STV operation was reflected in the amount of non-entertainment programming presented by the station. 102 FCC 2d at 446-49 ¶¶ 56-59. During the first year of the license term, WSNS-TV carried no news, 1.05 percent public affairs, and 22.65 percent other non- entertainment programming, with 7.86 percent of its programming locally produced. The figures for the second year were: 2.88 percent news, 3.63 percent public affairs, 16.04 percent other non-entertainment, and 4.36 percent local. During the third year the figures were: 0.08 percent news, 2.57 percent public affairs, and 5.84 percent other non-entertainment, with 0.89 percent local. (By contrast, other independent commercial UHF stations in the Chicago market presented amounts of programming in the following ranges: 0.4-22.2 percent news, 3.1-6.4 percent public affairs, and 8.5-91.5 percent other non-entertainment.)

9. The record contains descriptions of several programs presented by Video in the conventional mode. 102 FCC 2d at 432-40 ¶¶ 28-44. The record also reflects that Video ascertained community problems. 102 FCC 2d at 431-32 ¶ 27. Most of the listed programs were canceled by the end of the license term. (The date of cancellation will be listed in parentheses after the name of the program.) Video produced two local public affairs shows. These were *Dimensions* (June 4, 1982), an interview program, and *Coping* (July 6, 1981), a show concerning health issues. These were replaced by syndicated programs with similar formats. *Dimensions* was replaced by *Illinois Press*, produced by the University of Illinois, and *Coping* was replaced by *Health Field*, produced by NBC. Video also produced a news show with a business orientation called *AM La Salle Street* (June 1, 1981 to October 30, 1981).

10. Until the very end of the term, Video also presented other non-local programming in the conventional mode. Regular programs included: (1) *TV College* (July 1982), courses offered by the city colleges of Chicago; (2) *700 Club* (February 1982) and several other religious programs; and (3) *Mundo Hispano* (May 1982), a Spanish language program. Video also presented several specials including a discussion program concerning the Strategic Arms Limitation Talks and The Easter Seal Telethon. The station also carried childrens' and sports programming.

11. During most of the license term, WSNS-TV presented 90 public service announcements per week. 102 FCC 2d at 444-45 ¶ 52. However, from September to November, 1982, this number was reduced to 39 to 45 PSAs per week. (Until September 1981, Video produced a show called *Neighborhood Notes* as a vehicle for PSAs. 102 FCC 2d at 436-37 ¶ 37.)

12. As mentioned, by the last three months of the license term, WSNS-TV's conventional broadcast programming was limited to 6:00 to 7:00 a.m. on weekdays. 102 FCC 2d at 442-43 ¶ 49. This included no news or locally produced programming. Typically, the station presented *Health Field, Illinois Press*, a non-entertainment program called *Out and About* (produced by the University of Southern Illinois, 102 FCC 2d at 439 ¶ 42), miscellaneous programs, and PSAs. The percentage of public affairs programming varied from 2.63 to 3.02 percent, and that of other programming from 1.32 to 2.45 percent. (During this period, the station also presented a series entitled *Vietnam: The Ten Thousand Day War* in the STV mode.)

13. The record contains numerous letters concerning WSNS-TV. Many of these letter comment favorably on such programs as *Dimensions*. 102 FCC 2d at 445 ¶ 54. Other letters are critical of the station's STV operations -- including the need to pay, and the sex and violence presented in some programs.

14. The ALJ found that, in light of WSNS-TV's conversion in mid-1982 to virtual full-time STV operation, the programming presented after that conversion was a more reliable predictor of future service to the public than the programming over the entire license term. 102 FCC 2d at 457-62 ¶¶ 79-89. He found that Video had no justification for abandoning its public service programming -- which he concluded it had done by eliminating all of its local programming and terminating several other non-entertainment programs. He also found that the record reflected no community support for the format change and revealed extensive public criticism of the change. He therefore held that Video was not entitled to a renewal expectancy.[1]

15. The Board reversed the ALJ and held that Video was entitled to a renewal expectancy. It ruled that the ALJ erred in focusing only on the last 13 to 26 weeks of the three-year license term in evaluating Video's programming. The Board noted that it is the Commission's practice to examine the programming presented during the *entire* license term to determine whether a renewal expectancy is warranted. 3 FCC Rcd at 3588-89 ¶¶ 8-10. The Board disagreed that *United Broadcasting Co.*, 100 FCC 2d 1574 (1985), provided a basis for focusing solely on Video's performance during the last one-sixth of the license term.

16. The Board also found that the ALJ had exaggerated the degree to which Video reduced the performance of its public service obligations toward the end of the license term. 3 FCC Rcd at 3589 ¶¶ 11-15. In the Board's view, Video should not be criticized for eliminating its locally produced programming, because Video had determined that the syndicated programming that replaced the local programming was responsive to local needs. The Board also held that Video should not be faulted for curtailing local news. The Board observed that Video continued to

present public affairs programming and PSAs even after converting to almost full-time STV operation and that Video apparently believed that its scheduling of this programming at 6:00 to 7:00 a.m. was an effective way to reach its audience. Additionally, the Board found that at the time Video converted to almost full-time STV operation, the Commission's expectations of STV operators were not entirely clear. (The Commission had recently eliminated the requirement that STV operators present a minimum amount of conventional programming.) The Board did not consider the number of complaints received by Video as support for the generalization that there was no community support for the format change in view of the fact that Video had approximately 100,000 STV subscribers.

17. Based on the programming Video presented during the license term, the Board concluded that Video was entitled to a renewal expectancy -- although one that was perhaps weaker than usual. 3 FCC Rcd at 3589-91 ¶¶ 17-24.

18. Monroe and the Mass Media Bureau object to the Board's decision. They argue that Video's termination of all of its locally produced programming and the curtailment of most of its other non-entertainment programming late in the license term is most probative of whether Video deserves a renewal expectancy, because it is most predictive of future performance. In particular, they contend that *United* stands for the proposition that a licensee's most recent performance is most relevant to whether the licensee is entitled to a renewal expectancy. Both parties argue that locally produced programming is especially important in determining that a licensee deserves a renewal expectancy. Monroe stresses that Video's reduction of local programming appears to be permanent, because Video has shut down its studio and production facilities.

19. Both Monroe and the Bureau take exception to the Board's reliance on the number of Video's subscribers as evidence of public support for WSNS-TV. They maintain that the number of subscribers relates only to public acceptance of the entertainment aspects of the station's programming, which is irrelevant to the question of renewal expectancy. They also maintain that the expressions of support in the record were for programs that Video ultimately canceled before the end of the license term. Monroe asserts that Video had no cause to be in doubt about the Commission's requirements for STV operators. Monroe points to previous Commission statements that an STV operator has the same public service obligations as a conventional broadcast operator.

20. The Commission believes that, although this is a close case because of Video's format change, the Board correctly decided this issue. We agree with the Board that the renewal expectancy determination in this case should be based on WSNS-TV's programming throughout the license term and not solely on its performance after it was converted to almost full-time STV operation. In our view, this approach best comports with the established principle that a licensee "runs on its record" as developed during the preceding license term. *See,* for example, *Broadcasting Renewal Applicant,* 66 FCC 2d 419, 429-30 ¶¶ 23-24 (1977). Nevertheless, as the Board held, Video's late-term performance does diminish its renewal expectancy to some extent. Some amplification of our rationale is warranted.

21. The Commission's decision in *United* did not purport to alter the principle that a licensee runs on its record for the preceding license term. 100 FCC 2d at 1577 ¶ 7. In *United,* the Commission had deferred consideration of an FM station's 1969 renewal application while it considered the licensee's basic qualifications in connection with the renewal of co-owned AM stations. The applicant filed supplemental renewal applications in 1972, 1975, and 1978. Competing applicants filed against the 1978 application. The Commission held that the applicant was not on notice that it would be required to document its entitlement to a renewal expectancy until competing applicants were filed in 1978. Thus, the applicant was not required to produce documentation concerning its pre-1975 record.

22. As to the 1975-78 license term at issue in *United,* the Commission noted that the station had changed its format about one year into the three-year term. In finding that the licensee was entitled to a renewal expectancy, the Commission stated that the station's most recent performance -- that is, its performance after the format change -- was most probative. 100 FCC 2d at 1581 ¶ 13. We do not believe that this can be expanded to mean that a licensee's latest performance is always more probative than its performance at other times during the license term. Indeed, the Commission did not state in *United* that it was more probative merely because it was most recent. Additional factors also entered into that determination. In *United,* the station's new format encompassed two-thirds of the license term. Moreover, the Commission made no definite finding that the station's earlier programming was less than substantial. Thus, we believe *United* holds only that in that particular case the station's performance after the format change was most probative of its overall performance during the license term. We do not read it to say that a station's performance after a format change always supersedes its earlier performance.

23. In the absence of decisive precedent, we look to the policy underlying the granting of a renewal expectancy for guidance. The stated rationale for granting a renewal expectancy is set forth in the *Cowles* case. 86 FCC 2d at 1013 ¶ 62. Two factors are relevant to the question before us.[2] First, the Commission expressed its concern that a challenger's paper proposal might not match the incumbent's established performance when actually executed. This supports the ALJ's opinion that, in evaluating the licensee's past record, the Commission should consider its value in predicting future performance.

24. Second, and more significantly, however, the Commission said that it desired to encourage investments in quality service by rewarding such service with a likelihood of renewal. In contrast with the first rationale, this second rationale is essentially retrospective in character. In other words, for the renewal expectancy to function as an incentive, it must be awarded solely on the basis of a licensee's past record, regardless of what the licensee promises to do in the future. *See Comparative Hearings on Renewal Applications,* 22 FCC 2d 424, 427 (1970), rev'd on other grounds sub nom. *Citizens Communications Center v. FCC,* 447 F.2d 1202 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972) (rejecting reliance on late-term upgrading). Thus, as the Board found, Video deserves credit for substantial performance demonstrated during the bulk of the license term, despite a reduction of the service late in the term.

25. Viewed in full, the record indicates that Video is entitled to a renewal expectancy, as the Board found. There is no controversy on the record before us over the conclusion that, with the exception of its eventual conversion to almost total STV operation near the end of the license term, WSNS-TV's performance was substantial. As already noted, the ALJ implied as much in an observation shared with Monroe that, before its conversion to STV operation, WSNS-TV enjoyed the support of the community with little or no criticism of its program service. *See* note 1 above; Reply of Monroe Communications Corporation to Proposed Findings of Fact and Conclusions of Law filed May 22, 1984 at 13-14 ¶ 22. This was also the Mass Media Bureau's original recommendation. 102 FCC 2d at 457 n.24. We agree with the Board that the programming evidence presented in this record supports the conclusion that WSNS-TV's performance over the course of the license term as a whole was substantial.

26. We do not suggest that we should ignore a pattern or trend in performance that could indicate a licensee's lack of constancy in meeting its responsibilities. Indeed, in an appropriate case, a trend in performance might be most probative of a licensee's overall entitlement to a renewal expectancy. This factor must, however, be evaluated in the context of the specific circumstances present in each case. In this case, we cannot overlook the fact that the context in which Video reduced its public service programming was an attempt at STV operation. We find that the particular characteristics of STV counsels against giving Video's relatively brief experience with STV decisive weight. (Similarly, we find it unremarkable that the change to an STV format generated some complaints.)

27. Video's record indicates that its performance as a conventional operator was substantial. In this regard, we note that even after Video terminated most of its nonentertainment programming, Video made some effort, even if less than its previous performance, to meet its programming obligations by continuing to present five hours per week of public affairs programming. In addition, it continued to average 39-45 PSAs each week. This provides evidence that Video had a continuing intention to meet WSNS-TV's obligation to be responsive to the public.

28. Moreover, the nature of STV itself counsels against giving Video's brief performance as an STV operator dispositive weight. Video argues that its experience with STV should be treated as an experiment and that the nature of its future performance depends on further development of the format. *See* Tr. at 755-56, 760-61. The Commission's observation of STV generally confirms the view that STV is a commercially risky and uncertain service and that this circumstance may affect an operator's ability to provide optimal service in the STV mode during an initial start-up period. STV's volatility is demonstrated by its history. In 1979, 10 years after STV had been authorized and at the beginning of the license term at issue here, the Commission noted that there were six STV stations in operation. *Pay TV Service*, 46 RR 2d 461, 463 ¶ 16 (1979). By 1981, 19 STV stations were on the air and by 1982, the number had risen to 27. *Subscription TV Service*, 90 FCC 2d 341, 344 ¶ 8 (1982). But by 1987, the number had dropped to "one or two." *Subscription Video*, 2 FCC Rcd at 1005 ¶ 33. [3] In light of the evident difficulties in establishing STV operation, Video's performance during the last few weeks of its license term does not indicate any significant lack of dedication to its responsibilities.[4]

29. In view of the foregoing, we conclude that Video is entitled to a renewal expectancy based on its overall performance during the relevant license term. We also agree with the Board that this renewal expectancy is somewhat less than that accorded licensees in some past cases because Video's reduction in public service programming toward the end of the term did not comply with the standards applicable to STV operators at that time.

III. CONCEALMENT

30. Monroe accuses Video of concealing from the Commission the fact that it was not meeting the programming proposals made in its 1979 renewal application after WSNS-TV changed to an STV format. The pertinent proposals made in the 1979 renewal application were eight percent local programming, 24 percent nonentertainment programming other than news and public affairs, and 90 PSAs per week.

31. The record, however, does not support an inference that Video intended to deceive the Commission. On October 10, 1980, Video wrote to the Commission reporting that it had commenced STV operation. Monroe Exh. 10. In this letter, Video reduced its proposal for non-entertainment programming other than news and public affairs to 5.5 hours per week from 26 hours per week. Video also reported that it had reduced the number of PSAs carried (from 90 to 60 per week), reflecting a pro rata reduction from the previous proposal based on the reduced amount of non-STV programming.

32. On November 24, 1981, Video again wrote to the Commission reporting that it had increased its hours of STV operation. Monroe Exh. 12. The letter stated that the increase in STV programming did not affect "the percentage of news, public affairs and/or all other programming excluding entertainment and sports broadcast during non STV hours." Although somewhat ambiguous, this language is consistent with Video's contention that it was intended to inform the Commission that the amount of non-entertainment programming was being reduced proportionately as the amount of conventional broadcast programming decreased. In view of the information that was disclosed to the Commission, the fact that not all of the particulars of Video's format change were reported does not appear to reflect any motive to conceal. Neither the ALJ nor the Board found any lack of candor, and the Mass Media Bureau agrees with Video that the record reflects no motive to deceive. Mass Media Bureau's Comments on Monroe Broadcasting Corporation's Application for Review, filed July 11, 1988 at 3 ¶ 4.

IV. ADULT PROGRAMMING

33. Monroe asserts that WSNS-TV carried substantial amounts of indecent and obscene programming during the 1979-82 license term. This consisted of adult-oriented movies presented during the late evening in the STV mode. According to Monroe, such programming detracts from any merit that Video's other programming may have had and, therefore, should be taken into account in determining whether Video is entitled to a renewal expectancy.

34. In considering whether a licensee is entitled to a renewal expectancy, we have given positive weight to certain types of programming, such as news and information programming, public service announcements and local programming, which are traditionally considered to be in the public interest. We do not consider other programming, such as ordinary entertainment programming, either to enhance or detract from a licensee's entitlement to a renewal expectancy, because this type of programming does not appear to promote the policy objectives sought to be achieved through the award of a renewal expectancy. Monroe now asks us to decide whether we should allow certain types of programming, such as adult entertainment programming, which some people may find offensive, to *detract* from an award of a renewal expectancy. We cannot accept Monroe's approach.

35. Review of a licensee's program content during the renewal process for purposes of awarding a renewal expectancy, though permissible under current law, raises sensitive First Amendment concerns about free speech. Consequently, we must award the expectancy in a manner that minimizes the chilling effect on the expression of lawful, protected speech. Unless there has been a finding of unlawfulness, therefore, we will not allow a licensee's programming of material that a challenger finds offensive to detract from an otherwise appropriately awarded renewal expectancy -- even if we agreed that the programming was offensive or distasteful. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

36. The Commission has already ruled in this proceeding on the question of whether Video's allegedly offensive programming should be taken into account, when it deleted the obscenity issue added by the Board. *Video 44*, 3 FCC Rcd 757 (1988). The Commission held that the programming did not raise the issue of an indecency violation because, consistent with existing case law, the Commission does not impose indecency regulations on subscription services lacking indiscriminate access to children. 3 FCC Rcd at 760 n.2. Further, the Commission held that it would consider allegations of obscenity only where they were raised by contemporaneous complaints making a prima facie showing of obscenity. 3 FCC Rcd at 759 ¶¶ 15-21. Because no complaints that were sufficient under that test were made in this proceeding, the Commission declined to consider the question of obscenity further. 3 FCC Rcd 759-60 ¶¶ 22-24.

37. We reject Monroe's argument that we should not apply this policy retroactively to the 1979-82 license term. The First Amendment operates as an affirmative restraint on our authority, and we will not act in a manner that offends the First Amendment merely because we did not state these considerations fully in the past. Of course, contemporaneously adjudicated obscenity violations, in appropriate circumstances, may subsequently be relevant to a renewal expectancy determination in a renewal proceeding, but that is not the case here because there was no such contemporaneous ruling.

V. COMPARATIVE EVALUATION

38. The ALJ awarded Monroe moderate preferences for diversification and integration. As to diversification, he found that Monroe's principals had interests in four radio stations in Michigan, Tennessee, and Florida. Video's principals have interests in (1) seven television stations in California, New Mexico, Montana, Wyoming, and Florida; (2) a radio station in Wyoming; (3) several television translators; (4) cable systems; and (5) film and programming production and distribution facilities.

39. As to integration, Monroe received credit for no full-time integration and part-time credit for 38 percent ownership participation for 35 hours per week and 10 percent for 25 hours per week. Monroe's credit was enhanced by local residence, civic participation, and minority group membership. Video proposed no integration.

40. The Board held that Monroe's comparative advantages were relatively weak and were outweighed by Video's renewal expectancy preference. The Board said that Monroe's diversification advantage was comparatively weak because its principals own radio stations and numerous cable interests. The Board also considered Monroe's integration weak because less than half of Monroe's ownership would be integrated into management and none would be integrated full-time.

41. Monroe accuses the Board of understating its advantages. It points out that its principals do not own attributable cable interests. It also contends that its integration advantage is sizable because Video proposes no integration. Video characterizes both Monroe's integration and diversification advantages as slight.

42. Monroe is correct in observing that the Board somewhat understated its diversification preference, because its principals do not own attributable cable interests, as the Board stated. The record reflects only that one principal, Wayne J. Fickinger, owns a passive limited partnership interest of less than one percent in two cable ventures, of which he has pledged to divest himself. Monroe Ex. 1 at 8-9. Characterizing Monroe's diversification preference as moderate, as did the ALJ, would be generally consistent with precedent, given the significantly greater number of television interests attributable to Video. *See Bay Television, Inc.*, 95 FCC 2d 181, 186-87 ¶¶ 13-15 (Rev. Bd. 1983); *Cleveland Television Corp.*, 91 FCC 2d 1129, 1137-39 ¶¶ 15-18 (Rev. Bd. 1982), aff'd sub nom. *Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984).

43. It would also be generally consistent with precedent to describe Monroe's integration preference as moderate. However, Monroe's proposal is not as strong as in some other cases in which moderate preferences have been awarded. For example, in *Pittsfield Community Television*, 94 FCC 2d 1320, 1322-23 ¶¶ 5-6 (Rev. Bd. 1983), rev. denied, FCC 84-459 (Sept. 28, 1984), the Commission upheld the award of a moderate preference where one applicant proposed 41 percent full-time integration and the other applicant proposed none.

44. Nevertheless, even after increasing Monroe's diversification and integration preferences, its comparative advantages are ultimately not sufficient to prevail over Video's renewal expectancy. In *Cowles* the Commission explained that structural factors such as integration and diversification were not entitled to as much weight in comparison with the renewal expectancy. 86 FCC 2d at 1015 ¶ 67. Even though Video's renewal expectancy is less compelling than in the usual case, Monroe's integration and diversification advantages, which are not strong either, are not sufficient to outweigh Video's renewal expectancy. Thus, although the comparison is admittedly close in this case, on the whole, we conclude that the balance tips in favor of Video. We therefore agree with the Board's decision for Video.

VI. ORDERS

45. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed June 24, 1988 by Monroe Communications Corporation and July 6, 1988 by the Mass Media Bureau ARE DENIED.

46. IT IS FURTHER ORDERED, That the decision of the Review Board (FCC 88R-31), *Video 44*, 3 FCC Rcd 3587 (Rev. Bd. 1988), IS MODIFIED to the extent indicated herein; the application of Video 44 for renewal of its license to operate station WSNS-TV in Chicago, Illinois (File No. BRCT-820802J9) IS GRANTED; and the application of Monroe Communications Corporation for a construction permit (File No. BPCT-821101KH) IS DENIED.

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

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] As to WSNS-TV's programming earlier in the term, the ALJ said "WSNS . . . enjoyed the support of the community, with little or no criticism of its program service." 102 FCC 2d at 456 ¶ 78.

[2] The Commission also discussed a third factor -- the need to prevent the comparative renewal process from causing a haphazard restructuring of the broadcast industry. That factor does not shed significant light on the manner in which a licensee's past record should be evaluated.

[3] Video itself terminated STV programming effective June 30, 1985. 3 FCC Rcd at 3593 n.4. We are not, however, relying on Video's post-term performance in reaching our decision, but rather on our general knowledge of the characteristics of STV, of which we take official notice.

[4] Recently, the Commission decided that STV operation should not be classified as broadcasting. *Subscription Video*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). In that action we did not affirmatively set forth the renewal standard for STV operators. However, we did state that the change in classification implies that an STV operator's programming will no longer be examined in the same manner, as it is in the case of a broadcaster, for purposes of determining whether a renewal expectancy is warranted. *See Subscription Video Services*, 51 Fed. Reg. 1817, 1822-23 ¶¶ 33-36 (Jan. 15, 1986). It is therefore unlikely that cases such as this, where we have applied essentially a conventional broadcast standard to an operation offering both STV and conventional service, will arise in the future.